

# **TURNING THEIR BACK ON THE LAW?**

## **The Legality of the Coalition's Maritime Interdiction and Return Policy**

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## INTRODUCTION

Within a week of taking office ... Indonesian flagged, Indonesian crewed and Indonesian home-ported vessels without lawful reason to be headed to Australia [will] be turned around and escorted back to Indonesian waters.<sup>1</sup>

Tony Abbott, the Australian Opposition Leader, has proposed, as part of his 2013 federal election campaign, to ‘turn back the boats’. This political catchphrase denotes a border protection policy<sup>2</sup> of interdicting and returning vessels carrying asylum seekers (‘asylum vessels’) to their place of embarkation. According to Abbott, the policy will be implemented on the high seas and will focus on asylum vessels that have embarked from Indonesia and Sri Lanka. Such a policy, however, is subject to the law of the sea and the norm of *non-refoulement*, and the Commonwealth Minister for Foreign Affairs, Bob Carr,<sup>3</sup> has stated that it would be in contravention of both domestic and international law.<sup>3</sup>

The validity of Carr’s claim has not yet been examined, and it is the object of this thesis to examine whether the proposed interdiction policy complies with the law of the sea and the norm of *non-refoulement*.<sup>4</sup> The United States (‘US’) and Italy have both implemented similar policies, and as such, there is extensive literature examining the legal ramifications of such policies; interdiction policies, however, have not received sustained scrutiny in Australia. Accordingly, the importance of this thesis is, first, that it analyses and applies existing literature in a new context, and, second, that it provides a framework through which public discourse about the rights and obligations of asylum seekers and Australian border protection policies, can be discussed and critiqued.

This thesis argues that the Coalition’s policy can be implemented under current Australian law, but that the policy as it currently stands will place Australia in breach of the norm of *non-refoulement*. Vessels conducting interdiction operations on the high seas are bound by the customary law norm of *non-refoulement*, as it applies extraterritorially. Chapter I defines the legal scope and content of the norm of *non-refoulement* in light of recent case law. The norm permits states to return refugees to third states when certain requirements are met. The scope of these requirements has been subject to various interpretations by scholars and states. This thesis demonstrates that the norm requires not only protection from *refoulement* but also a guarantee that refugees will be afforded basic human rights. As Indonesia cannot meet either of these requirements, the Coalition’s policy will be in breach of this norm.

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<sup>1</sup> Tony Abbott, 'The Coalition's Plan for more Secure Borders' (Speech delivered at the Institute of Public Affairs, Melbourne, 27 April 2012).

<sup>2</sup> A Liberal-National Coalition policy.

<sup>3</sup> Simon Cullen, 'Bob Carr says turning back boats is 'illegal'', *ABC News (online)*, 18 July 2012 <<http://www.abc.net.au/news/2012-07-17/bob-carr-says-turning-boats-back-is-illegal/4135902>>.

<sup>4</sup> This thesis focuses solely on these two areas. It does not address other international law concerns.

The 1982 United Nations *Convention on the Law of the Sea* ('UNCLOS')<sup>5</sup> provides the governing framework for the law of the sea. Across the varying maritime zones, different rules apply in relation to interdiction. Although Abbott has said that interdictions under his policy will occur on the high seas,<sup>6</sup> it is likely, that operations will also take place in the territorial sea and the contiguous zone, as asylum vessels often traverse into the territorial sea undetected. Chapter II examines the legality of interdiction in these three maritime zones and the obligations that arise when a state claims to be carrying out a search and rescue operation.

Chapter III examines the impact of the law of the sea and the norm of *non-refoulement* on the Coalition's interdiction policy. It doing so, it demonstrates that if the forthcoming federal election results in a Coalition majority in the House of Representatives, Abbott will be able to immediately implement his policy under the current Australian legal framework. This is notwithstanding that the practice of interdiction, as proposed by the Coalition, will breach the norm of *non-refoulement*.

