

## EXTERNALIZED BORDERS AND THE INVISIBLE REFUGEE

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### INTRODUCTION

In October 2002, when twenty-year-old David Joseph's family was attacked and their home destroyed, he joined about two hundred other people and boarded a boat that carried them from the politically motivated violence in Haiti to Florida. Yet instead of finding the safety and freedom that he dreamed of, David was labeled a "national security threat" upon his arrival in the United States and was placed in mandatory detention for over two years before being sent back to Haiti.<sup>1</sup>

On April 29, 2006, when fishermen approached a small, rusty motorboat drifting in the Caribbean, they discovered eleven men, partly mummified by the sun and the salt spray. It was believed that the boat left the Cape Verde

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1. Lori A. Nessel & Anjum Gupta, *Abuse of (Plenary) Power? Judicial Deference and the Post-9/11 War on Immigrants*, in *Awakening From The Dream: Civil Rights Under Siege and the New Struggle for Equal Justice* 229 (Denise C. Morgan et al. eds., 2005) (citing Bob Herbert, *Ashcroft's Quiet Prisoner*, N.Y. Times, Aug. 13, 2004, at A21).

islands, off the western coast of Africa, on Christmas Eve with fifty people on board, taking a circuitous, authority-avoiding route to Spain's Canary Islands. By the time the fishermen discovered the boat near Barbados, the eleven remaining men had been dead for weeks. One had a note pinned to his shirt that read: "I would like to send to my family in Bassada a sum of money. Please excuse me and goodbye. This is the end of my life in this big Moroccan Sea."<sup>2</sup>

In May 2007, a group of twenty-seven Africans were rescued by the Italian Navy after they had spent three days and three nights clinging to a tuna pen dragged by a Maltese fishing boat. The ship's captain refused to divert his ship to disembark the men because he was afraid of losing his valuable tuna catch.<sup>3</sup>

These stories—as well as countless others—tell of the danger and desperation inherent in boarding an overcrowded and often unseaworthy boat in search of safety in a foreign land. Those fleeing often find themselves quickly stranded in open sea with no food or water—dehydrated, malnourished, and surrounded by fellow passengers that are sick, dying, or dead. But even for the few who survive long enough to be rescued by fishermen or military ships, the journey is often for naught. As nations around the world attempt to seal their borders and deter or divert unauthorized migration, refugees and economic migrants alike are turned back without an opportunity to access international protection regimes.

The duty to rescue those in peril at sea is longstanding and codified in various international laws.<sup>4</sup> The duty to protect refugees is similarly beyond dispute. Between these spheres of duty, however, lie murky waters marked only by unanswered questions. For example, once refugees are rescued at sea, is a nation obligated to allow the rescuing ship to disembark the refugees? Does this obligation apply only to nations that respect human rights? What if the boat is intercepted in the high seas outside of any nation's jurisdiction? Is there an obligation to provide access to asylum? Is it permissible to

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2. William Spindler, *Between the Devil and the Deep Blue Sea*, *Refugees Mag.*, Dec. 2007, at 16, 19, available at <http://www.unhcr.org/publ/PUBL/475fb0302.pdf>.

3. *Id.*

4. See *infra* note 15 and accompanying text.

enter a third country's waters to "push back" refugees attempting to flee? These questions are representative of the ambiguous legal and moral obligations that nations are navigating in an attempt to undermine access to international protection.

This Article undertakes a comparative analysis of external border enforcement measures in the European Union and the United States, with particular emphasis on the efforts of both to curtail migration by sea. In both the United States and the European Union, the image of poor black immigrants in rickety boats appears to evoke an unwarranted degree of fear and resistance. The United States, in particular, has responded to periods of mass exodus from Haiti with interception, interdiction, and forcible repatriation of refugees without any opportunity to seek asylum, and regulations that allow for harsher treatment of those arriving by sea. The U.S. Supreme Court and a number of international human rights bodies, including the Inter-American Commission on Human Rights, have issued inconsistent rulings on the legality of the United States' interception and forced repatriation efforts.<sup>5</sup>

Notwithstanding the international condemnation of the United States' repatriation policy,<sup>6</sup> nations around the world are

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5. Compare, for example, the U.S. Supreme Court ruling in *Sale v. Haitian Centers Council*, 509 U.S. 155 (1993) (holding that neither domestic immigration law nor international refugee law prohibits the U.S. Coast Guard from intercepting and forcibly repatriating Haitian refugees on the high seas), with the response from the United Nations High Commissioner for Refugees (whose opinions were recognized by the Supreme Court in its interpretation of the terms of the Refugee Convention, *see Sale*, 509 U.S. at 183 n.40): "UNHCR considers the Court's decision a setback to modern international refugee law which has been developing for more than forty years, since the end of World War II. It . . . sets a very unfortunate example." *UN High Commissioner for Refugees Responds to U.S. Supreme Court Decision in Sale v. Haitian Centers Council*, 32 I.L.M. 1215 (1993). *See also* *The Haitian Center for Human Rights v. United States*, Case 10.675, Inter-Am. C.H.R., Report No. 51/96, OEA/Ser.L.V/II.95, doc. 7 rev. ¶¶ 183–88 (1997) (ruling that the United States' interdiction and forced repatriation of certain Haitian asylum seekers violated the American Declaration of Human Rights, including the rights to life, liberty, security, equality before the law, resort to the courts, and the right to seek and receive asylum).

6. *See, e.g., The Haitian Center for Human Rights*, Case 10.675 ¶¶ 183–88; Ninette Kelley, *International Refugee Protection Challenges and Opportunities*, 19 Int'l J. Refugee L. 401, 419 (2007); Harold Hongju Koh, *The "Haiti Paradigm" In United States Human Rights Policy*, 103 Yale L.J. 2391, 2394 (1994); Letter from Ariel Dulitzky, In Charge of the Executive Secretary, Inter-American Commission on Human Rights, to James L. Cavallero, Human Rights Program,

increasingly following suit by moving the locus of border enforcement efforts beyond their terrestrial borders and floating such borders into the sea or landing them on territories of foreign countries, in an effort to halt the flow of refugees. In the European Union, some Member States have begun the process of externalizing the EU borders by leveraging the EU joint external border guard agency (FRONTEX) to intercept and repatriate thousands of migrants caught at sea while desperately attempting to reach Italy, Malta, Greece, or Spain's Canary Islands.<sup>7</sup> EU Member States with borders in close proximity to Africa (such as Spain) have entered into agreements with nations with large emigrant populations (such as Senegal and Mauritania) in order to shift responsibility for refugee flows onto already overburdened developing nations.<sup>8</sup> Nations with large emigrant populations have little choice but to enter into immigration agreements with EU Member States, since development funding or visa-allotment is often tied to acceptance of these agreements.

In addition, the global focus on securitization and enforcement has weakened the refugee protection regime, particularly the obligations of the 1951 United Nations Convention Relating to the Status of Refugees (Refugee Convention).<sup>9</sup> Because the flotillas of migrants appear primarily as a threat to security and sovereignty, their plight is at best considered a humanitarian crisis, not a situation that implicates international legal obligations. That some portion of this mixed migrant flow is comprised of refugees garners little attention.

The European Union is bound by a number of human rights and European Community conventions beyond the Refugee Convention. This makes it a particularly fertile ground for analyzing border externalization actions and reconceptualizing the needs of—and obligations to—the modern day refugee. Especially noteworthy in this context is the developing jurisprudence of the European Court of Human Rights and its efforts to strike a balance between the

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Harvard Law School (March 19, 2004), *available at* <http://www.gbls.org/immigration/decision.pdf>.

7. For a description of current initiatives aimed at deterring migration by sea to the EU southern states, see the official FRONTEX website, <http://www.frontex.europa.eu/>.

8. *See infra* notes 272–276.

9. Convention Relating to the Status of Refugees, July 28, 1951, 19 U.S.T. 6260, 189 U.N.T.S. 137 [hereinafter Refugee Convention].

migrant's guaranteed human rights and the state's interest in immigration enforcement. After examining this jurisprudence, I propose a framework for accountability and increased refugee protection that goes beyond the Refugee Convention to draw upon other international laws, including the United Nations Convention on the Law of the Sea<sup>10</sup> and the International Law Commission's Articles on the Responsibility of States for Internationally Wrongful Acts.<sup>11</sup> I also utilize the United Nations Human Rights Committee's interpretation of a state's obligations under the International Covenant on Civil and Political Rights (ICCPR).<sup>12</sup> I argue that just as a nation should not escape liability when it sends a person in its custody to a nation that is known to engage in torture, so too must a nation be liable for human rights violations that occur as a result of outsourcing refugee protection and the externalizing of borders. Although sovereign nations have a right to control entry into their territories, this right is not absolute and must be carried out in harmony with the various international human rights instruments guaranteeing the right to leave one's country, to seek protection, to be free from torture, and to have one's dignity respected. States cannot refuse to respect these rights either by blocking access to a receiving country or by partnering with third countries to block individuals from leaving their homelands.

The European Union, like the United States, has cast a wide net in its multifaceted approach to deterring migrants and refugees alike from reaching its land borders. EU Member States no longer wait for refugees to seek protection at their borders. Rather, the European Union proactively sends its forces directly into refugee-sending nations (whether by stationing officers at airports or ships in the sending-nation's waters) in order to prevent their citizens from fleeing to its Member States. Individual Member States also negotiate agreements with refugee-producing nations, so that any refugees actually landing on EU soil can quickly be sent south again.

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10. United Nations Convention on the Law of the Sea, Dec. 10, 1982, 1833 U.N.T.S. 397 [hereinafter UNCLOS].

11. United Nations International Law Commission, *Responsibility of States for Internationally Wrongful Acts*, submitted to the General Assembly, U.N. Doc. A/56/83 (Dec. 12, 2001).

12. International Covenant on Civil and Political Rights, United Nations High Commissioner for Human Rights, Dec. 16, 1966, G.A. res. 2200A (XXI) [hereinafter ICCPR].

In addition, Member States provide funding for southern border states to build detention centers.

Indeed, some of the techniques for blocking access to the European Union bear striking similarities to the United States' approach to its war on terror.<sup>13</sup> As in the war on terror, much of the EU border externalization is carried out through informal agreements that are not subject to public scrutiny or parliamentary review. FRONTEX operates with little transparency, oftentimes engaging in actions abroad that would be impermissible on European soil.

I argue that nations should not be permitted to insulate themselves from liability by severing border security from international protection obligations. Border security functions should not be floated out to sea or delegated to third countries without also ensuring that the concomitant international protection obligations are carried out fully. In order for the Refugee Convention to have meaning, it must be interpreted within the context of the broader international human rights framework; those in need of protection must be afforded true access. Nations that commit human rights abuses must be held accountable—whether the abuses occur at home or abroad.

Finally, I examine the role of race in shaping the United States' and European Union's responses to migration by sea. Haitian refugees fleeing by sea for the United States have been met with interception and interdiction—and only extremely limited access, if any, to the refugee protection regime. African migrants fleeing by sea toward the southern EU states of Italy, Spain, Malta, or Greece have also encountered new regimes implemented to detect and repel them before they reach the European Union. Although not the exclusive factor motivating interdiction, race does seem to play a role. I examine this role of race in the American and European responses to migration by sea as well as its impact on immigration policy. In place of the current practice of interdicting migrants at sea, I argue that the similar histories of racial and economic exploitation between the United States and Haiti, on the one hand, and Europe and Sub-

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13. As noted by Ratna Kapur, “[t]he new ‘War on Terrorism’ has created space for a more strident and alarming response to the global movements of people, reducing it at times to nothing more than an evil threat.” Ratna Kapur, *Travel Plans: Border Crossings and the Rights of Transnational Migrants*, 18 Harv. Hum. Rts. J. 107, 134 (2005).

Saharan Africa, on the other, give rise to a greater duty to offer protection to refugees from these regions.

Part I explores the existing protection framework, focusing particularly on the inter-relationship between the Law of the Sea, with its duty to rescue those in peril, and the Refugee Convention. Part II explores the history of the United States' treatment of Haitian boat people, including the evolution of an interdiction program that set the stage for current European Union externalization and interdiction actions. Part III critiques the European Union's actions in externalizing its borders, as well as the impact that it has had in undermining refugee protection for Sub-Saharan Africans. Part IV argues for legal and humanitarian-based change. By utilizing a broader framework of international law, this part suggests a reconceptualization of the obligations owed to refugees, including greater accountability for human rights violations that result from extraterritorial border enforcement. The article concludes by arguing that the parallel histories of racial and economic exploitation between the United States and Haiti, on the one hand, and the European Union and Africa, on the other, suggest a greater duty to protect refugees from those regions.

#### I. EXISTING PROTECTION FRAMEWORK

Both the United States and the European Union are engaging in interception activities designed to deter migrants from reaching their shores. In both cases, these interception actions, specifically directed at refugee-producing nations, are undermining the refugee protection regime. Standing in the way, however, are a number of international legal instruments that are applicable to refugees and migrants intercepted at sea. There is also a robust framework for protection that is applicable to externalization efforts, whether executed on land or at sea. Particularly in the case of the European Union, there are numerous international instruments that should offer protection. This section provides an overview of the international instruments that govern the treatment of refugees and migrants and identifies the gaps in protection.

A. The Duty to Rescue Those in Danger at Sea Under International Law

The duty to aid those who are in danger at sea is an ancient maritime obligation.<sup>14</sup> Pursuant to the United Nations Convention on the Law of the Sea, the International Convention for the Safety of Life at Sea of 1974 (SOLAS), the International Convention on Maritime Search and Rescue of 1979 (SAR), and the 1958 Convention on the High Seas, there is an explicit obligation to rescue persons in peril on the high seas.<sup>15</sup> The immigration status of the endangered person is irrelevant, as is the number of persons at risk, or the mode of travel.<sup>16</sup> The shipmaster is responsible for the initial rescue. And although the duty to rescue is clear, it is significantly less clear what duties are owed from that point on. Once the initial rescue has occurred, international law is silent as to any ongoing obligation owed by the shipmaster.<sup>17</sup>

Similarly, international law imposes only partial duties on both coastal and flag states.<sup>18</sup> Coastal states must develop adequate search and rescue services.<sup>19</sup> However, international law is silent as

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14. See Clayton Evans, *Rescue at Sea: An International History of Lifesaving, Coastal Rescue Craft and Organizations* 6 (2003) (discussing the ancient origins of the duty to rescue at sea).

15. Office of the United Nations High Commissioner for Refugees [UNHCR], *The Protection of Asylum-Seekers and Refugees Rescued at Sea, in Migration and International Legal Norms* 137, 138 (T. Alexander Aleinikoff & Vincent Chetail eds., 2003).

16. *Id.*

17. *Id.*

18. “Flag state” refers to the state under whose flag the rescuing ship sails: Every State shall require the master of a ship flying its flag, in so far as he can do so without serious danger to the ship, the crew, or the passengers: (a) to render assistance to any person found at sea in danger of being lost; (b) to proceed with all possible speed to the rescue of persons in distress, if informed of their need for assistance, in so far as such action may be reasonably expected of him . . .

UNCLOS, *supra* note 10, art. 98(1).

19. See, e.g., International Convention for the Safety of Life at Sea, ch. V reg. 7(3), Nov. 1, 1974, *as amended* Dec. 6, 2000 (requiring that state parties provide certain navigation safety services); UNCLOS, *supra* note 10, art. 98(2) (requiring every coastal state to “promote the establishment, operation and maintenance of an adequate and effective search and rescue service regarding safety on and over the sea . . .”); International Convention on Maritime Search and Rescue, Apr. 27, 1979, International Maritime Organization, S. Treaty Doc.

to disembarkation, landing, or follow-up for those who have been rescued.<sup>20</sup> Although there is a duty under international law to agree as expeditiously as possible as to which ports the rescuing ship will be allowed to enter, in practice these negotiations between affected states have moved slowly.<sup>21</sup> Flag states are bound by international law, yet different obligations arise depending upon the relationship between the coastal state, flag state, and ship.<sup>22</sup>

Finally, a series of international agencies have specified obligations under international law. For example, the International Maritime Organization (IMO) oversees the development of international maritime law. The United Nations High Commissioner for Refugees (UNHCR) has the specific responsibility to guide and assist states and other actors as to the proper treatment owed to refugees and asylum seekers rescued at sea, and to ensure that the rescuing parties are complying with the obligations owed to refugees and asylum seekers under international law.<sup>23</sup>

However, even the clearest obligations under the Law of the Sea, like the duty to rescue, are not uniformly adhered to as a matter

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No. 96-45 (requiring parties to make arrangements for the provision of adequate maritime search and rescue services in their coastal waters).

20. UNHCR, *supra* note 15, at 138.

21. Ruth Weinzierl & Urszula Lisson, *Border Management and Human Rights: A Study of the EU Law and the Law of the Sea*, 13 (German Institute for Human Rights, Dec. 2007). The UNHCR is in the process of promulgating regulations for such situations. See Interview with Amaya Valcarcel, former General Counsel, Spanish Commission for Refugee Assistance (Dec. 2007) (on file with author). In July 2006, amendments were made to the SOLAS and SAR Conventions to obligate states to cooperate and coordinate so that rescued persons would be disembarked to a place of safety as soon as possible. Spindler, *supra* note 2, at 21. However, several of the key maritime states have failed to ratify these amendments. *Id.*

22. Under customary international maritime law, any state that allows a vessel to register under its national flag must take responsibility for any administrative, technical, or social matters that arise onboard. UNCLOS, *supra* note 10, art. 94. If the vessel is on the high seas, the flag state has exclusive jurisdiction over it. *Id.* at art. 92. However, in territorial sea or contiguous zones, the coastal state has sovereign rights that limit the flag state's jurisdiction over the vessel. In such a situation, the flag state would not have territorial sovereignty. Instead, it would have legal sovereignty over the vessel flying its flag. The flag state's obligations in the context of human rights laws arise from national law, international human rights treaties and conventions, and EU law if applicable. Weinzierl & Lisson, *supra* note 21, at 32.

23. UNHCR, *supra* note 15, at 140.

of practice. As evidenced by the story of the tuna boat that refused for days to stop and disembark the rescued migrants, owners of small fishing boats at times fail to rescue refugees because of the associated loss of time and money.<sup>24</sup> This risk of costly delay has been aggravated by specific, recent disputes and protracted negotiations between various responsible states regarding disembarkation agreements.<sup>25</sup> Adding to this fear of delay is the reasonable fear of many ship captains that they will be criminally prosecuted for carrying undocumented migrants to shore.<sup>26</sup>

## B. Refugee Protection Regime

The refugee protection regime that exists today is based upon the 1951 Refugee Convention,<sup>27</sup> as amended by the 1967 United Nations Protocol on Refugees (U.N. Protocol).<sup>28</sup> Pursuant to Article 33 of the Refugee Convention, a refugee was defined universally for the first time as any person who:

[a]s a result of events occurring before 1 January 1951 and owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the

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24. See *supra* note 3 and accompanying text.

25. See *infra* notes 125–128 and accompanying text for a discussion of a boatload of Libyans that, once rescued from their sinking ship, nevertheless remained stranded at sea for days while the various states with a duty to assist negotiated over which state would take responsibility for the refugees.

26. Weinzierl & Lisson, *supra* note 21, at 13.

27. Refugee Convention, *supra* note 9.

28. Protocol Relating to the Status of Refugees, Jan. 31, 1967, 19 U.S.T. 6223, 606 U.N.T.S. 267 [hereinafter Refugee Protocol]. Pursuant to the Refugee Convention, signatory states are prohibited from returning a person to a country in which her life or freedom would be threatened, an act referred to as “*refoulement*”. Refugee Convention, *supra* note 9, art.33. However, customary international law has extended the concept of nonrefoulement by broadening the definition of “refugee” to also include displaced persons who do not enjoy the protection of their home country. Sadruddin Aga Khan, *Lectures on Legal Problems Relating to Refugees and Displaced Persons Delivered at the Hague Academy of International Law*, in *International Refugee Law: A Reader*, 239, 241–44 (B.S. Chimni ed., 2000); Guy S. Goodwin-Gill, *Nonrefoulement and the New Asylum Seekers*, in *The New Asylum Seekers: Refugee Law in the 1980s* 103, 105–09 (David A. Martin ed., 1988).

country of his former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it.<sup>29</sup>

The U.N. Protocol broadened the refugee definition by removing restrictions as to the timing and location of the persecution.<sup>30</sup> However, the U.N. Protocol left intact the substantive definition of refugee that benefited Europeans fleeing communist regimes.<sup>31</sup> What emerged from the Refugee Convention and the U.N. Protocol was—to the detriment of those seeking asylum worldwide—a highly politicized definition of refugee.<sup>32</sup>

Notwithstanding its textual or interpretive limitations, Article 33 of the Refugee Convention protects refugees from being returned to countries in which they would face persecution.<sup>33</sup> In addition to protecting against expulsion back into a dangerous country, the Refugee Convention is unique in that it also confers a

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29. Refugee Convention, *supra* note 9, at 152.

30. In addition to limiting the term “refugee” to include only those fleeing events that occurred prior to January 1, 1951, the Refugee Convention allowed states to choose between two methods of defining “events occurring before 1 January 1951.” See Maryellen Fullerton, *A Comparative Look at Refugee Status Based on Persecution Due to Membership in a Particular Social Group*, 26 Cornell Int’l L.J. 505, 508–09 (1993) (identifying these two categories as either events occurring (1) in Europe before January 1, 1951 or (2) in Europe or elsewhere before January 1, 1951).

