A CASE FOR HARMONIZING LAWS ON MARITIME INTERCEPTIONS OF IRREGULAR MIGRANTS

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Abstract Maritime interceptions continue as a fundamental dimension to external border controls against irregular migration, as seen most recently in Australia's institution of Operation Sovereign Borders in late 2013. The practice of developed States has highlighted the varied application and interpretation of four bodies of international law: the law of the sea, search and rescue obligations, refugee obligations and international human rights law. This article assesses this practice and the use of laws, highlighting the fragmentation of international law that has resulted. A proposal is presented to harmonize these laws and reconcile the divergent policy perspectives of different stakeholders.

Keywords: human rights, law of the sea, migration, refugees, search and rescue.

I. INTRODUCTION

To enhance national security, States, and especially developed States, have increasingly taken steps to externalize border controls. Rather than waiting until persons arrive in their territory, States undertake a range of measures to prevent the arrival of what may broadly be described as irregular migrants.[1] Among these interception measures,[2] interdicting vessels at sea has become a multipurpose endeavour. Stopping vessels of irregular migrants and compelling their journey to different places may prevent the success of a human trafficking or people smuggling enterprise. It may also constitute a rescue of persons on unseaworthy vessels who would otherwise perish at sea

* Macquarie University, natalie.klein@mq.edu.au. [1] The term 'irregular migrants' is used in this article to encompass the trend of mixed migration whereby economic migrants, asylum seekers and refugees may all use the same routes to arrive in another country. The designation as 'irregular' migrants is intended to indicate that the arrival may not be in accordance with the migration laws and asylum processes of the destination country. See International Organization for Migration, *Glossary on Migration* (2011) <https://www.iom.int/cms/en/sites/iom/home/about-migration/key-migration-terms-1.html#Irregular-migration>.

[2] The United Nations High Commissioner for Refugees (UNHCR) defines 'interception' as: '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'. UNHCR Executive Committee of the High Commissioner's Program, *Interception of Asylum Seekers and Refugees: The International Framework and Recommendations for a Comprehensive Approach*, Doc. EC/50/SC/CRP.17 (9 June 2000) para 10.

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and it further allows States to control who arrives within their sovereign territory.

Following an upsurge in arrivals of irregular migrants by vessels,[3] Australia launched Operation Sovereign Borders in September 2013. The precise details of this operation have not been publicly released for reasons of security.[4] Media reports indicate that Australia is interdicting Indonesian vessels of irregular migrants (where exactly is unclear), transferring migrants to lifeboats stocked with food, water and medical supplies, and towing those vessels back to the edge, or into, Indonesia's territorial waters.[5] Australia previously undertook maritime interdictions following the 2001 *Tampa* incident as part of a broad migration strategy known as the Pacific Solution.[6] These interdictions, as part of Operation Relex, entailed the interdiction of Indonesian vessels in Australia's contiguous zone and either towing the irregular migrants back towards Indonesia or transporting them to an offshore processing centre in Nauru.[7] The current operation stands in contrast to Operation Relex because there is no certainty due to the lack of information available that vessels are being interdicted within Australia's territorial sea or contiguous zone. Further, irregular migrants are not being taken anywhere for processing but are being forced back towards Indonesia and Indonesia objects to the operation.

Australia is not unique in undertaking maritime interceptions of irregular migrants. The United States has been doing so at least since the 1980s,[8] and Malaysia and Thailand interdicted vessels leaving Viet Nam in the 1980s as well.[9] European States bordering the Mediterranean have been active in addressing the movement of irregular migrants by sea from northern Africa in the last decade and, as will be discussed, have concluded agreements with

[3] In 2012, 17,204 irregular migrants arrived in Australia by boat, with 20,587 individuals reaching Australia in 2013. Refugee Council of Australia, 'Statistics on asylum seekers arriving in Australia' (2014) <https://www.refugeecouncil.org.au/r/stat-as.php>.

[4] See, eg, James Glenday, 'Asylum seekers: Releasing Operation Sovereign Borders details not in the national interest, Scott Morrison tells Senate committee', *ABC News* (4 February 2014) <http://www.abc.net.au/news/2014-01-31/morrison-appears-before-senate-committee/5230836>.

[5] George Roberts, 'Another orange lifeboat carrying asylum seekers arrives on Indonesia's Java coast: military source', *ABC News* (25 February 2014) <http://www.abc.net.au/news/2014-02-25/another-orange-lifeboat-carrying-asylum-seekers-arrives-in-indo/5281484>; George Roberts, 'Indonesia says second asylum seeker boat forced back by Australian Navy', *ABC News* (4 February 2014) <http://www.abc.net.au/news/2014-01-07/indonesia-says-second-boat-forced-back/5189332>.

[6] The Tampa incident involved the rescue of over 400 asylum seekers by the Norwegian cargo vessel, the *MV Tampa*, and Australia's refusal to allow the vessel into its port and subsequent forcible boarding of the vessel. The facts and relevant legal principles are discussed in DR Rothwell, 'The Law of the Sea and the *MV Tampa* Incident: Reconciling Maritime Principles with Coastal State Sovereignty' (2002) 13 PLR 118.

[7] For discussion, see P Mathew, 'Australian Refugee Protection in the Wake of the Tampa' (2002) 96 AJIL 661.

[8] See eg D Guilfoyle, *Shipping Interdiction and the Law of the Sea* (Cambridge University Press 2012) 187–97 and JE Kramek, 'Bilateral Maritime Counter-Drug and Immigrant Interdiction Agreements: Is this the World of the Future' (2000) 31 UMiamiInter-AmLRev 121, 142–5.

[9] P Mathew, 'Legal Issues Concerning Interception' (2003) 17 GeoImmigrLJ 221, 230.

States of embarkation in their efforts to intercept irregular migrants. Australia's Operation Sovereign Borders stands in contrast to the European efforts for two reasons: first, it is doing so without the agreement of Indonesia, the State of embarkation; and, second, it has commenced this operation following the 2012 decision of the European Court of Human Rights in *Hirsi v Italy*,[10] which has cast into doubt the legality of many of the European operations. While Australia is not bound by any decision of the European Court of Human Rights, State practice has highlighted the different policy interests of stakeholders and the varying applications and interpretations of international law in this area.

It is evident that analyses of these different operations and agreements reflect a fragmented approach to international law. For developed States that have securitized the question of migration, the legal focus is on the law of the sea and its law enforcement powers as well as the parameters of search and rescue obligations. Advocates of asylum seekers and refugees focus on the human rights and refugee protection regimes at stake in the actions taken. As a decision of a human rights body, it should not be surprising that the Grand Chamber of the European Court of Human Rights in *Hirsi* dismissed Italian arguments that search and rescue obligations and law enforcement agreements prevented human rights obligations from arising.[11]

It is the purpose of this article to demonstrate how these different bodies of law may be harmonized,[12] taking into account the contrasting policy interests that are at stake. To this end, the second part will briefly set out examples of State practice in intercepting vessels at sea to highlight the legal frameworks used in conducting these operations. The third part will examine in more detail the four bodies of law bearing on maritime interception operations: the law of the sea, search and rescue obligations, refugee law and international human rights law. The fourth part will draw out where fragmentation has occurred and examine the reasons for this occurrence. The fifth part will seek to harmonize the different areas of law and provide a stronger, more integrated legal framework for interceptions of irregular migrants at sea. It is hoped that a more holistic account of the various strands of law will better inform State decision-making in conducting maritime interceptions of irregular migrants.

[10] *Case of Hirsi Jamaa v Italy*, Appl no 27765/09 (European Court of Human Rights, Judgment of 23 February 2012) <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-109231> ('*Hirsi*').

[11] ibid para 65 and para 79.

[12] As noted by Rousseau, 'lorsqu'il est en presence de deux accords de volontés divergentes, il doit être tout naturellement porté à rechercher leur coordination plutôt qu'à consacrer à leur antagonisme'. Charles Rousseau, 'De la compatabilité des norms juridiques contradictoires dans l'ordre international' (1932) 39 RGDIP 153, cited in Martii Koskenniemi, 'Fragmentation of International Law : Difficulties Arising from the Diversification and Expansion of International Law: Report of the Study Group of the International Law Commission', UN Doc. A/CN.4/L.682 (13 April 2006) para 37.

II. STATE PRACTICE INTERCEPTING VESSELS OF IRREGULAR MIGRANTS AT SEA

Interdicting vessels at sea to prevent the illegal movement of persons has its antecedents in efforts to prevent the slave trade. Spearheaded by the United Kingdom, the prohibition against slavery and concomitant prevention of transport of slaves developed throughout the nineteenth century. Bilateral and multilateral treaties were concluded to allow for the right of visit and inspection over vessels flagged to States parties where those vessels were suspected of engagement in the slave trade.[13] The right of visit against vessels on the high seas that were reasonably suspected of transporting slaves was recognized in both the 1958 High Seas Convention,[14] and in Article 110 of the UN Convention on the Law of the Sea (UNCLOS). UNCLOS further provides that slaves taking refuge on ships were to be *ipso facto* free, but that the flag State was otherwise the State required to take measures to prevent and punish those involved.[15] The 2000 Migrant Smuggling Protocol has provided a mechanism for States other than the flag State to take action in response to criminal operations transporting irregular migrants,[16] and bilateral treaties and other agreements have further created reciprocal rights between States to intercept irregular migrants at sea. These agreements frequently form the basis for State practice, as will be discussed in this section. However, it will also be seen that States have operated in the absence of specific agreements, relying on general law of the sea principles.