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<sup>5</sup> Opened for signature 10 December 1982, 1833 UNTS 3 (entered into force 16 November 1994).

<sup>6</sup> Bianca Hall, 'Navy would have role in turning asylum boats around: Morrison', *Sydney Morning Herald* (online), 4 February 2013 <<http://www.smh.com.au/opinion/political-news/navy-would-have-role-in-turning-asylum-boats-around-morrison-20130204-2dtkd.html>>.

## I THE NORM OF *NON-REFOULEMENT*

Article 33 of the *Convention Relating to the Status of Refugees*<sup>7</sup> ('Refugee Convention') expressly prohibits states from 'expel[ling] or return[ing] a refugee in any manner whatsoever to territories where his [or her] life or freedom would be threatened' on account of a reason. This prohibition is known as the norm of *non-refoulement*.

### *A Legal Status of the Norm*

At the Refugee Convention's drafting, Article 33 was considered to be of such importance that no reservations were permitted in relation to the Article. Derogations from the Article are only permitted to protect the security or the community of the country in which the refugee is in, but not in cases of war or other emergency situations.<sup>8</sup> Article 33 has since developed into a norm of international human rights law. The norm has evolved from a number of different treaties.<sup>9</sup> The norm of *non-refoulement* is understood to have two limbs: the first stemming from the prohibition against torture, and the second from the Refugee Convention. This thesis will only examine the second limb.

A legal norm reaches customary international law status<sup>10</sup> when it can be established that there is 'evidence of a general practice accepted as law'.<sup>11</sup> This requires uniform and consistent practice among states over an enduring period of time and *opinio juris*, meaning a belief by states that the practice is legally required.<sup>12</sup> The norm of *non-refoulement* has been accepted as a norm of customary international law by states, scholars and courts.<sup>13</sup> Despite this, a handful of scholars, including James Hathaway, continue to dispute its legal status.

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<sup>7</sup> Opened for signature 28 July 1951, 189 UNTS 137 (entered into force 22 April 1954) as amended by the *Protocol Relating to the Status of Refugees*, opened for signature 21 January 1967, 1465 UNTS 297 (entered into force 4 October 1967).

<sup>8</sup> *Refugee Convention* arts 8, 33(2).

<sup>9</sup> Including the *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, opened for signature 10 December 1984, 606 UNTS 267 (entered into force 26 June 1987) art 3 ('CAT'); *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 172 (entered into force 23 March 1976) art 6, 7 ('ICCPR'); *Convention for the Protection of Human Rights and Fundamental Freedoms*, opened for signature 4 November 1950, 213 UNTS 222 (entered into force 3 September 1953), as amended by Protocol No 11 to the *Convention for the Protection of Human Rights and Fundamental Freedoms*, opened for signature 11 May 1994, ETS No 155 (entered into force 1 November 1998) art 3 ('ECHR').

<sup>10</sup> Customary international law binds all states except where the state is a persistent objector.

<sup>11</sup> *Statute of the International Court of Justice* art 38(1)(b).

<sup>12</sup> *Continental Shelf (Libya v Malta) (Judgement)* [1985] ICJ Rep 13, [27], [29]-[30].

<sup>13</sup> *Hirsi Jamaa and Others v Italy* (European Court of Human Rights, Grand Chamber, Application No 27765/09, 23 February 2012), 67 ('*Hirsi Jamaa*'). See Seline Trevisanut, 'The Principles of Non-Refoulement at Sea and the Effectiveness of Asylum Protection' (2008) 12 *Max Planck Yearbook of United Nations Law* 205, 214.