31. See James C. Hathaway, *A Reconsideration of the Underlying Premise of Refugee Law*, 31 Harv. Int’l L.J. 129, 149–50 (1990) (noting that “most Third World refugees remain de facto excluded, as their flight is more often prompted by natural disaster, war, or broadly-based political and economic turmoil than by ‘persecution,’ at least as that term is understood in the European context”).

32. The refugee definition includes only those who have been disenfranchised by their government because of their race, religion, nationality, membership in a particular social group, or political opinion. *Id.* at 145–51. These grounds all represent areas in which the Eastern Bloc countries were vulnerable. *Id.* at 150. In contrast, denial of basic socioeconomic rights—an area in which the Western countries were weaker—was excluded from the refugee definition. See Patrick Matlou, *Upsetting the Cart: Forced Migration and Gender Issues, the African Experience*, in *Engendering Forced Migration* 128, 139 (Doreen Indra ed., 1999) (finding that almost all African refugees before 1980 remained in Africa since Western countries were reluctant to accept them). Even after the United States started setting quotas for African refugees in 1980 (with Canada and Australia following suit during the subsequent four years), racism and spurious stereotypes of African refugees as rural, uneducated, and unskilled have “conspire[d] to keep Western resettlement miniscule.” *Id.*

33. See Refugee Convention, *supra* note 9.

*status* on the protected individual. For purposes of this discussion, however, the essential issue is the ability to petition for international protection, and in this regard the Refugee Convention is unclear. The Refugee Convention does not expressly provide for a *right* to enter a country in order to seek refugee status. But it does prohibit states from penalizing refugees for illegal entry.<sup>34</sup>

C. Other Applicable International Human Rights Norms, Treaties, and Conventions

In addition to the Refugee Convention, Article 3 of the United Nations Convention Against Torture (Convention Against Torture) requires that no state shall expel, return, or extradite a person to another state where there are substantial grounds for believing that she would be in danger of being subjected to torture.<sup>35</sup> Within the European Union there are additional protections. The 1950 European Convention on Human Rights and Fundamental Freedoms reiterates that “no one shall be subjected to torture or to inhumane or degrading treatment or punishment.”<sup>36</sup> The guarantees of both the Refugee Convention and the Convention Against Torture are also incorporated into the Charter of Fundamental Rights of the European Union.<sup>37</sup> Furthermore, Article 7 of the 1966 International Covenant on Civil and Political Rights provides that “no one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment.”<sup>38</sup>

The Universal Declaration of Human Rights guarantees “a right to seek and to enjoy in other countries asylum from persecution” as well as “the right to leave any country, including his

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34. Guy Goodwin-Gill, *International Law and the Movement of Persons Between States* 139 (1978).

35. United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, *opened for signature* December 10, 1984, S. Treaty Doc. No. 100-20, 1465 U.N.T.S. 85, (entered into force June 26, 1987) [hereinafter *Convention Against Torture*].

36. Convention for the Protection of Human Rights and Fundamental Freedoms, *as amended by* Protocol 11, Sept. 3, 1953, Europ. T.S., No. 5, art. 3.

37. Charter of Fundamental Rights of the European Union, art. 18, Dec. 18, 2000, O.J. 2000 C364/01.

38. International Covenant on Civil and Political Rights, United Nations High Commissioner for Human Rights, Dec. 16, 1966, G.A. res. 2200A (XXI).

own, and to return to his country.”<sup>39</sup> This right to “leave any country freely” is reiterated in the 1969 American Convention on Human Rights<sup>40</sup> as well as the 1963 Protocol No. 4 to the European Convention on the Protection of Human Rights and Fundamental Freedoms (ECHR).<sup>41</sup>

Despite the international laws that should govern the treatment of refugees and migrants at sea, as well as those whose protection needs are undermined by other aspects of externalization, such activities go largely unchecked.<sup>42</sup> In part, this is due to a lack of transparency.<sup>43</sup> Often, neither the public, nor legislative, nor regional bodies are aware of what transpires during interception efforts.<sup>44</sup> Related to the lack of transparency may be the widespread belief that the migrants attempting to reach the European Union by sea are all economic migrants, rather than refugees or a mixed-migration flow of refugees and other migrants.<sup>45</sup>

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39. Universal Declaration of Human Rights, G.A. Res. 217A, at 74, U.N. GAOR, 3d Sess., 1st plen. mtg., U.N. Doc. A/810 (Dec. 12, 1948) [hereinafter Universal Declaration].

40. 1969 American Convention on Human Rights, *entry into force* July 18, 1978, O.A.S. Treaty series No. 36 (1969), O.A.S., Official Records: OEA/Ser.K/XVI/1.1doc.65, Rev.1, Corr.1 of 7 January 1970, 9 ILM 99.

41. European Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, E.T.S. No. 5, 213 U.N.T.S. 222 [hereinafter European Convention on Human Rights].

42. It is worth noting that nations that have agreed to abide by international human rights treaties and conventions must so abide at all times when exercising border control operations, whether such operations are carried out at the nation’s actual borders, at sea, or on a third country’s soil.

43. As Ninette Kelley of the UNHCR states, “the terms of such agreements are often not made public and their implementation is opaque.” Kelley, *supra* note 6, at 430.

44. On a positive note, the UNHCR and FRONTEX have recently pledged to cooperate and exchange information. The Working Arrangements agreed to by the two agencies on June 17, 2008 call for a UNHCR liaison officer to work with FRONTEX “with the aim of ensuring that border management is fully compliant with Member States’ international obligations.” Press Release, FRONTEX, Frontex–UNHCR: reinforced cooperation (June 18, 2008), *available at* [http://www.FRONTEX.europa.eu/newsroom/news\\_releases/art39.html](http://www.FRONTEX.europa.eu/newsroom/news_releases/art39.html). Although a joint agreement to cooperate and an acknowledgement that the UNHCR should play a role in FRONTEX’s work is an important step, the actual level of engagement of the UNHCR in FRONTEX operations is unclear.

45. As Ninette Kelley of the UNHCR explains:  
myths permeate the asylum discourse, reinforced at times by deliberate misrepresentation. Asylum systems are frequently

II. A HISTORICAL LOOK AT THE U.S. POLICY OF REPATRIATING  
HAITIANS INTERCEPTED AT SEA: FROM A GRUDGING  
INTERPRETATION OF THE OBLIGATIONS OWED UNDER THE REFUGEE  
CONVENTION TO A NATIONAL SECURITY FOCUS

The United States' treatment of Haitian boat people is a prime example of how concerns with controlling the borders, national security, and race have worked together to eclipse refugee protections—notwithstanding the obligations owed to all refugees under international and domestic law. The United States has always had particular methods of controlling the entrance of Haitian boat people. For nearly a decade from 1963 to 1972, the United States was able to halt the movement of Haitians to the United States through summary rejection and return of all Haitian asylum seekers.<sup>46</sup> Between 1972 and 1980, approximately 30,000 Haitians landed on American shores, about a quarter of whom were granted asylum.<sup>47</sup> Most of the remaining asylum seekers were returned to Haiti without a formal hearing.<sup>48</sup> Starting in 1980 and continuing to the present day, the United States has had a policy of intercepting all unauthorized boats approaching its shores. This initially began as a response to particular mass influx situations; it has evolved into an ongoing method of border enforcement.<sup>49</sup>

With the passage of the Refugee Act in 1980, Congress was bound to uphold the obligations of the U.N. Protocol as a matter of domestic law.<sup>50</sup> At the time, however, the public was fearful of the increased numbers of Cubans and Haitians who were approaching U.S. shores by boat—a fear that was stoked by the Mariel boat incident of 1980, in which boatloads of “undesirable” Cubans were

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characterised as a threat of ‘swelling tides’, ‘floods’ of unlawful immigrants, ‘invaders’, ‘outsiders’, ‘criminals’, and moneyed gate crashers.’ That the largest source countries of refugees to industrialised countries are those that have poor human rights records and/or that are marred by serious internal conflict rarely influences the debate.

Kelley, *supra* note 6, at 419.

46. Matthew J. Gibney, *The Ethics and Politics of Asylum* 154 (2004).

47. *Id.*

48. *Id.*

49. Kathleen Newland, *The US and the Caribbean* (Jun. 10, 2005) in Joanne Van Selm & Betsy Cooper, *The New “Boat People,”* app. B, at 70 (Jan. 2006), available at [http://www.migrationpolicy.org/pubs/Boat\\_People\\_Report.pdf](http://www.migrationpolicy.org/pubs/Boat_People_Report.pdf).

50. Refugee Act of 1980, 8 U.S.C. § 1158 (2006).

permitted entry into the United States through the port of Mariel.<sup>51</sup> President Carter pointed to the Mariel boat incident as an important factor in his 1980 defeat, remarking that “[i]t was a burning issue. It made us look impotent.”<sup>52</sup>

Similar to the current EU characterization of Sub-Saharan African boat people as solely economic migrants—rather than, for example, political asylum seekers—throughout the 1980s the United States portrayed all Haitian boat people as economic migrants. This characterization subjected them, in general, to harsh treatment.<sup>53</sup> Starting in 1981, President Ronald Reagan ordered that “the entry of undocumented aliens from the high seas [be] . . . suspended and . . . prevented by the interdiction of certain vessels carrying such aliens.”<sup>54</sup> However, the United States at that time agreed that anyone found to be a refugee would not be returned to Haiti.<sup>55</sup> From 1982 until 1991, the numbers of interdictions carried out by the U.S. Coast Guard continued to rise dramatically from 171 (almost exclusively Haitians) in 1982 to 4,990 (mainly Haitians) in 1991.<sup>56</sup> After the military coup against Haiti’s first democratically-elected president at the end of 1991, the numbers of Haitian interdictions soared to 38,000 in 1992.<sup>57</sup>

The United States initially responded to the dramatic increase in Haitians fleeing by sea by temporarily suspending

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51. Gibney, *supra* note 46, at 156. Fidel Castro’s decision to allow this migration was seen as a way to purge opposition and spite America. The media’s portrayal of Castro’s emptying out prisons and sending the freed “undesirables” to the United States terrified the American public.

52. *Id.* at 156 (citing Jorge Dominguez, *Immigration as Foreign Policy in US-Latin American Relations*, in *Immigration and U.S. Foreign Policy* 155 (R.W. Tucker et al. eds., 1990), available at [http://www.wcfia.harvard.edu/sites/default/files/707\\_jid\\_immigration.pdf](http://www.wcfia.harvard.edu/sites/default/files/707_jid_immigration.pdf)).

53. *Id.* at 156. Anthropologist Robert Lawless has pointed out that the American press’ depoliticization and mischaracterization of all Haitian boat people in the 1980s as poor, illiterate, and unskilled made it easier for the INS to deport them. Robert Lawless, *Haiti’s Bad Press* 7 (1992).

54. Proclamation No. 4865, 46 Fed. Reg. 48,107 (Sept. 29, 1981) (Presidential proclamation on High Seas Interdiction of Illegal Aliens).

55. Stephen H. Legomsky, *The USA and the Caribbean Interdiction Program*, 18 *Int’l J. Refugee L.* 677, 679 (2006).

56. Van Selm & Cooper, *supra* note 49, at 73.

57. *Id.* During 1992, only 54 Haitian refugees were lawfully admitted to the United States, as compared with the admission of 3,720 Cubans. Philippe Girard, *Paradise Lost: Haiti’s Tumultuous Journey from Pearl of the Caribbean to Third World Hotspot* 129 (2005).

repatriations to Haiti.<sup>58</sup> Instead, the Coast Guard began transporting Haitian refugees to the American base at Guantanamo Bay, Cuba, for a preliminary screening of their claims to asylum.<sup>59</sup> Once the Guantanamo Bay facility was full, however, President George H.W. Bush issued an Executive Order declaring that the nonrefoulement obligations of the Refugee Convention were inapplicable outside the territorial waters of the United States.<sup>60</sup> The President then ordered that all Haitians interdicted on the high seas were to be immediately returned to Haiti.<sup>61</sup> Although President Clinton had expressed outrage at the policy during his candidacy, he continued the policy as president.<sup>62</sup>

The U.S. Supreme Court later validated such immigration policies. In 1993, in *Sale v. Haitian Centers Council, Inc.*, the Court held that the United States' actions in intercepting boatloads of Haitian asylum seekers on the high seas and forcibly repatriating them without providing any access to asylum procedures was consistent with the United States' obligations under domestic law and the Refugee Convention.<sup>63</sup> The *Sale* decision was widely

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58. Koh, *supra* note 6, at 2394.

59. *Id.*

60. Exec. Order No. 12,807, 57 Fed. Reg. 23,133 (May 24, 1992).

61. *Id.* The only exception was in cases in which the Attorney General decided, as a matter of unreviewable discretion, to grant refugee status. Legomsky, *supra* note 55, at 680.

62. As a Presidential candidate, Bill Clinton vowed to provide temporary asylum to fleeing Haitians, stating that he was:

appalled by the decision of the Bush administration to pick up fleeing Haitians on the high seas and forcibly repatriate them to Haiti before considering their claim to political asylum. . . . It is a blow to the principle of first asylum and to America's moral authority in defending the rights of refugees around the world.

Who Belongs In America? 218–19 (Vanessa B. Beasley ed., 2006). However, upon assuming office as President, he announced that “the practice of direct return of those who depart Haiti by boat will be continued.” *Id.* The Clinton mandatory repatriation policy remained in effect until May 1994. Legomsky, *supra* note 55, at 680. President Clinton finally retracted the repatriation order after entering into agreements with Jamaica, as well as Turks and Caicos Islands, in which those nations agreed to conduct full refugee status determinations on their soil, with the participation of the UNHCR. *Id.* at 681.

63. *Sale v. Haitian Ctrs. Council, Inc.*, 509 U.S. 155, 158–59 (1993). The statutory provision implementing U.S. obligations under the Refugee Convention stated that “[t]he Attorney General shall not deport or return any alien . . . to a country if the Attorney General determines that such alien's life or freedom

criticized both within the United States and the international community.<sup>64</sup> The Organization of American States Inter-American Commission on Human Rights twice held that the Refugee Convention applies in international waters and that the U.S. interdiction program violated international law as well as various guarantees of the American Declaration on Human Rights, including the right to seek and enjoy asylum.<sup>65</sup> In addition to causing the refoulement and probable deaths of thousands of Haitians, the *Sale* decision served as “an open invitation to other asylum-weary states to avoid their international obligations through extraterritorial interception or push-backs of seaborne refugees.”<sup>66</sup>

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would be threatened in such country on account of race, religion, nationality, membership in a particular social group, or political opinion.” Immigration and Nationality Act, § 243(h)(1) (codified as amended at 8 U.S.C. § 1253(h)(1)). Although the statute contained no limitations on extraterritorial application, and in fact, Congress had amended it to remove language limiting its applicability only to those “within the United States,” the majority of the Court held that the statute lacked extraterritorial force. According to the Court, Congress’ use of terms like “deport” and “return,” as well as the limitation of power directed at the Attorney General (who wields solely domestic authority), signified that it intended to apply only within U.S. borders. Congressional use of the term “return” was also interpreted to signify “a defensive act of resistance or exclusion at a border” rather than its common usage to signify “repulse,” “repel,” or “drive back.” *Sale*, 509 U.S. at 181–82. See also Justice Blackmun’s critique in the sole dissenting opinion in the case. *Id.* at 191–92. The Supreme Court’s holding has been described as “clear[ing] the legal way for Presidents to mistreat Haitians by holding that direct return without any screening after interdiction on the high seas does not violate the U.S. obligation not to return refugees to countries of persecution.” Andrew I. Schoenholtz, *Refugee Protection in the United States Post-September 11*, 36 Colum. Hum. Rts. L. Rev. 323, 362 (2005).

64. The Executive Committee of the UNHCR [EXCOM] has characterized the decision as “a setback to modern international refugee law which has been developing for more than forty years, since the end of World War II.” Legomsky, *supra* note 55, at 692. For just a few of the many articles criticizing the *Sale* decision, see Harry A. Blackmun, *The Supreme Court and the Law of Nations*, 104 Yale L.J. 39, 43 (1994) (noting that the majority of the Court applied a presumption against extraterritoriality, notwithstanding that the statute at issue was enacted pursuant to a multilateral treaty and without “acknowledging the primacy of the principle of nonrefoulement in customary international law”); Harold Hongju Koh, *Reflections on Refoulement*, 35 Hastings Int’l L.J. 1 (1994).

65. See Haitian Ctr. for Human Rights v. United States, Case 10.675, Inter-Am. C.H.R., Report No. 51/96, OEA/ser.L/V/II.95 doc. 7 rev. at 550 (1997); Letter from Ariel Dulitzky, *supra* note 6.

66. Joan Fitzpatrick, *The International Dimension of U.S. Refugee Law*, 15 Berkeley J. Int’l L. 1, 10 (1997). See also Lori A. Nessel, *Forced to Choose: Torture, Family Reunification and United States Immigration Policy*, 78 Temple

Following the terrorist attacks of September 11, 2001, interception efforts explicitly have been linked to deterring refugees, as well as migrants, in the name of public safety.<sup>67</sup> Although the number of Haitians fleeing by sea had declined dramatically after the reinstatement of the democratically-elected president in 1994, this number increased when violence erupted again in Haiti in 2004. On February 25, 2005, President George W. Bush announced that he had made it “abundantly clear to the Coast Guard . . . [to] turn back any refugee that attempts to reach our shore.”<sup>68</sup> Then-Attorney General John Ashcroft similarly characterized the Haitian boat arrivals as a threat to American national security, asserting that deterrence of all boat traffic, including genuine refugees, took clear priority over the interests of potential refugees.<sup>69</sup>

The current U.S. policy toward Haitians interdicted on the high seas allows the U.S. Coast Guard to stop Haitian boats and transfer passengers to Coast Guard cutters without advising them of their right to seek asylum.<sup>70</sup> Indeed, the only procedure by which a Haitian boat person can access asylum is known as the “shout test.” This involves a process whereby the burden is placed on the Haitian to proactively make his or her protection needs known to the Coast

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L. Rev. 897, 918 (2005) (discussing the influence of the *Sale* decision on Australia’s interception regime and asserting that “[t]he United States’ treatment of Haitian refugees has guided Australia, historically a welcoming nation for refugees, to revamp its protection regime into a multi-tiered one that divides families and undermines the international human rights guarantee of safety from persecution or torture”). On August 21, 2001, the Australian government refused to allow the *Tampa* (a ship containing 433 rescued Afghan and Iraqi boat people) to disembark. In defending its actions and dramatically restricting its immigration regime, the Australian Parliament relied upon briefing papers that detailed the United States’ high seas interdiction regime for Haitians. Mary Crock, *In the Wake of the Tampa: Conflicting Visions of International Refugee Law in the Management of Refugee Flows*, 12 Pac. Rim L. & Pol’y J. 49, 62 (2003).

67. Newland, *supra* note 49, at 70.

68. Legomsky, *supra* note 55, at 681.

69. Newland, *supra* note 49, at 77.

70. The Bahamas Coast Guard also interdicts and forcibly returns desperate Haitians fleeing by boat. Legomsky, *supra* note 55, at 678 n.5. The British Turks and Caicos Islands follow the same practice. See Peter Hallward, *If Stones Could Float: The British Press and the Turks and Caicos Boat Disaster*, HaitiAnalysis.com, Sept. 4, 2007, <http://www.haitianalysis.com/2007/9/4/if-stones-could-float-the-british-press-and-the-turks-and-caicos-boat-disaster.html> (chronicling an interception disaster at the hands of the Turks and Caicos Coast Guard resulting in the deaths of eighty Haitians in shark-infested waters).

Guard, often without the assistance of a Creole-speaking interpreter. Only those refugees that pass this “shout test” are, at least in theory, afforded a shipboard pre-screening interview. As testament to the unfairness of this procedure, *not one person* who fled Haiti during the period of extreme political chaos and violence following the implementation of the policy was afforded protection in the United States; every person was forcibly repatriated to Haiti.<sup>71</sup>

### III. EXTERNALIZATION OF THE EU BORDERS AND EFFORTS TO UNDERMINE PROTECTION AND DETER AFRICAN MIGRATION

Notwithstanding the media’s portrayal of “tides” of African migrants crossing the Mediterranean Sea and threatening to overrun European beach destinations, the vast majority of the world’s refugees remain in their country of origin.<sup>72</sup> Even for those lucky enough to make it to another country in search of surrogate protection, life is often unpredictable and beyond their control. In the words of Fawzi Mellah, a Tunisian scholar and writer, “it is not the destination that forms the journey, but rather the contingencies of the journey that result in a certain point of arrival.”<sup>73</sup>

Just as the U.S. interdiction policy undermines access to international protection for Haitian boat people, the European Union’s imposition of a unifying refugee protection regime throughout its twenty-seven Member States and its attempt to seal off its southern water borders from Africa similarly undermines access to protection. The UNHCR defines interception as “encompassing all measures applied by a State outside its national territory in order to prevent, interrupt or stop the movement of

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71. Legomsky, *supra* note 55, at 682.