A. The United States

The United States has a strong history of concluding bilateral treaties with States in the Caribbean and Central America to enhance law enforcement operations of the US Coast Guard outside US maritime zones.[17] These bilateral agreements have addressed drug trafficking and terrorist activities,[18] as well as irregular migration. In the mid-1990s, the US Coast Guard intercepted irregular migrants fleeing from Cuba and diverted them for processing at Guantánamo Bay or in Panama with a view to organizing their return.[19] The authority for these activities is not expressly granted under a bilateral agreement between the United States and Cuba, but is primarily predicated on responsibilities

[13] Guilfoyle (n 8) 75.

[14] Convention on the High Seas (opened for signature 29 April 1958, entered into force 30 September 1962) 450 UNTS 11, art 22.

[15] United Nations Convention on the Law of the Sea (opened for signature 10 December 1982, entered into force 16 November 1994) 1833 UNTS 3, art 99 ('UNCLOS').

[16] See Protocol against the Smuggling of Migrants by Land, Sea and Air Supplementing the Convention against Transnational Organized Crime (opened for signature 12 December 2000, entered into force 28 January 2008) 40 ILM 384 (2001) art 8. Note, however, that other States may only act with the consent of the flag State.

[17] For an overview, see Kramek (n 8).

[18] For discussion, see Guilfoyle (n 8) 79–96, 232–58; N Klein, *Maritime Security and the Law of the Sea* (Oxford University Press 2011) 130–6, 184–92.

[19] Guilfoyle (n 8) 193.

for search and rescue or potentially action over stateless vessels.[20] By contrast, a bilateral treaty provides the United States with the necessary powers to undertake interdictions of Dominican Republic vessels carrying irregular migrants, as well as potentially acting in the territorial sea of the Dominican Republic when an official from that State is on board (a shiprider agreement).[21]

A 1981 Agreement between the United States and Haiti permitted US authorities to visit and exercise enforcement jurisdiction over Haitian vessels on the high seas.[22] While US officials initially conducted screenings of asylum seekers to determine if they had credible refugee claims,[23] this practice was discontinued pursuant to a 1992 Executive Order.[24] The US Supreme Court affirmed this order in *Sale v Haitian Centers Council*,[25] concluding that the obligation of *non-refoulement*, an obligation on a State not to return a refugee to her or his place of persecution, did not have extraterritorial force.[26] The 1981 Agreement was subsequently terminated in 1994, but the United States concluded agreements with third States through which Haitians were travelling as another means of addressing the flow of irregular migrants.[27] In relation to these agreements, Papastavridis has commented 'they do reflect a certain trend . . . that the interdiction is preferred to be effectuated as close as possible to the State of origin or transit, rather than in the territorial waters of the State of destination or even on the high seas'.[28] The United States has also continued to interdict Haitian vessels on the high seas in its 2004 Operation Able Sentry even in the absence of an agreement.[29]

B. European States

European experience in maritime interdictions of irregular migrants has become increasingly complex over the last decade. There are estimates that between 100,000 and 200,000 individuals currently attempt to cross from northern African States into Europe by sea each year.[30] The European Union

[20] ibid 193–5.

[21] Agreement between the Government of the United States of America and the Government of the Dominican Republic concerning Maritime Migration Law Enforcement (signed 20 May 2003, entered into force 20 May 2003) 2003 UST Lexis 32. See further Guilfoyle (n 8) 196.

[22] Agreement to Stop Clandestine Migration of Residents of Haiti to the United States (exchange of letter 23 September 1981) (1981) 20 ILM 1198.

[23] Guilfoyle (n 8) 189–90.

[24] US Executive Order 12807 of 23 May 1992, 57 Fed Reg 23, 133 (1992). See further Guilfoyle (n 8) 190.

[25] *Sale v Haitian Centers Council Inc* (1993) 509 US 155, 158–159.

[26] See ibid 181–2.

[27] See E Papastavridis, 'Interception of Human Beings on the High Seas: A Contemporary Analysis under International Law' (2009) 36 Syracuse JIntlL&Com 145, 180.

[28] ibid 180.

[29] ibid 179.

[30] A Fischer-Lescano, T Löhr and T Tohidipur, 'Border Controls at Sea: Requirements under International Human Rights and Refugee Law' (2009) 21 IJRL 256, 256. The Migration Policy Centre estimates an average of almost 40,000 persons per year over the period of 1998–2013. See P De Bruycker *et al*, 'Migrants smuggled by sea to the EU: facts, laws and policy options' (Migration Policy Centre Research Report 2013/0+, 2013) <http://www.migrationpolicycentre.eu/docs/MPC-RR-2013-009.pdf>.

created the European Agency for the Management of External Borders (Frontex) in 2004, which has undertaken a series of joint operations in the Atlantic off Senegal and Mauritania and in the central and eastern Mediterranean.[31]

The largest Frontex operation, *Hera*, was intended to manage irregular arrivals in the Canary Islands, with the objective to intercept the vessels in the territorial sea or contiguous zone of the State of embarkation.[32] Only those individuals who were intercepted outside the contiguous zone of the State of embarkation were taken to Spain's Canary Islands. Another Frontex operation, *Nautilus*, focused on the central Mediterranean border to support Italy and Malta's efforts in dealing with an influx of irregular migrants voyaging from Libya.[33] Italy had concluded bilateral agreements with Libya, authorizing joint patrols and allowing for the return of irregular migrants to Libya.[34]

Not all aspects of Frontex operations have been publicly released. Moreno-Lax has commented that Frontex does not necessarily specify the legal basis of its operations, but it appears to rely on the bilateral agreements in existence between its members and other States.[35] These bilateral agreements predominantly relate to the law of the sea in terms of addressing interdiction powers on the high seas, as well as the exercise of law enforcement powers in the territorial sea of other States.[36] Italy's actions under its bilateral agreement with Libya, which involved intercepting a vessel and returning Eritrean and Somali asylum seekers to Libya, were successfully challenged for their violation of human rights principles before the European Court of Human Rights in *Hirsi*, which is discussed in more detail below.

The European Union adopted Guidelines in 2010 to enhance uniform application of relevant international law in interception operations.[37] These principles incorporated the core protection obligation under refugee law of *non-refoulement*, providing: 'No person shall be disembarked in, or otherwise handed over to the authorities of, a country in contravention of the principle of *non-refoulement*, or from which there is a risk of expulsion or return to another country in contravention of that principle.'[38] After the Court of Justice of the European Union annulled this decision,[39] the Commission proposed in 2013 a regulation to provide greater human rights protections and more clarity on

[31] Papastavridis (n 27) 148–9. For discussion, see V Moreno-Lax, 'Seeking Asylum in the Mediterranean: Against a Fragmentary Reading of EU Member States' Obligations Accruing at Sea' (2011) 23 IJRL 174.

[32] Moreno-Lax (n 31) 180–1.

[33] Ibid 182–4.

[34] These are discussed in *Hirsi* (n 10) paras 19–21.

[35] Moreno-Lax (n 31) 182 (referring to a series of Framework Agreements and Memoranda of Understanding between Spain and relevant African States). See also Papastavridis (n 27) 182.

[36] These are discussed in Papastavridis (n 27) 182–3.

[37] Council Decision of 26 April 2010 supplementing the Schengen Borders Code as regards the surveillance of the sea external borders in the context of operational cooperation coordinated by the European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union (2010/252/EU).

[38] ibid para 1.2.

[39] *European Parliament v Council of the European Union* (European Court of Justice, Case C-355/10, 5 September 2012). The basis for the decision was the failure to gain parliamentary

disembarkation requirements following rescue operations.[40] However, States such as Cyprus, France, Greece, Malta, Italy and Spain had objected to the proposed regulation on the basis that the European Union does not have competence to legislate in detail in relation to search and rescue operations.[41] At time of writing, the new regulation had been adopted by the European Parliament.[42]

C. Australia

As previously noted, Australia has undertaken two key maritime interception operations since 2001. Operation Relex consisted of 'enhanced surveillance, patrol and response operations in international waters between the Indonesian archipelago and Australia'.[43] A regional cooperation arrangement with Indonesia provided for Australia's financial aid to process and support irregular migrants intercepted in Indonesia, but did not address such support for irregular migrants intercepted by Australia at sea.[44] Australia's position has been that Indonesia is a safe third country for asylum seekers and refugees, hence it is not in violation of an obligation of *non-refoulement*.[45] Until a change of government in Australia in 2007, intercepted irregular migrants who were not returned to the vicinity of Indonesia's waters were instead taken to offshore processing facilities.[46]

With the increase in boat arrivals throughout 2012 and 2013, and a further change in government, the newly elected leadership vowed to 'stop the boats',[47] and launched Operation Sovereign Borders in September 2013.[48] Operation Sovereign Borders, as noted above, appears to involve the interdiction of Indonesian vessels and the towback of those vessels to waters adjacent to Indonesia's territorial sea boundary.[49] As Australia does not have

approval for such a significant change to the Schengen Borders Code. The effects of the Guidelines are to continue until a new regulation is adopted.

