



COLUMBIA LAW SCHOOL

HUMAN RIGHTS CLINIC

IN THE EUROPEAN COURT OF HUMAN RIGHTS
APPLICATION No. 27765/09

HIRSI AND OTHERS
V.
ITALY

WRITTEN COMMENTS OF THE
COLUMBIA LAW SCHOOL HUMAN RIGHTS CLINIC
AFRICAN REFUGEE DEVELOPMENT CENTER
ALLARD K. LOWENSTEIN INTERNATIONAL HUMAN RIGHTS CLINIC AT YALE LAW SCHOOL
CENTER FOR SOCIAL JUSTICE AT SETON HALL UNIVERSITY SCHOOL OF LAW
FLORIDA COASTAL SCHOOL OF LAW IMMIGRANT RIGHTS CLINIC
INSTITUTE FOR JUSTICE & DEMOCRACY IN HAITI
MIGRANT AND REFUGEE RIGHTS PROJECT OF THE AUSTRALIAN HUMAN RIGHTS CENTRE
AT THE UNIVERSITY OF NEW SOUTH WALES SCHOOL OF LAW
PHYSICIANS FOR HUMAN RIGHTS
PROFESSORS JAMES GATHII, TALLY KRITZMAN-AMIR,
STEPHEN H. LEGOMSKY & MARGARET L. SATTERTHWAITE

17 APRIL 2010

I. INTRODUCTION

1. These written comments are respectfully submitted on behalf of the Columbia Law School Human Rights Clinic, African Refugee Development Center, Allard K. Lowenstein International Human Rights Clinic at Yale Law School, Center for Social Justice at Seton Hall University School of Law, Florida Coastal School of Law Immigrant Rights Clinic, Institute for Justice & Democracy in Haiti, Migrant and Refugee Rights Project of the Australian Human Rights Centre at the University of New South Wales School of Law, Physicians for Human Rights and Professors James Gathii, Tally Kritzman-Amir, Stephen H. Legomsky and Margaret L. Satterthwaite (“Intervenors”) pursuant to permission of the President of the Grand Chamber of the European Court of Human Rights (“Court”) and in accordance with Rule 44(2) of the Rules of the Court.
2. Brief descriptions of each of the Intervenors are set out in Annex I. Together, the Intervenors have substantial expertise in advocating for full implementation of human rights norms in domestic and international migration policy, including before national, regional and international courts.
3. This case concerns the interdiction and summary return of African sea migrants by Italian authorities to Libya, raising the question of whether such conduct put Italy in breach of, *inter alia*, the *non-refoulement* obligation under Article 3 of the European Convention on Human Rights (“Convention”). It arises at a critical time. While irregular sea migration is not a new phenomenon, the international community has increasingly recognized the need to identify the legal constraints on migration control practices, including maritime interdiction, that may obstruct migrants’ access to protection and thereby expose them to the risk of torture or other harm. While, as described below, the Inter-American Commission on Human Rights and various United Nations bodies have made clear that such practices may contravene international human rights standards, this Court has yet to decide a case in this particular context.
4. These written comments provide guidance on international human rights standards and state practice regarding interdiction of sea migrants. Drawing on international and regional jurisprudence, the first section describes legal constraints on interdiction practices, including the extraterritorial applicability of the *non-refoulement* principle and the procedural protections that states owe interdicted migrants. The second section evaluates state practice, describing states’ traditional recognition of the protection needs of sea migrants. It also highlights the negative consequences of Australian and U.S. practices that do not comply with international human rights standards.

II. THE APPLICATION OF HUMAN RIGHTS PRINCIPLES TO INTERDICTION ON THE HIGH SEAS

- A. The *non-refoulement* principle applies extraterritorially and constrains interdiction practices that obstruct access to protection or expose migrants to the risk of harm.
5. This Court has consistently interpreted the *non-refoulement* principle “so as to make its safeguards practical and effective,” prohibiting conduct that would “plainly be contrary to the spirit and intention” of the Article 3 prohibition on torture and ill-treatment, even where such conduct is not explicitly contemplated by the Article’s terms.¹
6. Thus, in determining whether the *non-refoulement* principle applies, the Court has focused on the practical effect of state conduct, rather than its geographic locus. Most recently, in *Al-Saadoon v. U.K.*, the Court found that the UK’s *non-refoulement* responsibility was engaged where it relinquished custody of detainees in Iraq notwithstanding that the UK did not effect a “return,” “expulsion” or “extradition,” that is, conduct explicitly contemplated by the terms of *non-refoulement* provisions in major human rights treaties.²
7. This practical approach to the *non-refoulement* principle is consonant with the Court’s decisions holding, in the context of other Convention provisions, that state responsibility is engaged by conduct undertaken during interdiction operations on the high seas.³

¹ *Soering v. UK*, Appl. No. 14038/88, July 7, 1989, ¶¶87-88 (interpreting Article 3 of the Convention as prohibiting return of an individual where there is a real risk of torture or inhuman and degrading treatment).

² See *Al-Saadoon & Mufdhi v. UK*, Appl. No. 61498/08, Mar. 2, 2010.

³ See *Medvedyev & Others v. France*, Appl. No. 3394/03, July 10, 2008, ¶50 (referral to the Grand Chamber) (concluding that France’s responsibility was engaged where French commandos boarded a ship and arrested the crew); *Xhavera & 12*

8. Moreover, the Court’s practical approach to *non-refoulement* accords with the views of the U.N. High Commissioner for Refugees (UNHCR), the U.N. Committee Against Torture and the U.N. Human Rights Committee, all of which have recognized that state responsibility is engaged wherever an individual comes under the effective “authority and control” of the state, regardless of location.⁴ The Committee Against Torture has addressed the issue specifically in the interdiction context, finding Spain’s responsibility engaged with regard to *non-refoulement* where it interdicted sea migrants and conducted extraterritorial refugee status determinations.⁵
9. Beyond the issue of authority and control, the question of whether state conduct breaches an international obligation is determined by the content of the obligation. Rather than being territorially bounded, “*non-refoulement* is precisely the sort of obligation which is engaged by extraterritorial action, for it prohibits a particular result—return to persecution or risk of torture—by whatever means, direct or indirect, and wherever the relevant action takes place.”⁶ For this reason, UNHCR, the Committee Against Torture and the Human Rights Committee have declined to find the content of the *non-refoulement* obligation territorially bounded.⁷ Similarly, the Inter-American Commission, addressing the issue in the interdiction context, has found “no geographical limitations” to the *non-refoulement* obligations in the American Declaration on the Rights and Duties of Man and the U.N. Refugee Convention.⁸
10. Moreover, it would be incongruous with this Court’s practical approach to Article 3 if it were interpreted as territorially bounded and inapplicable to interdiction operations on the high seas, for three key reasons.
11. First, the application of the *non-refoulement* principle to conduct beyond state borders is critical to forestalling its circumvention. It is increasingly common for states to make initial entry and return decisions beyond their territory.⁹ Were external border controls beyond the reach of the *non-refoulement* principle, these measures would enlarge a state’s ambit of control and exercise of jurisdiction while shrinking its responsibilities in human rights and refugee protection.¹⁰ Thus, according to UNHCR, the *non-refoulement* obligation is binding “regardless of whether the state first

Others v. Italy & Albania, Appl. No. 39473/98, Jan. 11, 2001 (assuming that Italy’s responsibility was engaged where its navy attempted to board but collided with a ship carrying Albanian migrants, but finding inadmissibility on other grounds).