72. Wies Maria Maas, *Fleeing to Europe: Europeanization and the Right to Seek Refugee Status* 9 (Institute of Social Studies, Working Paper No. 454, 2008). “In 2005,” according to Maas, “from the 8.7 million world’s refugee population, 6.5 million were living in developing countries. Of the 2.2 million refugees that did flee to industrialized countries, only 260,700 asylum claims were lodged in Europe.” *Id.*

73. Fawzi Mellah, *Clandestino nel Mediterraneo* (Antonella Furlan trans., Trieste, Italy: Asterios (2001)), *as cited by* Maurizio Albahari, *Death and the Moral State: Making Borders and Sovereignty at the Southern Edges of Europe* (Center for Comparative Immigration Studies, Working Paper No. 130, 2006) (analyzing the legal and political framework—including EU law, bilateral agreements, deportations, and internments—behind the deaths of migrants and asylum seekers off the Italian coast).

persons without the required documentation from crossing international borders by land, air or sea and making their way to the country of prospective destination.”<sup>74</sup> In order to understand how the enforcement focus of immigration control has eclipsed the need to offer international protection to refugees, it is necessary to examine interception within the broader context of the harmonization of asylum and migration measures in the European Union.

As a starting point, the idea of a European Union that allows the free movement for members within its broadened territory has developed alongside the goal of restricting access to that territory by foreigners. In order to join the European Union, states have been required to restrict their national immigration laws. As Professor James Hathaway predicted fifteen years ago, the evolution of a European Union without internal barriers for members would be “devastating for refugees” seeking access to the territory.<sup>75</sup>

On November 15, 2001, the European Commission first set forth its common policy on illegal immigration.<sup>76</sup> As set forth in this “Action Plan” to prevent and combat irregular immigration and human trafficking in the European Union, any measures directed at fighting illegal immigration must balance “the right to decide whether to accord or refuse admission to the territory to third country nationals and the obligation to protect those genuinely in need of international protection.”<sup>77</sup> The Plan also calls upon Member States to explore the possibility of offering expedited access to protection to avoid situations in which refugees resort to smugglers or illegal migration.<sup>78</sup> Unfortunately, the “balancing” has tipped so

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74. UNHCR, *Interception of Asylum-Seekers and Refugees: The International Framework and Recommendations for a Comprehensive Approach*, P23, U.N. Doc. EC/50/SC/CRP.17 (June 9, 2000).

75. James C. Hathaway, *Harmonizing for Whom? The Devaluation of Refugee Protection in the Era of European Economic Integration*, 26 *Cornell Int'l L.J.* 719, 723 (1993).

76. *Communication from the Commission to the Council and the European Parliament on a Common Policy on Illegal Immigration*, COM (2001) 0672 final (Nov. 15, 2001), available at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2001:0672:FIN:EN:PDF>.

77. *Interdiction and Refugee Protection: Bridging the Gap* (Canadian Council on Refugees, Ottawa, Canada), May 29, 2003, at 9.

78. *Id.*

greatly in favor of combating illegal migration that access to asylum in the European Union has been undermined.<sup>79</sup>

The interception program in the European Union is comprised of a number of mechanisms that work together to deny access to the European Union for those in need of international protection. These barriers to protection include: visa requirements,<sup>80</sup> carrier sanctions,<sup>81</sup> and external immigration controls and policy.<sup>82</sup> Under the current system, responsibility for assessing applications for protection is vested in the individual Member States and their national asylum institutions. The role of the EU Institutions is limited to monitoring and supervising compliance with both European and international standards. These duties are carried out by the Commission, the European Court of Justice, and the European Parliament.<sup>83</sup>

On April 29, 2004, the Council of the European Union adopted Council Directive 2004/83/EC on Minimum Standards for the Qualification and Status of Third Country Nationals or Stateless Persons as Refugees or as Persons who Otherwise Need International Protection and the Content of the Protection Granted (Qualification Directive).<sup>84</sup> The Directive establishes two different categories for those in need of international protection: refugee status and subsidiary protection.<sup>85</sup> The stated goal of the Directive is to

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79. *Id.*

80. *Id.* Although a discussion of visa requirements is beyond the scope of this paper, the European Union requires third country nationals from particular countries to obtain visas prior to entering. Not surprisingly, many of the countries subject to visa requirements are also significant refugee-producing nations such as Afghanistan, Somalia, Sudan, and Iraq.

81. Private carriers must essentially exercise immigration control functions or risk a sanction of at least €3,000 for each person carried without proper immigration documentation. Council Directive 2001/51/EC, 2001 O.J. (L 187/45). *See infra* note 90 and accompanying text for a critique of carrier sanctions.

82. External immigration controls include stationing immigration officers at major airports of large refugee-producing countries to ensure that asylum seekers cannot board planes to the European Union.

83. UNHCR, *Response to the European Commission's Green Paper on the Future Common European Asylum System*, at 5 (Sept. 2007), available at <http://www.unhcr.org/cgi-bin/texis/vtx/refworld/rwmain?docid=46e159f82&page=search>.

84. Council Directive 2004/83/EC, 2004 O.J. (L 304/12) [hereinafter Qualification Directive].

85. *Id.* Subsidiary protection refers to “protection for persons from third states who do not fall within the scope of the Geneva Convention but who still

“ensure that Member States apply common criteria for the identification of persons genuinely in need of international protection” and to reduce “the current great variances in recognition rates between Member States.”<sup>86</sup> Some scholars have hailed the Qualification Directive as an instrument with the potential to equalize and, at times, raise the standards and practices in Member States throughout the European Union.<sup>87</sup> However, others have noted the shortcomings inherent in a harmonization effort that merely attempts to equalize existing practices across a broad spectrum, rather than examine and reform the underlying regime in which legal interpretations have evolved within a restrictive and fearful political environment.<sup>88</sup>

The Qualification Directive, in addition to harmonizing refugee procedures across the European Union, designates “safe” third countries as a way to reduce the numbers of refugees eligible

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have need of some other form of international protection.” Jane McAdam, *Complementary Protection in International Refugee Law* 54 (2007) (quoting statement made by Austrian President Thomas Klestil in 1998). Pursuant to the Directive, those entitled to subsidiary protection must be granted a renewable residence permit valid for at least one year, travel documents, access to education, social welfare, health care, accommodation, and freedom of movement within the state. States may condition employment on the labor market and may limit social welfare and health care to “core benefits.” *Id.* Refugees, by contrast, are granted renewable residence permits valid for a minimum of three years, with few or no conditions placed upon their rights in the EU state.

86. Qualification Directive, *supra* note 84.

87. See, e.g., Hugo Storey, *EU Refugee Qualification Directive: A Brave New World?*, 20 Int'l J. Refugee L. 1, 5 (2008) (extolling the Directive as a “remarkable development in the field of international law” because it is the first supranational binding instrument on EU Member States to offer protection to non-Refugee Convention refugees and to address both refugee and subsidiary protection). As Mr. Storey notes, although the rights guaranteed to those afforded subsidiary protection are not as full as those afforded to Convention refugees, it is nevertheless quite significant that the Directive provides for a legal status, and set rights, for those afforded subsidiary protection. *Id.* at 7. Certainly, in some regards, the Directive has exerted an upward, rather than downward, pull. For example, the Directive’s clear recognition of non-state actors as persecutors has led Germany to change its national legislation to acknowledge such previously unrecognized actors. *Id.* at 12.

88. See, e.g., McAdam, *supra* note 85, at 56 (stating that this Directive does not create a new system “but rather distills State practice by drawing on the ‘best’ elements of the Member States’ national systems”).

for protection in EU Member States.<sup>89</sup> This coordinated approach to migration imposes visa requirements on migrant-producing, less-developed nations, and imposes sanctions on private carriers that allow asylum seekers and others to board without the required visa. Sanctioning private carriers for failing to adequately perform visa inspections shifts the burden for determining who is in need of international protection away from government officials, who are bound to uphold international human rights laws and can be held accountable, onto private individuals seeking to avoid monetary penalties.<sup>90</sup> Such private individuals lack the authority to grant protection and are untrained in refugee and asylum law.<sup>91</sup>

For example, the United Kingdom now stations fifty-six airline liaison officers (ALOs) in overseas countries to stop unwanted migrants from leaving for the United Kingdom. According to the strategic director for border control in the United Kingdom, “one of the most effective ways to stop illegal immigrants is to take the U.K. borders overseas.”<sup>92</sup> The newly created U.K. Border Agency has 25,000 officers, including 9,000 warranted officers, operating in the United Kingdom and 135 other countries.<sup>93</sup> This new agency combines overseas risk-assessment units, airline liaison officers, and customs and immigration intelligence officers based around the globe.<sup>94</sup>

The use of airline liaison officers is often justified as necessary to prevent unauthorized migrants from gaining entry into a particular host country, rather than as a means of preventing departure. However, as nations are emboldened in their efforts to reap the benefits of enforcing border controls offshore without

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89. Council Directive 2005/85/EC of 1 December 2005 on Minimum Standards on Procedures in Member States for Granting and Withdrawing Refugee Status, [2005] OJ L326/13.

90. Hathaway, *Harmonizing for Whom?*, *supra* note 75, at 724–25 (citing UNHCR’s disapproval of visa requirements and carrier sanctions because they “tend[] to increase the risk of refoulement” and because the mechanism for enforcement of these requirements “falls wholly outside the realm of legal accountability”).

91. *Id.*

92. Richard Ford, *Pushing Back the Boundaries*, *Times*, U.K. Edition, Apr. 22, 2008, at 5 (interview with Brodie Clark, Border Control Strategic Director, Border and Immigration Agency, in Surrey, U.K.).

93. Benet Wilson, *U.K. Home Office Unveils Newly Created Border Agency*, *Aviation Daily*, Apr. 10, 2008, at 1.

94. *Id.*

transparency or oversight, the tentacles of the airline liaison officers are probing new waters. For example, as Australian government officials boast, “[i]n certain locations, ALOs work with liaison officers from other countries to prevent travel of improperly documented passengers, *regardless of their destinations*.”<sup>95</sup> Based on the great success of the airline liaison officer programs, Scotland has proposed implementing a similar initiative at sea ports.<sup>96</sup>

Visa requirements are another instrument that is being used to limit access to the refugee protection regime. For example, the United Kingdom utilizes visa requirements as a way to reduce the number of asylum applicants from high refugee-producing countries. Notably, in November 2002, following a surge in the number of Zimbabwean asylum applicants in the United Kingdom, the government imposed a new visa requirement that reduced the number of asylum applications the following year by sixty-one percent.<sup>97</sup> In recognition of the deterrent effect of visa requirements on asylum seekers, UNHCR has requested that states not impose visa requirements on the nationals of countries undergoing civil wars, generalized violence, or widespread human rights abuses.<sup>98</sup> Overall, the harmonization movement has been criticized for its potential to exert a downward, rather than upward, pull on the treatment of refugees and immigrants throughout the European Union. To take just one example, states with more punitive detention and removal laws exert pressure on other nations to similarly restrict their own immigration laws.<sup>99</sup>

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95. Australian Government, Dept. of Immigration and Multicultural and Indigenous Affairs, *Managing the Border: Immigration Compliance*, 7 (2004-2005), available at <http://www.immi.gov.au/media/publications/compliance/managing-the-border/pdf/mtb-complete.pdf> (emphasis added).

96. Response of Mr. Byrne, Secretary of State for the Home Department, U.K. (June 25, 2007), available at <http://www.publications.parliament.uk/pa/cm200607/cmhansrd/cm070625/text/70625w0072.htm> (discussing the possibility of creating a Sea liaison officer, modeled on the current Airline liaison officer, who would patrol the major U.K. embarkation ports).

97. Response of Joint Refugee Council and Oxfam International GB to the Home Affairs Committee Inquiry into Immigration Control, at 4 (Dec. 2005), available at [http://www.refugeecouncil.org.U.K./NR/rdonlyres/9370C2B1-5A82-4083-A11C-397801EE1553/0/immigration\\_controlsNov\\_05.pdf](http://www.refugeecouncil.org.U.K./NR/rdonlyres/9370C2B1-5A82-4083-A11C-397801EE1553/0/immigration_controlsNov_05.pdf).

98. *Id.* at 5.

99. For example, the Returns Directive approved by Parliament on June 18, 2008, has been criticized for “failing to guarantee the return of irregular migrants in safety and dignity.” Amnesty International, *EU Return Directive*

Significantly, the European Union does not have any burden-sharing mechanism amongst Member States for refugees. Similar to the United States, the border states receive a greater number of refugees and feel pressure to limit the numbers of migrants that enter their borders. Perhaps because of the lack of an official burden-sharing mechanism within the European Union, border states are increasingly turning further south to “relieve” their disproportionate burden.<sup>100</sup>

#### A. Funneling Migrants into More Perilous Waters

The largest proportion of Sub-Saharan Africans in Europe are West Africans from Ghana, Nigeria, and Senegal.<sup>101</sup> And each year the number of Sub-Saharan African migrants arriving in the European Union increases.<sup>102</sup> As described by a leading Spanish daily newspaper, “irregular migration from Africa is like a flood: if one exit is blocked, it works a new channel.”<sup>103</sup> Historically, most of these Sub-Saharan African migrants have travelled from their home countries

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*Affects Dignity and Security of Irregular Migrants*, July 4, 2008, available at <http://www.amnesty.org/en/news-and-updates/EU-return-directive-affects-dignity-security-irregular-migrants-20080704>. The Directive allows for periods of detention of up to eighteen months and contains an EU-wide ban on reentry for forcibly returned migrants. According to Amnesty International, the Directive risks lowering standards of protection throughout the European Union and sets a poor example for nations around the world.

100. Maas, *supra* note 72, at 23.

101. Hein de Haas, *Trans-Saharan Migration to North Africa and the EU: Historical Roots and Current Trends*, Migration Information Source (2006), <http://www.migrationinformation.org/Feature/display.cfm?id=484>.

102. Naomi Schwarz, *Enforcement Fails to Slow Illegal West African Immigration to Europe*, Voice of America, Dec. 18, 2007, <http://www.voanews.com/english/archive/2007-12/2007-12-18-voa56.cfm>.

103. *Más Muertos y Más Menores*, El País, January 8, 2008, at 16. The article continues:

When Morocco sealed its coasts, the immigrants overwhelmed the fenced borders of Ceuta and Melilla. When they were deported from Rabat, they searched for an escape in Mauritania. And when the border controls also toughened up there, they began to set sail from Senegal: first from San Luis, then from Dakar, then from Casamance. Each time further south. With the length of the journey the risks of the adventure have increased. This year, the number of dead bodies discovered on the Spanish coasts has increased considerably

[translated from the Spanish by author].

north to Morocco, with the hope of ultimately accessing Spain; the number of Sub-Saharan African migrants arriving in Morocco has increased ten-fold between 2000 and 2005.<sup>104</sup> This increase in Sub-Saharan African migration to Morocco led to a joint Rabat/European Union action to surround Morocco's Spanish enclaves of Melilla and Ceuta, as well as to patrol the Atlantic coast, in order to reorient the migration flow.<sup>105</sup> As a result of various agreements between Spain and Morocco, Morocco has actually prevented boats from leaving for Andalusia and the Canary Islands.<sup>106</sup>

With the Moroccan coasts effectively sealed off, Africans began embarking for Spain from further south, from the Mauritanian ports of Nouadhibou and Nouakshott.<sup>107</sup> In order to close off this new route, Spain signed agreements with Mauritania to repatriate those who attempted to enter the Canary Islands and to prevent boats from leaving from Mauritanian ports.<sup>108</sup> The more rigid migration controls of the EU Member States and the sealing off of its southern borders (as well as the coastal line between Morocco and Mauritania) have resulted in more elaborate, and significantly more dangerous, migration routes by sea.<sup>109</sup>

Spain's anti-immigration efforts are a textbook example of the externalization of borders. Since 1994, the Spanish Civil Guard has employed the Integrated System of External Vigilance (SIVE)—“a technologically advanced structure for detecting and intercepting

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104. Dirk Kohnert, *African Migration to Europe: Obscured Responsibilities and Common Misconceptions* 8 (German Institute of Global and Area Studies (GIGA), Working Paper No. 49, 2007). See also Comisión Española de Ayuda al Refugiado (CEAR), *Report on Certain Externalisation Practices Pursued by the Spanish Government That Violate the Rights Both Now and in the Future of Immigrants Who May Seek to Reach Spain via the Southern Border*, available at <http://www.cear.es> (copy on file with author) (chronicling Spain's attempts to externalize its borders) [hereinafter CEAR Externalization Report].

105. See Kohnert, *supra* note 104, at 8; see also Kitty Calavita, *Immigrants At The Margins: Law, Race, and Exclusion in Southern Europe* 137–39 (2005) (describing the growth of anti-immigrant rhetoric in Spanish politics and media, citing concerns about the increase in immigration from North Africa, and mentioning the fortification and high-technology surveillance now present in the Spanish enclaves of Melilla and Ceuta).

106. CEAR Externalization Report, *supra* note 104, at 3.

107. Hein de Haas, *supra* note 101.

108. CEAR Externalization Report, *supra* note 104, at 1.

109. See Kohnert, *supra* note 104, at 12 (noting the increase in Canary Islands-bound migration routes from nations like Senegal, Gambia, and Guinea).

‘pateras’ and other small vessels.”<sup>110</sup> According to Jorgen Carling, “[t]here is no doubt that expansion of the SIVE has been associated with geographical shifts in human smuggling routes.”<sup>111</sup> As unauthorized migrants and refugees attempted to avoid detection, there was an immediate shift in the route from the Strait of Gibraltar to the Canary Islands.<sup>112</sup>

The data that is available suggests that the European Union’s increased enforcement measures and patrolling of the sea have not lead to a reduction in the number of migrants making the journey. Instead, migrants are taking more perilous routes.<sup>113</sup> For example, over 31,000 Africans migrated by sea to the Canary Islands in 2006—six times the number in 2005 and almost four times as many as in the previous four years combined.<sup>114</sup> The Canary Islands Coastguard intercepted an additional 5,000 sea voyagers, and 6,000 migrants died or went missing on the dangerous 1,000 km sea journey from Africa to the Canary Islands.<sup>115</sup> The southern sea has become so dangerous that the UNHCR says it “has become like the Wild West, where human life has no value anymore and people are left to their fate.”<sup>116</sup>

#### B. Expanding EU Borders

When Spain still found itself unable to stop African boat migration to its Canary Islands, it requested help from the EU FRONTEX forces. Ultimately, eight EU countries (Austria, Greece,

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110. Jorgen Carling, *Migration Control and Migrant Fatalities at the Spanish-African Borders*, 41 Int’l Migration Rev. 316, 325 (2007).

111. *Id.* at 326.

112. *Id.* at 326 (noting that in the two years immediately following implementation of the SIVE, the Canary Islands’ proportion of total interceptions rose from twelve percent to fifty-nine percent).

113. *See, e.g.*, Thomas Spijkerboer, *The Human Costs of Border Control*, 9 Eur. J. Migration & L. 127, 131 (2007) (arguing that increased sea border control is directly proportional to increased casualties because it forces irregular migrants to pursue increasingly dangerous routes, and that international law obliges states to take the human costs into account when making border control policy).

114. Kohnert, *supra* note 104, at 12.

115. *Canaries Migrant Death Tolls Soars*, (BBC News television broadcast Dec. 28, 2006), available at <http://news.bbc.co.U.K./2/hi/europe/6213495.stm>.

116. Peter Popham, *Europe’s Shame*, *The Independent*, May 28, 2007, available at <http://www.independent.co.U.K./news/world/europe/europes-shame-450754.html>.

Finland, France, Holland, Italy, Portugal, and the United Kingdom) sent vessels to help Spain guard the routes most frequented by Africans travelling to the Canaries. This operation, Operación Hera II, took place August 11 through December 15, 2006, at a cost of over three million Euros. According to Eduardo Lobo, commander of the Civil Guard and coordinator of FRONTEX, "This operation, coordinated by Spain and led by the Civil Guard, has been the first of its kind on all levels, given that it was the first time that a European deployment took place in a third country."<sup>117</sup> Spain's deployment enabled it to intercept 3,900 persons in their countries of origin as well as to facilitate the repatriation of 5,000 immigrants from the Canary Islands.<sup>118</sup>

Just as the militarization of the U.S./Mexico border has forced migrants to engage in more perilous journeys and is resulting in a greater number of fatalities, the same is true of the increased enforcement actions along the European Union's southern water borders. Because of the enhanced patrols and resulting likelihood that the boats will not return, smugglers are utilizing less expensive materials to build the boats. With no need to transport fuel for a return trip, migrants are making use of this extra space by loading their boats with more people.<sup>119</sup> There has also been an increase in the use of faster inflatable rubber boats, filled with more migrants.<sup>120</sup> Small boats or "*pateras*" now arrive in groups and "fan-out" when nearing the coast so that the Civil Guard cannot intercept all of them.<sup>121</sup> It has been reported that smugglers send the Sub-Saharan Africans first and stay behind with the Moroccans so that the Coast Guard only intercepts the Sub-Saharan Africans.<sup>122</sup> In other instances, smugglers are sending the migrants to navigate the sea on their own, rather than risk being caught with the passengers.<sup>123</sup> In yet another disheartening trend, it has been noted that because the likelihood of being caught is now substantially higher, Moroccan

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117. Comisión Española de Ayuda al Refugiado, *La Situación de los Refugiados en España*, at 43 (2007), available at [http://www.2015ymas.org/IMG/pdf/informe\\_CEAR\\_2007.pdf](http://www.2015ymas.org/IMG/pdf/informe_CEAR_2007.pdf) (translated from the Spanish by author) [hereinafter CEAR Situation Report].