[40] European Commission Proposal for a Regulation of the European Parliament and of the Council establishing rules for the surveillance of the external sea borders in the context of operational cooperation coordinated by the European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union, COM(2013) 197 final. [41] De Bruycker (n 30) 11. [42] See (n 161) further below.

[43] Joint Press Conference of Prime Minister John Howard and the Minister of Immigration the Hon Philip Ruddock, cited in PD Fox, 'International Asylum and Boat People: The Tampa Affair and Australia's "Pacific Solution"' (2010) 25 MdJIntlL 356, n 62.

[44] S Taylor, 'Protection Elsewhere/Nowhere' (2006) 18 IJRL 283, 295–6.

[45] For discussion, see ibid 295–300. [46] See discussion in Guilfoyle (n 8) 206–8.

[47] See 'The Coalition's Operation Sovereign Borders Policy' (July 2013) <http://www.nationals.org.au/Portals/0/2013/policy/The%20Coalition%E2%80%99s%20Operation%20Sovereign%20Borders%20Policy.pdf>.

[48] Government information on Operation Sovereign Borders may be accessed at <http://www.customs.gov.au/site/operation-sovereign-borders.asp>.

[49] See George Roberts *et al*. 'Passengers describe drama of turning asylum seeker boats back' *ABC 7.30 Report* (transcript) (17 March 2014) <http://www.abc.net.au/7.30/content/2014/s3965617.htm>.

any bilateral treaty or other arrangement with Indonesia in relation to these towbacks, Australia must be presumed to be operating under basic law of the sea principles and pursuant to search and rescue obligations where necessary. Questions nonetheless arise as to the legality of towing a detained vessel on the high seas as an exercise of the freedom of navigation. Moreover, is the placement of irregular migrants on lifeboats with fuel and provisions to reach Indonesia delivery to a 'place of safety',[50] as required in a search and rescue situation? Australia's conformity with international law must be challenged given that Australia has acknowledged its violation of Indonesia's territorial sovereignty on at least six occasions, which has been ascribed to miscalculations of Indonesia's maritime boundaries.[51]

III. LEGAL REGIMES APPLYING TO MARITIME INTERCEPTIONS OF IRREGULAR MIGRANTS

As indicated by this overview of State practice, States have primarily relied on general law of the sea principles, more specific bilateral agreements or search and rescue requirements to guide their actions in pursuing interception measures at sea. Refugee obligations and international human rights law have only come to the fore when these measures are judicially challenged. These different legal regimes are examined in more detail in this part.

A. The Law of the Sea

UNCLOS, as the key constitutive instrument for the law of the sea, sets out the rights and obligations of States over a variety of activities in different maritime zones. Under the law of the sea, it is critical to know where vessels are located and what they are doing so as to determine the rights and duties accruing to that vessel and to those on board, or to other States with an interest in the area or the activity. The discussion below surveys the respective rights and duties of States relating to irregular migration at sea in relation to the different maritime zones extending from the coast.

Starting from land and extending up to 12 nautical miles, the territorial sea is an area over which the coastal State has sovereignty.[52] This sovereignty grants the coastal State authority to prescribe and enforce domestic migration laws, including the power to intercept and arrest those vessels and individuals on board in violation of the coastal State's laws.[53] Another State may only exercise this enforcement jurisdiction in the territorial sea of a coastal State

[50] See (n 76) and accompanying text.

[51] Australian Customs and Border Protection Service, 'Joint Review of Positioning of Vessels Engaged in Operation Sovereign Borders - Executive Summary' (19 February 2014) < http://newsroom.customs.gov.au/releases/joint-review-of-positioning-of-vessels-engaged-in-operation-sovereign-borders-is-completed>.

[52] UNCLOS (n 15) art 2 and art 3.

[53] Ibid art 27 and art 28.

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with the consent of that coastal State. On this basis, Italy and the United States, for example, have concluded agreements allowing for entry into the territorial sea of States of embarkation.[54]

One limitation on the coastal State's sovereignty over the territorial sea is the right of innocent passage accorded to foreign flagged vessels.[55] Innocent passage must not prejudice the peace, good order or security of the coastal State. Article 19 of UNCLOS lists activities that are considered in violation of this right, and includes unloading persons in violation of migration laws.[56] A coastal State is permitted to take necessary steps in its territorial sea to prevent non-innocent passage under Article 25 of UNCLOS.[57] Those steps could conceivably entail requiring the vessel to leave the territorial sea and escorting it or towing it beyond the coastal State's territorial sea. Similar power may exist in the contiguous zone, which extends up to 24 nautical miles from the coast, as a coastal State is authorized to prevent infringements of its customs and migration laws.[58]

The prescription and enforcement of migration laws beyond the contiguous zone must be assessed against the laws governing the high seas.[59] No State has sovereignty over the high seas.[60] As States only have exclusive authority over vessels flying their flags in this maritime zone, no State may nterfere with foreign-flagged vessels unless the flag State consents or in exceptional circumstances, such as the right of hot pursuit,[61] or the right of visit.

The right of visit allows a warship or other duly authorized government vessel to approach and potentially board and search a foreign-flagged vessel if there is a reasonable suspicion that the vessel has engaged in particular activities. Article 110 of UNCLOS provides a basis for the right of visit in respect of piracy, slave trading, unlawful radio broadcasting, where a vessel is stateless or where questions arise as to the nationality of a particular vessel.

If irregular migrants are voyaging in small craft that are not flagged or registered to a particular State,[62] this status as stateless allows a warship to approach and board that vessel on the high seas to ascertain the ship's

[54] The US agreement with the Dominican Republic allows for entry to render emergency assistance when needed to migrant smuggling vessels. Agreement concerning Cooperation in Maritime Migration Law Enforcement (n 21) art 5(6). Italy was authorized by its agreement with Libya to undertake joint patrols in Libya's territorial waters. *Hirsi* (n 10) para 19.

[55] UNCLOS (n 15) art 17.

[56] ibid art 19(2)(g). Moreno-Lax has suggested that passage for the purpose of requesting international protection as a refugee should not be in violation of the migration laws of a country, provided their migration laws have implemented rules regarding asylum. Moreno-Lax (n 31) 191.

[57] On this point, Barnes has commented: 'Although the exercise of this power in this way might be morally repugnant it is not per se unlawful and difficult to challenge.' R Barnes, 'Refugee Law at Sea' (2004) 53 ICLQ 47, 57.

[58] UNCLOS (n 15) art 33.

[59] UNCLOS (n 15) art 87 and Pt VII, generally. The Exclusive Economic Zone is not addressed here as irregular migration is not a matter over which the coastal State has sovereign rights or jurisdiction for that zone but the relevant assessment is under the rules relating to the high seas.

[60] UNCLOS (n 15) art 89.

[61] ibid art 111.

[62] '[I]t is very often the case that the transportation of the persons in question is carried out using non-registered small vessels, without name or flag, i.e. stateless vessels'. Papastavridis (n 27) 6.

nationality or confirm its status as stateless.[63] This right is distinct from the exercise of enforcement jurisdiction, which allows for detention and arrest. A State's exercise of enforcement jurisdiction over a stateless vessel has been accepted on the basis that there is no flag State interest to be respected.[64] However, commentators have also suggested that the individuals on board should still be afforded the protection of their State of nationality and a visiting warship should not enforce laws against them without a jurisdictional nexus.[65] The difficulty with the latter argument is that if the individuals onboard are fleeing from their State of nationality because of persecution then it is extremely unlikely that the State of nationality would protest the actions of an interdicting State on their behalf.

If the vessels in question are in fact flagged to another State, an interdicting State may not conduct a right of visit under UNCLOS to intercept irregular migrants. Under Article 8 of the 2000 Migrant Smuggling Protocol, a warship with reasonable grounds to suspect that a foreign flagged ship is engaged in illegal migrant smuggling may request the consent of the flag State and take necessary measures against that ship as set out in the Protocol. Beyond this multilateral agreement, and, as discussed above, States have also concluded bilateral treaties allowing for measures to be taken against their vessels on the high seas by the other State party.

B. Search and Rescue Obligations

UNCLOS has enshrined in Article 98 the fundamental obligation to render assistance to those in distress at sea. It further obliges States to promote search and rescue services and, where circumstances require, cooperate with neighbouring States by way of mutual regional arrangements. These basic obligations have been elaborated on in the Safety of Life at Sea Convention (SOLAS Convention)[66] and the Search and Rescue Convention.[67]

Under the Search and Rescue Convention, the oceans have been divided into 13 search and rescue regions (SRR), which are established independent of any legal maritime boundaries.[68] Within a SRR, the State responsible is required to coordinate responses to calls of distress, typically by requesting the assistance

However, Guilfoyle has noted that national laws allow for the owner's nationality to determine the nationality of these vessels. Guilfoyle (n 8) 16.