Hathaway argues that neither the state practice element nor the *opinio juris* element has been satisfied.<sup>14</sup> Over the past decade, multiple states, including the US, Italy and Australia, have returned refugees to countries where there is a likely chance they face threats to their freedom and life. These states have consistently re-characterised their conduct and claimed that the norm does not apply extraterritorially or that the individuals were not refugees.<sup>15</sup> The International Court of Justice ('ICJ') found that if a:

state acts in conflict with a recognised rule or norm but defends its conduct based on exceptions to such a rule, this confirms rather than weakens the strength of the rule itself.<sup>16</sup>

It follows that contrary state practice can arguably be viewed as reinforcing the legal strength of the norm, as states are not disputing the applicability of the norm but merely trying to claim an exception. Moreover, the ICJ clarified that the state practice only requires 'general practice'<sup>17</sup> rather than 'the near-universal' practice Hathaway postulates.<sup>18</sup> Conformity with the norm in the form of physical state practice is found in a majority of states, including those specially affected by refugees.<sup>19</sup> Messineo confirms that 'this practice may not be universal, but it is indeed widespread and consistent.'<sup>20</sup>

Furthermore, the customary international law status of the norm has been widely acknowledged by many states and multi-state bodies.<sup>21</sup> Additionally, all state parties to the Refugee Convention affirmed the norm's status in customary international law in 2001.<sup>22</sup> Hathaway acknowledges this evidence, but concludes that it bears little legal weight, as they are mere 'pronouncements' rather than evidence of actual state practice.<sup>23</sup> However these 'pronouncements' reflect the views of 144 states and have

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<sup>14</sup> James Hathaway, *The Rights of Refugees under International Law* (Cambridge University Press, 2005) 364.

<sup>15</sup> Guy Goodwin-Gill and Jane McAdam, *The Refugee in International Law* (Oxford University Press, 3<sup>rd</sup> ed, 2007), 224.

<sup>16</sup> *Military and Paramilitary Activities in and Against Nicaragua (Nicaragua v United States) (Judgement)* [1986] ICJ Rep 14, [186].

<sup>17</sup> *Ibid.*

<sup>18</sup> Hathaway, above n 14, 364.

<sup>19</sup> Elihu Lauterpacht and Daniel Bethlehem, 'The scope and content of the principle of non-refoulement: Opinion' in Erika Feller, Volker Türk, and Frances Nicholson (ed), *Refugee Protection in International Law: UNHCR's Global Consultations on International Protection* (Cambridge University Press, 2003) 87, 148.

<sup>20</sup> Francesco Messineo, 'Non-refoulement Obligations in Public International Law: Towards a New Protection Status' in Satvinder Juss (ed), *Research Companion to Migration Theory and Policy* (Ashgate, 2013) 129, 20.

<sup>21</sup> UNHCR Executive Committee on International Protection of Refugees, *General Conclusions No 25 (XXXIII)* (1982) [b]. See Lauterpacht and Bethlehem, above n 19, 147.

<sup>22</sup> *Declaration of State Parties to the 1951 Convention and/or its 1967 Protocol Relating to the Status of Refugees*, Ministerial Meeting of State Parties to the 1951 Convention and/or its 1967 Protocol relating to the Status of Refugees, UN Doc HCR/MMSP/2001/09 (16 January 2002, adopted December 2001).

<sup>23</sup> Hathaway, above n 14, 363-365.

been endorsed by a number of domestic courts<sup>24</sup> and the European Court of Human Rights (ECtHR).<sup>25</sup> Additionally a majority of states around the world continue to accept refugees and have not engaged in *refoulement*. The evidence indicating the norm's customary international law status confronts and outweighs Hathaway's critique.

Debate has also arisen regarding the *jus cogens* status of the norm. *Jus cogens* status is afforded to customary law norms from which no deviations are allowed. Allain stresses the importance of recognising the norm of *non-refoulement* as one with *jus cogens* status as it gives greater powers to individuals to hold their states to account.<sup>26</sup> The United Nations High Commissioner for Refugees Executive Committee ('ExCom') has endorsed the norm's *jus cogens* status,<sup>27</sup> along with Albuquerque J of the ECtHR in *Hirsi Jamaa*.<sup>28</sup> However, issues regarding state practice arise here as *jus cogens* requires universal state practice. It is likely that the mixed practice, whilst not sufficient to prevent recognition of the norm's customary international law status, is 'an obstacle' to the norm attaining *jus cogens* status.<sup>29</sup> Accordingly, this thesis proceeds on the assumption that the norm has reached customary international law status only.