118. *Id.*

119. Carling, *supra* note 110, at 327.

120. *Id.*

121. *Id.*

122. *Id.*

123. *Id.*

migrants are more likely to send unaccompanied minors, as it is much harder for Spain to repatriate minors than adults to Morocco.<sup>124</sup>

As a result of EU Member States' efforts to divert African boat people from Europe's shores, refugees find themselves stranded at sea while nations argue over who will have to assume responsibility for them. For example, in July 2006, a small Spanish fishing boat named the *Francisco and Catalina* rescued fifty-one shipwrecked men, women, and children in waters outside Malta. Malta refused to let the Spanish fishing boat dock or the shipwrecked passengers land. According to Maltese authorities, Libya was responsible for the passengers because the boat was rescued in Libyan waters. For seven days, the fishing boat that was meant to hold ten people held sixty-one.<sup>125</sup> Meanwhile, the plight of the shipwrecked refugees in need of protection went unrecognized by the states concerned, as well as by the media. The media focused instead on the "undocumented" and the States argued over how many each one had to take and how to repatriate them. In the end, the shipwrecked passengers were divided between Italy, Spain, Andorra, Malta, and Libya.<sup>126</sup> The passengers who were ultimately allowed to disembark in Spain sought asylum, and most of them were granted either refugee or complementary protection, belying the myth that refugees with protection needs are not mixed in with the unauthorized boat migration stream.<sup>127</sup> This entire process, including the allocation of the shipwrecked passengers, was made without any concern for the guarantees of the Refugee Convention.<sup>128</sup>

In another recent incident involving shipwrecked migrants in need of rescue, a Spanish fishing boat rescued fifty immigrants (including women and children) who were drowning in Libyan waters. Because the Libyan government refused to allow the fishing boat full of refugees to dock, it remained stranded at sea for days. For the fishermen and boat crews, the toll of rescuing immigrants is tremendous. In this instance, as in others, the crew lost valuable

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124. CEAR Situation Report, *supra* note 117, at 9. See also *Más Muertos y Más Menores*, *supra* note 103, at 16 (reporting that the repatriation of illegal migrants has led parents to send their small children, who are more difficult to repatriate).

125. CEAR Situation Report, *supra* note 117, at 59.

126. *Id.*

127. *Id.* at 58–61.

128. For example, although some passengers were sent to Andorra and Libya, neither nation is even a party to the Refugee Convention.

days of work and gave all their food, blankets, and beds to the shipwrecked immigrants. In stark contrast to the crew's humanity was the Libyan government's response. Rather than assessing the refugee claims of the shipwrecked or caring for their health needs, the government focused solely on repatriation.<sup>129</sup> In this striking example of the clash between the fishermen's conduct (sensitive to the obligation to rescue under the international law of the sea) and a government's immigration policy (focused on exclusion, repatriation, and security), the immigrants were stranded, floating between a humanitarian-based international protection regime and a restrictionist immigration regime.<sup>130</sup>

### C. A Lack of Transparency

As we have seen with Operación Hera II, the EU FRONTEX forces are now venturing into the waters of non-Member countries to stop refugees from starting their journeys toward the European Union. The invisibility of the refugee population is due in large part to the enforcement/security lens through which FRONTEX sees migrants intercepted at sea.<sup>131</sup> Tellingly, when the director of

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129. See C. Medina & S. Navarro, *Rescatados 50 Inmigrantes Frente a Libia*, *El País*, Oct. 15, 2007, at 30.

130. When Libya finally allowed the boat to disembark, it was determined that all but two of the fifty passengers were Libyans who feared returning there. The fishermen aboard the Spanish ship that rescued them had to lie to their passengers and promise to take them to Italy. When the passengers realized that they were being returned to Libya, they were devastated and asked why they had risked their lives just to be taken back to Libya. The fisherman lost at least €8,000 for each day that they were stranded at sea awaiting a determination from Libya, Portugal, and Spain as to whether they could dock. The Secretary General of CEAR, Amaya Valcárcel, has argued that there needs to be a protocol for these situations so that action will be quicker, better coordinated, and give priority to the humanitarian situation, particularly when there are women and children involved. See *Negociación 'in extremis'*, *El País*, Oct. 16, 2007, at 28.

131. Commentators have criticized the broader EU efforts to control borders as embodying an:

ultimate goal . . . of sealing the borders of European States, by ensuring that individuals do not leave their countries of origin (visa regimes, carrier sanctions); or if they manage to do so, that they remain as close as possible to their country/region of origin; or if they manage to reach the European Union, that they may be removed to 'safe third countries'; and, if all that fails, that only one Member State be responsible for any given asylum seeker, namely, the one that fails to control the

FRONTEX was asked about the fate of refugees who might also be targeted in relation to Operación Hera II, he replied, “Refugees? They aren’t refugees, they’re illegal immigrants.”<sup>132</sup>

According to the regulatory language that governs it, FRONTEX is subject to protection obligations under the Refugee Convention.<sup>133</sup> Yet FRONTEX defines its mission in security terms—“to integrate national border security systems of Member States against all kind of threats that could happen at or through the external border of the Member States.”<sup>134</sup> Although control of the external borders is said to lie with the Member States, rather than with FRONTEX, FRONTEX has been criticized for lacking democratic control mechanisms.<sup>135</sup> All of FRONTEX’s actions are said to be based on private risk-assessments as to “the roots, routes, modus operandi, patterns of irregular movements, conditions of the countries of transit, statistics of irregular flows and displacement.”<sup>136</sup>

This lack of transparency is also cause for concern because FRONTEX is charged with enforcing RABIT (Rapid Border

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external borders of the European Union.

Maria-Teresa Gil-Bazo, *The Practice of Mediterranean States in the Context of the European Union’s Justice and Home Affairs External Dimension. The Safe Third Country Concept Revisited*, 18 Int’l J. Refugee L. 571, 574 (2006).

132. Maas, *supra* note 72, at 42.

133. Council Regulation 2007/2004, *Establishing a European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union*, 2004 O.J (L 349), 1–11, available at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2004:349:0001:0011:EN:PDF> (noting, in ¶ 22, that this Regulation “respects the fundamental rights and observes the principles recognized [sp] by Article 6(2) of the Treaty on European Union and reflected in the Charter of Fundamental Rights of the European Union”). On June 18, 2008, FRONTEX announced that it had entered into a working arrangement with the UNHCR to establish a framework for greater cooperation between the two agencies. See Press Release, FRONTEX, Frontex–UNHCR: reinforced cooperation, available at [http://www.frontex.europa.eu/newsroom/news\\_releases/art39.html](http://www.frontex.europa.eu/newsroom/news_releases/art39.html). FRONTEX’s pledge to cooperate with the UNHCR on “preparation of general and specific training materials and tools on international human rights and refugee law applicable to the context of border management” certainly appears to be an important step in the right direction. *Id.* However, it remains to be seen whether and in what way this new commitment will be implemented.

134. Maas, *supra* note 72, at 39 (discussing the statistics of European asylum claims vis-à-vis other industrialized nations).

135. *Id.* at 40.

136. *Id.* (noting the general lack of transparency with which FRONTEX operates).

Intervention Teams), which is meant to provide operational assistance to Member States in urgent circumstances. Such urgencies include the arrival of large numbers of third country nationals.<sup>137</sup> This new RABIT regulation specifies that it “shall apply without prejudice to the rights of refugees and persons requesting international protection,” but FRONTEX has not disclosed any plan for ensuring that refugees will be protected.<sup>138</sup> In addition to a lack of transparency, the lack of a fully harmonized asylum system calls into question FRONTEX’s ability to protect potential asylum seekers.<sup>139</sup>

Although the joint sea operations, such as Hera II and its predecessors, are always heralded by FRONTEX as humanitarian missions leading to a “reduction in human lives lost at sea during the dangerous long journey,”<sup>140</sup> there is no proof that these missions are saving lives. In fact, evidence suggests that migrants are now resorting to other more hazardous routes not patrolled by FRONTEX to reach the European Union. Commentators critical of the “humanitarian” focus of the discourse have instead referred to the European Union’s efforts as “erecting a Berlin wall on water controlling its border while removed from public scrutiny.”<sup>141</sup>

#### D. Flawed Partnerships with African Nations

European Union Member States, particularly those on the southern border, are increasingly partnering with African nations to stem the tide of illegal immigration.<sup>142</sup> These joint efforts frequently

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137. *Id.* at 41.

138. *Id.* However, FRONTEX and the UNHCR have agreed to cooperate to ensure that FRONTEX operations conform to the requirements of international law. *See supra* note 44.

139. *Id.* at 41.

140. Maas, *supra* note 72, at 42.

141. The U.S. interdiction regime for Haitian refugees at sea was often characterized as creating a “floating Berlin wall.” *See, e.g.*, Brandt Goldstein, *Storming the Court* 119 (2006) (finding the practical effect of the U.S. policy to be the prevention of Haitians from both entering the United States and leaving Haiti); *Floating Berlin Wall*, *Time*, Mar. 15, 1993, at 16 (describing Black leaders’ criticisms of President Clinton’s Haitian interdiction policy).

142. After the meeting of the EU Heads of State in Seville on June 21–22, 2002, the Seville European Council urged that “any future cooperation, association or equivalent agreement which the European Union concludes with any country should include a clause on joint management of migration flows and on compulsory readmission in the event of illegal immigration.” Canadian Council, *supra* note 77, at 12.

involve readmission agreements, which constitute a significant aspect of the regulation of migration between nations. A nation's willingness to readmit its own citizens is generally an expected component of diplomatic relations between nations. However, the readmission agreements that are increasingly being entered into between EU Member States and African nations are the result of undue pressure and a lack of transparency—not to mention that they fail to conform to international human rights norms.

These agreements take different forms and rely on different types of inducements.<sup>143</sup> Some agreements simply require countries to repatriate their nationals.<sup>144</sup> Other agreements, however, require countries to repatriate all unlawful migrants that have moved through their country, regardless of nationality.<sup>145</sup> In these repatriation agreements, the treatment of refugees is never

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143. Even those agreements, like Spain's Africa Plan (2006–2008), that are ostensibly aimed at addressing the root causes of migration through a multifaceted policy to be carried out in conjunction with African sending nations, tend to focus more heavily on enforcement and strengthening border controls. Just as the enforcement-first models of comprehensive immigration reform proposed in the United States are doomed to failure, the insistence on securing borders first and strengthening developing nations later cannot work.

144. For example, as part of the Cotonou Agreements, African, Caribbean, and Pacific nations, including large refugee-producing nations such as Somalia and the Democratic Republic of China, are required to repatriate their nationals. See Maas, *supra* note 72, at 26.

145. For example, Spain and Morocco have entered into repatriation agreements whereby Morocco has agreed to repatriate all unlawful migrants that have transited from Morocco to Spain, regardless of nationality. Spain has similarly entered into agreements with Senegal whereby Senegal will make greater efforts to prevent immigrants from undertaking unauthorized water voyages toward Spain, as well as to take back irregular migrants who have reached European shores. Maas, *supra* note 72, at 5 (noting that such agreements were entered into as early as 1992). In May 2006, Senegalese authorities announced their intention to arrest over 15,000 irregular migrants who were preparing to reach the Canary Islands by small wooden boats. By the end of that month, 642 Senegalese were awaiting repatriation in Mauritania, while another 105 were being detained by the police; 116 were given two-year prison sentences. See Spijkerboer, *supra* note 113, at 130. However, on June 1, 2006, Senegal suspended its May 2006 repatriation agreement with Spain after allegations arose that a group of migrants who had been deported on May 30, 2006, had been handcuffed and misled into believing they were being transferred to mainland Spain. *Id.* at 131.

mentioned, and scant attention is paid to whether the partner country has a history of respecting the rights of refugees.<sup>146</sup>

Amnesty International has argued that readmission agreements must contain provisions that clearly protect the rights of migrants and asylum seekers. Such rights include: the right to freedom from arbitrary detention; protection against torture and ill-treatment; the right to access a fair asylum adjudicatory procedure; and protection from refoulement to a country or territory that poses a risk of serious human rights violations.<sup>147</sup>

However, readmission agreements are increasingly being entered into informally, in a way that is insulated from either public comment or parliamentary control.<sup>148</sup> Furthermore, there are intense pressures and strong financial inducements for already distressed southern nations to enter into such readmission agreements.<sup>149</sup> For example, some developing countries are required to undertake efforts to prevent unlawful migration to Europe as a precondition to receiving development aid from the European Union.<sup>150</sup> For countries that aspire to join the European Union, the pressures are greater and the bargaining power even more uneven. One of the prerequisites to

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146. In fact, EU Member States have entered into agreements with Libya to take back unlawful migrants, notwithstanding that Libya has not even acceded to the Refugee Convention and does not recognize refugee or asylum status under its domestic laws. For example, Italy forcibly returned more than 1,500 irregular migrants from Lampedusa to Libya between October 2004 and March 2005 without even assessing the applicants' claims to asylum. See Spijkerboer, *supra* note 113, at 132; Rutvica Andrijasevic, *How to Balance Rights and Responsibilities on Asylum at the EU's Southern Border of Italy and Libya* 11–15 (Univ. of Oxford Ctr. on Migration, Policy and Soc'y, Working Paper No. 27, 2006). The EU is also negotiating similar agreements with China, Tunisia, Morocco, and Syria. See Maas, *supra* note 72, at 26.

147. Amnesty International, *Mauritania: "Nobody Wants To Have Anything To Do with Us"* 13 (2008), AI Index, AFR 38/001/2008, available at <http://www.amnesty.org/en/library/info/AFR38/001/2008/en>.

148. Weinzierl & Lisson, *supra* note 21, at 22.

149. See Franco Frattini, European Commissioner for Justice and Internal Affairs, Address to the French Senate (March 2006), in Amnesty International, *Mauritania*, *supra* note 147, at 14 (describing readmission agreements as "in practice . . . essentially serv[ing] the interests of the [European] Community" and noting that such agreements are dependant on the "levers' or 'carrots' that the Commission has at its disposal").

150. Weinzierl & Lisson, *supra* note 21, at 22, 26 (noting that "the conclusion of such agreements is frequently coupled with approval of financial assistance for the receiving countries").

EU membership now seems to be a country's willingness to take the European Union's unwanted migrants, including refugees.

In addition to informal agreements, EU Member States are actively involved in bolstering the ability of African states to detect, deter, and detain would-be migrants to the European Union. For example, on October 16, 2007, Spanish and Mauritanian defense ministers entered into a joint agreement to fight against irregular migration and to improve the efficiency of assistance services in Mauritania.<sup>151</sup> As part of this agreement, Spain promised to provide Mauritania with an airplane with advanced radar capacity to monitor movement toward the Canaries, training for Mauritanian pilots and mechanics, and financial support for the creation of a center in the capital for the battle against irregular migration.<sup>152</sup> This agreement complements a prior one between the two countries in which Spain agreed to assist the legal entry of workers from Mauritania.<sup>153</sup> Spain also provided funding and staff to create new detention centers in Mauritania<sup>154</sup> and arranged for mass repatriations of persons from third countries to Mauritania, "a country that does not have the minimal resources required in order to guarantee a proper reception and treatment of these individuals."<sup>155</sup> Despite Spain's active role in immigration and detention policy and practice in non-Member States such as Mauritania, its actions are not subject to the supervision of the Spanish courts nor, in practice, to international human rights bodies.<sup>156</sup> Absent any real oversight, it is no surprise that migrants held in camps and detention centers in Mauritania pursuant to these agreements with Spain are not being afforded the opportunity to seek

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151. CEAR Situation Report, *supra* note 117, at 45. Although Mauritania had traditionally been a country that welcomed immigrants, in 2003 it entered into an agreement with Spain to readmit Mauritians and third country nationals if Spain "ascertained" or "presumed" that they had attempted to migrate to Spain from the Mauritanian coast. Amnesty International, *Mauritania*, *supra* note 147, at 3–4.

152. CEAR Situation Report, *supra* note 117, at 45.

153. *Id.* at 61.

154. In April 2006, with European funding, thirty-five Spanish engineers built a prison for immigrants in Naudibu, Mauritania. Spain is also building detention centers in Senegal. *Id.* at 43.

155. CEAR Externalization Report, *supra* note 104, at 2.

156. *Id.* at 3.

asylum in Spain.<sup>157</sup> Rather, the emphasis is solely on pressuring the migrants to agree to repatriation.<sup>158</sup> Moreover, Spain's interception efforts are not limited to its territorial waters or to the open sea. Spain has intercepted "thousands of people in the waters" under the jurisdiction of Mauritania and Senegal.<sup>159</sup>

Yet another means by which EU Member States deter migrants is the threat of criminal sanctions. A criminal court in Gambia, for example, recently sentenced thirty-seven Senegalese youth to one month in prison—to be followed by deportation—for attempting to embark for the Canary Islands without valid immigration papers. The judge found that their conduct violated section 222 of the Criminal Code—not an unlikely decision considering the financial assistance Gambia receives from Spain in exchange for its efforts to prevent unlawful migration to Spain.<sup>160</sup> In Mauritania, lawful immigrants assert that they are languishing in jail after being arrested in the street or at home and, without any evidence, accused of "intending to leave Mauritania irregularly to travel to Europe."<sup>161</sup> Simple acts such as 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.<sup>162</sup>

Spain is certainly not alone in its efforts to end unauthorized migration (and refugee protection) from Africa. In 2004, the European Union proposed setting up five "reception centers" in Algeria, Libya, Mauritania, Morocco, and Tunisia. On November 5, 2004, leaders of twenty-five EU governments agreed on common asylum rules that would govern until 2010. Also in 2004, the

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157. *Id.* See also Letter from CEAR to Thomas Hammarberg, Commissioner, European Commission on Human Rights (Oct. 15, 2007) (on file with author) [hereinafter CEAR Letter] (detailing Spain's involvement in the policing, interception, and subsequent detention of immigrants encountered in African waters).

158. CEAR Externalization Report, *supra* note 104, at 10.

159. CEAR Letter, *supra* note 157, at 2.

160. See ACCEM, Eumigre, No. 84, Feb. 2008, at 6, available at <http://www.accem.es/pdf/eumigre/84.pdf>.

161. Amnesty International, *Mauritania*, *supra* note 147, at 19.

162. *Id.* at 21. As reported by Amnesty International and confirmed by the United Nations Working Group on Arbitrary Detention, "[t]here is evidence that appears to indicate that nationals of African countries, notably ECOWAS countries, have been arrested arbitrarily, even though they have papers, on the pretext that they were attempting to go to Europe irregularly." *Id.*

European Union built at least one camp in Libya (assisted by Italian Prime Minister Berlusconi) and one with Spanish assistance in Mauritania (through which 4,000 undocumented migrants passed in 2006, mainly from Senegal and Mali).<sup>163</sup>

In response to a sharp rise in the number of boat people arriving in Italy in 2008, Italy has targeted the island of Lampedusa for its new offshore processing policy.<sup>164</sup> Prior to January of 2009, refugees or migrants arriving by sea were transferred from Lampedusa to Sicily or mainland Italy for full asylum proceedings.<sup>165</sup> As of January 16, 2009, Italy now deploys immigration officers to Lampedusa in order to make protection decisions “on the spot.”<sup>166</sup> This dramatic change in policy has been widely criticized by refugee and human rights advocates because of its potential to undermine the entire asylum system in Italy.<sup>167</sup>

Italy also has a history of deporting unwanted migrants to Libya without first offering any opportunity to seek protection. In October 2004, Italy did just this—forcibly returning 1,000 “illegal migrants” to Libya, without allowing them to seek asylum.<sup>168</sup> Libya, which is not a signatory to the Refugee Convention, deported these migrants to Egypt and Nigeria.<sup>169</sup> Italy has also financed a program of charter flights used to repatriate migrants from Libya to their home countries, returning 5,688 individuals during 2004.<sup>170</sup> Moreover, Italy has financed the construction of a camp for migrants in northern Libya and plans to build two additional camps in southern Libya.<sup>171</sup>

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163. Kohnert, *supra* note 104, at 16–17.

164. Italian Council for Refugees: New policy in Lampedusa undermines Italian asylum system, ECRE Weekly Bulletin (European Council on Refugees and Exiles, Brussels, Belg.), Jan. 16, 2009, at 2–3, available at [http://www.ecre.org/files/ECRE\\_Weekly\\_Bulletin\\_16\\_January\\_2009.pdf](http://www.ecre.org/files/ECRE_Weekly_Bulletin_16_January_2009.pdf). The number of boat people landing in Italy doubled between 2007 and 2008. *Id.*

165. *Id.* at 2.

166. *Id.*

167. *Id.* at 3. By processing asylum applications offshore at Lampedusa, asylum seekers will be deprived of their right to counsel, which is necessary to challenge asylum decisions.

168. See Maas, *supra* note 72, at 23.

169. *Id.*

170. Sara Hamood, *EU-Libya Cooperation on Migration: A Raw Deal For Refugees And Migrants?* 21 J. Refugee Stud. 19, 33 (2008).

171. *Id.* at 33.

Even countries with atrocious human rights records are able to sign migration agreements with the European Union. Take Libya, for example. Although the European Union has expressed concerns that human rights be respected,<sup>172</sup> and has framed its cooperation with Libya in terms of humanitarian concerns and efforts to curtail migrant deaths at sea, in reality the European Union turns a blind eye to Libya's inhumane treatment of migrants.<sup>173</sup> Amnesty International has criticized the EU "blank check" approach of providing Libya with financial support to tackle irregular migration without seeking any guarantees that the rights of asylum seekers and migrants will be upheld in return.<sup>174</sup>

Such practices clearly violate the nonrefoulement guarantee of the Refugee Convention. In theory, agreeing to liberalize lawful immigration for workers or offering development aid in exchange for cooperation in deterring unlawful migration makes sense. Improving human rights and economic conditions in the sending countries, as well as improving the means to lawful immigration, are keys to reducing unlawful migration. However, as example after example demonstrates, these migration agreements are not *actually* joint projects designed to increase development aid or lawful immigration options for Sub-Saharan Africans. They are, fundamentally, yet another means by which EU Member States push back migrants.