[63] UNCLOS, art 110(1)(d) and (e).

[64] RR Churchill and AV Lowe, *The Law of the Sea* (3rd edn, Manchester University Press 1999) 214. See also Papastavridis (n 27) 160.

[65] Churchill and Lowe (n 63) 214.

[66] International Convention for the Safety of Life at Sea (concluded 1 November 1974, entered into force 25 May 1980) 1184 UNTS 278, ch V, reg 10(a) ('SOLAS Convention').

[67] International Convention on Maritime Search and Rescue (opened for signature 27 April 1979, entered into force 22 June 1985) 1405 UNTS 119, Annex, para 2.1.1 ('Search and Rescue Convention').

[68] The Search and Rescue Convention provides that the search and rescue zones are without prejudice to any maritime boundary delimitation. Ibid Annex, para 2.1.7.

of nearby vessels to proceed to the site of a vessel in distress and render assistance to those on board. Matters relating to the flag State's exclusive jurisdiction and boarding the vessel are not relevant in these situations of distress. As such, commentators have noted that search and rescue operations potentially provide a wider scope for action than maritime interdictions for law enforcement purposes.[69] The critical question in this regard will be whether a vessel or the persons on board are in distress. The status of the individuals on board as irregular migrants should make no difference.[70]

Under the Search and Rescue Convention, 'rescue' is defined as retrieving persons in distress, seeing to their medical and other needs, and delivering them to a place of safety.[71] The common maritime practice would be for the rescuing vessel to take the individuals concerned to the next port of call and deliver them to their consular officials or national authorities, as this would minimize interference with the voyage of the rescue vessel.[72] However, there is no obligation on a State to allow for disembarkation within its territory. Instead, the Search and Rescue Convention provides that States '*should* authorize, subject to applicable national laws, rules and regulations, immediate entry'.[73]

Australia's refusal to disembark those rescued on the *Tampa* within its territory prompted discussions as to whether a definitive duty of disembarkation could be established and imposed on particular States. However, this issue has not been resolved despite several negotiating efforts at the International Maritime Organization (IMO). Amendments to the SOLAS and Search and Rescue Conventions, adopted in 2004, set out that the State responsible for the SRR in which the vessel is rescued has the primary role for ensuring coordination and cooperation among parties to these treaties so as to alleviate the burden imposed on shipmasters.[74] However, they do not require a State to accept rescued persons. A 2009 circular adopted by the IMO's Facilitation Committee has indicated that the State responsible for the SRR

[69] B Miltner, 'Irregular Maritime Migration: Refugee Protection Issues in Rescue and Interception' (2006) 30 FordhamIntLJ 75, 92.

[70] Search and Rescue Convention (n 66) para 2.1.10. The SOLAS Convention was also amended to this effect. SOLAS Convention (n 65), ch V, reg 33-3.

[71] Search and Rescue Convention (n 66) para 1.3.2.

[72] M Pallis, 'Obligation of States towards Asylum Seekers at Sea: Interactions and Conflicts between Legal Regimes' (2002) 14 IJRL 329, 360. See also Miltner (n 68) 88. Miltner comments that disembarking at the next port of call was once so well established as a matter of practice that there had not previously been a need to articulate the requirement. Miltner (n 68) 89. However, with the increase of irregular migrants travelling in unseaworthy vessels, this practice has been challenged. Ibid 89–90.

[73] Search and Rescue Convention (n 66) para 3.1.2 (emphasis added).

[74] See IMO Maritime Safety Committee, 'Adoption of Amendments to the International Convention for the Safety of Life at Sea, 1974, as Amended', MSC Res 153(78), IMO Doc MSC 78/26/Add.1 (20 May 2004) Annex 3, reg. 33-1-1 ('SOLAS Amendments'); see also IMO Maritime Safety Committee, 'Adoption of Amendments to the International Convention on Maritime Search and Rescue, 1979, as Amended', MSC Res 155(78), IMO Doc MSC 78/26/Add.1 (20 May 2004) Annex 5, para 3.1.9 ('SAR Amendments'). Both entered into force on 1 July 2006.

is the most likely location for accepting rescued persons,[75] but there is still no obligation to this effect.

Non-binding Guidelines on the Treatment of Persons Rescued at Sea, which were also adopted in 2004,[76] have noted that a 'place of safety' is a location where rescue operations are considered terminate; where the survivors' safety of life is no longer threatened and their basic human needs can be met; and is one from which transportation arrangements can be made for their next or final destination.[77] Recognition of refugee obligations is included in the Guidelines through acknowledgement of the 'need to avoid disembarkation in territories where the lives and freedoms of those alleging a well-founded fear of persecution would be threatened is a consideration in the case of asylum seekers and refugees recovered at sea'.[78] While providing greater guidance on the performance of search and rescue obligations, these Guidelines still fall short of a duty of disembarkation in any particular place. The prospect that rescued individuals may be left at sea while searching for a port to disembark remains.[79]

Malta, Spain and Italy had sought greater clarity around a duty of disembarkation at the time of negotiations of the 2004 amendments,[80] but the United States resisted this elaboration, claiming that the issue was a regional problem.[81] Discussions on this point within the European Union in 2007 also faltered, partially because some States considered that clearer rules would create 'a pull factor, encouraging migrants to come to the EU by sea'.[82] The Terms of Reference for a regional agreement indicated that these disembarkation impasses should be overcome.[83] A new draft regional agreement under consideration would be a memorandum of understanding and as such may not be legally binding on the relevant parties.[84] Negotiations on the draft had not been concluded at time of writing.

Even if an agreement is adopted, it is only intended to operate on a regional basis and global consensus on the parameters of search and rescue obligations remains elusive. It is perhaps because of these ongoing uncertainties and gaps in the search and rescue legal regime that other bodies of international law

[75] IMO, 'Principles relating to Administrative Procedures for Disembarking Persons Rescued at Sea', IMO Doc FAL.3/Circ.194 (22 January 2009) para 2.3 ('IMO Principles').

[76] IMO Maritime Safety Committee, 'Guidelines on the Treatment of Persons Rescued At Sea', MSC Res 167(78), IMO Doc MSC 78/26/Add.2 (20 May 2004) Annex 34 ('IMO Guidelines').

[77] ibid para 6.12.

[78] ibid para 6.17.

[79] The IMO Guidelines provide that every effort is to be made by governments to minimize the time that survivors remain on board the assisting ship. ibid para 6.8.

[80] Spain and Italy wanted the State coordinating the rescue to be the place of disembarkation, which was perceived as a way to pressure Malta to reduce the size of its SRR. See Moreno-Lax (n 31) 197 n 156; N De Blouw, 'Drowning Policies: A Proposal to Modify the Dublin Agreement and Reduce Human Rights Abuses in the Mediterranean' (2010) 40 CalWIntLJ 335, 355.

[81] See J Coppens, 'The Essential Role of Malta in Drafting the New Regional Agreement on Migrants at Sea in the Mediterranean Basin' (2013) 44 JMarL&Com 89, 101.

[82] Moreno-Lax (n 31) 176 (citing EU report containing comments from UK and Malta representatives).

[83] See discussion in Coppens (n 80) 103–5.

[84] Ibid 105.

must be considered to improve the overall regulation of maritime interceptions of irregular migrants.

C. Refugee Law

Irregular migrants may include refugees, asylum seekers, or other migrants.[85] If an individual is claiming to be a refugee, she or he is entitled to have that claim assessed.[86] Once a person is found to meet the definition of a refugee, as set out in the Refugee Convention and its Protocol,[87] a suite of protections follow beyond the human rights adhering to all persons. Most importantly, if an individual is assessed to be a refugee then a key protection to be afforded is *non-refoulement*, including indirect *non-refoulement*, which requires that a refugee not be sent to a third country where there is a risk of being returned to the place of persecution.[88]

For asylum seekers voyaging by sea, the critical question is when the attendant duties imposed on States arise. This issue emerges in asking whether a coastal State is bound by an obligation of *non-refoulement* if it prevents a vessel carrying asylum seekers from departing its territory, including from its territorial sea as part of the sovereign territory of the State. Arguably no, if the obligation of *non-refoulement* is predicated on the idea that persons must be outside their place of persecution to receive protection from being returned there.[89] If the coastal State is not the place of persecution, then as this maritime area is part of the sovereign territory of the coastal State, it is argued that the obligations set out in the Refugee Convention apply.[90]

The extraterritorial application of an obligation of *non-refoulement* for States intercepting vessels on the high seas has proven controversial. As discussed in Part II, Australian and European practice has not typically demonstrated consideration of refugee protection obligations in interception operations. Also as noted, the United States explicitly adopted the position in 1992 that it was not required to provide refugee protections on the high seas, and this position was reflected in the US Supreme Court decision of *Sale v Haitian Centers Council*.[91] The latter decision has been

[85] See (n 1). This part is primarily concerned with asylum seekers and refugees.

[86] This right is implicit in the obligation of *non-refoulement*. Fischer-Lescano (n 30) 284–5; Papastavridis (n 27) 217.