Nevertheless, the operation of this norm of customary international law is constrained by the lack of clarity about the scope of the norm of *non-refoulement*. The scope of the norm has expanded from its initial form in the Refugee Convention.<sup>30</sup> The rest of the Chapter will examine both the clearly defined aspects of the norm that are within the category of customary international law and the areas which have a less clear status under customary international law.

## B Application of the Norm

The norm of *non-refoulement* affords protection to all individuals who satisfy the definition of a refugee in the Refugee Convention.<sup>31</sup> This protection is afforded whenever a person falls within the jurisdiction of any state that is not a persistent

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<sup>24</sup> *Suresh v Canada (Minister of Citizenship and Immigration)* [2002] 1 SCR 3, [65]; *Zaoui v. Attorney General (No. 2)* [2005] 1 NZLR 690, [28]-[29]; *C and others v Director of Immigration* (2008) 2 HKC 16, [113], [138].

<sup>25</sup> *Hirsi Jamaa* (2012) ECtHR Application No 27765/09, 67, [135].

<sup>26</sup> Jean Allain, 'The Jus Cogens Nature of Non-Refoulement' (2001) 13 *International Journal of Refugee Law* 532, 550.

<sup>27</sup> *ExCom Conclusion 25 (1982)*, [b].

<sup>28</sup> *Hirsi Jamaa* (2012) ECtHR Application No 27765/09, 67.

<sup>29</sup> Messineo, above n 20, 20.

<sup>30</sup> Robert Newmark, 'Non-Refoulement Run Afoul: The Questionable Legality of Extraterritorial Repatriation Programs' (1993) 71 *Washington University Law Review* 833, 843-844.

<sup>31</sup> UNHCR, *Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1961 Protocol relating to the Status of Refugees*, UN Doc HCR/1P/4/Eng/REV.3, 1979 (reissued December 2011) 51.

objector to the norm. As recognition of refugee status is merely declaratory, the norm applies not only to individuals who have been afforded the status but also those claiming the status. It is also afforded to those who have not yet claimed refugee status or protection but who are presumed by the state to be in need of it.<sup>32</sup>

States are only permitted to disregard the norm of *non-refoulement* when there are reasonable grounds for finding the refugee to be a danger to national security or public safety.<sup>33</sup> There is a high threshold for establishing these grounds.<sup>34</sup> These exceptions will not be examined as their relevance is beyond the scope of this thesis.

Article 1A(2) of the Refugee Convention defines a refugee as someone who:

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.

The UNHCR Handbook states that under the Refugee Convention ‘a threat to life or freedom on account of a convention reason’ will always constitute persecution.<sup>35</sup> In addition, breaches of civil and political rights for a convention reason also amount to persecution.<sup>36</sup> *Hirsi Jamaa* affirmed this in *Hirsi Jamaa*, stating that the norm protects against a risk of breach of any right contained in the ECHR, including freedom of religion and freedom of thought.<sup>37</sup> The UNHCR has also confirmed that the required threat may be found in any place, not simply the individual’s country of origin.<sup>38</sup> Therefore, states are prohibited from refouling a refugee, whether declared or not, to *any* country in which the individual has a well-founded fear of persecution.

### *C Obligations Imposed on States*

The overarching obligation on states is to not return an individual to a place where they fear for their safety and life. Importantly, this does not equate to a right of access to a foreign state’s territory.<sup>39</sup> However, it does impose an obligation on that state to provide access to a fair and effective refugee status determination (‘RSD’) procedure and to ensure the safety of refugees under its control.<sup>40</sup> A state cannot shift this latter obligation to a third state; however, it can transfer a refugee to a third state when

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<sup>32</sup> *Hirsi Jamaa* (2012) ECtHR Application No 27765/09 65, [133].