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172. *Id.* at 24. For example, the Justice and Home Affairs minutes regarding EU cooperation with Libya note, "[i]t is essential that the European Union leads these third party countries of transit, including Libya, to respect certain basic principles—more particularly the principles enshrined in the Geneva Convention of 1951." *Id.*

173. *See generally* Hamood, *supra* note 170 (detailing the publicly available information documenting Libya's violations of refugees' rights, including Amnesty International's reports on refoulement from Libya to countries of danger, the 2005 European Commission Report on Libya migration issues, and Human Rights Watch reports on Libya's failure to respect the rights of refugees).

174. Press Release, Amnesty International, Closing Eyes to Human Rights Leaves Asylum Seekers and Migrants at Risk (Oct. 5, 2006), *available at* <http://www.libertysecurity.org/article1127.html> (accusing the EU of "signalling that in exchange for collaboration, it is ready to close its eyes").

## IV. THE NEED FOR LEGAL AND HUMANITARIAN-BASED CHANGE

## A. Potential for Statutory Reform

Because the current law of the sea cannot reconcile the duty to rescue with refugee disembarkation, nations should seek to amend the applicable maritime conventions in a way that prioritizes the humanitarian needs of refugees. Specifically, the amended maritime conventions should obligate rescuing vessels to disembark at the nearest port of call and coastal states to allow for such disembarkation.

Although such an approach would better recognize the humanitarian needs of rescued asylum seekers and other migrants, coastal states are likely to argue that this solution would shoulder them with a disproportionate burden.<sup>175</sup> A second approach would avoid this objection by increasing temporary protection and imposing refugee resettlement quotas on receiving nations. Various states would then permanently accept the refugees according to a pre-arranged agreement to cover resettlement and temporary protection.<sup>176</sup> The inherent danger in this plan, of course, is that states may employ temporary protection as a replacement for true refugee protection.<sup>177</sup> As Joan Fitzpatrick warned almost fifteen years ago, we must be careful that temporary refuge does not “accelerate the flight from asylum.”<sup>178</sup>

The Refugee Convention should also be changed to better accommodate refugees at sea. I have argued elsewhere that the definition of “refugee” under the Convention is unduly narrow and

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175. See Richard Barnes, *Refugee Law at Sea*, 53 Int'l & Comp. L.Q. 47, 71 (2004). Allowing the rescuing vessel to disembark its rescues at the next port of call would reduce the financial disincentive to save lives at sea. Currently, ship captains are well aware of the financial burdens associated with rescues—namely, prolonged delays at sea while states negotiate an agreement to disembark the rescuees. See *id.*

176. *Id.*

177. Joan Fitzpatrick, *Flight from Asylum: Trends Toward Temporary “Refuge” and Local Responses to Forced Migrations*, 35 Va. J. Int'l L. 13, 19 (1994). Fitzpatrick has expressed concern that temporary protection not be used as a “belated recognition of the excessive narrowness of the Refugee Convention, but instead constitutes one more device to constrict access to asylum.” *Id.*

178. *Id.* For a more optimistic view of the potential role of temporary refuge, see Barnes, *supra* note 175, at 71.

that restrictive interpretations of that definition operate to the detriment of modern-day refugees.<sup>179</sup> These limitations derive, in part, from the historical and political context in which the Convention took shape, particularly the Cold War desire to protect Europeans fleeing Communist regimes.<sup>180</sup> But the political appeal of the Convention—its widely-telegraphed message that freedom prevailed in the West—evaporated with the end of the Cold War and the shift in refugee flow to a south-to-north migration. Many refugees today are non-white and flee not Communism, but civil wars, repressive regimes, ethnic violence, and social repression.

The definition of “refugee” should reflect these changes. Some modern definitions of “refugee” attempt to do this by incorporating concepts like “generalized violence” or “external conflicts.” For example, the Organization of African Unity Convention Governing the Specific Aspects of Refugee Problems in Africa expands the Refugee Convention definition to also include:

Every person who owing to external aggression, occupation, foreign domination, or events seriously disturbing public order in either part or the whole of his country of origin or nationality, is compelled to leave his place of habitual residence in order to seek refuge in a place outside his country of origin or nationality.<sup>181</sup>

Similarly, the Cartagena Declaration on Refugees includes within its definition of refugees:

Persons who have fled their country because their lives, safety, or freedom have been threatened by generalized violence, foreign aggression, internal conflicts, massive

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179. See Lori A. Nessel, “Willful Blindness” to Gender-Based Violence Abroad: *United States’ Implementation of Article Three of the United Nations Convention Against Torture*, 89 Minn. L. Rev. 71 (2004) (arguing that the Refugee Convention’s failure to include gender as a protected category often leaves refugee women unprotected).

180. Heleen Boushcer, *Shifting Borders: Immigration, Refugee and Asylum Matters and Public Policy: Humanitarian Motives, Political Statements and the 1951 Geneva Convention Relating to the Status of Refugees*, 12 Geo. Public Pol’y Rev. 71, 79 (2006/2007).

181. Organization of African Unity Convention Governing the Specific Aspects of Refugee Problems in Africa, art. 1, para. 2., Sept. 10, 1969, 1001 U.N.T.S. 45.

violations of human rights, or other circumstances which have seriously disturbed public order.<sup>182</sup>

Unfortunately, these definitions are not widely accepted. The shifting, increasingly diverse makeup of the refugee population has prompted many states to restrict application of the Refugee Convention and endorse lesser forms of complementary<sup>183</sup> or temporary protection.<sup>184</sup>

The Refugee Convention's definitional shortcomings are particularly acute in situations involving a "mass influx" of refugees. Although there is no quantitative definition of a "mass influx," the term generally encompasses instances of large-scale migration from countries in conflict to nations unable to offer effective protection. Even apart from Convention status, these refugees who are part of mass influxes deserve temporary refugee status.<sup>185</sup> In these situations, unfortunately as in sub-Saharan sea migration to Europe, states have increasingly failed to offer even the minimal rights associated with temporary refuge.<sup>186</sup> As part of an increasing emphasis on the security implications of the refugee movement, states now look to protect themselves from mass influxes rather than to determine the needs of individual refugees. It is thus the attendant circumstances of the mass influx itself, not the underlying cause of flight, that all too often determines whether a refugee

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182. Cartagena Declaration on Refugees, Nov. 22, 1984, Annual Report of the Inter-American Commission on Human Rights, OAS Doc. OEA/Ser.L/V/II.66/doc.10, rev. 1.

183. Complementary protection refers to international protection granted by States for reasons that fall outside of the mandate of the Refugee Convention. See McAdam, *Complementary Protection*, *supra* note 85.

184. It is paradoxical that as the number of nations that agree to abide by the Refugee Convention has grown, the number of persons being recognized as refugees has declined. Danièle Joly, *Introduction*, in *Global Changes in Asylum Regimes* 1, 7 (Danièle Joly ed., 2002). Ninette Kelley, of the UNHCR, notes that "[s]ome states use complementary forms of protection for persons who would qualify in other States as Convention refugees, leading to the criticism that resort to the former is used to avoid or forestall the engagement of Convention obligations towards refugees." See Ninette Kelley, *supra* note 6, at 428. As Jane McAdam has observed, "[i]n the context of mass influx situations, the price that States have demanded for admitting large numbers of refugees and asylum seekers is a de facto suspension of all but the most immediate and compelling Convention rights." McAdam, *Complementary Protection*, *supra* note 85, at 200.

185. Fitzpatrick, *supra* note 177, at 42.

186. See Erin Patrick, *Mass Influx in South Africa?*, Migration Pol'y Inst., Apr. 1, 2005, [http://www.migrationpolicy.org/research/south\\_africa.php](http://www.migrationpolicy.org/research/south_africa.php).

receives asylum or temporary refuge.<sup>187</sup> And to the extent that there is any concern expressed about refugees caught in mixed migration flows and deprived of access to asylum, the focus has been on the Refugee Convention in isolation from other international laws and norms.<sup>188</sup>

In addition to textual and interpretive problems relating to the Refugee Convention's categorization of "refugee," its prohibition on refoulement is meaningless unless refugees have access to a fair adjudicatory process. Such a process would require an individual interview regarding the claim to protection, the right to an interpreter and an attorney, the right to contact the UNHCR, and "an effective legal remedy with suspensive effect that enables a stay in-country pending a decision on the appeal"—a process which necessitates, at very minimum, disembarkation and entry to land.<sup>189</sup>

#### B. Reconceptualizing the Mediterranean Crisis as a Refugee Crisis

For any change to occur, the nature of the crisis must be reconceptualized. In the contexts of both the United States' interdiction of Haitians and the European Union's externalized border regime, boat people are all too often viewed as solely economic or "unauthorized" migrants. To the extent that courts or regional bodies examine the legality of EU externalization practices, the Refugee Convention is often dismissed as inapplicable without any particularized analysis of individual cases. Furthermore, as Member States enter into agreements with refugee-sending nations to prevent refugees from fleeing toward the European Union, the limitations found in the Refugee Convention regarding its inapplicability to

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187. Fitzpatrick, *supra* note 177, at 16.

188. See, e.g., Jane McAdam, Paper Presented at the Moving On: Forced Migration and Human Rights Conference: Humane Rights: The Refugee Convention as a Blueprint for Complementary Protection Status (Nov. 22, 2005) (noting the "general reluctance by States, academics and institutions to view human rights law, refugee law and humanitarian law as branches of an interconnected, holistic regime, particularly when it comes to triggering eligibility for protection beyond the scope of . . . the Refugee Convention").

189. Ruth Weinzierl, *The Demands of Human and EU Fundamental Rights for the Protection of the European Union's External Borders* 8 (German Institute for Human Rights, (July 2007), available at <http://www.statewatch.org/news/2007/sep/eu-borders-gihr.pdf>).

“persons outside their countries” undermines protection to those who might otherwise qualify.<sup>190</sup>

We have seen that there are myriad ways in which Europe restricts access to asylum, including: entering into agreements with poor refugee-sending nations to ensure that refugees cannot flee from the global South toward Europe; intercepting, interdicting, and repatriating boatloads of migrants without providing an opportunity to seek protection; and imposing strict visa requirements, safe third country agreements, extraterritorial processing, and carrier sanctions. Although the European Union, or its Member States, may not be liable under any of the existing international human rights conventions or treaties alone,<sup>191</sup> this section explores theories for accountability that seek to reframe the issue. This is not only a “humanitarian” problem—one structured so as to elicit our moral outrage. In addition, this is a legal problem—legal duties, not just moral principles, are being flouted. These legal duties include: a duty of care to migrants intercepted at sea; international treaty-based obligations to act in good faith and not to engage in direct or indirect refoulement; a broader interpretation of the Refugee Convention so as not to exclude from the definition of “refugees” persons who are interdicted while still in their home country or its waters; an obligation to uphold the same international human rights standards in extraterritorial actions as would be required at or within the state’s borders; a duty not to engage in acts that will cause foreseeable harm internationally; and a special duty of care based on historical, economic, and race-based factors. By applying traditional legal notions of accountability to a problem which has been largely forsaken, and in which Western nations too often operate outside of the realm of international human rights protection norms, the goal of

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190. In keeping with the intent and purpose of the Refugee Convention, it must be interpreted as applicable when immigration or Coast Guard officers enter a refugee-sending nation (or its territorial seas) to prevent departure. See *infra* Part IV.B.3.

191. There are several potential protections, including the Refugee Convention, the Convention Against Torture, the International Declaration on Human Rights, the International Convention on Civil, and Political Rights, the Convention on the Rights of the Child, the European Convention on Human Rights, the International Law of the Sea, and the International Law Commission’s Articles on the Responsibility of States for Internationally Wrongful Acts.

this section is to change the direction of the discourse—away from hopelessness and towards obligation.

The elevation of enforcement and security concerns above the protection needs of refugees at sea is the by-product of a political process that uses the boat people for political gain.<sup>192</sup> Michael Pugh refers to a process of securitization, by which issues are identified, labelled, and reified as threats to a community. He explains that the “discourse distances [the immigrants’] plight from the human rights abuse, from the conflict and dysfunctional inequalities in the global economic system that cause people to move, and their need for humanitarian assistance is usually ignored in presenting the issue to the public in destination states.”<sup>193</sup> An essential part of the “securitization process” is the manipulation of the distinction between refugees and migrants.<sup>194</sup>

Rather than viewing the “Mediterranean crisis” through a security or even humanitarian lens, EU Member States must see that they owe a duty of care to migrants intercepted at sea. This duty includes providing access to a fair refugee-determination system so that refugees are not arbitrarily repatriated or returned to third countries. The small number of asylum applications submitted, and the even smaller number granted, in southern EU Member States also suggests that the Refugee Convention is being narrowly interpreted (or that access to asylum is being curtailed severely through initiatives such as carrier sanctions, safe third countries, or interception at sea). This suggests that there is a need for international protection that goes beyond the narrow contours of the Refugee Convention.<sup>195</sup>

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192. See Michael Pugh, *Drowning Not Waving: Boat People And Humanitarianism at Sea*, 17 J. Refugee Stud. 50 (2004).

193. *Id.* at 53.

194. *Id.* at 55.

195. See Nadine El-Enany, *Who Is the New European Refugee?* 11 (London Sch. of Econ. Law, Society and Economy Working Paper No. 19, 2007) (“From looking at the figures of asylum claims lodged over the last few decades, there has been an obvious decrease in the number of applications for asylum lodged in the EU and a parallel admission from the Commission that this does not necessarily mean that the number of those individuals in need of protection has decreased.”).

1. Increasing Numbers of Convention Refugees  
Amongst the Migrants

Because of the lack of transparency as to what occurs when boats are intercepted, and given the large numbers of migrants who die at sea, it is impossible to estimate how many potential refugees are among the mixed migrant groups that attempt to enter the EU.<sup>196</sup> But it is known that many of the migrants who travel from Morocco to Spain, whether via Ceuta or the Canary Islands, come from countries with a long history of human rights abuses, including Algeria, Cameroon, Cote D'Ivoire, Congo, the Democratic Republic of Congo, Gambia, Ghana, Guinea-Bissau, Guinea-Conakry, Iraq, Mali, Niger, Nigeria, Liberia, Senegal, Sierra Leone, Sudan, and Togo.<sup>197</sup> It has also been noted that the proportion of African migrants who are refugees is in fact well over the global average. By the end of 2005, 18% of all African migrants were refugees, and African refugees constituted about one-third of the global refugee population.<sup>198</sup>

Moreover, because interception is primarily a migration control or enforcement tool, rather than a humanitarian device, the emphasis is on preventing unauthorized migration without adequate inquiry into the root causes of such movement by sea. Because border enforcement goals dramatically eclipse protection needs, interception activities lack adequate safeguards for identifying and protecting refugees and often serve to deter or prevent access to protection for refugees.<sup>199</sup>

The troubling human rights records of the countries that send the greatest number of boat people suggest that the flow of unauthorized migration by sea is likely comprised of some mix of

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196. See Gil-Bazo, *supra* note 131, at 585 (emphasizing just how little is actually known about the number of potential refugees mixed in with illegal migrants). As pointed out by the United Nations High Commission for Refugees, "[b]ecause the refugee dimension of transit migration has so far been largely ignored, comparatively little is known about the number of potential refugees mixed in with illegal migrants trying to reach Europe." *UNHCR Project to Shed Light on Africa-Europe Transit Migration*, UNHCR News Stories, Feb. 1, 2005, <http://www.unhcr.org/cgi-bin/texis/vtx/home/openssl.htm?tbl=NEWS&id=41ffa0f54&page=news>; see also Gil-Bazo, *supra* note 131, at 585.

197. *Id.* at 577.

198. Kohnert, *supra* note 104, at 6. Nearly half (47%) of the 16.7 million cross-border migrants in Africa in 2005 were women and children. *Id.*

199. Guy Goodwin-Gill & Jane McAdam, *The Refugee in International Law* 373 (3rd ed. 2007).

genuine refugees and economic migrants.<sup>200</sup> Although there are often claims that the asylum system is being abused and that most asylum seekers are actually economic refugees, it has been found that asylum seekers in Europe and the United States are fleeing from some of the most violent nations in the world.<sup>201</sup> People escaping violent nations that eventually seek international protection in the territorial sea<sup>202</sup> or at maritime borders<sup>203</sup> of EU Member States should be afforded the same rights as those persons seeking protection on land.<sup>204</sup>

## 2. EU Interception Efforts in Violation of the Refugee Convention

The Refugee Convention and U.N. Protocol obligate signatory states not to expel or return (“refouler”) a refugee to a country in which her life or freedom would be threatened on account of a protected ground.<sup>205</sup> Significantly, the drafters of the Refugee Convention included explicit language to prohibit contracting states from engaging in such prohibited expulsion or refoulement “in any manner whatsoever.”<sup>206</sup> This language has been widely interpreted to

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200. Mark Gibney, *Certain Violence, Uncertain Protection*, in *Global Changes In Asylum Regimes* 15, 16 (Danièle Joly ed., 2003) (recognizing that “the most violent countries in the world produce nearly all of the world’s refugees”).

201. *Id.* Gibney notes that, while it is true that the refugee-producing nations are also very poor, nations that are very poor but not violent produce substantially fewer refugees than those that are violent and poor. *Id.*

202. The coastal states have jurisdiction for their territorial sea. Spain, France, Italy, Malta, Cyprus, and, for the most part, Germany, each have territorial seas stretching in width for twelve nautical miles, while Greece’s territorial waters are six nautical miles wide. Weinzierl & Lisson, *supra* note 21, at 13 n.7.

203. Maritime borders are those which delineate the nation’s territorial waters from the high seas.

204. Weinzierl & Lisson, *supra* note 21, at 13. This obligation arises from numerous human rights instruments and regional instruments binding on the EU, including: Council Directive 2005/85, On Minimum Standards in Member States for Granting and Withdrawing Refugee Status, art. 3, 2005 O.J. (L326) 13 (EC) (“Asylum Procedure Directives”); the Convention for the Protection of Human Rights and Fundamental Freedoms, *supra* note 36; Article 33(1) of the Refugee Convention, *supra* note 9; Article 3(1) of the Convention Against Torture, *supra* note 35; and from Articles 6 and 7 of the ICCPR, *supra* note 12; and the prohibition on non-refoulement as derived from customary international law.

205. Refugee Convention, *supra* note 9; Refugee Protocol, *supra* note 28.

206. Refugee Convention, *supra* note 9.

prohibit indirect refoulement such as that which occurs when a refugee is expelled or returned to a state that poses a foreseeable risk of subsequent refoulement.<sup>207</sup> Actions that “amount to aiding, abetting, or otherwise assisting another state to breach Art. 33 are themselves in breach of the duty of non-refoulement.”<sup>208</sup>

The European Union’s externalization and interception activities violate the terms of the Refugee Convention and the Member States’ duty to exercise good faith in implementing their treaty obligations.<sup>209</sup> Take, for example, the episode involving the Spanish fishing boat *Francisco and Catalina*.<sup>210</sup> When it rescued fifty-one shipwrecked men, women, and children outside Malta, it remained stranded at sea for another week as Malta, Spain, and Libya argued over who was responsible for the rescuees. The three countries finally entered into an agreement that violated the Refugee Convention since the passengers were sent to nations in which they risked subsequent refoulement.<sup>211</sup> Similarly, many of the readmission agreements EU Member States and African nations enter into violate the Refugee Convention because of the pressures placed on African nations by the EU Member States—namely, to accept unwanted migrants without having to offer any assurances that refugees will not subsequently be refouled to dangerous countries.<sup>212</sup>

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207. See, e.g., James C. Hathaway et al, *The Michigan Guidelines on Protection Elsewhere*, 28 Mich. J. Int’l L. 207 (2007) (presenting the consensus views of colloquium participants on issues of refugee protection).

208. *Id.* at 213.

209. As a matter of international law, states are required to exercise good faith in implementing their treaty obligations. Goodwin-Gill & McAdam, *supra* note 199, at 109. A breach of this duty of good faith occurs when a state, through a combination of acts or omissions, renders the fulfilment of treaty obligations obsolete, or defeats the object or purpose of a treaty. *Id.* at 236–37. The test for good faith focuses on the practical effect of State action, rather than its intent or motivation. *Id.* at 235.

210. See *supra* notes 125–128 and accompanying text.

211. Two of the nations that agreed to accept the rescuees (Andorra and Libya) have not even agreed to abide by the terms of the Refugee Convention.

212. See *supra* notes 142–157 and accompanying text. The move toward extraterritorial processing of asylum claims is another way in which the protection regime is being undermined. The United Kingdom first proposed transit processing centers in 2003, with support from the Netherlands and Denmark. In 2004, Germany proposed “safe zones” to be set up in North Africa to process asylum claims for the EU Member States. Although none of these plans has been formally adopted to date, extraterritorial processing remains prominent

3. Applying the Refugee Convention to Refugees Still Within Their Home Countries (or Territorial Waters)

Extraterritorial processing, in which a nation adjudicates asylum claims outside of its own borders, raises the difficult question as to whether the Refugee Convention applies to those who are still within their own territorial waters or homelands. Judges and academics alike have largely accepted the premise that the Refugee Convention is limited to situations in which a refugee is outside of her homeland or country of last residence.<sup>213</sup> Indeed, as noted above, such an interpretation is supported by the literal language of the Convention itself.<sup>214</sup> The prohibited practice of “refoulement” under the Refugee Convention refers to returning or repelling one from a nation’s borders.<sup>215</sup> Therefore, what applicability, if any, does the Refugee Convention have to refoulement efforts that take place within the territorial waters, or on the land, of the refugee’s home country?