[87] Convention relating to the Status of Refugees (opened for signature 28 July 1951, entered into force 22 April 1954) 189 UNTS 150, art IA(2) ('Refugee Convention'); Protocol relating to the Status of Refugees (opened for accession 31 January 1967, entered into force 4 October 1967) 606 UNTS 267, art I(2) ('Refugee Protocol').

[88] See eg LA Nessel, 'Externalized Borders and the Invisible Refugee' (2009) 40 ColumHumRtsLRev 625, 670–1.

[89] *R v Immigration Officer at Prague Airport and another, ex parte European Roma Rights Centre and others* [2005] 2 AC 1 (9 December 2004) ('*Prague Airport*').

[90] Fischer-Lescano (n 30) 262–3. Guilfoyle considers this position to be unconvincing. Guilfoyle (n 8) 226.

[91] See above (nn 24–25).

subjected to considerable academic criticism,[92] and has also been refuted by the Inter-American Commission of Human Rights,[93] and the UN High Commission for Refugees.[94] The extraterritorial application of the Refugee Convention and its customary obligation of *non-refoulement* remains one of the challenges to be resolved in harmonizing this body of law with the law of the sea and search and rescue obligations.

D. International Human Rights Law

All irregular migrants are entitled to different human rights protections irrespective of whether or not they are asylum seekers or refugees. International human rights principles found in international treaties, such as the International Covenant on Civil and Political Rights (ICCPR),[95] and the Convention against Torture (CAT),[96] may be invoked in this regard. In particular, the obligation of *non-refoulement* is not limited to individuals who fall within the recognized definition of refugee but to all persons who may be at risk of being subjected to torture or cruel, inhuman or degrading punishment when sent to a particular country.[97]

The extraterritorial application of human rights obligations has been increasingly recognized so as to avoid a situation whereby a State may violate human rights norms in activities or conduct that occurs outside its sovereign territory. The relevant test for extraterritorial application of human rights obligations is whether the State has effective control over an area or person. This standard applies in relation to the ICCPR[98] and the CAT,[99] and was followed by the European Court in *Hirsi*.[100] In *Hirsi*, the Court considered that because the irregular migrants were on board Italian ships that were crewed

[92] For discussion see HH Koh, 'Reflections on Refoulement' (1994) 35 HastingsIntlLJ 1; SH Legomsky, 'The USA and the Caribbean Interdiction Program' (2006) 18 IJRL 677, 687–91. See also *Hirsi* (n 10) concurring opinion of Judge Pinto de Albuquerque.

[93] *Haitian Centre for Human Rights v United States* Case 10.675, Inter-American Commission of Human Rights, Report No 51/96, OEA/Ser.L/V/II.95 Doc. 7 rev. at 550 (1997).

[94] UNHCR Executive Committee, 'Interception of Asylum-Seekers and Refugees: The International Framework and Recommendations for a Comprehensive Approach' (9 June 2000) <http://www.unhcr.org/4963237411.pdf> para 23.

[95] International Covenant on Civil and Political Rights (opened for signature 16 December 1966, entered into force 23 March 1976) 999 UNTS 171 ('ICCPR').

[96] Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (opened for signature 10 December 1984, entered into force 26 June 1987) 1465 UNTS 85 ('CAT').

[97] Ibid art 3. Art 7 of the ICCPR has also been interpreted to similar effect. UN Human Rights Committee, 'General Comment 20, Article 7', UN Doc. HRI/GEN/1/Rev.1 at 30 (1994) para 9.

[98] UN Human Rights Committee, 'General Comment No. 31: Nature of the General Legal Obligation Imposed on States Parties to the Covenant', UN Doc CCPR/C/21/Rev.1/Add.13 (26 May 2004) para 10. See also Fischer-Lescano (n 30) 272.

[99] UN Committee against Torture, 'Concluding Observations: United States of America', UN Doc CAT/C/USA/C/2 (2006) para 20. See further Fischer-Lescano (n 30) 271.

[100] *Hirsi* (n 10) para 73.

entirely by Italian military, Italy had exercised de jure and de facto effective control in the time between the boarding and the handover to Libyan officials.[101] Where such control was established, Italy became bound by its human rights obligations to those individuals and the jurisdiction of the Court to resolve disputes in relation to those obligations was founded. The decision in *Hirsi* aligns with other judgments of the European Court that persons on board a vessel that is targeted for interdiction on the high seas are brought within the jurisdiction of the State conducting the interdiction.[102]

Whether the requisite level of control is established is a question of fact. In *JHA v Spain*, the Committee against Torture considered Spain could be held liable for its violation of the *non-refoulement* principle where it had provided assistance as part of a search and rescue operation and then overseen the detention and repatriation of those rescued in Mauritania.[103] In *Medvedyev v France*, the European Court of Human Rights considered that escorting a vessel, even with permission of the flag State, demonstrated the necessary level of control.[104] In *Hirsi v Italy*, the Court considered that the standard is one that must be determined objectively, rather than by reference to the intention of the State undertaking the actions.[105] The ten hours of escort and the control evinced by Italian authorities in conducting the return of the claimants established effective control.

It is difficult to conceive of scenarios where the interaction of authorities with the vessels of irregular migrant during maritime interceptions would not become a situation of effective control of those vessels. Commentators have suggested that even blocking or diverting the passage of smaller vessels carrying irregular migrants could constitute 'effective control' for the purposes of establishing the application of human rights obligations.[106] This benchmark is clearly very low and supportive of a regime that promotes the application of human rights norms at sea.

The European Court determined in *Hirsi* that Italy had violated Article 3 of the European Convention, which prohibits torture and inhuman or degrading treatment or punishment. This violation occurred because there was a real risk of the irregular migrants facing such prohibited treatment in their return

[101] Ibid para 81.

[102] See eg *Medvedyev and Others v France* (European Court of Human Rights, Appl no 3394/03, 29 March 2010); *Women on Waves and Others v Portugal* (European Court of Human Rights, Appl no 31276/05, 3 February 2009); *Xhavara and Others v Italy and Albania* (European Court of Human Rights, Appl no 39473/98, 11 January 2001).

[103] *JHA v Spain*, (CAT/C/41/D/323/2007, 21 November 2008). See further M Guiffre, 'Watered-down Rights on the High Seas: Hirsi Jamaa and others v Italy (2012)' (2012) 61 ICLQ 728, 735–6.

[104] *Medvedyev v France* (n 102) para 67. See also Giuffre (n 102) 733.

[105] *Hirsi* (n 10) para 81. See also I Papanicolopulu, 'Hirsi Jamaa v Italy' (2013) 107 AJIL 417, 420.

[106] Fischer-Lescano (n 30) 275–6. However, Coppens considers that the *Hirsi* judgment leaves open the question as to whether diversion of a vessel would amount to effective control. J Coppens, 'The Law of the Sea and Human Rights in the Hirsi Jamaa and Others v Italy Judgment of the European Court of Human Rights' (2014) 30 Ius Gentium 179, 200 and 202.

to Libya. To make this assessment, the Court referenced facts about Libya that Italy knew or should have been known at the time of removal.[107] The European Court was highly critical of Libya's human rights violations and the decision entailed a judgment of whether that country was a place where the rights of the claimants would be protected.[108]

Italy's other human rights violations occurring during its maritime interception operations and return of irregular migrants to Libya included the violation of an obligation prohibiting collective expulsions,[109] and denial of an effective remedy.[110] Italy had violated the prohibition on collective expulsions as the European Court determined this responsibility to be engaged 'in the context of interceptions on the high seas …, the effect of which is to prevent migrants from reaching the borders of the State or even to push them back to another State'.[111] Moreover, the fact that the applicants were on vessels did not absolve Italy of its responsibility to provide effective remedies in the face of its violations of other Convention requirements.[112] Instead, the European Court highlighted the detrimental effect of being denied access to information about accessing asylum procedures and determined the applicants had been denied an effective remedy.[113] Although not directly at issue in *Hirsi*, it is foreseeable that irregular migrants may make other claims of human rights violations, including in relation to rights of due process and freedom from arbitrary detention.

In sum, the law of the sea and search and rescue obligations predominantly focus on the rights of States in intercepting vessels at sea and the obligations that are owed to other States, such as a coastal State, flag State or States of embarkation and disembarkation. For the laws governing the relationship of the State and the individuals on board the vessels, the law of the sea has addressed law enforcement powers for prosecuting those involved in people smuggling and human trafficking. There are otherwise only broad references to the rights to be accorded to those on board. Regard must instead be had to refugee law and international human rights law, but there has been controversy as to when and where these bodies of law become applicable. These bodies of law are important for maritime interceptions because of the potential protections afforded to asylum seekers and refugees, as well as for rights concerning *inter alia* freedom from torture and cruel, inhuman or degrading treatment, and from collective expulsion as well as rights to effective remedies and due process. Understanding how these different laws may be integrated

[107] *Hirsi* (n 10) para 121. [108] Ibid para 115.

[109] Protocol No 4 to the Convention for the Protection of Human Rights and Fundamental Freedoms, securing certain rights and freedoms other than those already included in the Convention and in the first Protocol thereto (opened for signature 16 September 1963, entered into force 2 May 1968) ETS 46, art 4.