<sup>33</sup> *Refugee Convention* art 33(2).

<sup>34</sup> Lauterpacht and Bethlehem, above n 19, 169.

<sup>35</sup> UN Doc HCR/1P/4/Eng/REV.3 [51].

<sup>36</sup> Michelle Foster, 'Responsibility Sharing or Shifting? 'Safe' Third Countries and International Law' (2008) 25(2) *Refugee* 64, 69.

<sup>37</sup> *Hirsi Jamaa* (2012) ECtHR Application No 27765/09, 63, 67.

<sup>38</sup> *Advisory Opinion on the Extraterritorial Application of Non-Refoulement Obligations under the 1951 Convention relating to the Status of Refugees and its 1967 Protocol*, UNHCR, 26 January 2007, [7].

<sup>39</sup> Trevisanut, above n 13, 208.

<sup>40</sup> Penelope Mathew, 'International Association of Refugee Law Judges Conference, Address: Legal Issues Concerning Interception' (2003) 17 *Georgetown Immigration Law Journal* 221, 229.

specific criteria are met.<sup>41</sup> This transfer process is often referred to as the ‘effective protection regime’ as the initial state must ensure the third state provides the refugee effective protection. The effective protection regime imposes two obligations. The first obligation requires states to evaluate the consequences of refouling an individual to the third state before in fact doing so. The second obligation requires the initial state to establish that the third state meets certain requirements in regards to refugee protection.<sup>42</sup> Once a transfer is effected under the regime, the initial state remains liable for the refugee’s protection from *refoulement*.<sup>43</sup> The third states are usually either safe countries through which the refugee has transited, or are states, which willingly take responsibility for the processing of the refugee claim.

### 1 *Obligation 1: Evaluation*

Refugee law is centred on the right of all individuals to have their status fairly examined in order for them to be accorded their rights under the international human rights framework. Before an individual can be removed to a third state there is an obligation on the initial state to evaluate the consequences of the individuals expulsion.<sup>44</sup> A breach of the norm of *non-refoulement* is established if a state fails to do this or if an assessment is done but the assessment procedure is inadequate.<sup>45</sup> What amounts to an adequate evaluation procedure is not clearly defined. A number of states, including European Union (EU) member states, use generic countrywide assessments to create ‘safe third country’ lists that are then drawn upon when unwanted refugees arrive. This process is predominately implemented through bilateral agreements between the initial state and the third state.

However, these generic country based assessments only satisfy the duty to evaluate when they are accompanied by individual evaluations.<sup>46</sup> The individual evaluations must be in relation to the circumstances of the individual claiming refugee status and the country in which they will be *refouled* to.<sup>47</sup> This is because specific states may be safe for certain individuals, but not for others due to their personal background. In *T.I v The United Kingdom* the ECtHR stated that the process of transferring a refugee must be subject to ‘rigorous scrutiny,’ suggesting that a countrywide assessment

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<sup>41</sup> *Note on International Protection*, Executive Committee of the High Commissioner's Programme, 54th sess, UN Doc A/AC.96/975 (2 July 2003) [12]; UNHCR Executive Committee on International Protection of Refugees, *Conclusion on Problem of refugees and asylum-seekers who move in an irregular manner from a country in which they had already found protection* No 58 (XL) (1989) [f].

<sup>42</sup> *Note on International Protection*, UN Doc A/AC.96/975, 19.

<sup>43</sup> *R (Adan) v Secretary of State for the Home Department* [2001] 2 AC 477, [527].

<sup>44</sup> Andreas Fischer-Lescano, Tillmann Lohr, and Timo Tohidipur, 'Border Controls at Sea: Requirements under International Human Rights and Refugee Law' (2009) 96 *International Journal of Refugee Law* 256, 284-285.