⁴ See UNHCR, *Advisory Opinion on the Extraterritorial Application of Non-Refoulement Obligations under the 1951 Convention relating to the Status of Refugees and its 1967 Protocol* (2007), ¶35 (finding that the “decisive criterion is not whether that person is on the state’s national territory, or within a territory which is *de jure* under the sovereign control of the state, but rather whether or not he or she is subject to that state’s effective authority and control.”); U.N. Comm. Against Torture, *Conclusions and Recommendations of the Comm. Against Torture Concerning the Second Report of the United States of America*, CAT/C/USA/CO/2 (2006), ¶15 (emphasizing that a state must ensure that the *non-refoulement* obligation is “fully enjoyed by all persons under [its effective control]...wherever located in the world”); U.N. Human Rights Comm., *General Comment No. 31: The Nature of the General Legal Obligation of States Parties to the Covenant*, CCPR/C/21/Rev.1/Add.13 (2004), ¶12 (emphasizing that a state must respect and ensure the right of protection from *refoulement* “for all persons in their territory and all persons under their control”).

⁵ U.N. Comm. Against Torture, *J.H.A. v. Spain*, CAT/C/41/D/323/2007 (2008).

⁶ G. Goodwin-Gill, *The Extraterritorial Processing of Claims to Asylum or Protection: The Legal Responsibilities of States and Int’l Organizations*, 9 *University of Technology Sydney Law Rev.* 26, 33 (2007).

⁷ See *supra* note 4.

⁸ Haitian Centre for Human Rights et al. v. U.S., Case 10.675, Inter-American Commission on Human Rights, Report No. 51/96, OEA/Ser.L./V/II.95, doc. 7 rev. ¶157 (1997). While the U.S. Supreme Court held in *Sale v. Haitian Center Council*, 509 U.S. 155 (1993), that the Refugee Convention does not apply extraterritorially, the U.N. Human Rights Committee and human rights experts denounced its decision. See U.N. Human Rights Comm., *Concluding Observations of the Human Rights Comm.: United States of America*, CCPR/C/79/Add.50 (1995), ¶284; G. Goodwin-Gill, *The Refugee in International Law* 248 (2007); A.C. Helton, *The United States Government Program of Intercepting and Forcibly Returning Haitian Boat People to Haiti: Policy Implications and Prospects*, 10 *New York Law School Journal of Human Rights* 325, 339 (1993).

⁹ UNHCR ExCom, *Interception of Asylum-Seekers and Refugees: The Int’l Framework and Recommendations for a Comprehensive Approach*, EC/50/SC/CRP.17 (2000), ¶23.

¹⁰ See J.C. Morris, *The Spaces in Between: American and Australian Interdiction Policies and Their Implications for the Refugee Protection Regime*, 21(4) *Refugee* 51, 59 (2003).

encounters the refugee inside or outside its own territory;" otherwise, "the international refugee protection regime would be rendered ineffective."¹¹

12. Second, were the *non-refoulement* principle territorially bounded, the availability of protection would turn on an individual's ability to subvert border controls and enter clandestinely, rather than on the individual's need for protection.¹² In addition to effectively encouraging dangerous smuggling practices, such an interpretation would render protection out of reach for an entire class of refugees who have fled home states but have been unable to secure entry into new states prior to departure.¹³ These "refugees in orbit" would be left vulnerable to extraterritorial exercises of state control, unconstrained by international human rights law.¹⁴
13. Third, this Court and U.N. bodies have consistently found that the *non-refoulement* obligation is absolute and applies even under exceptional circumstances, including a declared state of emergency.¹⁵ To permit states to act contrary to the *non-refoulement* principle outside their borders, when such acts would never be permissible within their borders, would be at odds with the consensus on the primacy of the *non-refoulement* principle.¹⁶
14. Furthermore, it follows from these principles that the *non-refoulement* obligation constrains interdiction operations in two particular ways.
15. First, the *non-refoulement* principle constrains interdiction operations that obstruct access to protection and thereby expose individuals to risk of torture or other harm.¹⁷ This practical ambit is illustrated by the widely accepted principle of "chain *refoulement*," derived from the *non-refoulement* obligation, which prohibits transfer of an individual to a state which is likely to further expel him to a place where he is at risk of torture or other harm. The *non-refoulement* principle is thus implicated not only by the immediate effects of state conduct, but also by its foreseeable consequences. Indeed, UNHCR has emphasized that states may not return individuals "directly or indirectly, to a place where their lives or freedom would be in danger" and other U.N. bodies have affirmed the same.¹⁸ This logic applies equally to interdiction on

¹¹ UNHCR, *The Haitian Interdiction Case 1993, Brief Amicus Curiae*, 6 Int'l Journal of Refugee Law 85, 88 n.7 (1994); UNHCR ExCom, *Interception of Asylum-Seekers and Refugees*, *supra* note 9. See E. Lauterpacht and D. Bethlehem, UNHCR, *The Scope and Content of the Principle of Non-Refoulement: Opinion (2.1)*, ¶67 (emphasizing that the obligation attaches "to the conduct of state officials or those acting on behalf of the state *wherever this occurs*, whether beyond the national territory of the state in question, at border posts or other points of entry, in international zones, at transit points, etc."); G. Goodwin-Gill, *The Refugee in Int'l Law* 248 (2007) (emphasizing that the principle regulates "state action wherever it takes place" including "through its agents outside territorial jurisdiction").

¹² UNHCR, *The Haitian Interdiction Case 1993, Brief Amicus Curiae*, *supra* note 11, at 92.

¹³ See UNHCR, *Addressing Security Concerns without Undermining Refugee Protection, UNHCR's Perspective*, Rev. 1 (2009), ¶6 ("Non-admission at borders and barring access to the asylum procedure not only endangers bona fide asylum-seekers but could serve, ironically, as an incentive to terrorism by encouraging those involved to seek entry through illegal means").

¹⁴ The term "refugee in orbit" describes a refugee unable to find a country willing to examine his asylum request. See I.C. Jackson, *Some Int'l Protection Issues Arising During the 1970s and 1980s with Particular Reference to the Role of the UNHCR Executive Comm.*, 27 Refugee Survey Quarterly 30, 32-33 (2008); Morris, *supra* note 10, at 60.

¹⁵ While the *non-refoulement* obligation in the U.N. Refugee Convention is subject to exception on national security and public safety grounds, transfers involving the risk of torture or cruel, inhuman or degrading treatment fall within the scope of non-derogable *non-refoulement* obligations in the European Convention, U.N. Convention Against Torture and International Covenant on Civil and Political Rights (ICCPR). See *Chahal v. U.K.*, Appl. No. 70/1995/576/662, Nov. 16, 1996, ¶¶79-80; U.N. Comm. Against Torture, *Tapia Paez v. Sweden*, CAT/C/18/D/39/1996 (1997), ¶14.5; U.N. Comm. Against Torture, *M.B.B. v. Sweden*, CAT/C/22/D/104/1998 (1999), ¶6.4; U.N. Human Rights Comm., *General Comment No. 20*, HRI/HEN/1/Rev.1 (1994), ¶¶3, 9.