[110] Convention for the Protection of Human Rights and Fundamental Freedoms (opened for signature 4 November 1950, entered into force 3 September 1953) ETS 005, art 13.

[111] *Hirsi* (n 10) para 180. [112] ibid para 202. [113] ibid paras 204–205.

is therefore important for all stakeholders in maritime interceptions of irregular migrants.

IV. A CASE FOR HARMONIZATION

The different bodies of law at issue in maritime interceptions of irregular migrants are not completely independent but are interrelated to varying degrees. As has been indicated, some of the dissonance arises as a result of disagreement as to the applicability of refugee law or human rights law in different maritime settings. This part will highlight how the varied use of laws by different stakeholders has contributed to the fragmentation of laws relating to maritime interceptions. The fragmentation is partially attributable to the contrasting policy goals being pursued,[114] and these goals also influence the interpretation and application of the different legal regimes. These policy priorities will also need to be taken into account in seeking to overcome the fragmentation of the law if a politically realistic legal regime for maritime interceptions is to emerge.

A. Fragmentation of International Law Relating to Maritime Interceptions

In separating the law of the sea and search and rescue obligations from human rights obligations, the difficulties presented by the fragmentation of international law are manifest. The wide powers granted to coastal States in their territorial sea favour practical, commercial and security considerations over humanitarian concerns.[115] If vessels are being towed back from a State's territorial sea then it would appear that the coastal State is not following its human rights obligations irrespective of which State is towing. These violations emerge even though a coastal State is lawfully exercising its powers under UNCLOS to prevent non-innocent passage or to exercise criminal or civil jurisdiction over vessels within its territorial sea.

On the high seas, maritime interdiction regimes and search and rescue obligations fail to take full (or some would suggest any) account of obligations arising under refugee law and international human rights law.[116] Maritime interdiction treaties will sometimes reference that in exercising the right of visit, State authorities must ensure the safety and humane treatment of those on board,[117] but the obligations do not usually extend much further. The Migrant Smuggling Protocol does seek to preserve the application of international

[114] As noted in the ILC Study Group Report, a conflict in the substance of law may arise where there is a choice between what interests are relevant and what are not. Koskenniemi (n 12) para 22.

[115] Barnes (n 56) 61.

[116] In examining the practice of Frontex, Moreno-Lax has commented: 'Search and rescue obligations are understood as operating independent from other international obligations arising from refugee law and human rights, the observance of which is rendered uncertain'. Moreno-Lax (n 31) 177.

[117] eg Migrant Smuggling Protocol (n 16) art 9.

human rights law but does not solve the question as to the extraterritorial application of this body of law. As noted, the non-binding IMO Guidelines do suggest that States involved in search and rescue operations take into account refugee obligations but requesting such consideration does not properly reflect the binding nature of these obligations in their own right.

Even where an effort may be undertaken to have greater regard to refugee obligations and international human rights law in maritime interceptions, there is conflicting jurisprudence on the interpretation and application of human rights norms in a law of the sea context, as seen in the conclusions in the United States in *Sale* compared to the European position in *Hirsi*. As national and regional decisions, respectively, they do not formally bind States outside these regimes. The UN treaty bodies have reached the view that the principle of *non-refoulement* will apply in the context of search and rescue operations if the State concerned exercised effective control over the vessel and those on board.[118] Yet as interpretations of their own specific treaties, rather than consideration of all relevant norms, concern must remain as to how different bodies of international law may be reconciled.

At the very least, the variety of opinions indicates that there is need for greater clarity and uniformity in the interpretation and application of international law relating to maritime interceptions of irregular migrants. There is undoubtedly a conflict between the different bodies of laws because they each suggest different ways to deal with the problem of irregular migration at sea.[119]

In the face of these deficiencies, be they gaps, conflicting interpretations or ambiguities in the existing law, an immediate response may be to look to practical options to redress the immediate humanitarian need and account for existing political realities.[120] Greater burden-sharing between developed States, working to improve situations in States from which irregular migrants are departing and improved resources for meeting the challenges presented by migration are all ways (varying in feasibility) to address perceived problems with the movement of irregular migrants. However, improving the legal framework remains a vital task. Before attempting to undertake this exercise, it is also important to underline the policy imperatives that are shaping the operation of international law in this area because these policy choices help to explain State conduct.

B. The Influence of Policy Priorities

It is common in literature on international migration law to comment on how developed States have increasingly sought to externalize their border

[118] See *JHA v Spain* (n 102).
[119] Koskenniemi (n 12) para 25.
[120] See the proposals put forward by Barnes, for example. Barnes (n 56) 74–6.

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control.[121] The use of carrier sanctions, visa restrictions, posting State officials at points of departure or utilizing private companies to inspect travel documentation as well as interception measures have all provided mechanisms by which States can prevent the arrival of irregular migrants within their sovereign territory.[122] These measures are justified pursuant to a State's right to determine who may enter its territory and under what conditions they may enter.

The increasing use of external border controls is driven by a State's desire to improve its security and to reduce perceived threats to its population and infrastructure. In protecting State sovereignty, the response is devised as one essential to the security of the State. It is this lens of securitization that has become the dominant paradigm in maritime interceptions of irregular migrants.

Securitization is a process whereby actors with sufficient authority identify existential threats to the State, society or other particular object and seek to implement extraordinary measures in response to this threat.[123] Watson has noted that the securitization of migration is 'relatively well-established in the literature on international security'.[124] Other commentators have observed that securitization of migration distances discussions as to the treatment of irregular migrants from possible human rights abuses, their need for humanitarian assistance and the reasons of social and economic inequality that prompt their plight in the first instance.[125] The focus on security concerns thus outweighs considerations of human rights obligations owed to the irregular migrants.

Securitization does not necessarily have to come at the expense of human rights. Papastavridis has commented that there is a positive dimension to maritime interdictions of irregular migrants as it involves tackling the problem of human trafficking and people smuggling.[126] Law enforcement operations that can target transnational criminal enterprises may assist the victims and provide protection and assistance to them. Moreover, search and rescue operations inherently support the sanctity of human life as they save irregular migrants who may otherwise perish at sea.

Human concerns have been centered in security debates through the concept of human security. Human security reframes security from State concerns to human concerns and is generally understood to encompass protection from threats to economic, food, health, environmental, personal, community and political security.[127] Human security may be relied upon by States

[121] See eg Legomsky (n 91) 677–8; Miltner (n 68) 78–83; N Klein, 'International Migration by Sea and Air' in B Opeskin *et al.* (eds), *Foundations of International Migration Law* (Cambridge University Press 2012) 260, 261.
[122] Klein (n 120) 262–7.
[123] See B Buzan *et al.*, *Security: A New Framework for Analysis* (Lynne Reinner 1998) 32–3. See also SD Watson, 'Manufacturing Threats: Asylum Seekers as Threats or Refugees?' (2007) 3 JILIR 95, 97–8.
[124] Watson (n 122) 101.
[125] M Pugh, 'Drowning not Waving: Boat People and Humanitarianism at Sea' (2004) 17 JRS 50, 53. See also Nessel (n 87) 668; Miltner (n 68) 82–3.
[126] See Papastavridis (n 27) 148.
[127] See United Nations Development Program, '1994 Human Development Report' <http://hdr.undp.org/en/content/human-development-report-1994 >.

externalizing their border controls through interception operations on the basis that their actions are intended to protect the human security of their own population. This view would be followed as opposed to a view of human security that would require regard to the rights of irregular migrants who are leaving States that have failed to provide for their particular needs and rights.

To argue that a State should have regard to the broader dimension of human security (whereby the needs of irregular migrants as well as the national population may both be taken into account), the universal nature of human rights must be accepted. It does not necessarily follow that the rights of one group must prevail over those of another, although it is understandable that the decisions of a democratically elected government would be to prioritize the rights and interests of those who vote. Instead, the legal framework should be reconciled for States to have a reliable point of reference in determining their legal position consistent with their policy preferences and existing rights and obligations. The clear need from a legal perspective is to determine how the different strands of law can be reconciled.

The International Law Commission has studied some of the issues relating to the fragmentation of international law and recommended approaches based on rules of treaty interpretation. Given that there are different treaties at stake in relation to the maritime interception of irregular migrants, these recommendations provide relevant guidance. In particular, there is a case to be made for the principle of harmonization. Harmonization provides a mechanism to meet the varied demands at issue, particularly taking into account the policy preferences of the States concerned.

V. HARMONIZING THE LAW OF MARITIME INTERCEPTIONS OF IRREGULAR MIGRANTS

In seeking to overcome the fragmented nature of international laws pertaining to maritime interceptions of irregular migrants, the options presented by the report of the International Law Commission's Study Group provide a useful starting point. Among the techniques presented in that report are considering the co-existence of a *lex specialis* within the setting of general international law,[128] tools of treaty interpretation and the principle of harmonization.