Furthermore, if a nation stations asylum or immigration officers in another country in order to deny visas to persons wishing to travel to that nation in search of asylum, does such action constitute prohibited refoulement under Article 33 of the Refugee

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on the EU agenda. See Susan Kneebone, et. al., *A Mediterranean Solution? Chances of Success*, 18 Int’l J. Refugee L. 492, 497 (2006).

213. Indeed, judges and academics generally state that the Refugee Convention solely imposes obligations on states for refugees within their borders. See, e.g., *Sale v. Haitian Centers Council*, 509 U.S. 155 (1993); *Minister for Multicultural Affairs v. Ibrahim* (2000) 204 C.L.R. 1 para. 136 (Austl.); *Minister for Immigration and Multicultural Affairs v. Khawar* (2002) 210 C.L.R. 1 para. 42 (Austl.); *Regina (European Roma Rights Centre) v. Prague Immigration Officer (HL(E))*, [2005] 2 A.C. 1 [2004] U.K.H.L 55; Atle Grahl-Madsen, *The Status of Refugees in International Law* 94 (2d ed. 1972).

214. The language of the Refugee Convention explicitly limits the definition of a refugee to one who “[i]s outside the country of his nationality . . . or who, not having a nationality [is] outside the country of his former habitual residence . . .” Refugee Convention, *supra* note 9.

215. The U.S. Supreme Court in *Sale v. Haitian Centers Council*, 509 U.S. 155 (1993), went to great lengths to rule that the Refugee Convention does not apply outside of the U.S. borders. However, as discussed above, the international community condemned this decision. The Inter-American Commission on Human Rights, for example, found that the Convention’s obligations extended to interdiction actions carried out in the high seas, and thus found the United States to be in violation of Article 33 of the Refugee Convention, as well as other international human rights instruments guaranteeing a right to seek asylum.

Convention? According to Professor Goodwin-Gill, the principle of non-refoulement regulates “state action *wherever* it takes place,” including “through its agents outside territorial jurisdiction.”<sup>216</sup> However, Goodwin-Gill distinguishes interception and forced return of refugees on the high seas, which constitutes refoulement, from the denial of a visa to one who wishes to seek asylum. He characterizes the latter as preventing or obstructing refugees’ flight to safety, but not breaching the prohibition of *returning* refugees to persecution.<sup>217</sup> Professors James Hathaway and J.A. Dent concur that, strictly speaking, visa requirements “may not violate Article 33 directly” but nevertheless “increase the risk of refoulement, and effectively undermine the most fundamental purposes of the Convention.”<sup>218</sup>

The drafters of the Refugee Convention could not have envisioned modern day efforts by industrialized nations to intercept refugees before they reach their borders, or even before they flee from their countries.<sup>219</sup> Today, the deployment of immigration officials in foreign ports is as common as it was uncommon when the Refugee Convention was drafted.<sup>220</sup> This trend of extraterritorial enforcement has not gone unnoticed by the courts. A prominent case is *Regina (European Roma Rights Centre) v. Immigration Officer at Prague Airport*.<sup>221</sup> In that case, the United Kingdom stationed an immigration officer at the Prague airport to detect and deter Roma<sup>222</sup> asylum seekers bound for the United Kingdom. The Roma applicants challenged the action as a violation of their right to seek asylum

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216. Guy S. Goodwin-Gill, *The Refugee in International Law* 143 (1996) (emphasis in original).

217. *Id.* at 252.

218. James Hathaway & J.A. Dent, *Refugee Rights: Report on a Comparative Survey* 5–17 (1995).

219. See Richard Barnes, *Refugee Law at Sea*, 53 *International and Comparative Law Quarterly* 47, 71 (2004) (warning that “[i]f States retain the discretion to determine the point of application of the Refugee Convention, then the protection of refugees under international law is seriously undermined”).

220. Kelley, *supra* note 6, at 421. In 2003 Canada’s Minister of Citizenship and Immigration announced that the stationing of additional immigration officials abroad had prevented 8,000 persons with invalid documents from entering Canada in just one year. *Id.* The United States has pre-clearance consular areas in nations including Aruba, Bermuda, the Bahamas, Canada, and Ireland (with Mexico next), while the U.K. stations officers at ports and terminals in Belgium and France. *Id.*

221. *Regina (European Roma Rights Centre) v. Prague Immigration Officer* (HL(E)), [2005] 2 A.C. 1 [2004] U.K.HL 55.

222. The term “Roma” refers to those of Romani ethnic origin.

pursuant to the Refugee Convention, as well as on grounds of racial discrimination. The House of Lords<sup>223</sup> found that the Refugee Convention was inapplicable unless the refugee was outside of her country of nationality, and that even if applicable, the Roma were free to seek asylum elsewhere, just not in the United Kingdom.<sup>224</sup>

What is disturbing in the House of Lords' analysis, as in the European Court of Human Rights' analysis in *Xhavara*, below, is that the consequences of one nation's refusal to allow access to its protection regime are ignored. The analysis takes place as if in a vacuum, suspended above and disengaged from the complex web in which so many accessible nations are attempting to deter access to their protection regimes.<sup>225</sup> To say that the British asylum officers stationed at the Prague airport were only denying access to the United Kingdom ignores the broad net that is being cast by the European Union to deter asylum seekers generally.

The British officers stationed at Prague to deter Roma asylum seekers are just one part of a multi-faceted program aimed at locking out refugees. Thus, the action must be analyzed in the context of these other deterrent measures, including carrier sanctions, interdiction, safe third country agreements, and visa requirements. When viewed in this context, it is clear that the Roma are not just being denied access to the United Kingdom. With few, if

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223. The House of Lords is the final court of appeal in the United Kingdom.

224. The House of Lords did find, however, that the U.K. immigration actions were discriminatory in that they treated Roma applicants less favorably than others on racial grounds.

225. The same is true of the United States' interception regime as directed towards Haitians. The United States' utilization of its Coast Guard to intercept and return boatloads of Haitian refugees should be analyzed within the context of simultaneous Haitian interception activities carried out by the U.K. Turks and Caicos Islands Coast Guards. The U.K. interception activities have resulted in tragedies similar to those of their American counterparts. For example, on May 4, 2007, while patrolling the Turks and Caicos Islands, a U.K. Coastguard ship named *The Sea Quest* intercepted a thirty-foot boat loaded with approximately 160 Haitians attempting to reach the islands, which are located just 100 miles north of Haiti. Although it is unclear exactly what transpired, *The Sea Quest* appears to have struck the small, overcrowded vessel while towing it into the high seas to prevent the people aboard from reaching land, in compliance with "standard procedure." The collision caused the vessel to capsize in shark-infested waters, resulting in approximately 80 deaths, including women and children. Survivors were allowed to disembark, but were held in detention until such time as they were repatriated to Haiti. For a full description, see Hallward, *supra* note 70.

any, remaining avenues for asylum, the Roma are effectively being denied access to *anywhere*. The House of Lords failed to fully comprehend this unfortunate reality.

The same is true of Italy's interception of Albanians in Albanian waters in the *Xhavara* case.<sup>226</sup> In *Xhavara and Others v. Italy and Albania*, an Albanian ship that was carrying unauthorized Albanians to Italy sank after a collision with an Italian military vessel, killing a number of passengers. Some of the surviving passengers brought a complaint before the European Court of Human Rights. They alleged, inter alia, that the bi-national agreement between Albania and Italy, allowing for Italy's interception of Albanian sea vessels in international and Albanian waters, violated Article 2(2) of Protocol 4, which is the ECHR's guarantee of the right to leave one's country.<sup>227</sup> The Court held that the interception activities were not aimed at preventing the Albanians from leaving their country, but rather at preventing them from entering Italian territory.<sup>228</sup> However, the Court did state that the contracting parties were bound to protect the lives of those falling within their jurisdiction.<sup>229</sup>

Italy entered into the agreement to station patrol boats in Albanian waters precisely because of the high number of Albanians fleeing to Italy for protection. However, when the most accessible safety route is sealed off, the result, unsurprisingly, is to lock refugees into their home countries or to cause them to risk more perilous journeys. Just as in the Roma case, Italy's actions significantly frustrated, if not completely undermined, both the right to access international protection and the right to leave one's country.

This flawed reasoning—that a bi-national agreement only prevents refugees from migrating to *one* country, not *all* countries—harkens back to the U.S. Supreme Court's ruling in *Shaugnessy v.*

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226. *Xhavara and Others v. Italy and Albania*, Eur. Ct. H.R. 39473/98 (2001), available at <http://www.echr.coe.int/eng>.

227. European Convention on Human Rights, *supra* note 41, at Protocol 4, art. 2.2.

228. *Id.*

229. Jorrit J. Rijpma & Marise Cremona, *The Extra-Territorialisation of EU Migration Policies and the Rule of Law* 22 (European Univ. Inst., Working Paper No. 2007/01, 2007), available at <http://www.iue.it/PUB/LawWPs/law2007-01.pdf>.

*United States ex rel. Mezei*.<sup>230</sup> In *Mezei*, a long-time lawful permanent resident of the United States attempted to travel to Romania to visit his ailing mother.<sup>231</sup> He was denied entry to Romania, and so he entered Hungary en route to Romania. But he was denied an exit visa from Hungary for eighteen months.<sup>232</sup> Upon his attempted return to the United States, he was ordered excluded based on confidential national security concerns.<sup>233</sup> After being detained for twenty-one months on Ellis Island, and attempting to return to various other countries, Mezei brought an action to challenge his ongoing detention and exclusion without a hearing.<sup>234</sup> In a decision that, fifty years later, is still relied upon by the government and courts in immigration cases involving national security and detention,<sup>235</sup> the Supreme Court, apparently choosing to ignore the reality of Mezei's situation,<sup>236</sup> ruled that his exclusion without a hearing did not constitute unlawful detention because he was free to go to *any other* country, just not the United States.<sup>237</sup>

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230. *Shaugnessy v. United States ex rel. Mezei*, 345 U.S. 206 (1953).

231. *Id.* at 208.

232. *Id.*

233. *Id.*

234. *Id.* at 209.

235. *See, e.g., Jean v. Nelson*, 472 U.S. 846 (1985) (relying on *Mezei* to deny immigration); *Borrero v. Aljets*, 325 F.3d 1003 (8th Cir. 2003) (same); *Arar v. Ashcroft*, 414 F. Supp. 2d 250 (E.D.N.Y. 2006) (recognizing that *Mezei* affords only limited due process protections to individuals treated as though "stopped at the border"). *See also* Robert J. Shulman, *Children of a Lesser God: Should the Fourteenth Amendment Be Altered or Repealed to Deny Automatic Citizenship Rights and Privileges to American Born Children of Illegal Aliens?*, 22 Pepp. L. Rev. 669 (1995) (discussing the development of anti-immigration sentiment in the United States); Dave Martella, *Defending the Land of the Free and the Home of the Fearful: The Use of Classified Information to Deport Suspected Terrorists*, 7 Am. U. J. Int'l L. & Pol'y 951 (1992) (discussing American fear of terrorism and its effect on immigration policies).

236. It was blatantly clear that Mezei had no other real options once the United States refused to admit him. In fact, he had been shipped back to Hungary twice but was refused admission. France and Great Britain similarly refused to admit him, as did about a dozen Latin American countries in which he sought admission. *Mezei*, 345 U.S. at 208–09.

237. *Id.* at 215–16. Justice Jackson, joined by Justice Frankfurter in dissent, took issue with the majority's assertion that Mezei "is free to depart from the United States to any country of his choice," commenting that it "might mean freedom, if only he were an amphibian." *Id.* at 220 (Jackson, J., dissenting). Justice Jackson further noted: "Realistically this man is incarcerated by a combination of forces which keeps him as effectually as a prison, the dominant and proximate of these forces being the United States immigration authority. It

The impact of a foreign nation's entrance upon the land or water of a potential refugee's country, in violation of the Refugee Convention, all too often results in indefinite detention within the refugee's home nation. States cannot be permitted to undermine the very essence of the Refugee Convention by proactively entering refugee sending nations to stop refugees from seeking protection. A broader international framework must prohibit nations from undermining this fundamental right to seek international protection.

#### 4. Analyzing Duties Within the Context of International Human Rights Law

Aggressive extra-territorial border control is, as the European Council on Refugees and Exiles (ECRE) has noted, "undermining the right to seek refugee status."<sup>238</sup> In extreme cases, those who set sail for EU Member States find themselves not only intercepted and pushed back, but actually imprisoned for their attempted effort to migrate.<sup>239</sup> Such penalization of migrants for attempting to leave their nations violates Article 13 of the Universal Declaration on Human Rights, which provides all people the right to leave any country.<sup>240</sup>

The right to seek asylum, in other words, must be read in conjunction with the right to freedom of movement and the totality of rights protected by the Universal Declaration on Human Rights and the ICCPR. Read holistically, states have an obligation to respect an individual's right to leave his or her country in search of protection.<sup>241</sup>

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overworks legal fiction to say that one is free in law, when by the commonest of common sense, he is bound." *Id.*

238. Refugee Council & the European Council on Refugees and Exiles (ECRE), *Joint Response to Select Committee on the European Union Sub-Committee F (Home Affairs): FRONTEX Inquiry*, at 3, Sept 24, 2007.

239. See *supra* note 160 and accompanying text for a discussion of Gambia's recent criminal sentencing of Senegalese migrants who attempted to reach Spain's Canary Islands by boat.

240. Universal Declaration, *supra* note 39, at art. 13.

241. See Goodwin-Gill & McAdam, *supra* note 199. According to Professors Goodwin-Gill and McAdam:

if an airline liaison officer employed by a receiving State refuses embarkation to an individual fearing inhuman treatment in the country he or she seeks to leave, this could potentially constitute a breach of that receiving State's obligations under 7 ICCPR66 or article 3 ECHR50, in addition to obstructing the right to leave and seek asylum.

The right to leave, the right to seek and enjoy asylum, and the principle of nonrefoulement must, at the very minimum, produce an obligation for states to grant asylum seekers access to an asylum determination procedure.<sup>242</sup>

Although the security-based focus of new immigration initiatives around the world improves potential receiving nations' ability to detect and halt migrants before they even leave their home countries, little attention is paid to the impact on refugees who find themselves "locked into" their home countries. Reminiscent of the past images of refugees trapped behind the Iron Curtain, or Cuba's refusal to allow dissidents to leave, this new era of global migration control has turned the refugee protection regime on its head. In addition to undermining the refugee's right to leave her home country and seek and enjoy asylum, receiving nations are disproportionately targeting the very nations that bear the greatest refugee burdens (and that often have poor human rights records) for their overly restrictive policies.<sup>243</sup> Additionally, as the wealthier industrialized nations fortify regimes aimed at precluding access to their borders, the only option for refugees who can escape their nations is to seek safety in neighboring nations. However, as such already-overburdened nations strain to accommodate their fair share of refugees, incidents of anti-immigrant violence and civil unrest are on the rise.<sup>244</sup>

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*Id.* at 385–86. Moreover, as in the case of Gambia imprisoning migrants for attempting to immigrate unlawfully to Spain, *supra* note 160, if the migrants were in search of refugee protection, Gambia's actions, and perhaps those of Spain, subvert access to refugee protection and should be held to violate the Refugee Convention.

242. Goodwin-Gill & McAdam, *supra* note 199, at 387.

243. For example, Asylum Liaison Officers are posted in Kenya, Sri Lanka, Bangladesh, Russia, and Romania. These are countries that have extensively-documented human rights violations, and that tend to be refugee-producing or en transit nations for refugees seeking to access effective Refugee Convention protection. See Joint Refugee Council & Oxfam International, *supra* note 97, at 5–6.

244. The anti-immigrant violence that erupted in South Africa in May 2008 is one example of this. Beginning in Johannesburg, the violence was aimed at migrants from Zimbabwe and other African nations who are perceived as harder-working and better-educated. The violence quickly spread from Johannesburg to seven other provinces, displacing approximately 80,000 immigrants and forcing the South African government to set up new refugee camps. See *S. Africa to Set up Migrant Camps*, BBC, May 28, 2008, <http://news.bbc.co.U.K./2/hi/africa/7422887.stm>; Barry Bearak & Celia W. Dugger, *South Africans Take Out*

Although ostensibly aimed at reducing unlawful migration by stopping those who lack proper immigration documentation, the use of asylum liaison officers punishes refugees in a way that violates the Refugee Convention. The drafters of the Refugee Convention recognized that refugees might have to rely on irregular documents in order to escape their countries and seek asylum. With this in mind, the Convention explicitly prohibited states from punishing refugees for using fraudulent documents to escape persecution.<sup>245</sup>

Rather than simply relying on refugee law, the rights of refugees (and therefore the obligations the state owes to refugees) must be analyzed within a broader context of international law, with particular attention paid to the jurisprudence of the European Court of Human Rights.<sup>246</sup> Under international law, whether a state is obligated to adhere to its international protection mandates is determined based on the state's actions toward the individual, regardless of whether the individual is inside or outside the territory of the State, including circumstances where states are controlling their land and sea borders.<sup>247</sup>

In the context of challenging interception and interdiction actions carried out by EU Member States, the European Convention

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*Rage On Immigrants*, N.Y. Times, May 20, 2008, at A1. The displacement of large numbers of Iraqi refugees into neighboring countries provides another example. In Jordan, the presence of approximately 700,000 Iraqi refugees has been linked with a soaring unemployment rate, a lowering of wages, and a tripling of the price of housing and basic commodities, all of which result in resentment toward the refugee population. Similarly, Syria has taken in approximately 1.4 million Iraqi refugees, and although the nation has maintained an open door policy and has welcomed the Iraqis, the strain on resources is diminishing the way in which the Iraqis are perceived by the general public in Syria. See Sumedha Senanayake, *Iraq: Refugee Crisis Could Become Regional Security Threat*, Radio Free Europe, July 19, 2007, available at <http://www.rferl.org/content/article/1077719.html>.

245. [T]he Contracting states shall not impose penalties, on account of their illegal entry or presence, on refugees who, coming directly from a territory where their life or freedom was threatened in the sense of Article 1, enter or are present in their territory without authorization, provided they present themselves without delay to the authorities and show good cause for their illegal entry or presence.

Refugee Convention, *supra* note 9, at art. 31(1)

246. See Gil-Bazo, *supra* note 131, at 594.

247. *Id.* at 594, 599. Jurisdiction by a state would also be established through state action in entering into readmission agreements, interception at sea, or subsequent removals to "safe countries." *Id.*

on Human Rights (ECHR) is particularly salient. Article 3 of the ECHR guarantees that “no one shall be subject to torture or to inhuman or degrading treatment or punishment.”<sup>248</sup> Unlike the Refugee Convention which, pursuant to a literal textual interpretation, applies solely to “persons . . . outside of their country of nationality, or for those without a nation, outside their last country of habitual residence,” Article 3 of the ECHR does not contain geographical limitations.<sup>249</sup> In *Soering v. United Kingdom*, the European Court of Human Rights affirmed the extraterritorial applicability of Article 3 in situations in which a country’s expulsion placed an individual in danger.<sup>250</sup>

The Court similarly recognized the extraterritorial application of the ECHR in *Loizidou v. Turkey*.<sup>251</sup> In that case, the Court mapped out three different scenarios in which jurisdiction may be established, notwithstanding that the acts occurred outside of the state’s territory. The first is when the extradition or expulsion of a person by a state party gives rise to a violation of the Article 3 prohibition on torture or other degrading or inhumane treatment or punishment. The second scenario is when acts of the contracting state’s authorities, either inside or outside the state’s territory, produce results outside the state’s territory. And the third is when, through military action (lawful or unlawful), the state exercises effective control of an extraterritorial area.<sup>252</sup>

As the European Court of Human Rights has stated, an interpretation of jurisdiction under Article 1 that includes acts carried out by state agents or under state authority, lawful or unlawful, is necessary to ensure that “a State party [is not allowed]

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248. European Convention on Human Rights, *supra* note 41.

249. See Refugee Convention & U.N. Protocol, *supra* notes 27 & 28. However, I argue that, in keeping with the intent and spirit of the Refugee Convention, signatory states must not be allowed to subvert their treaty obligations by entering the refugee’s state to deny access to protection. Many scholars have also argued that the Refugee Convention’s prohibition on refoulement should be interpreted so as to apply extraterritorially. See, e.g., Angus Francis, *Bringing Protection Home: Healing the Schism Between International Obligations and National Safeguards Created by Extraterritorial Processing*, 20 Int’l J. Refugee L. 273 (2008) (citing prominent scholars and noting the lack of territorial attachment applicable to Article 33 of the Refugee Convention, especially in comparison with other Convention obligations).

250. 11 Eur. Ct. H.R. (ser. A) (1989).

251. 20 Eur. Ct. H.R. (1995).

252. *Id.* at 101.

to perpetrate violations of the Convention on the territory of another State, which it could not perpetrate on its own territory.”<sup>253</sup> This ruling, which effectively levels the distinction between territorial border enforcement and extraterritorial border enforcement in the context of the Refugee Convention, is critical to the prevention of future human rights abuses.