¹⁶ See U.N. Human Rights Comm., *De López v. Uruguay* (52/1979), *Selected Decisions under the Optional Protocol*, CCPR/C/OR/1 (1985), ¶12.3 ("[I]t would be unconscionable...to permit a state party to perpetrate violations of the Covenant on the territory of another state, which violations it could not perpetrate on its own territory.").

¹⁷ The *non-refoulement* principle "encompasses any measure attributable to the state which could have the effect of returning an asylum-seeker or refugee to the frontiers of territory where his or her life or freedom would be threatened...including interception." UNHCR, *Summary Conclusions: the principle of non-refoulement*, Expert Roundtable organized by the UNHCR and the Lauterpacht Research Center for Int'l Law, University of Cambridge, UK (2003), ¶4.

¹⁸ UNHCR, *Advisory Opinion on the Extraterritorial Application of Non-refoulement*, *supra* note 4; U.N. Human Rights Comm., *General Comment No. 31*, *supra* note 4, ¶12 (noting prohibition of transfer where there is a real risk of irreparable

the high seas where it obstructs access to protection and has the practical effect of leaving individuals vulnerable to the conduct of other states and a “real risk” of torture or other harm.¹⁹

16. Second, interdiction on the high seas that effectively or directly “pushes back” sea migrants to the territorial waters of states with poor human rights records is contrary to the *non-refoulement* requirement that states act to “prevent such acts [of torture] by not bringing persons under the control of other states where they would be at risk of torture.”²⁰ Furthermore, under the principles of state responsibility, states must “act in conformity with international obligations wherever they may arise.”²¹ Under these principles, a state impermissibly aids or assists in the commission of a wrongful act where it knowingly delivers an individual to a state where there is a risk of torture or other harm or further expulsion to such a state.²²
- B. Procedurally, the *non-refoulement* principle requires that when a state conducts interdiction operations, it take affirmative steps to advise migrants of their protection rights and individually assess their claims.
17. The *non-refoulement* principle requires states to take affirmative steps to ensure migrants are not returned to the risk of torture or other harm, including by providing due process. If a state returned interdicted migrants without first identifying and assessing their claims, it would have breached its *non-refoulement* obligation if they in fact needed protection.²³ Historically, inadequate procedures in various states have resulted in such returns in breach of the *non-refoulement* principle.²⁴
18. Thus, to give effect to the *non-refoulement* obligation, a state must afford migrants “access to fair and effective procedures for determining status and protection needs,” including, at a minimum, advising them of their rights and evaluating their claims on an individual basis.²⁵ These requirements derive from basic principles of due process.²⁶ They also derive from the *non-refoulement* principle itself, as described below.

harm “in any country to which the person may subsequently be removed”); U.N. Comm. Against Torture, *General Comment No. 1*, A/53/44 (1996), ¶2 (noting that the *non-refoulement* obligation prohibits transfer where there is a risk of torture in “any state to which the author may subsequently be expelled, returned or extradited”).

¹⁹ See UNHCR, *Conclusion on Protection Safeguards in Interception Measures*, A/AC.96/987 (2003), part a(iv) (“Interception measures should not result in asylum-seekers and refugees being denied access to international protection, or result in those in need of international protection being returned, directly or indirectly, to the frontiers of territories where their life or freedom would be threatened...or where the person has other grounds for protection”); M. Pallis, *Obligations of States towards Asylum Seekers at Sea: Interactions and Conflicts Between Legal Regimes*, 14 Int’l Journal of Refugee Law 347, 349 (2002) (emphasizing that “[t]he practical consequences of a state’s action must be examined: if the return to the high seas would leave the refugees with no alternative but to return home, this can be said to be *de facto* refoulement”).

²⁰ U.N. Special Rapporteur on Torture and other Cruel, Inhuman or Degrading Treatment or Punishment, *Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, delivered to the General Assembly*, A/59/324 (2004), ¶27; U.N. Human Rights Comm., *General Comment 31, Nature of the General Legal Obligation on States Parties to the Covenant*, CCPR/C/21/Rev.1/Add.13 (2004), ¶10 (“[A] State party must respect and ensure the rights laid down in the Covenant to anyone within the power or effective control of that state party, even if not situated within the territory of the state Party.”).

²¹ UNHCR, *Summary Conclusions: the principle of non-refoulement*, *supra* note 17, ¶6.

²² See International Law Commission, *Articles on State Responsibility* (2001), endorsed U.N.G.A. Res. 56/83 (2002); S. Legomsky, *Secondary Refugee Movements and the Return of Asylum Seekers to Third Countries: The Meaning of Effective Protection*, 15 Int’l Journal of Refugee Law 567, 621 (2003) (“If a state delivers a refugee to another state that in turn violates his or her rights under international law, and the first state does so ‘with knowledge of the circumstances of the internationally wrongful act,’ then the assumption here is that the first state thereby ‘aids or assists’ in the commission of that wrongful act.”).

²³ See Pallis, *supra* note 19, at 347.

²⁴ See J.C. Hathaway, *The Rights of Refugees Under Int’l Law* 285-287 (2005).

²⁵ UNHCR ExCom, *General Conclusion on Int’l Protection No. 99* (2004), ¶1. See *General Conclusion on Int’l Protection No. 85* (1998), ¶q; UNHCR ExCom, *General Conclusion No. 71* (1993), ¶(i); UNHCR, *Handbook on Procedures and Criteria for Determining Refugee Status*, HCR/IP/4/Eng/Rev.1 (1992) ¶192.

²⁶ See ICCPR, art. 14 (providing that an individual “shall be entitled to a fair and public hearing” and “be informed promptly and in detail in a language which he understands of the nature and cause of the charge”); U.N. Human Rights Comm., *General Comment No. 15: The Position of Aliens Under the Covenant* (1986), ¶10 (“An alien must be given full facilities for pursuing his remedy against expulsion”); American Conv. on H.R., art. 8 (“Every person has the right to a hearing, with due guarantees and...prior notification in detail to the accused of the charges”); Cantoral Benavides Case, 2000 Inter-Am. Ct. H.R., Ser. C, No. 69 (2000), ¶163 (emphasizing “the right of all persons to a simple and rapid remedy or to any other effective remedy...that will protect them against acts that violate their fundamental rights”).