A. Lex Specialis

Characterizing one of the bodies of relevant law as a *lex specialis* does not resolve the fragmentation issue in relation to maritime interceptions. Refugee law may be considered as a *lex specialis* against the broader rules of

[128] 'The principle that special law derogates from general law is a widely accepted maxim of legal interpretation and technique for the resolution of normative conflicts.' Koskenniemi (n 12) para 56.

international human rights law; refugees could be viewed as a class of individuals who warrant specific protection in addition to the rights more generally afforded to all persons under international human rights law. The laws relating to search and rescue sit within the framework of the law of the sea, even though the obligations do not follow the strict demarcation of maritime zones as laid out under UNCLOS.

For those States that enter into bilateral agreements with a coastal State in order to intercept vessels of irregular migrants before they depart the territorial sea, this bilateral agreement becomes a *lex specialis* against the general law of the sea and would also fall within the 'other rules of international law' anticipated in UNCLOS.[129] Moreover, the bilateral agreements may be *lex posterior* to UNCLOS. Yet is the law of the sea a *lex specialis* vis-à-vis international human rights law, or vice versa? Arguments could be posited either way and the principle does not provide a solution for this broader perspective.

B. Treaty Interpretation

Rules of treaty interpretation allow for systemic integration, whereby subsequent agreements, uniform practice and other norms applicable between the parties to a treaty are relevant to its interpretation.[130] There is undoubtedly scope within the law of the sea for account to be taken of other rules of international law, which would include human rights and refugee obligations. Coastal States' sovereignty over the territorial sea is subject not only to the right of innocent passage belonging to other States but is also limited by 'other rules of international law'.[131] Also on the high seas, exercises of jurisdiction are subject to 'other rules of international law'.[132] Beyond these specific references, the preamble to UNCLOS affirms 'that matters not regulated by this Convention continue to be governed by the rules and principles of general international law'.

The Migrant Smuggling Protocol is more explicit about the ongoing relevance of international human rights law, providing in Article 16 an obligation on States to respect the rights and protect those who are the object of criminal people smuggling and human trafficking operations. A savings clause, Article 19(1), further states:

> Nothing in this Protocol shall affect the other rights, obligations and responsibilities of States and individuals under international law, including international humanitarian law and international human rights law and, in particular,

[129] See below (nn 130–131).

[130] Vienna Convention on the Law of Treaties (opened for signature 23 May 1969, entered into force 27 January 1980) 1155 UNTS 331, art 31(3)(c). See further C McLachlan, 'The Principle of Systemic Integration and Article 31(3)(c) of the Vienna Convention' (2005) 54 ICLQ 279.

[131] UNCLOS (n 15) art 2(3).

[132] ibid art 87(1).

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where applicable, the 1951 Convention and the 1967 Protocol relating to the Status of Refugees and the principle of *non-refoulement* as continued therein.

However, this language does not resolve the question of whether the Refugee Convention and Protocol may apply extraterritorially.[133] Soft law instruments further indicate that human rights and refugee obligations are relevant in guiding State conduct in maritime interceptions.[134]

If bilateral agreements permitting the interception of vessels carrying irregular migrants provide the prevailing law, is it possible for the coastal State to contract itself out of its human rights obligations? A model agreement once used by the United States as the basis for its bilateral agreements to counter drug-trafficking as well as for migrant interdictions did not specifically reference human rights protections for those on board interdicted vessels.[135] Instead, boardings and searches were to be consistent with applicable 'international law and accepted international practices'.[136] Such a reference could potentially allow for reading in human rights obligations but a more explicit reference would be desirable to ensure such a result. There is, nonetheless, scope to consider how these different treaty obligations may be read together when account is taken of 'other rules of international law applicable in the relations between the parties'.[137]

C. Harmonization

Beyond specific rules of treaty interpretation, the principle of harmonization can be brought to bear to reconcile the operation of the law of the sea and international human rights law. To this end, it is important to recall that the law of the sea does not only set out the rights and obligations of States and their vessels, but also extends to the individuals who undertake activities at sea. Regulating the conduct of individuals at sea can primarily be considered as a question of jurisdiction, in terms of which State may exercise authority over those individuals.[138] This assessment remains largely dependent on what activity is occurring and where it is occurring. International human rights law has followed this focus on the exercise of authority over individuals in the law of the sea to the extent that States are held accountable for their actions where they have exercised 'effective control' over individuals at sea.[139]

It may be argued that international human rights law should apply, irrespective of whether land or sea activities are at issue. The European Court

[133] Because of the reference to 'where applicable'.
[134] See eg IMO Guidelines (n 75) and the Frontex Guidelines (n 37).
[135] See agreement appended to Kramek (n 8) 152–60. [136] ibid 158.
[137] As per art 31(3)(c) of the Vienna Convention on the Law of Treaties (n 129).
[138] See discussion in I Papanicolopulu, 'A Missing Part of the Law of the Sea Convention: Addressing Issues of State Jurisdiction over Persons at Sea' in C Schofield *et al.* (eds), *The Limits of Maritime Jurisdiction* (Martinus Nijhoff 2014) 387.
[139] See above nn 97–105 and accompanying text.

has taken this approach in stating 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' international human rights.[140] Barnes has commented, '[i]t is arguable that human rights norms should not be subject to the technicalities of maritime zone classification'.[141] These views are consistent with an approach that endorses the universality of human rights.

Decisions of international courts have also offered grand statements about the need to ensure considerations of humanity in the interpretation and application of the law of the sea. In the *Corfu Channel* case, the International Court of Justice referenced 'elementary considerations of humanity' in discussing Albania's failure to notify the United Kingdom of the laying of mines in its waters.[142] The International Tribunal for the Law of the Sea also posited in the *MV Saiga (No 2)* that '[c]onsiderations of humanity must apply in the law of the sea, as they do in other areas of international law'.[143]

These perspectives do not necessarily suggest that international human rights law, including refugee law, should trump the law of the sea and its obligations. International human rights law does not prohibit States from intercepting vessels at sea. The critical point of crossover between these bodies of law is when persons are stopped, detained or rescued. When the interaction begins between a State authority and irregular migrants, either as law enforcement or during a search and rescue, does the ensuing conduct rise to the level of effective control for the application of refugee obligations and international human rights law? Opinions will no doubt vary on this point. Yet the threshold for establishing effective control is not the central issue. What is important here is establishing that human rights obligations may apply during an interception. This point should be accepted because the law of the sea incorporates the principle that there are 'elementary considerations of humanity' that are taken into account in activities at sea.

An interpretation that reconciles the policy desire to prevent departures from a particular State as well as the preference to respect human rights can be drawn from the effective control test. This test is apt in the particular circumstances because it aligns with the perspective that States should not be able to operate outside their borders inconsistently with the human rights obligations that apply within their borders. Hence, if the intercepting State crosses the threshold of effective control in relation to the vessels or individuals concerned, human rights obligations should apply. Even if the view is maintained that the obligation of *non-refoulement* only applies once an individual has departed the place of persecution, it may still be the case that the individuals have

[140] *Hirsi* (n 10) para 178. See also *Medvedyev v France* (n 101) 81.
[141] Barnes (n 56) 70.
[142] *Corfu Channel* (Albania v United Kingdom) 1994 ICJ Reports 4 (9 April).
[143] *M/V Saiga (No 2) (Saint Vincent and the Grenadines v Guinea) (Admissibility and Merits)* (1999) 38 ILM 1323, para 155.

nationalities different to that of the place of embarkation and so refugee assessments would need to be undertaken within the State of embarkation. Further, States could still potentially be liable for the violation of other human rights obligations, including the prohibition against collective expulsion pursuant to the reasoning in *Hirsi*.

If irregular migrants are intercepted outside the territorial sea or contiguous zone of a coastal State, interdictions are only lawful against vessels flagged to the intercepting State, or if the vessel is stateless and there is otherwise a jurisdictional nexus between the intercepting State and those on board, or if the flag State has consented to the visit and detention of the vessel. If there is a lawful basis for interdiction, the controversial question of whether *non-refoulement* applies on the high seas arises. Putting to one side intricate arguments interpreting the Refugee Convention, the better legal interpretation is that it does apply, along with other human rights requirements, once a State has effective control over the individuals so as to ensure universal application of human rights norms.

Accepting this position does not undermine the imposition of external border controls; vessels may still be interdicted on the high seas and there is no requirement to take an irregular migrant to their preferred destination, so long as they are not taken to a place where there is risk of their rights being violated. It does mean that arrangements will need to be put in place to ensure that assessments of refugee status can be undertaken to adhere to the obligation of *non-refoulement*. The 'pull factor' that has been considered dissuasive in adhering to refugee obligations on the high seas may not be as strong if there are no guarantees the irregular migrants will reach their destination of choice. Certainly it should be expected in this scenario that the alternative location for assessment does not in itself violate human rights standards because of poor conditions or abuses inflicted on irregular migrants. Human rights norms against arbitrary detention and adherence to due process norms would be required. The political reality may be that such an alternative location is not available in which case the onus must shift back to the intercepting State to fulfil their human rights and refugee obligations.

If there is no legal basis for interdicting a vessel carrying irregular migrants on the high seas, it may then only be intercepted if it is in distress. Although it has been suggested that unseaworthiness *per se* constitutes distress,[144] determining distress may require consideration of a variety of factors.[145] If a vessel is in distress then the search and rescue obligations apply; if not, the requirement of non-interference with foreign-flagged vessels on the high seas remains.