<sup>45</sup> Stephen Legomsky, 'Secondary Refugee Movements and the Return of Asylum Seekers to Third Countries: The Meaning of Effective Protection' (2003) 15 *International Journal of Refugee Law* 567, 658.

<sup>46</sup> UNHCR, *Global Consultations on International Protection/ Third Track: Asylum Processes (Fair and Efficient Asylum Procedures)*, UN Doc EC/GC/01/12 (31 May 2001) [12]-[18].

<sup>47</sup> *Report of the Human Rights Committee, vol 1 (2002-03)*, UN GAOR, 58th sess, Supp No 40, UN Doc A/58/40 (24th October 2003) [79(13)].



alone is insufficient.<sup>48</sup> The UNHCR has found when individual evaluations do not occur it has resulted in *refoulement* in a number of cases.<sup>49</sup> *Refoulement* is also more likely to occur when 'safe third country' lists are developed in line with a state's foreign policy strategy, as individual concerns will be superseded by greater political interests.<sup>50</sup> The nature of the individual assessment is unlikely to be a lengthy process as the effective protection regime is utilised to reduce the burden on specific states, not increase it. The implication is that a minimum obligation is imposed on states requiring them to evaluate the impact of *refoulement* on the refugee claimant in each individual case.

Difficulties arise in regards to individual examinations when refugees are interdicted whilst travelling on the sea. Assuming a state's refugee protection obligations are engaged, can the interdicting state conduct accurate individual examinations whilst at sea? O'Brien argues that states can only conduct effective and fair status examinations on land and as such, the obligation to individually evaluate correspondingly accords the refugee claimant a temporary right to disembark.<sup>51</sup> However, this has not yet been legally recognised.<sup>52</sup> Despite this, legitimate concerns can be raised regarding the accuracy of individual evaluations conducted at sea. Maritime interdictions are generally carried out by navy personnel whilst on navy warships. A large number of refugees associate the military with their past persecution and are, thus, unlikely to speak freely with military personnel, particularly about their fear of persecution. Further practical concerns that arise include the requirement of interpreters on board to ensure all refugees can present their claims and the ability of personnel to scrutinise claims whilst on a ship. Indeed, the overwhelming conclusion to draw is that the conditions on naval vessels will not allow for adequate individual evaluations.

## 2 *Obligation 2: Third State Requirements*

To comply with the effective protection regime, states must demonstrate that the third state: *guarantees* the refugee protection from *refoulement*, contains an effective RSD procedure, and will treat the refugee according to basic human standards.<sup>53</sup>

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<sup>48</sup> (European Court of Human Rights, Grand Chamber, Application No 43844/98, 7 March 2000) 14.

<sup>49</sup> *Note on International Protection*, UN Doc A/AC.96/975, 19.

<sup>50</sup> Rosemary Byrne and Andrew Shacknove, 'The Safe Country Notion in European Asylum Law' (1996) 9 *Harvard Human Rights Journal* 185, 223.

<sup>51</sup> Killian O'Brien, 'Refugees on the High Seas: International Refugee Law Solutions to a Law of the Sea Problem' (2011) 3 *Goettingen Journal of International Law* 715, 731.

<sup>52</sup> Hathaway, above n 14, 301.

<sup>53</sup> Catherine Phuong, 'The Concept of 'Effective Protection' in the Context of Irregular Movements and Protection in Regions of Origin' (Research Paper No. 26, Global Migration Perspectives, Global Commission on International Migration, April 2005) 4; Department of International Protection, 'Summary Conclusions on the Concept of "Effective Protection" in the Context of Secondary Movements of Refugees and Asylum-Seekers' (Lisbon Expert Roundtable, UNHCR, February 2003) [15].