19. First, international human rights and refugee law require that a state advise migrants of their right to access protection.²⁷ Such advice is critical to effecting the state's larger duty to "identify those in need of international protection among interdicted persons."²⁸ This requirement is heightened for those interdicted at sea because they are particularly unlikely to be familiar with local law, and often lack access to an interpreter, legal counsel or independent advice.²⁹ In these circumstances, failure to advise migrants of their rights may foreclose their invocation of state protection duties, effectively subverting the *non-refoulement* principle.³⁰ Thus, the Committee Against Torture has repeatedly expressed concern as to whether states have properly informed migrants of their right not to be returned to torture.³¹ Likewise, UNHCR has emphasized that individuals rescued from unseaworthy vessels should be identified and given access to status determination procedures.³²
20. Second, a state must assess migrants' claims individually, since discharging the *non-refoulement* obligation requires an evaluation of personal risk of harm.³³ Thus, the Committee Against Torture has repeatedly emphasized the importance of individual identifications and assessments to forestall returns where there is a risk of torture.³⁴ The International Law Association has emphasized that migrants should be "given the opportunity of a personal interview" with "their claims decided on an individual basis."³⁵

²⁷ Special Rapporteur on Torture Manfred Nowak has noted that the Article 3 *non-refoulement* obligation "entails an obligation to advise individuals" of their protection rights. M. Nowak & E. McArthur, *The U.N. Convention Against Torture: A Commentary* 153 (2008). The Council of Europe has similarly emphasized that a migrant has "the right to be informed of his/her legal position at decisive moments in the course of the procedure." *Directive on the Minimum Standards for Granting and Withdrawing Refugee Status*, 2005/85/EC (2005), ¶13. Likewise, UNHCR has stated that migrants should "be given the opportunity, of which they should be duly informed" to contact UNHCR and "receive the necessary guidance as to the procedure to be followed." UNHCR, *Handbook on Procedures and Criteria for Determining Refugee Status*, *supra* note 25, ¶192. See UNHCR, *Global Consultations on Int'l Protection*, 2nd meeting, *Asylum Process (Fair and Efficient Asylum Procedures)*, EC/GC/01/12 (2005), ¶¶4-5; UNHCR ExCom *General Conclusion on Int'l Protection No. 85* (1998), ¶(r).

²⁸ UNHCR, *Refugee Protection and Migration Control: Perspectives from UNHCR and IOM*, EC/GC/01/11 (2001), ¶36. See International Law Association, *Resolution 6/2002 on Refugee Procedures (Declaration on Int'l Minimum Standards for Refugee Protection)* (2002), ¶8 (emphasizing that "effective identification" of asylum-seekers requires that states provide, *inter alia*, "[g]uidance....in a language which [they] clearly understand, on the procedure and on the opportunity to contact [UNHCR]").

²⁹ See U.N. G.A. Res. 54/166, *Protection of Migrants*, A/RES/54/166 (2000) (describing "the situation of vulnerability in which migrants frequently find themselves, owing, *inter alia*, to their absence from their state of origin and to the difficulties they encounter because of differences of language, custom and culture, as well as the economic and social difficulties and obstacles for the return to their states of origin of migrants who are non-documented or in an irregular situation"); Inter-American Ct. H.R., *Advisory Opinion OC-18/3 Juridical Condition and Rights of the Undocumented Migrants* (2003), ¶112 ("Migrants are generally in a vulnerable situation as subjects of human rights").

³⁰ See Int'l Law Assoc., *supra* note 28, ¶8 ("The effective identification of those entitled to international protection requires...that states provide the opportunity to ensure that international obligations are fully implemented"); U.N. Human Rights Comm., *General Comment No. 32, Article 14: Right to Equality before Courts and Tribunals and to a Fair Trial*, CCPR/C/GC/32 (2007), ¶10 ("The availability or absence of legal assistance often determines whether or not a person can access the relevant proceedings or participate in them in a meaningful way").

³¹ See U.N. Comm. Against Torture, S.H. (name withheld) v. Norway, CAT/C/23/D/121/1998 (2000), ¶7.4 (emphasizing the state should "ensure that asylum-seekers are duly informed about all domestic remedies available to them"); U.N. Comm. Against Torture, *Second periodic report of the United Kingdom of Great Britain and Northern Ireland*, CAT/C/SR.234 22 (1995), ¶50 (expressing concern over whether the state advised deportees of rights to protection).

³² UNHCR, *Background Note on the Protection of Asylum-Seekers and Refugees Rescued at Sea* (2002), ¶¶17-20 (citing UNHCR ExCom, *General Conclusion on Int'l Protection No. 85* (1998), ¶q).

³³ This Court has emphasized the need to establish whether "in the *particular circumstances* of the case, there was a real risk [of torture]." *Shamayev v. Georgia & Russia*, Appl. No. 36378/02, Apr. 12, 2005, ¶339 (emphasis added); see *Gamal El Rgeig v. Switzerland*, CAT/C/37/D/280/2005 (2007), ¶7.2 (emphasizing the need to "determine whether the complainant runs a *personal risk* of being subjected to torture") (emphasis added).

³⁴ U.N. Comm. Against Torture, *Conclusions and Recommendations: France*, CAT/C/FRA/CO/3 (2006), ¶6 (expressing concern at expedited asylum procedures that fail to "distinguish between asylum applications based on article 3 of the Convention and other applications, thereby increasing the risk that some persons will be returned to a State where they might be tortured"); U.N. Comm. Against Torture, *Consideration of Reports Submitted by States Parties under Article 19 of the Convention, China*, CAT/C/CHN/CO/4 (2008), ¶26 (expressing concern at allegations of forcible returns "without any examination of the merits of each individual case").

³⁵ See Int'l Law Assoc., *supra* note 28, ¶8.

21. The Inter-American Commission recognized the importance of these procedural safeguards in the *Haitian Interdiction Cases*, finding that the U.S. impermissibly returned interdicted Haitian migrants “without making an adequate determination of their status, and without granting them a hearing to ascertain whether they qualified as refugees.”³⁶
22. The importance of advising migrants of their rights and evaluating their claims individually is further underscored by the prohibition on collective expulsion, enshrined in core international and regional human rights conventions.³⁷ This Court has emphasized that a state may not take “any measure compelling aliens, as a group, to leave a country” unless it is “taken on the basis of a reasonable and objective examination of the *particular case of each individual* alien of the group.”³⁸ Likewise, the U.N. Committee on the Elimination of Racial Discrimination has emphasized that a state may not expel a group without evaluating “the personal circumstances of each of the persons concerned.”³⁹ Applying these principles to the related *refoulement* prohibition makes clear that a state may not conduct “push back” operations without first identifying and assessing the particularized circumstance of each migrant.

III. STATE PRACTICE OF INTERDICTION OF SEA MIGRANTS ON THE HIGH SEAS

23. The legal constraints on interdiction practices described above reflect states’ traditional recognition of the legal and humanitarian imperative to afford sea migrants access to protection.⁴⁰ This recognition, and the modern regime of refugee protection, were born in part from the international community’s horror at its failure to protect Jews who spontaneously fled Europe in the late 1930s as “irregular migrants,” that is, without proper documentation or permission to enter.⁴¹ Notoriously, the *St. Louis* ship was refused disembarkation in Cuba, the U.S. and Canada. Forced to turn back to Europe, many of its Jewish passengers resettled in states that came under Nazi rule, where they ultimately perished.⁴²
24. As refugee protection and human rights mechanisms developed to forestall further tragedies, states repeatedly encountered crises of irregular migration. Following the Vietnam War, states responded in concert to provide processes and resettlement for thousands of Southeast Asian refugees facing potential push-backs from neighbouring states, in one of the largest scale irregular migrations of the 20th century.⁴³

³⁶ Haitian Centre for Human Rights et al. v. U.S., Case 10.675, Inter-Am. C.H.R., *supra* note 8, ¶163.