### C. Holding Nations Accountable

The increasing use of informal agreements between EU Member States and refugee-sending nations cannot insulate states from international human rights obligations. The outsourcing of refugee processing is reminiscent of the way in which the United States’ labor needs are increasingly outsourced to poorer, developing nations, oftentimes regardless of these nations’ human rights policies. In fact, the very appeal of outsourcing in the labor context is often the unscrupulous attempt to avoid American domestic laws and regulations that impose requirements on businesses, including laws aimed at ensuring a safe workplace, adherence to minimum wage laws, or compliance with child labor laws (all of which, of course, increase the costs of production).

Although there are strong arguments against outsourcing or moving production to poor countries that fail to protect workers, private businesses can all too often skirt domestic labor laws by employing foreign workers abroad.<sup>254</sup> In contrast, governments cannot avoid discharging their human rights obligations simply by posting a liaison officer in a foreign country or stopping a patera in international waters. After all, upholding the refugee protection

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253. *Issa and Others v. Turkey*, App. No. 31821/96 (2004).

254. For example, Title VII of the Civil Rights Act limits its extraterritorial scope to situations involving American workers employed by American companies abroad. See 42 U.S.C. § 2000e(f) (2006) (responding to the Supreme Court’s ruling in *E.E.O.C. v. Arabian-American Oil Co.*, 499 U.S. 244 (1991), by amending the definition of employee under Title VII to clarify that “[w]ith respect to employment in a foreign country, such term includes an individual who is a citizen of the United States.”). *But see* Erin Murdock, *The Result of Disparate Treatment of Third-Country Alien Employees in Multinational Enterprises: a Class Distinction*, 43 *Texas Int’l L.J.* 325 (2008) (arguing that Title VII should apply to all employees of American companies operating abroad, regardless of alienage).

regime is an international obligation, not simply a domestic one that can cleverly be avoided through outsourcing.<sup>255</sup>

As with the outsourcing of jobs, the outsourcing of torture—or “extraordinary rendition”—provides another lens through which to view this problem.<sup>256</sup> In the context of the American extraordinary rendition program, there is compelling evidence to suggest that the United States *purposely* sends particular detainees to particular nations that are known to engage in torture.<sup>257</sup> Although perhaps lacking the intent present in cases of extraordinary rendition, EU Member States engage in a similar practice when they outsource their responsibility for refugees to nations that are known to disregard the Refugee Convention or that clearly do not have the economic ability or infrastructure to adequately handle refugee claims. Moreover, the highly controversial proposals for extraterritorial processing of asylum claims would detain asylum seekers in third countries such as Albania, Russia, or the Ukraine—nations in which harsh economic and human rights conditions would certainly deter legitimate claims to international protection.<sup>258</sup>

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255. The EU, and individual Member States, are also bound to respect a host of other international obligations, including those imposed by the Torture Convention, the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights, and the European Convention on Human Rights.

256. For a fascinating overview of the evolution and post-9/11 expansion of the United States’ extraordinary rendition program, see Jane Mayer, *Outsourcing Torture: The Secret History of America’s “Extraordinary Rendition” Program*, *The New Yorker*, Feb. 14, 2005, at 2, available at [http://www.newyorker.com/archive/2005/02/14/050214fa\\_fact6](http://www.newyorker.com/archive/2005/02/14/050214fa_fact6) (noting that the most common destinations for rendered suspects—Egypt, Morocco, Syria, and Jordan—are also known human rights violators and torturers).

257. *Id.*

258. For example, in 2003, the United Kingdom proposed that the European Union establish “transit processing camps” outside EU territory to hold asylum seekers. Germany and Italy have both advocated for establishing similar camps in Libya to stop migrants from attempting the Mediterranean Sea crossing. David A. Martin et al, *Forced Migration Law and Policy* 634 (2007). It is also essential to bear in mind that the impetus for external border controls and extraterritorial processing was the United States’ use of the Guantánamo Naval Base to detain and provide lesser protections to Haitian asylum seekers in the 1990s. See, e.g., Jeff Crisp, *A New Asylum Paradigm? Globalization, Migration and the Uncertain Future of the International Refugee Regime*, UNHCR (2003) at 12, available at <http://www.unhcr.org/cgi-bin/texis/vtx/research/opendoc.pdf>.

Extraordinary rendition, unlike the outsourcing of labor, violates numerous human rights treaties and conventions.<sup>259</sup> The United Nations Human Rights Committee has suggested that a country knowingly sending a prisoner to another state where he would be in danger of torture would violate the purpose of Article 7 of the ICCPR.<sup>260</sup> “The right to be free from torture,” the Human Rights Committee (the body charged with interpreting the ICCPR) ruled in another case, “requires . . . that the State party not only refrain from torture but take steps of due diligence to avoid a threat to an individual of torture from third parties.”<sup>261</sup> The Human Rights Committee has placed greater weight on the issue of control over individuals, rather than limiting itself to analyzing a state’s territorial control.<sup>262</sup>

Returning asylum seekers without allowing them to seek asylum similarly violates numerous international human rights

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259. See e.g., Universal Declaration, *supra* note 39 (prohibiting torture, cruel, inhuman, or degrading treatment or punishment, and securing rights to liberty and security); ICCPR, *supra* note 12 (prohibiting torture, cruel, inhuman, or degrading treatment or punishment); International Covenant on Economic, Social and Cultural Rights art. 1, Dec. 16, 1966, 993 U.N.T.S. 3 (securing individuals’ economic, social, and cultural rights, thereby implicitly prohibiting extraordinary rendition); Convention Against Torture, *supra* note 35 (banning torture); The Vienna Convention on Consular Relations, *adopted* Apr. 24, 1963, art. 36, 21 U.S.T. 77, 100-1, 596 U.N.T.S. 261, 292 (entered into force Mar. 19, 1967) (mandating access to national consulates); Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, Aug. 12, 1949, 6 U.S.T. 3114, 3217, 75 U.N.T.S. 31, 85 (entered into force Oct. 21, 1950) (prohibiting torture, cruel, inhuman, or degrading treatment or punishment). In the context of defending its practice of extraordinary rendition, the United States has argued that human rights treaties, or parts of such treaties, are inapplicable in geographic locations outside of United States territory. But “[t]his argument attempts to exploit the ongoing debate about the proper scope of application of international human rights treaties by carving out a space where no human rights law applies.” Margaret L. Satterthwaite, *Rendered Meaningless: Extraordinary Rendition and the Rule of Law*, 75 Geo. Wash. L. Rev. 1333, 1351 (2007).

260. A.R.J. v. Australia, United Nations Human Rights Committee, 60th Sess., Comm. No. 692/1996, U.N. Doc. CCPR/C/60/D/692/1996, para. 3.3 (July 28, 1997).

261. Ahani v. Canada, United Nations, Human Rights Committee, 80th Sess., Comm. No. 1051/2002, U.N. Doc. CCPR/C/80/D/1051/2002, par. 10.6 (Mar. 29, 2004).

262. See Margaret L. Satterthwaite, *Rendered Meaningless: Extraordinary Rendition and the Rule of Law*, 75 Geo. Wash. L. Rev. 1333 (2007).

guarantees.<sup>263</sup> This is also true of EU actions to push back migrants and refugees to countries that are known to violate human rights, as occurs through the informal agreements with countries like Morocco and Libya. Although a literal reading of the ICCPR would limit its protection to a signatory state's violations against "individuals within its territory and subject to its jurisdiction," the Human Rights Committee has interpreted the scope of its protection mandate more broadly.<sup>264</sup> The Committee has ruled that a person need not be located within a state's territory in order for that state to have obligations toward that person.<sup>265</sup> Rather, the state's obligations pursuant to the ICCPR attach when a person is "within the power or effective control" of the state.<sup>266</sup> Similarly, Article 16 of the Convention Against Torture prohibits torture carried out by a state or "any territory under [the state's] jurisdiction."<sup>267</sup>

Certainly in the context of FRONTEX actions at sea, the FRONTEX agents have exclusive control over the migrants. If migrants are not allowed to seek international protection and are forcibly returned, such refoulement violates the Refugee Convention, the ICCPR, the Convention against Torture, and other applicable Conventions such as the ECHR. The argument under the Refugee Convention is strongest as to interception efforts outside of the migrant's territorial waters. However, interception efforts that are carried out within the migrant's territorial waters should still be held to violate the prohibition against refoulement and torture, or other degrading or inhuman treatment, as incorporated into the ICCPR, CAT or ECHR.

In spite of these international human rights treaties, Spain and Italy, both Member States on the southern border of the

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263. Article 14 of the Universal Declaration on Human Rights guarantees all persons the right to seek and enjoy asylum. Many of the guarantees in the Universal Declaration on Human Rights, including this one, have been codified through the ICCPR, *supra* note 12.

264. See U.N. Hum. Rts. Comm., Gen. Comment No. 31: Nature of the General Legal Obligation Imposed on State Parties to the Covenant, ¶ 10, U.N. Doc. CCPR/C/21/Rev.1/Add.13 (May 29, 2004).

265. *Id.*

266. *Id.* See also David Weissbrodt & Amy Bergquist, *Extraordinary Rendition: A Human Rights Analysis*, 19 Harv. Hum. Rts. J. 123, 134 (2006) (describing extraordinary rendition as an emergent human rights violation and surveying international human rights instruments that support such a view).

267. Convention Against Torture, *supra* note 35, at art. 16.

European Union, have taken actions to push back migrants and refugees to Morocco and Libya, respectively. Both Morocco and Libya are nations known to violate human rights. Libya, in fact, is not even a signatory to the Refugee Convention.<sup>268</sup> Morocco's human rights record is little better.<sup>269</sup> In Spain, the Comisión Española de Ayuda al Refugiado (CEAR) filed a complaint against Morocco with the United Nations Committee against Torture on behalf of thirty-four recognized refugees for multiple violations of their protected rights under the Convention Against Torture.<sup>270</sup> The claimed violations arose when Moroccan officials raided the barrios of black immigrants in the middle of the night to deport them. Although many of the immigrants were refugees with official refugee documents issued by the UNHCR, the authorities threw them out. The Moroccan newspapers described this action as an effort to stem European migration, carried out "in the framework of cooperation with the European Union and the Spanish authorities."<sup>271</sup>

Although there is insufficient evidence to show that the European Union or Spain, in particular, should be held liable for Morocco's treatment of refugees, they may have been complicit in human rights violations. Spanish authorities were aware of Morocco's failure to respect its obligations under the Refugee

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268. There are currently 146 nations that are signatories either to the Refugee Convention, the Refugee Protocol, or both. The Office of the United Nations High Commission for Refugees, *The 1951 Refugee Convention: Questions & Answers* 16 (2007), <http://www.unhcr.org/basics/BASICS/3c0f495f4.pdf>.

269. In 2007, Amnesty International reported that Morocco engaged in unlawful expulsions of refugees, asylum seekers, and migrants. Amnesty International, *Amnesty International Report 2007—Morocco/Western Sahara*, May 23, 2007, available at <http://report2007.amnesty.org/eng/Regions/Middle-East-and-North-Africa/Morocco-Western-Sahara>.

270. Comisión Española de Ayuda al Refugiado (CEAR), *Al Comité Contra La Tortura De Naciones Unidas*, Comunicación No. 321/2007, available at <http://www.cear.es>.

271. *Id.* In addition to violations of the right to be free from torture or cruel and unusual or degrading treatment, the refugees also alleged additional violations, including: violations of the right to respect for life and physical and moral integrity without arbitrary interference, as protected by: Article 4 of the 1981 African Charter on Human Rights; Article 7.1 of the U.N. Declaration on the Elimination of all Forms of Racial Discrimination; Article 5 of the African Charter on Human Rights; Article 9 of the International Pact on Civil and Political Rights; Articles 13 and 14 of the Agreement of Principles for the Protection of all persons subjected to any form of detention or prison; and Article 14 of the ICCPR. *Id.* at 20–21.

Convention. But they nonetheless chose to team up with Morocco in their attempt to stem the flow of refugees into the European Union. And when Moroccan authorities violated refugees' human rights and engaged in massive repatriations, they reported that they were doing it, at least in part, to please Europe.<sup>272</sup>

These problems extend beyond Morocco. Amnesty International reports that West African nationals in Mauritania claim to have been "arbitrarily arrested in the street or at home and accused, apparently without any evidence, of intending to travel to Spain."<sup>273</sup> According to Mauritanian security forces, in 2007 they held 3,257 people at the Nouadhibou detention center, before abandoning them without food or transport at the border of Senegal and Mali, regardless of their nationality or country of origin.<sup>274</sup> Mauritania's brutal policies have been attributed to its efforts to placate the European Union and Spain, in particular.<sup>275</sup> This political and economic pressure to appease Europe has resulted in African governments becoming "the de facto 'policemen of Europe.'"<sup>276</sup>

If the European Union continues to enter into clandestine agreements on immigration and border enforcement with nations that are known to disregard human rights and international protection norms, the international refugee regime will be further eroded. There are also reputational costs to such reckless behavior. The European Union runs the risk of losing legitimacy in much the same way as the excesses of the war on terror have stained the international reputation of the United States.<sup>277</sup>

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272. See *supra* notes 269–271 and accompanying text. Spain has also earmarked development money to Mauritania to be used for detention centers to hold unlawful migrants. Amnesty Int'l, *Morocco Report*, *supra* note 269.

273. Amnesty International, *Migrants Face Illegal Arrest in Mauritania*, AI-Index AFR 38/001/2008, July 2, 2008, <http://www.amnesty.org/en/news-and-updates/report/migrants-face-illegal-arrest-in-mauritania-20080702> (noting that the "policy of arrests and collective expulsions by the Mauritanian authorities is the result of intense pressure exerted on Mauritania by the European Union (EU), and Spain in particular, as they seek to involve certain African countries in their attempt to combat irregular migration to Europe").

274. *Id.*

275. *Id.*

276. *Id.*

277. See, e.g., Kermit Roosevelt III, *Detention and Interrogation in the Post-9/11 World*, 42 *Suffolk U. L. Rev.* 1, 36 (2008) (discussing the reputational costs of America's abuse of power and use of torture in the war on terror).

#### D. Taking into Account Foreseeable Risks

Notwithstanding the foreseeable and rising death toll associated with enhanced border enforcement efforts, the United States and the European Union continue to approach the regulation of their borders as an absolute sovereign right. The right of a nation to control its borders has always been recognized as an important component of sovereignty. But it is not an absolute right. It is a right that must be balanced against international human rights, such as the right to life and the right to seek and enjoy asylum. Unfortunately, international law has not yet developed to the point where deaths associated with border controls are clearly actionable under any one treaty or convention. But an examination of both the overall impact of externalization efforts and the potentially applicable international laws allows for a reconceptualization of a more just and humane regime with protection duties owed to migrants and refugees.

The case against the U.S.-Mexico border fence provides a compelling example of the importance—and shortcomings—of an international human rights-based approach to the human toll of border enforcement. In a complaint brought before the Inter-American Commission on Human Rights, scholars and advocates argued that the border fence violates international law because it has resulted in the foreseeable deaths of thousands of immigrants in search of a better life for themselves and their children.<sup>278</sup> Petitioners relied on the American Declaration of Human Rights to argue that “[e]very human being has the right to life, liberty and security of his person” and that this right is absolute and nonderogable, and therefore must be read consistently with the principle of good faith and the abuse of rights doctrine, so as to establish an affirmative

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278. Petition Alleging Violations of Human Rights of Persons Placed in Danger at the United States-Mexico Border by Actions and Inaction of the United States of America Pursuant to its “Operation Gatekeeper,” (1999), *available at* <http://www.povertylaw.org/poverty-law-library/case/52300/52321/52321a.pdf>. See also Sanchez et al. v. United States, Case 65/99, Inter-Am C.H.R., Report No. 104/05, OEA/Ser.L/V/II.125, doc. 5 ¶ 33 (2005), *available at* <https://www.cidh.oas.org/annualrep/2005eng/USA.65.99eng.htm> (summarizing the petitioners’ arguments and noting their citation of international cases standing for the proposition that a state’s right to use force to protect its security is limited by the requirements of proportionality and the state’s international human rights obligations).

obligation on the United States to ensure that its border policy does not undermine such guaranteed rights.<sup>279</sup>

In defense of its border control policy, the United States relied upon a nation's sovereign right to control its borders, and called into question whether the fence was the direct cause of the migrant deaths.<sup>280</sup> The United States argued in its brief that "the right to life is a decision that rests in the hands of an individual of whether or not to take the risk of crossing the harsh terrain of the U.S. southern border."<sup>281</sup>

The militarization of the U.S.-Mexico border has led untold numbers of migrants to their deaths.<sup>282</sup> The increased death toll that has resulted from the erection of the U.S.-Mexico fence comes as no surprise. Some commentators maintain that the United States knew of the risks associated with the construction of a border fence but continued the project nonetheless.<sup>283</sup> Others have gone further, asserting that the increased risk (and probable deaths) were not only foreseeable, but intentional.<sup>284</sup>

The United Nations International Law Commission has also drafted articles on state responsibility that prohibit states (or their actors) from taking actions that are wrongful under international law or pose a risk of causing serious harm. The International Law Commission's Articles on the Responsibility of States for Internationally Wrongful Acts prohibits states from actions or

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279. *Sanchez*, *supra* note 278.

280. Reply of United States at § IA, *Sanchez et al. v. United States*, Case 65/99, Inter-Am C.H.R., Report No. 104/05, OEA/Ser.L/V/II.125, doc. 5 (2005), available at <http://www.state.gov/s/l/2004/78086.htm>.

281. *Sanchez*, *supra* note 278, at ¶ 42. The complaint was ultimately found to be inadmissible based largely on the petitioners' failure to exhaust domestic remedies. *Id.* at ¶ 74.

282. See Kevin R. Johnson, *Opening the Floodgates: Why America Needs To Rethink Its Borders And Immigration Laws* 111 (2007). See also *Our Lethal Policies*, Editorial, *The Arizona Republic*, June 2, 2008, at B10 (describing the "season of death" along the Arizona-Mexico border and the increased numbers of deaths as U.S. immigration enforcement methods and policies have pushed migrants further into the desert, away from sources of water).

283. Johnson, *Opening the Floodgates*, *supra* note 282, at 112.

284. See, e.g., Jorge A. Vargas, *U.S. Border Patrol Abuses, Undocumented Mexicans Workers, and International Human Rights*, 2 *San Diego Int'l L.J.* 1, 69 (2001) (claiming that American immigration policy was "deliberately formulated to maximize the physical risks of Mexican migrant workers, thereby ensuring that hundreds of them would die").

omissions that violate the state's international obligations and are attributable to the state under international law.<sup>285</sup> The International Law Commission's International Liability for Injurious Consequences Arising Out of Acts Not Prohibited Under International Law prohibits states from engaging in hazardous activities, defined as those that involve a risk of causing significant harm.<sup>286</sup> Thus, in order to establish liability under these international laws, the state's border control measures would either need to be wrongful under international law or pose a risk of causing significant injury.

The case for border control as a wrongful act under international law is strongest with regard to refugees.<sup>287</sup> States that are signatories to the Refugee Convention or the U.N. Protocol are prohibited from returning refugees to danger. Therefore, it can be argued that states that engage in border control measures such as interception and repatriation at sea without access to refugee protections are committing internationally wrongful acts. In the context of the European Union, the important legal question is whether the cumulative effect of visa policies, carrier sanctions, the stationing of immigration officers in third countries, border control agreements with third countries, and EU interdiction efforts amounts to an activity that involves a risk of causing "significant harm."<sup>288</sup> Rather than analyzing the legality of the European Union's interception and interdiction efforts in isolation, they must be analyzed within the context of the "*de facto* although not necessarily *de jure* criminalization of the act of seeking asylum."<sup>289</sup>

The European Union collectively, as well as its southern Member States individually, have an obligation under Article 2 of the ECHR to protect against the loss of life resulting from its interdiction

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285. *Responsibility of States for Internationally Wrongful Acts*, *supra* note 11, at arts. 1–2.

286. United Nations International Law Commission, *Prevention of Transboundary Harm from Hazardous Activities*, art. 1, submitted to the General Assembly, U.N. Doc. A/56/10 (Aug. 10, 2001) [hereinafter *Transboundary Harm*].

287. Commentators have questioned whether border control, in and of itself, can fairly be characterized as a wrongful act. See Spijkerboer, *supra* note 113, at 136–37.

288. *Transboundary Harm*, *supra* note 286.

289. Canadian Council, *supra* note 77, at 12 (finding that the EU interception techniques have left people who are in need of international protection with no option other than to rely on smugglers and traffickers).

regime.<sup>290</sup> The European Court of Human Rights has held that the state has a positive duty to protect, which is triggered by “the State’s knowledge that a particular life is at risk and that same State’s ability to do something about it.”<sup>291</sup> Here, it is beyond dispute that the European Union and its southern Member States are both aware of the high fatality rate at sea and capable of saving many of those at risk.

With the development of a body of jurisprudence under the European Court of Human Rights, states now have a greater responsibility to take positive steps to protect from harm those under their jurisdiction. For example, the Court has held a state responsible for deaths occurring in an industrial accident.<sup>292</sup> In the context of a waste-treatment factory, the Court held that the “dangerous nature” of the activity gave rise to a positive obligation on the state to protect the right to life.<sup>293</sup> Although the Court has yet to consider a claim for loss of life resulting from a migration policy, the Court’s evolving jurisprudence may help to shift the paradigm of responsibility for the rising death toll from the migrant to the state.