A fundamental aspect of the effective protection regime is protection from chain *refoulement*.<sup>54</sup> Chain *refoulement* occurs when a state transfers a refugee to a third state, and the third state then expels the refugee to a further territory where the refugee faces threats to his life or freedom. Any state transferring refugees must guarantee that the third state will not engage in *refoulement*.<sup>55</sup> This guarantee must be legally binding on the third state and should also accord a legal right to enter and reside.<sup>56</sup>

Additionally, the third state must have in place a fair and effective RSD process.<sup>57</sup> Expelling an individual to a third state where ‘an inadequate [RSD] procedure prevents an actual Convention refugee from establishing his or her status’ will amount to *refoulement*.<sup>58</sup> Ratification of the Refugee Convention is not required,<sup>59</sup> nor will ratification alone be sufficient to demonstrate an effective RSD procedure has been established.<sup>60</sup> Evidence of the state’s *actual* practice is required.<sup>61</sup> The third state must interpret the definition of a refugee in line with its true meaning,<sup>62</sup> provide access to judicial review and follow the procedures outlined by the ExCom.<sup>63</sup> Factors that can be used to show an effective procedure include processing refugee claims within a reasonable timeframe and ensuring confidentiality over claims.<sup>64</sup>

The initial state must also ensure that the third state will treat the refugee according to ‘basic human standards’.<sup>65</sup> The exact content of these ‘basic human standards’ is unclear. Arguably, however, at a minimum they include the right to non-discrimination, protection from arbitrary detention, the right to education and the right to a means of subsistence.<sup>66</sup> The right to non-discrimination and protection

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<sup>54</sup> Phuong, above n 53, 4.

<sup>55</sup> UNHCR Executive Committee on International Protection of Refugees, *Conclusion on International Protection* No 85 (XLIX) (1998) [aa]; UNHCR Executive Committee on International Protection of Refugees, *General Conclusion* No 87 (L) (1999) [j].

<sup>56</sup> *T.I v The United Kingdom* (2000) ECtHR Application No 43844/98, 15; *Plaintiff M70/2011 v Minister for Immigration and Citizenship*; *Plaintiff M106 of 2011 v Minister for Immigration and Citizenship* (2011) 280 ALR 18, [116] (‘*Plaintiff M70*’).

<sup>57</sup> *Excom Conclusion 85* (1998) [aa].

<sup>58</sup> Legomsky, above n 45, 585.

<sup>59</sup> See Legomsky, above n 45, 658-660. Contra, Department of International Protection, ‘Maritime interception operations and the processing of international protection claims: legal standards and policy considerations with respect to extraterritorial processing’ (Protection Policy Paper, UNHCR, November 2010) [38].

<sup>60</sup> *Minister for Immigration and Multicultural Affairs v Al-Sallal* (1999) 94 FCR 549, 559; Mathew, above n 40, 243.

<sup>61</sup> *Al-Zafiry v Minister for Immigration and Multicultural Affairs* (1999) 58 ALD 663, [20]; *M.S.S v Belgium and Greece* (2011) 53 EHRR 28, [353] (‘*M.S.S*’).

<sup>62</sup> ‘Michigan Guidelines on Protection Elsewhere’ (2007) 28 *Michigan Journal of International Law* 207, [4].

<sup>63</sup> Outlined in UNHCR Executive Committee on International Protection of Refugees, *Conclusion on Determination of refugee status* No 8 (XXVIII) (1977) [e].

<sup>64</sup> *Hirsi Jamaa* (2012) ECtHR Application No 27765/09, 75; *Canadian Council for Refugees and others v R* [2007] FC 1262, [239]-[240].

<sup>65</sup> Legomsky, above n 45, 585; *ExCom Conclusion 85* (1998) [aa].