³⁷ See U.N. Human Rights Comm., *General Comment No. 15*, *supra* note 26, ¶10 (noting that Article 13 of the ICCPR prohibits arbitrary expulsion and “entitles each alien to a decision in his own case”); Protocol 4 to the European Conv., art. 4; American Conv. on Human Rights, art. 22(9); African Charter on Human and People Rights, art. 12(5); Int’l Conv. on the Protection of the Rights of All Migrant Workers and Members of Their Families, art. 22 (1); Commonwealth of Independent States Conv. on Human Rights & Fundamental Freedoms, art. 25(4); Arab Charter on Human Rights, art. 26(b).

³⁸ Conka v. Belgium, Appl. No. 51564/99, Feb. 5, 2002, ¶59 (emphasis added). This principle has been echoed in nearly identical terms by the U.N. Special Rapporteur on the Prevention of Discrimination. *Final report of the Special Rapporteur, Mr. David Weissbrodt*, E/CN.4/Sub.2/2003/23 (2003), ¶11.

³⁹ CERD, *General Rec. 30, Discrimination against Non-citizens*, CERD/C/64/Misc.11/rev.3 (2004), ¶26.

⁴⁰ See B. Frelick, “Abundantly Clear”: *Refoulement*, 19 *Georgetown Immigration Law Journal* 245, 252-53 (2005) (describing “prior consensus among States, including the United States, that the principle of *non-refoulement* applied without geographical limitation.”).

⁴¹ The 1948 Universal Declaration of Human Rights included a “right to seek asylum” in Article 14, “signif[ying] a deep community concern for transforming the matter of asylum from the realm of ‘state discretion’ to that of international humanitarian concern.” M.S. McDougal, et. al, *Human Rights and World Public Order* 708 (1980). See also D. Martin, *Strategies for a Resistant World: Human Rights Initiatives and the Need for Alternatives to Refugee Interdiction*, 26 *Cornell Int’l Law Journal*, 753, 755-56 (1993) (describing how “shame” at the failure to provide protection from Nazi atrocities spurred efforts to provide a better legal and institutional framework for refugee protection).

⁴² See I. Abella & H. Troper, *None is Too Many: Canada and the Jews of Europe* (1986); American Jewish Historical Society, *Chapters in American Jewish History: The Tragedy of the St. Louis*, <http://www.ajhs.org/scholarship/chapters/>.

⁴³ While some southeast Asian states attempted to conduct push-back operations at this time, other states, including the U.S., urged them to give sea migrants safe haven and ultimately responded with resettlement programs. See Frelick, *supra* note 40, at 252-53; W.C. Robinson, *Terms of Refuge: The Indochinese Exodus and The Int’l Response* 127 (1998). Under the 1979 Disembarkation Resettlement Offers program, resettlement states agreed to accept any Vietnamese refugee rescued at sea by a non-resettlement state. See J. Van Selm & B. Cooper, Migration Policy Institute, *The New “Boat People”* 19-21 (2006).

25. This traditional recognition of protection needs is reflected in Canada's contemporary practice of permitting sea migrants to disembark and affording them the same process as other migrants. For instance, in 1999, four boats carrying nearly 600 passengers from Fujian, China approached the coast of British Columbia. Canadian officials conducted search and rescue operations and air drops of supplies, and deployed a medical team. Upon disembarkation, the vast majority of migrants made refugee claims, benefiting from Canada's national asylum system.⁴⁴
26. The U.S. and Australia have at times recognized the importance of providing sea migrants access to protection, but their practices also illustrate that interdiction practices pose a risk of *refoulement* and other harms. In particular, these practices: (1) deny sea migrants access to national asylum systems, which the UNHCR has characterized as essential to refugee protection;⁴⁵ and (2) implement extraterritorial claims processing, which leaves migrants vulnerable to abusive conditions and may fail to provide due process.⁴⁶
27. Recognizing these problems, Australia recently abandoned its "Pacific Solution" policy.⁴⁷ From 2001 to 2007, Australia routinely interdicted boats bound for or in its territorial waters and returned sea migrants to third countries for "off-shore" processing. This resulted in physical abuse of migrants during interception operations, inhumane conditions at sea and in detention centres and serious deprivations of due process, notwithstanding the presence of UNHCR or other oversight, that put migrants at risk of *refoulement*.⁴⁸ As described below, this practice included (1) "push-backs" to Indonesia and (2) extraterritorial processing by Australian authorities.
28. In conducting "push-backs" to Indonesia, Australian authorities obtained control over and returned approaching vessels to Indonesian territorial waters.⁴⁹ This practice demonstrates the danger that interdiction operations will physically imperil sea migrants when they aim to obstruct access to territory, rather than provide rescue and aid. In two notorious cases in 2001, the Australian navy kept interdicted migrants in inhumane conditions for seven days before ultimately returning them to Indonesian waters. Australian authorities denied migrants adequate medical treatment, food and water during the entire period, leading to skin infections and other illnesses. Some migrants were subjected to unnecessary use of force by Australian naval officials upon disembarkation.⁵⁰
29. Moreover, Australia's practice of returning interdicted migrants to Indonesia illustrates the dangers of "outsourcing" processing to a third state which is not a signatory to the Refugee Convention and lacks a

⁴⁴ See Van Selm & Cooper, *supra* note 43, at 92-96. When Canada interdicted Sri Lankan Tamil migrants in the late 1990s, it also provided them access to full status determinations. See S. Legomsky, *The USA and the Caribbean Interdiction Program*, 18 Int'l Journal of Refugee Law 677, 678 n.5 (2006). In 1999, as controversy on U.S. practice swelled, Canada's Minister of Citizenship & Immigration affirmed, "[w]e will not turn back boats at sea...we need to stand together in opposition to such draconian measures." *Notes for an Address to the Annual Meeting of the Canadian Council for Refugees*, Dec. 3, 1999, cited in Thomas J. White Center on Law & Gov't, *The Expedited Removal Study: Report on the First Three Years of Implementation of Expedited Removal*, 15 Notre Dame Journal of Law, Ethics & Public Policy 1, 147 n.412 (2001).

⁴⁵ See UNHCR, Aide Memoire, "Directive on Minimum Standards on Procedures for Granting and Withdrawing Refugee Status" (2003); UNHCR, "Communication from the European Commission 'Towards a common asylum procedures and a uniform status, valid throughout the Union, for persons granted asylum': UNHCR's preliminary observations" (2001).

⁴⁶ For a discussion of how extraterritorial processing "leads to an increased risk of *refoulement* by denying due process and access to tribunals and courts that scrutinize asylum decision-making," see A. Francis, *Bringing Protection Home: Healing the Schism Between Int'l Obligations and National Safeguards Created by Extraterritorial Processing*, 20 Int'l Journal of Refugee Law 273, 298 (2008).

⁴⁷ See Briefing Notes, UNHCR, *UNHCR welcomes close of Australia's Pacific Solution* (Feb. 8, 2008); Senate Legal and Constitutional Legislation Comm, *Provisions of the Migration Amendment (Designated Unauthorized Arrivals) Bill 2006*, ¶¶3.1, 3.204 (describing opposition to practices); *Dissenting Report by the Australian Labor Party*, ¶¶1.4, 1.37 (2006); Australian House of Representatives, *Official Hansard*, No. 10, 2006, 38-42 (Aug. 9, 2006) (same).