#### E. Duties Towards Those Formerly Exploited

In mapping out his vision of distributive justice, political philosopher Michael Walzer argues that a society should have a special “affinity” for those “whom [it has] helped turn into

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290. See European Convention on Human Rights, *supra* note 41, at art. 2(1) (guaranteeing that “[e]veryone’s right to life shall be protected by law”). According to UNITED, a European anti-racism network, over 11,000 migrants have died since 1993 due to EU asylum laws, deportations, border controls, detention policies, and carrier sanctions. United, List of 11,105 Documented Refugee Deaths through Fortress Europe (2008), [http://www.unitedagainstracism.org/pdfs/actual\\_listofdeath.pdf](http://www.unitedagainstracism.org/pdfs/actual_listofdeath.pdf).

291. Spijkerboer, *supra* note 113, at 138. See also *Osman v. United Kingdom*, 87 Eur. Ct. H.R. (1998) (holding that the State is obligated to protect lives that are at risk).

292. *Öneryildiz v. Turkey*, App. No. 48939/99 Eur. Ct. H.R. (2002) (finding Turkey liable for the failure to prevent exposure to citizens from dangerous gasses).

293. For more on the European Court of Human Rights’ view that dangerous activity potentially gives rise to a positive obligation on the state to protect the right to life, see Dimitris Xenos, *Asserting the Right to Life (Article 2, ECHR) in the Context of Industry*, 8 German L. J., 231, 237 (2007) (analyzing *Öneryildiz v. Turkey*).

refugees.”<sup>294</sup> In other words, in certain instances the actual harm that a nation causes gives rise to a special relationship with those who have suffered the harm.<sup>295</sup> However, according to Walzer, such affinity can be undermined if there is no sense of connection with, or relatedness to, the particular victims.<sup>296</sup>

In the case of Haiti, the United States has engaged in conduct that has helped turn Haitians into refugees. However, rather than exhibiting a sense of affinity toward Haiti, U.S. immigration policy reflects a long-standing disconnection from the plight of the Haitian refugees.<sup>297</sup>

The United States’ relationship with Haiti—one marred by racism, exploitation, and political control—dates all the way back to the slave trade.<sup>298</sup> “Trade, the proximity of [Haiti], the flood of refugees to American seaports, and the cultural links between the slaveholding South and the Caribbean,” notes one historian, “meant that Americans were both interested and formally involved in the affairs of the troubled French colony from the beginning.”<sup>299</sup> Because

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294. Michael Walzer, *Spheres of Justice: A Defense of Pluralism and Equality* 49 (1983). According to Walzer’s theory, the community should be able to adopt criteria to limit the admission of outsiders to preserve community self-definition and promote shared community values. *Id.* at 35–42. *See also* Linda S. Bosniak, *Membership, Equality, and the Difference That Alienage Makes*, 69 N.Y.U. L. Rev. 1047, 1057–58, (1994) (finding Walzer’s theory helpful in understanding alienage, but limited with respect to his theory of alien status). Although beyond the scope of this article, it is worth noting that Walzer’s communitarian theory has been widely criticized for its restrictionist implications in the immigration debate. *See* Johnson, *Opening the Floodgates*, *supra* note 282, at 92–95.

295. Walzer, *supra* note 294, at 49.

296. *Id.* at 50.

297. This problem also inheres in the United States-Mexico relationship. *See* Johnson, *Opening the Floodgates*, *supra* note 282 (arguing that the symbiotic history of United States-Mexico relations calls for a heightened moral obligation on the part of the United States because until recently the U.S. did little to discourage Mexican migration and has benefited greatly from its laborers).

298. *See* Malissia Lennox, Note, *Refugees, Racism, and Reparations: A Critique of the United States’ Haitian Immigration Policy*, 45 Stan. L. Rev. 687, 690 (1993).

299. *Id.* *See also* Paul Farmer, *The Uses of Haiti* (1994) (detailing the slavery-scarred history of Haiti and her people). Transatlantic human trafficking started in 1517. By 1540, approximately 30,000 Africans had been brought to Hispaniola to work on the sugar plantations. *Id.* at 62. On the eve of the American Revolution, Haiti generated more revenue than all thirteen American colonies combined. *Id.* at 63. The Haitian slave revolt of 1791 reverberated in

of Haiti's geographic proximity to the United States, it has always been viewed as strategically important to U.S. security.<sup>300</sup> American control over Haiti has been a key component of its assertion of power over the Caribbean and has been essential to thwarting any European efforts to assert control in the region.<sup>301</sup>

Indeed, years of U.S.-installed and U.S.-supported dictatorships arguably have played a role in consigning Haiti to its status as the poorest country in the Western Hemisphere. From 1915 through 1934, the United States formally occupied Haiti.<sup>302</sup> The United States established and trained the notorious military *Gendarmerie d'Haiti* in 1917.<sup>303</sup> When the United States formally ended its occupation in 1934, it left behind a devastated economy and a population that was approximately ninety-five percent illiterate.<sup>304</sup> For more than the next fifty years, the United States supported the brutal dictatorships of Francois Duvalier ("Papa Doc"), his successor son, "Baby Doc,"<sup>305</sup> and their atrocious *Tonton Macoute* army.

On February 7, 1991, Jean Bertrand Aristide, a Roman Catholic priest steeped in liberation theology, ascended to the presidency after winning sixty-seven percent of the vote. He became the first democratically-elected president in Haitian history.<sup>306</sup>

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both Europe and the United States. At least a thousand Whites were killed as were over 10,000 slaves, with 25,000 more slaves fleeing to the hillside. *Id.* at 68. Haiti became the first independent nation in Latin America and the only instance of an enslaved population "breaking its own chains" and using force to defeat a powerful colonial power. *Id.* at 71.

300. Haiti is only 600 miles away from Florida and it lies along the only direct route from the American Atlantic seaboard to the Panama Canal. Ludwell Lee Montague, *Haiti and the United States: 1714–1938* 3 (1966). During the slave trade, Thomas Jefferson advocated exporting U.S. slaves to Haiti in order to insulate whites from a slave revolt at home and George Washington shipped his "unmanageable" slaves to Haiti. *Id.* at 68.

301. Lennox, *supra* note 298, at 692–93.

302. J. Michael Dash, *Haiti and the United States: National Stereotypes and the Literary Imagination* 22–44 (1997) (likening the United States' relationship with Haiti during these years to what Alice saw through her looking glass—the effect of living backwards). *See also* Girard, *supra* note 57, at 89 (asserting that for nineteen years Haiti was, "in fact if not in official rhetoric, an American colony").

303. Lennox, *supra* note 298, at 693–94.

304. Even after the U.S. occupation formally ended, the United States retained control of the Haitian treasury until 1947. *Id.* at 695.

305. *Id.*

306. Girard, *supra* note 57, at 114–16.

Notwithstanding the immense hope for democracy that President Aristide inspired among Haiti's impoverished residents, the vicious *Tonton Macoutes* overthrew him in a coup just seven months later, on September 30, 1991.<sup>307</sup>

In the years since 1991, when Jean-Bertrand Aristide first ascended to the presidency, the United States has maintained an active role in Haitian politics, beginning with economic and military assistance to reinstitute him to the presidency in October 1994, and then, according to President Aristide and much of the international community, orchestrating and supporting a coup to oust him from power and force him into exile in 2004, during his second term.<sup>308</sup>

As we have seen, nations consistently respond to periods of turmoil and heightened violence both at home and abroad by increasing vigilance at their borders. The U.S. response to Haiti has been no exception. After the 1991 military coup that ousted President Aristide, and in the face of massive known human rights abuses occurring in Haiti, the U.S. Coast Guard intercepted and turned back more than 40,000 Haitian refugees on the high seas without any opportunity to seek asylum.<sup>309</sup> Similarly, when the United States was actively involved in the 2004 overthrow of President Aristide, it stationed three of its own Coast Guard cutters less than a mile off the shore of Port-au-Prince to intercept would-be asylum seekers.<sup>310</sup> Most recently, when violence broke out in Haiti because of a food crisis and widespread starvation, rather than orchestrate a humanitarian response, the Coast Guard stated that it was "on the lookout for mass emigration."<sup>311</sup>

Notwithstanding the intertwined histories of the United States and Haiti, Haitians have always been seen as the "other," undermining the sense of obligation toward Haitian refugees that ought to exist.<sup>312</sup> The "othering" of Haitians dates back to the

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307. *Id.* at 122–25.

308. See Walt Bogdanich & Jenny Nordberg, *Democracy Undone: Mixed U.S. Signals Helped Tilt Haiti Toward Chaos*, N.Y. Times, Jan. 29, 2006, at A1.

309. See Natsu Taylor Saito, *Crossing the Border: The Interdependence of Foreign Policy and Racial Justice in the United States*, 1 Yale Hum. Rts. & Dev. L.J. 53, 61 (1998).

310. Hallward, *supra* note 70.

311. Marc Lacey, *In Wake of Protests, Haitian Leader Announces Rice Subsidies*, N.Y. Times, Apr. 13, 2008, at A14.

312. See Dash, *supra* note 302, at 1.

American attitudes to Haiti can be seen in terms of the

European slave trade with Africa.<sup>313</sup> The racism that fueled the slave trade also contributed to the characterization of Haitians as barbarians and cannibals, with the slave uprising in Haiti and the island's independence in 1804 sending a wave of fear across to the shores of America. Travelers to Haiti commented on the blackness of its people, and the image of Haitians as cannibals and voodoo worshippers took hold.<sup>314</sup> Haitians were described as "dumb, drumming, demoralized, and up to no good."<sup>315</sup>

In the instances of mass migration by sea of Haitians to the United States or of Africans to the southern EU states, race also plays a significant role in shaping the policy response.<sup>316</sup> One scholar has explained the impact of race on immigration in the following way:

In the end, we must understand that the impact of racially exclusionary immigration laws does more than just stigmatize domestic minorities. Such laws reinforce domestic subordination of the same racial minority groups who are excluded. By barring admission of the outsider group that is subordinated domestically, society rationalizes the disparate treatment of the domestic racial minority group in question and reinforces that group's inferiority. Exclusion in the immigration laws must be viewed as an integral part of a larger mosaic of racial discrimination in American society.<sup>317</sup>

In the context of Haitian interdiction and the *Sale* decision, commentators have explored the role of race as a motivating factor behind both the interdiction and repatriation decisions, and as an

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creation of self-serving or rather self-aggrandizing images designed to tame the alien or threatening world on the outside. These images acquire a cumulative force over time and consistently resurface in order to define and reconstruct Haiti in terms which emphasize its difference or 'Otherness.'

*Id.*

313. See generally Lawless, *supra* note 53, at 30–48 (discussing origins of foreigners' biases against Haitians).

314. *Id.* at 33 (uncovering popular travel guidebooks from the turn of the twentieth century explaining that Haitians inherited "African savagery" from "their barbarous ancestors in Africa").

315. *Id.* at 34.

316. See Johnson, *Opening the Floodgates*, *supra* note 282, at 89 (asserting that immigration law "allows the United States to do at its borders what it cannot do within them").

317. *Id.* at 153.

explanation for the lack of public outcry against the policy.<sup>318</sup> Indeed, a comparison of the immigration regime's treatment of similarly-situated Cuban and Haitian boat people reveals a history of unequal protection under the law. In stark contrast with the "shout test" required of intercepted Haitians, Cubans are subjected to a more generous "wet foot/dry foot policy." Under the "wet foot/dry foot policy," Cubans who are interdicted before they reach U.S. shores are advised of the right to seek asylum. If they elect to do so, they are then sent to Guantanamo, where, as detainees, they are granted a refugee determination interview. In contrast, those who reach dry land in the United States fare much better—they are generally allowed to remain in the United States, pursuant to the Cuban Adjustment Act of 1966.<sup>319</sup>

In a challenge to a U.S. Immigration and Naturalization Service (INS) "program" for Haitian asylum seekers that denied all 4,000 Haitian asylum claims brought under the program, a federal

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318. See, e.g., Kevin R. Johnson, *The Moral High Ground? The Relevance of International Law to Remedying Race Discrimination in U.S. Immigration Laws, in Moral Imperialism: A Critical Anthology* 285, 291 (Berta Esperanza Hernández-Truyol eds., 2002) (arguing that "domestic concerns about a mass migration of black refugees" affect immigration policy); Charles J. Ogletree, Jr., *America's Schizophrenic Immigration Policy: Race, Class, and Reason*, 41 B.C. L. Rev. 755, 756 (2000) (noting that the immigration laws' differential treatment of Haitians and Cubans has a "clear racial impact when refugees from Cuba and Haiti are compared"). Reverend Jesse Jackson has opined that the disparate treatment "reflects racism in U.S. immigration policy that allows preferential treatment for Cuban refugees but not for those with darker skin colors from Haiti and elsewhere." *Id.*

319. See Felix Roberto Masud-Piloto, *With Open Arms: Cuban Migration to the United States* 119 (1988). Such differential treatment has been widely criticized. See, e.g., Philip W. D. Martin, *Perspective on Refugees; Cuba, Haiti: Racism or Hypocrisy?; Cubans and Haitians Arrive in the Same Boat but Only One Group is Detained; U.S. Policy is Dreadfully Wrong*, L.A. Times, Mar. 17, 1994, at B7 ("Racism, too, can not be discounted as a factor for the disparate treatment of Cubans and Haitians. For starters, Haitians have been identified, with great exaggeration, as carriers of the HIV virus. And so, on the same beaches where "white" Cubans are greeted with open arms, Haitians are plucked from the surf by police wearing surgical gloves and masks."); Laurence Jolidon, *Haitian Policy Called 'Immoral' // Telling People to Seek Visas 'Surrealistic'*, USA Today, May 27, 1992, at 1A (quoting Charles Rangel, a member of the Congressional Black Caucus, as saying that the policy wouldn't be in place if the refugees weren't black or poor. "It's a racial thing, it's an economic thing and it's a political thing because it's an election year. People don't want poor black folks coming here").

judge noted that “the first substantial flight of black refugees from a repressive regime to this country” found themselves “confronted with an Immigration and Naturalization Service determined to deport them . . . despite whatever claims to asylum individual Haitians might have.”<sup>320</sup> Senators, scholars, and historians have also commented on the role that race has played in the treatment of Haitian immigrants.<sup>321</sup>

The racial dynamics of exclusion play out similarly in the relationship between the European Union and African nations. For example, despite Nigeria’s poor human rights record, particularly towards certain ethnic groups, Spain’s grant rate for asylum applications from Nigeria is dramatically lower than for asylum seekers from non-African nations such as Colombia, Cuba, or Bangladesh.<sup>322</sup>

In both the United States-Haiti and European Union-Sub-Saharan Africa contexts, race has been combined with new national security language to incite fear.<sup>323</sup> When referring to boat people,

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320. Haitian Refugee Ctr. v. Civiletti, 503 F.Supp. 442, 451, 532 (S.D. Fla. 1980), *aff’d as modified sub nom.* Haitian Refugee Ctr v. Smith, 676 F.2d 1023 (5th Cir. Unit B 1982).

321. For example, Republican Senator Alan Simpson of Wyoming described United States policy toward Haitians as “racist” but stated that it was “hard [for Congress] to do anything when nobody gives a damn.” Denise M. Bostdorff, *Rhetorical Ambivalence, Bush and Clinton Address the Crisis of Haitian Refugees, in Who Belongs in America* 206, 237 (Vanessa B. Beasley ed., 2006) (quoting Senator Alan Simpson, Address at Conference on Presidential Rhetoric and the Politics of Immigration: A Noble National Goal Swirling Around Emotion, Fear, Guilt, and Racism (Mar. 3, 2001)). This seemingly racially discriminatory immigration policy toward Haitians is in violation of the International Convention on the Elimination of All Forms of Racial Discrimination (CERD). This treaty, signed by the President and ratified by Congress but never executed through implementing legislation, prohibits racial discrimination with regard to basic rights, including: the right to leave any country (including one’s own) and return; the right to equal treatment before the tribunals and all other organs administering justice; the right of freedom of movement; and the right of residence within the borders of the state. International Convention on the Elimination of all forms of Racial Discrimination, Dec. 21, 1965, 660 U.N.T.S. 195.

322. CEAR Externalization Report, *supra* note 104, at 7.

323. One commentator has described racial discrimination as “the driving force behind United States immigration policy” toward Haitians. Lennox, *supra* note 298, at 714. On a broader level, commentators have also suggested that the fact that many asylum seekers hail from nations commonly associated with radical Islam and political violence has also led to an outcry against asylum

whether from from Sub-Saharan Africa or Haiti, the media uses words like currents, avalanches, floods, and waves, “suggest[ing] that immigration is irrational and uncontrollable, and certainly dangerous.”<sup>324</sup> Such unfortunate turns of phrase remind us of the central, if sometimes latent, role that racial dynamics continue to play in the debate over immigration policy. It is no wonder, considering Europe’s—and, especially, the United States’—history of race relations, that immigration policies so bound up with questions of race are in such desperate need of reform.

### CONCLUSION

The perilousness of the waters that separate Africa from Europe and Haiti from the United States do not drown out the hope for a better life that motivates both refugees and migrants to attempt dangerous sea crossings. Dramatic disparities in human rights and economic opportunities between sending and receiving nations make continued migration both foreseeable and inevitable.<sup>325</sup> The EU and

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seekers. As Jeff Crisp, chief of the evaluation and policy analysis unit of the UNHCR’s global headquarters has noted, “[I]t could be argued that an important connection exists between the ‘war on terror’ and the mounting challenge to asylum since the events of ‘9/11.’” Jeff Crisp, *A New Asylum Paradigm*, *supra* note 258, at 9.

324. Kitty Calavita, *Immigrants at the Margins: Law, Race, and Exclusion in Southern Europe* 138 (2005) (internal citations omitted).

325. The economic disparity that exists between Haiti and the United States or between Sub-Saharan Africa and Spain (or other southern EU states) is dramatic. According to the United Nations Human Development Index for 2007/2008, out of 177 countries, the United States is ranked 12 and Haiti is ranked 146 in order of most to least developed. United Nations Development Department, *Human Development Report 2007/2008: Fighting Climate Change: Human Solidarity in a Divided World* 225 (2007), available at [http://hdr.undp.org/en/media/HDR\\_20072008\\_EN\\_Complete.pdf](http://hdr.undp.org/en/media/HDR_20072008_EN_Complete.pdf). Similarly, Spain is ranked 13 and Senegal 156. *Id.* at 229, 231. In terms of human rights conditions, the U.S. State Department reports that in Haiti in 2007, “despite some improvements, the government’s human rights record remained poor.” U.S. Department of State, Bureau of Democracy, Human Rights, and Labor, *Haiti Country Report on Human Rights Practices* (2008). In Senegal, “domestic violence, rape, sexual harassment, and discrimination against women were serious problems. Female Genital Mutilation (FGM) was widespread. Child abuse, child marriage, male and female infanticide, trafficking in persons, and child labor were reported.” U.S. Department of State, Bureau of Democracy, Human Rights, and Labor, *Senegal Country Report on Human Rights Practices* (2008).

U.S. actions to undermine other forms of access to protection force an increasing number of refugees into the riskiest of sea crossings. In the words of a Sudanese man in Italy, “I considered returning to Sudan but thought I would try my luck in Europe and leave it to God: either I would die or survive, I would try it out . . . . I knew the journey to Italy was dangerous and that I could die.”<sup>326</sup> The steps taken to date to prevent this migration by sea have contributed to the death of untold numbers of refugees. A policy of “willful blindness” towards the known, cruel consequences of border control policies is both immoral and should be held to violate the obligation under international law to avoid actions that “involve[] a risk of causing significant harm.”<sup>327</sup>

This externalization of the borders into the seas between sending and receiving nations—and especially onto the lands of sending nations—is unprecedented. To prevent this extension of borders from circumventing the provisions of the Refugee Convention, the Convention should be read—or, even better, amended—to apply to individuals seeking to flee a country for protection whether or not that individual is outside of her nation of origin. Additionally, the individuals that make up this unyielding flow of immigrants should not be broadly, and incorrectly, labeled as economic refugees. Immigrants qualifying as refugees under the Convention are unquestionably part of the migrant flow. The process used by FRONTEX and the European Union, as well as the United States, to intercept and send back or resettle immigrants in third party countries that are not signatories to the Convention or have a history of human rights abuses, should not be tolerated.

Before any migrant is returned, she should be afforded due process, including, at a minimum, the opportunity for an interview with an asylum officer and the right to an attorney. In addition, FRONTEX must have transparent policies to ensure that refugees are given appropriate access to international protection. Rather than merely focusing on border control measures and limiting access to protection, there is a need for long-term solutions that address the

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326. See Hamood, *supra* note 170, at 36.

327. See U.N. International Law Commission, International Liability for Injurious Consequences Arising Out of Acts Not Prohibited by International Law, U.N. Doc. A/CN.4/L.686 (May 26, 2006).

root causes of migration, such as inequality, lack of opportunities, and human rights violations in the sending countries.<sup>328</sup>

The United States' interception and forced repatriation of thousands of Haitian refugees in the 1990s, without any attention to its obligations under the Refugee Convention, lowered the protection threshold for all refugees, as demonstrated both by the EU externalization efforts and the dramatically weakened global protection regime. Because of America's unique influence, both actual and symbolic, American leadership can reshape the way that other nations interpret their international obligations.<sup>329</sup> By repudiating its policy of interdiction at sea and by providing greater access to international protection, the United States could lead the way to a more just international protection regime.

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328. One positive example of this was the November 2006 EU-Africa Ministerial Conference with a focus on long-term solutions. Hamood, *supra* note 170, at 34.

329. See Mariano-Florentino Cuellar, *The Limits of the Limits of Idealism: Rethinking American Refugee Policy in an Insecure World*, 1 Harv. L. & Pol'y Rev. 401 (2007) (similarly arguing for a shift in U.S. refugee policy).