The outstanding difficulty is the absence of a duty of disembarkation following rescue. Miltner interprets the IMO Guidelines to mean that 'Rescue Coordination Centres . . . may now designate where disembarkation will occur

[144] Moreno-Lax (n 31) 195.

[145] See Council Decision (n 38).

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on behalf of the assisting vessel, regardless of the status of that vessel as private or State-owned, military or non-military'.[146] However, there is no widespread agreement as to where disembarkation may be required. It may be the case that no such duty should be specified as the individual circumstances of the irregular migrants may mean that delivering them to the next port of call would be a violation of *non-refoulement*. To read the search and rescue obligations consistently with refugee obligations, Fischer-Lescano *et al.* consider that a 'place of safety' should be interpreted in line with refugee requirements so that a place is not '"safe" for refugees simply because distress at sea has been prevented; it is only safe when *non-refoulement* is guaranteed'.[147] Certainly this view is supported by the IMO Guidelines, which include *refoulement* requirements as a 'consideration', albeit not an obligation.[148] This requirement should adhere irrespective of whether a private vessel undertakes the rescue or whether State authorities do so.[149]

Yet this view does not prevent the scenario of a vessel carrying irregular migrants being left at sea for an extended period of time because no State will permit its entry into port. A vessel in that situation may reach a point, as happened with the *MV Tampa*, that the conditions on board with additional passengers creates another situation of distress, allowing for a customary right of entry into port.[150] While this right of entry allows human rights concerns to sit within the law of the sea and search and rescue obligations, it is unsatisfactory that a ship undertaking a rescue should be driven to a point of distress itself in order to gain admission to a State. The willingness of vessels to conduct rescues would necessarily be undermined if that situation were to result. It should instead be the case that delivery to a place of safety should take precedence over migration concerns and not be used as grounds for delaying disembarkation.[151] This approach prioritizes human rights concerns over national security, however, and may be unacceptable to States as a result.

There is a clear challenge to the achievement of harmonization in this regard. As the ILC Study Group on Fragmentation noted in its report:

> Between the parties, anything may be harmonized as long as the will to harmonization is present. Sometimes, however, that will may not be present, perhaps because the positions of the parties are so wide apart from each other – something that may ensue from the importance of the clash of interests or preferences that is expressed in the normative conflict, or from the sense that the

[146] Miltner (n 68) 109.

[147] Fischer-Lescano (n 30) 290. This view was also set out by the Parliamentary Assembly of the Council of Europe in Resolution 1821 (2011) ('Yet it is clear that the notion of "place of safety" should not be restricted solely to the physical protection of people, but necessarily also entails respect for their fundamental rights.'). See Council of Europe, 'The interception and rescue at sea of asylum seekers, refugees and irregular migrants', Resolution 1821 (21 June 2011) para 9.5.

[148] IMO Guidelines (n 75) para 6.17.

[149] Fischer-Lescano (n 30) 291.

[150] Churchill and Lowe (n 63) 63.

[151] Miltner (n 68) 111.

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> harmonizing solution would sacrifice the interests of the party in a weaker negotiation position.[152]

In the absence of clear and binding requirements relating to disembarkation following a rescue and a manifest lack of political will to resolve the issue, it is difficult to establish how international human rights law and refugee obligations can be harmonized with the existing search and rescue framework.

The unsatisfactory state of the law in this particular area prompts the question as to whether the SRR should be reconceived and more closely aligned with coastal State responsibility. It is a proposal that would be swiftly denied by advocates who favour high seas freedoms and who resist increasing claims of exclusive coastal State rights.[153] A further difficulty is the practical issue of resources and the questionable ability of all coastal States to undertake search and rescue operations within extensive zones generated from their coastlines. A risk may also arise of search and rescue operations not being conducted where there are disputed maritime boundaries or territories, or tensions arising where one State conducts a rescue in an area claimed by another State. Thus the existing regime of SRR remains preferable, although greater regard could be had to the ability and willingness of States to declare responsibility for such regions if those States are not willing to adhere to human rights norms that are triggered in the course of these operations.

Malta's experience is pertinent in this regard. Maltese officials apparently have been unsuccessful in proposals to the Maltese government to decrease the size of its SRR so as to reduce its burden in conducting search and rescues.[154] Italy and Malta instead have overlapping SRR, despite Italian requests to Malta as well 'to relinquish segments of its SRR in an effort to reduce immigrant arrivals via rescues at sea'.[155] De Blouw has commented that Malta has significant financial incentives to maintain a sizeable SRR.[156] Yet the Search and Rescue Convention requires States to have adequate services available in their waters,[157] and so a State is arguably in violation of its treaty obligations if it is not undertaking the rescues and making arrangements as required. A rigorous application of this requirement would better ensure that States fulfil existing obligations, including consideration of potential protection claims from asylum seekers.

In sum, the decision in *Hirsi* has provided an impetus for considering how international human rights law can be harmonized with law of the sea and search and rescue obligations as they relate to interception of irregular

[152] Koskenniemi (n 12) para 42.
[153] This argument would be seen as another situation of 'creeping jurisdiction'.
[154] De Blouw (n 79) 352.
[155] ibid.
[156] ibid 352–3 (citations omitted). See also Coppens (n 80) 98.
[157] Search and Rescue Convention (n 66) para 2.1.1.

migrants. The policy imperative of border control has resulted in destination States focusing on law of the sea principles in engaging in interceptions and in dealing with States of embarkation. Yet the focus on 'effective control', along with full consideration being given to 'other rules of international law', provide a sound mechanism to harmonize the application of these different bodies of law. The absence of a duty of disembarkation in a search and rescue scenario remains a discordant feature of this harmonization and necessitates a policy decision prioritizing human lives. At the least, there should be rigorous regard paid to States' abilities to ensure that they are sufficiently able and adequately resourced to undertake their search and rescue responsibilities consistent with the spirit of saving lives in peril of being lost at sea.

VI. CONCLUSION

Preventing the entry of foreigners into a State is an entitlement that flows from State sovereignty. Refusal of entry, as noted by Barnes, 'does not automatically amount to *refoulement*'.[158] As uncharitable as it may seem, developed States are fully within their rights to undertake interception measures as a means of controlling or preventing irregular migration. There are legal bases for these States to interdict vessels carrying irregular migrants and to control search and rescue operations. Yet these powers recognized under the law of the sea must still be interpreted and applied consistently with international human rights obligations where applicable. Those obligations are applicable in a State's territorial sea as it exercises sovereignty over this maritime area. The obligations are also applicable once a State exercises effective control over individuals in high seas areas.

States have not always embraced an integrated legal regime for maritime interceptions of irregular migrants because there are different policy concerns at stake. Rather than providing protection to individuals who may be fleeing from persecution or otherwise seeking a better life elsewhere, States have been primarily concerned with controlling who may enter their territory and become part of that State's community.

The fragmentation of laws in this area may only be overcome if there is agreement as to the objectives of the regime.[159] Saving human lives is a common theme, and interception operations have been touted by States as a key means for preventing loss of life at sea. This desire to save human lives must be extended to include saving these same lives from persecution or other human rights violations. If this aim is agreed, the regime can hold together. As noted by the ILC, 'legal reasoning will either have to seek to harmonize the apparently conflicting standards through interpretation or, if that seems implausible, to establish definite relationships of priority between them'.[160] Legal reasoning does largely permit the law of the sea, search and rescue

[158] Barnes (n 56) 64. [159] Koskenniemi (n 12) para 34. [160] ibid para 36.

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obligations, refugee obligations and international human rights norms to be read together, even in the face of contrasting policy imperatives. Both of these policy perspectives can be addressed within the legal framework that has been proposed. Whether the varied stakeholders are willing to accept the necessary compromises that are entailed in harmonizing these bodies of law remains to be seen.

The most recent response of the European Union is arguably a more advanced attempt at reconciling the different legal regimes, yet still lacks overall coherency. The proposed European Union regulation was adopted by the European Parliament on 21 May 2014,[161] and is expected to enter into force during July 2014. This regulation has set out the core human rights principles to be applied for operations coordinated by Frontex, but not maritime interceptions conducted separately by individual member States. These human rights obligations are to apply irrespective of effective control or in what maritime zone the operations are occurring, as these issues are not addressed in the regulation but all dealt with separately. The human rights requirements are designated as general rules whereas the law of the sea and search and rescue obligations are designated as specific rules. The latter elaborate on interception measures and search and rescue procedures, including particular instances giving rise to a duty of disembarkation. Yet ultimately, there is no harmonization in effect. At most, it is notable that there is now one binding document that sets out all the different bodies of international law at issue in maritime interceptions of irregular migrants.

[161] Surveillance of the external sea borders in the context of operational cooperation coordinated by the European Agency for the Management of Operational Cooperation at the External Borders of the Members States, 2013/0106 (COD) (21 May 2014) <http://parltrack.euwiki.org/dossier/2013/0106(COD)>. This article was in production at the time the Regulation was adopted.

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