⁴⁸ Observers have repeatedly documented these abuses. See Human Rights Watch (HRW), *By Invitation Only: Australian Asylum Policy* 41-48 (2002); U.S. Comm. for Refugees, *Sea Change: Australia's New Approach to Refugees*, 31-34 (2002); Oxfam Community Aid Abroad, *Adrift in the Pacific: The Implications of Australia's Pacific Refugee Solution*, 14-18 (2002); R. Manne, *Sending Them Home: Refugees and the New Politics of Indifference*, 13 Quarterly Essay 1, 15-20 (2004).

⁴⁹ See Media Release, Philip Ruddock, Minister for Immigration & Multicultural & Indigenous Affairs, *Suspected Illegals Turned Back*, MPS 193/01, Dec. 21, 2001.

⁵⁰ HRW, *By Invitation Only*, *supra* note 48, at 41-48.

national asylum system. Rather than constituting permissible transfers to “safe third countries,” these returns may deprive migrants of access to fair and effective determination procedures or otherwise fail to provide “effective protection.”⁵¹ In Indonesia, forcibly returned migrants lacked any guarantee of legal status. Where they successfully accessed the UNHCR claims processing system, migrants lacked legal counsel or the right to appeal decisions, putting them at risk of *refoulement*.⁵² Furthermore, by obstructing migrants’ access to Australia’s national system of asylum determination and relegating them to an inferior adjudication system in Indonesia, Australia impermissibly penalized asylum-seekers based on their mode of arrival, contrary to Article 31(1) of the Refugee Convention.⁵³

30. “Push-backs” and out-sourcing of claims processing also insulate states from public accountability, with the foreseeable consequence that migrants are left without protection and in harsh conditions. In Indonesia, many intercepted migrants live in detention centres funded by the Australian government but run by the International Organization for Migration. They have suffered from limited clean water, cramped facilities that exacerbate the spread of disease and physical attacks by local groups.⁵⁴ Moreover, even asylum-seekers whom the UNHCR has found to be in need of protection have awaited resettlement offers for years, without lawful residence or the right to work.⁵⁵
31. In a second aspect of the “Pacific Solution,” Australian and UNHCR officials conducted “off-shore” processing in the Pacific island states of Nauru and Papua New Guinea of sea migrants interdicted on the high seas or near Australia’s “excised” outlying territories.⁵⁶ Here, asylum-seekers were similarly deprived of sufficient process and put at risk of *refoulement*, illustrating how interdiction practices that deny migrants’ access to regular asylum adjudication systems run afoul of international standards. On arrival, migrants were detained in camps for as long as three years while awaiting the processing of their asylum applications.⁵⁷ Asylum decisions were not subject to review by Australian courts and migrants had no recourse under national laws.⁵⁸ Migrants, including unrepresented minors⁵⁹ and trauma victims,

⁵¹ While extraterritorial processing does not *per se* violate refugee and human rights standards, an interdicting state runs afoul of its obligations where the processing state does not provide “effective protection” to returned migrants, including by failing to provide access to a fair and effective determination procedure, access to a means of subsistence sufficient to maintain an adequate standard of living, or where there is no explicit agreement for admission of the persons as asylum-seekers. See UNHCR, *Position on Readmission Agreements, “Protection Elsewhere” and Asylum Policy* (1994), ¶5; UNHCR, *Global Consultations on Int’l Protection*, *supra* note 27, ¶15; UNHCR ExCom, *General Conclusion on Int’l Protection No. 85* (1998), ¶(aa); Lisbon Expert Roundtable, Lisbon, Spain (2002) *Summary Conclusion on the Concept of “Effective Protection” in the Context of Secondary Movements of Refugee and Asylum-Seekers*, ¶15(f); Legomsky, *Secondary Refugee Movements*, *supra* note 22, at 620-21; C.M.-J. Bostock, *The Int’l Legal Obligations Owed to the Asylum Seekers on the MV Tampa*, 14 *Int’l Journal of Refugee Law* 279, 293 (2002).

⁵² HRW, *By Invitation Only*, *supra* note 48, at 57-59.

⁵³ Article 31 prohibits states from imposing a penalty on refugees due to their illegal entry where they present themselves without delay to the authorities and show good cause for their illegal entry. Refugee Conv., art. 31 (1954); G. Goodwin-Gill, *Article 31 of the 1951 Refugee Convention Relating to the Status of Refugees: Non-Penalisation, Detention and Protection*, in *Refugee Protection in Int’l Law: UNHCR’s Global Consultations on Int’l Protection* 185, 194 (E. Feller et al., eds. 2003).

⁵⁴ HRW, *By Invitation Only*, *supra* note 48, at 52-54.

⁵⁵ S. Kneebone & S. Pickering, *Australia, Indonesia and the “Pacific Plan” in New Regionalism and Asylum Seekers: Challenges Ahead* 167, 177 (S. Kneebone & F. Rawlings-Sanaei, eds. 2007).

⁵⁶ In 2001, Australia passed legislation removing its outlying territories from its “migration zone,” creating the legal category of “offshore entry person” to refer to non-citizens who enter illegally via these territories and are denied access to the state’s regular asylum adjudication system. See Migration Amendment (Excision from Migration Zone) Act of 2001; Morris, *supra* note 10.

⁵⁷ HRW, *By Invitation Only*, *supra* note 48, at 74-75. Isolated living conditions on Nauru and Papua New Guinea and lengthy delays in claim processing resulted in psychological deterioration, particularly for child migrants. See National Council of Churches in Australia, *Submission to the Inquiry into the Provisions of the Migration Amendment (Designated Unauthorised Arrivals) Bill 2006*, May 22, 2006 (“Past experience shows that asylum seekers left on Nauru for many years suffered severe psychological damage”); Victorian Foundation for the Survivors of Torture, *Submission to Senate Legal and Constitutional Legislation Comm. Inquiry into the Migration Amendment (Designated Unauthorised Arrivals) Bill 2006*, May 23, 2006 (describing “deleterious psychological consequences” of living indefinitely on Nauru, particularly for children).

⁵⁸ See Migration Act, 1958, as modified by Migration Amendment (Excision from Migration Zone) Act of 2001; Dep’t of Immigration & Multicultural Affairs, *Unauthorised Arrivals and Detention*, 3 (2001), *cited in* T. Magner, *A Less than “Pacific” Solution for Asylum Seekers in Australia*, 16 *Int’l Journal of Refugee Law* 54, 59 n.40, 62 n.65 (2004).

lacked access to legal assistance or independent advice.⁶⁰ These conditions systematically resulted in erroneous determinations and the *refoulement* of individuals in need of protection.⁶¹

32. In 2008, the Australian government dismantled the “Pacific Solution,” repudiating its policy of delivering migrants interdicted on the high seas to third countries for claims processing.⁶² Unfortunately, Australia maintains a discriminatory policy of subjecting sea migrants to a separate system of asylum claims processing on its “excised” outlying territories, practically obstructing their access to counsel and translators.⁶³ It also continues to support efforts to intercept and detain migrants in Indonesia or Indonesian waters. Nevertheless, Australia’s recent steps reflect its acknowledgment of its obligation to make *non-refoulement* assessments and ensure the safety of asylum-seekers.
33. The U.S. has similarly acknowledged its protection responsibilities, having long-abandoned its notorious 1992-1994 practice of summarily returning Haitian sea migrants, even if they voiced fears of return.⁶⁴ Nevertheless, U.S. practice regarding interdicted Haitian migrants has continually illustrated the inadequacy of claims processing conducted primarily at sea, which lack safeguards necessary for fair and effective determinations and create the risk of *refoulement*.⁶⁵ In 1981, the U.S. entered into an agreement with Haiti to return sea migrants but guaranteed that “no person who is a refugee w[ould] be returned without his consent.”⁶⁶ However, identification and claims assessment processes, conducted at sea, were so inadequate that of more than 21,000 Haitians interdicted from 1981 to 1990, immigration officers found only six individuals with credible fears warranting access to a full interview.⁶⁷ Similarly, when in 2004 violence in Haiti prompted an exodus of sea migrants, inadequate U.S. determination procedures resulted in only three of 905 Haitians being granted access to a full determination.⁶⁸ In what has become

⁵⁹ Rather than benefiting from “special protection and assistance” as required by Article 1 of the U.N. Convention on the Rights of the Child, unaccompanied children in offshore processing centres suffered physical, financial and emotional hardship. See T. Penovic & A. Dastyari, *Boatloads of incongruity: the evolution of Australia’s offshore processing regime*, 13 *Australian Journal of Human Rights* 33, 44-45 (2007).

⁶⁰ “[P]eople in offshore processing receive no professional application assistance, and may receive limited or no access to legal advisors, media, visitors and charitable or religious assistance.” S.H. Rimmer, Dep’t of Parliamentary Service, *Information Analysis and Advice for the Parliament, Migration Amendment (Designated Unauthorised Arrivals) Bill 2006*, 2.

⁶¹ In 2006 a former government official described a pattern of material errors in decision-making at Nauru, including conflation of cases, prejudicial comments by interpreters and reliance on faulty evidence. See Marion Le, *Submission to Senate Legal and Constitutional References Comm. Inquiry into the Provisions of the Migration Amendment (Designated Unauthorised Arrivals) Bill 2006*. Such errors likely resulted in *refoulement* of asylum-seekers. See A Just Australia, *Nauru is no place for asylum-seekers*, May 15, 2006, <http://www.ajustaustralia.com> (suggesting lack of counsel and right to appeal likely resulted in return of unaccompanied children in need of protection given that “the percentage of unaccompanied children whose claims were rejected on Nauru was dramatically higher than in Australia”); D. Corlett, *Returning Failed Asylum Seekers from Australia* 25-27 (2007) (noting that a third of asylum-seekers detained off-shore ultimately returned, a far larger percentage than those of the same nationalities who were detained on mainland Australia).

⁶² See Press Release, Chris Evans, Minister for Immigration & Citizenship, *Last refugees leave Nauru* (Feb. 8, 2008).

⁶³ See Australian Human Rights Commission, *Submission to the Senate Standing Comm. on Legal and Constitutional Affairs, Inquiry into the Migration Amendment (Complementary Protection) Bill 2009* (2009), ¶¶45-49.

⁶⁴ Following the 1991 military coup of Jean-Bertrand Aristide, thousands of Haitians fled by sea. While the U.S. initially processed interdicted migrants at its Guantanamo Bay military base, it later initiated a program of summary return, claiming that the *non-refoulement* obligation did not apply extraterritorially. See *supra* note 8. Previously, senior U.S. officials had publicly and repeatedly affirmed the principle of *non-refoulement*, including in the context of Haitian operations. See G. Goodwin-Gill, *The Haitian Refoulement Case: A Comment*, 6 *Int’l Journal of Refugee Law* 103, 105 (1994).

⁶⁵ According to UNHCR, onboard processing has “proved problematic in various respects, including *inter alia*, ensuring adequate access to translators, safeguarding the privacy of interviews...ensuring access to appropriate counsel and providing appropriate appeals mechanisms.” UNHCR, *Background Note on the Protection of Asylum-Seekers and Refugees Rescued at Sea* (2002), ¶23.

⁶⁶ Executive Order No. 12,324, 46 Fed. Reg. 48109 (1988); Haiti-US, *Migrants-Interdiction*, 33 UST 3559, 3560 (1981).

⁶⁷ “Given the high incidence of serious human rights violations in Haiti during that period, there was ample reason to worry that the rarity of cases found to justify full hearings said more about the procedural adequacy of the interviews than about the merits of the claims.” Lawyers Committee for Human Rights, *Refugee Refoulement: The Forced Return of Haitians under the US-Haitian Interdiction Agreement*, 4 (1990); see Legomsky, *The USA and the Caribbean Interdiction Program*, *supra* note 44, at 679-80. Indeed, the interviews on Coast Guard vessels were “inherently flawed,” since they took place without privacy and were “extremely cursory.” See W. O’Neill, *Roots of Human Rights Violations in Haiti*, 7 *Georgetown Immigration Law Journal* 87, 96 (1993).

⁶⁸ Frelick, *supra* note 40, at 245-7.

known as the “shout test,” U.S. immigration officials failed to inform the migrants of their right to seek protection, interviewing only those who, without prompting and often without the assistance of a Creole-speaking interpreter, indicated a fear of return.⁶⁹ This approach has practically obstructed Haitian migrants’ access to a refugee determination process, resulting in the loss of protection.⁷⁰

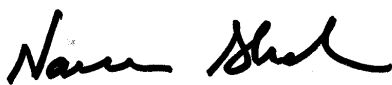
34. In stark contrast, the U.S. has recognized the need to inform interdicted sea migrants from states with whom the U.S. has strained political relations, i.e. Cuba and China, of their rights. It has provided these migrants a specific opportunity to express any fear of persecution. U.S. Coast Guard officials are required to read interdicted Cuban migrants a statement that invites them to raise concerns regarding why they should not be returned to Cuba, informs them that they may be processed as refugees through the U.S. resettlement program in Havana and assures them that they will not be prosecuted in Cuba for their illegal departure. Similarly, interdicted Chinese migrants are provided a written questionnaire asking why they left China and giving them the opportunity to express fear of return.⁷¹ Such affirmative measures demonstrate the feasibility of interdiction practices that comply with international human rights requirements to inform migrants of their rights and individually assess their claims.⁷² Indeed, while U.S. interdiction practices remain rife with procedural problems, the U.S. has increasingly recognized its obligation not to forcibly return interdicted asylum-seekers, based upon both humanitarian and legal principles.⁷³

IV. CONCLUSION

35. As illustrated above, numerous human rights bodies and experts have recognized that the *non-refoulement* obligation applies to interdiction on the high seas and requires states to take affirmative steps to ensure that sea migrants have access to protection, including by advising migrants of their rights and individually evaluating their claims. A decision by this Court affirming these principles would clarify the obligations of European member states. It would be consonant with the international community’s traditional recognition of the protection needs of sea migrants and help forestall practices that, as the experiences of Australia and the U.S. demonstrate, put migrants at risk of *refoulement* and other harms. Finally, such a decision would lend pivotal support to the growing international recognition that states should design interdiction operations to support, rather than undercut, the regimes of refugee and human rights protection.

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Respectfully submitted,



Naureen Shah, Esq.

Human Rights Clinic
Columbia Law School Human Rights Institute
435 West 116th Street, Box B-28
New York, New York, 10027, U.S.A.

⁶⁹ *Id.*; L. Nessel, *Externalized Borders and the Invisible Refugee*, 40 Columbia Human Rights Law Rev. 625, 642 (2009).

⁷⁰ “[Haitians] must contend with the ‘shout’ test, the crowded and chaotic conditions on board ship....The practical effect is to shut out refugees from full and fair refugee status determination procedures. The consequence is the loss of adequate protection, not only from *refoulement*, but also from orbit, prolonged detention, and other deprivations.” Legomsky, *The USA and the Caribbean Interdiction Program*, *supra* note 44, at 686.

⁷¹ Human Rights Watch, *Submission to CERD During its Consideration of the 4th, 5th, and 6th Periodic Reports of the U.S.A., CERD 72nd Session*, 13-14 (2008); Van Selm & Cooper, *supra* note 43, at 12.

⁷² *See supra*, section II.B.

⁷³ *See* Frelick, *supra* note 40, at 273-75 (noting official statements and diplomatic measures through which the U.S. has “indicated its intention to rebind itself to the obligation under Article 33 of the Refugee Convention...not to return refugees to persecution, including refugees interdicted on the high seas”). However, U.S. extraterritorial processing of interdicted Haitian migrants and Cuban migrants at Guantanamo Bay, undertaken since 1991 and 1994 respectively, continues. It poses many of the same problems noted with regard to Australian practice, including depriving migrants access to legal assistance and independent advice. *See* V. Clawson, E. Detweiler & L. Ho, *Litigation as Law Students: An Inside Look at Haitian Centre Council*, 103 Yale Law Journal 2337, 2339-40 (1994).

Annex I: Description of Intervenors

Columbia Law School Human Rights Clinic is dedicated to the full implementation of international human rights norms in the United States and internationally. The Clinic has conducted human rights documentation, advocacy and litigation regarding the protection of migrants and asylum-seekers in the U.S. and Latin American region. Working in active partnership with national and international non-governmental organizations, the Clinic has litigated and consulted on related cases before the Inter-American Commission and Court of Human Rights and U.S. courts.

African Refugee Development Center is a non-profit organization founded in 2004 by refugees and Israeli citizens to assist, support and empower refugees and asylum seekers in Israel. The ARDC seeks to ensure access to basic social services, and to facilitate refugee and asylum seeker integration, self-sufficiency and ownership in matters affecting their lives. The ARDC advocates for the rights of refugees and asylum seekers and for a humane and fair Israeli asylum policy.

Allard K. Lowenstein International Human Rights Clinic at Yale Law School gives students first-hand experience in human rights advocacy under the supervision of international human rights lawyers. The Clinic undertakes litigation and research projects on behalf of human rights organizations and individual victims of human rights abuses. Its projects have included efforts to promote the work of regional and international organizations that develop and protect human rights. The Clinic has prepared briefs and other submissions for the Inter-American Commission on Human Rights, the African Commission on Human and Peoples' Rights and various bodies of the United Nations, as well as for courts in the United States and other countries. Since its beginning, the Clinic has been involved in litigation in the United States concerning the interdiction of migrants at sea and in documenting states' interdiction practices.

Center for Social Justice at Seton Hall University School of Law is a clinical program that provides pro bono legal representation to indigent clients in a variety of areas including Immigration and International Human Rights Law. The Center for Social Justice engages in direct representation and reporting and advocacy on issues relating to refugee rights and human rights issues impacting migrant workers. Faculty in the Center have written scholarly articles on the Refugee Convention and the applicability to migration by sea and have engaged in collaborative projects before the European Court on Human Rights.

Florida Coastal School of Law Immigrant Rights Clinic is a law school clinical program providing direct representation to indigent migrants in asylum cases.

Institute for Justice & Democracy in Haiti works to make justice work for Haiti's poor. The Institute represents the unjustly imprisoned and victims of political persecution, coordinates grassroots advocacy in Haiti and the US, train human rights advocates in Haiti and disseminate human rights information worldwide. It also works in an advisory capacity for immigrant advocates here in the U.S. IJDH's Director, Brian Concannon, has served as an expert witness for dozens of asylum seekers and persons seeking relief under the Convention Against Torture.

Migrant and Refugee Rights Project (MRRP) of the Australian Human Rights Centre at the University of New South Wales School of Law engages in research, advocacy, litigation and law reform to advance the human rights of refugees and migrants in Australia and Asia. MRRP runs a clinical program in which UNSW Law students gain practical experience in multifaceted approaches to human rights litigation and advocacy in

both domestic and international settings, in collaboration with regional partner organisations The MRRP's current advocacy projects and cases in development focus on transparency and accountability with respect to Australia's role in the interception and detention of asylum seekers in South-East Asia.

Physicians for Human Rights (PHR) is a nonprofit organization that mobilizes health professionals across the United States to advance health, dignity and justice. Harnessing the specialized skills, rigor and passions of doctors, nurses, public health specialists and scientists, PHR investigates and exposes human rights violations in the US and internationally. Health professional members of PHR have evaluated the mental and physical health of detained and non-detained asylum seekers and torture survivors since 1992. PHR is committed to the principle of comprehensive protection of persecuted persons which prevents *refoulement* in any and all circumstances and territories, and has advocated for the health and other rights of particular refugee groups, such as the Rohingya of Burma, who are known to be frequent sea migrants.

James Gathii is the Associate Dean for Research and Scholarship and Governor George E. Pataki Professor of International Commercial Law at Albany. He is the author of *War, Commerce, and International Law* (Oxford University Press, November 2009), as well as numerous articles on the intersection of human rights and commercial law.

Dr. Tally Kritzman-Amir is an Assistant Professor of Law in the Academic Center for Law and Business, Israel and a Polonsky Fellow in the Van Leer Jerusalem Institute, where she manages the research group "Refugees in Israel." Kritzman's research and teaching interests focuses on refugee law.

Stephen H. Legomsky is the John S. Lehmann University Professor at the Washington University School of Law in St. Louis, Missouri, USA. He is the principal author of 'Immigration and Refugee Law and Policy', which has been adopted as the required text for law courses at 172 U.S. law schools, and he has advised the George H.W. Bush, Clinton and Obama Administrations, UNHCR, IOM, and several foreign governments, on migration and refugee policies. As a teacher and scholar in this field, he is interested in the accurate, humane, and efficient administration of the migration and refugee laws.

Margaret L. Satterthwaite is Associate Professor of Clinical Law and Faculty Director of the Center for Human Rights & Global Justice at New York University School of Law. She currently serves on the Advisory Panel of Experts to the U.N. Special Rapporteur on Protecting Human Rights While Countering Terrorism. Her research focuses on the human rights protections applicable to individuals who are moved across borders without the benefit of formal processes, a topic about which she has written several articles.