<sup>66</sup> Phuong, above n 53, 5.

from arbitrary detention amount to basic human standards due to their fundamental nature within the Refugee Convention<sup>67</sup> and ICCPR,<sup>68</sup> both treaties from which the norm has been derived. The right to education is a central human standard given the special vulnerabilities of children and its basis in a number of international treaties, including the *Convention on the Rights of a Child*<sup>69</sup> and the Refugee Convention.<sup>70</sup> The right to a means of subsistence is more controversial. However, Lord Bingham in the House of Lords, stated that treatment is inhuman and degrading when an individual is ‘unable to support himself, [and] by the deliberate action of the state, [is] denied shelter, food, or the most basic necessities of life.’<sup>71</sup> This finding was affirmed by the ECtHR in *M.S.S v Belgium*.<sup>72</sup> As the norm of *non-refoulement* protects against inhuman and degrading treatment, effective protection must also include provision of ‘social assistance or access to the labour market in the interim’.<sup>73</sup> Additional obligations, beyond those required under the norm, apply to states who have ratified the Refugee Convention and are transferring the refugee from within their territory.<sup>74</sup>

### D Extraterritorial Application

*Non-refoulement* obligations arise when a refugee, whether formally recognised or not, falls within the jurisdiction of a state.<sup>75</sup> However, whether these obligations apply when states exercise their jurisdiction extraterritorially has been more controversial. The US Supreme Court decision in *Sale v Haitian Centres Council*<sup>76</sup> (‘*Sale*’) sparked extensive debate on this legal issue. The Supreme Court considered whether an order to interdict and return Haitian asylum vessels outside of US territory was consistent with the US’ domestic law and international obligations. The judgement outlines the argument against extraterritorial application and is the key source of law for critics of the norm’s extraterritorial application. There is now an almost universal consensus that the norm is applicable when states extraterritorially enforce their effective jurisdiction.<sup>77</sup>

The majority judgement relied on three key aspects of Article 33(1) of the Refugee Convention to justify its finding that the Article does not apply extraterritorially. Firstly, they found that the term ‘return’ should be narrowly interpreted, due to the

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<sup>67</sup> *Refugee Convention* arts 3, 31.

<sup>68</sup> *ICCPR* arts 2(2), 9.

<sup>69</sup> Opened for signature 20 November 1989, 1577 UNTS 3 (entered into force 2 September 1990) art 28.

<sup>70</sup> *Refugee Convention* art 22.

<sup>71</sup> *R (Limbuella) v Secretary of State for the Home Department* [2005] UKHL 66, [7].

<sup>72</sup> *M.S.S* (2011) 53 EHRR 28, [252]-[264].

<sup>73</sup> Goodwin-Gill and McAdam, above n 15, 396; ‘Michigan Guidelines on the Right to Work’ (2010) 31 *Michigan Journal of International Law* 293, [295].

<sup>74</sup> See Legomsky, above n 45, 639-653.

<sup>75</sup> Goodwin-Gill and McAdam, above n 15, 244.

<sup>76</sup> 509 U.S. 155 (1993).

<sup>77</sup> Goodwin-Gill and McAdam, above n 15, 244; Lauterpacht and Bethlehem, above n 19, 111; Thomas Gammeltoft-Hansen, *Access to Asylum: International Refugee Law and the Globalisation of Migration Control* (Cambridge University Press, 2011) 58.

inclusion of the French verb '*refoule*' within the English text of Article 33.<sup>78</sup> This narrow interpretation of 'return' was held to include only exclusions within the territorial zone.<sup>79</sup> Secondly, the Court argued that Article 33(2) implied a territorial limitation on Article 33(1).<sup>80</sup> Thirdly, the majority relied on the Swiss and Dutch delegate statements from the travaux préparatoires, which suggested that the delegates did not intend the treaty to apply extraterritorially.<sup>81</sup>

The reasoning of the majority in *Sale* was heavily criticised not only by Blackmun J in his scathing dissenting judgement but also by scholars,<sup>82</sup> the ECtHR,<sup>83</sup> and other international organisations.<sup>84</sup> Article 31(1) of the *Vienna Convention on the Law of Treaties*<sup>85</sup> ('VCLT') specifies that treaties should be interpreted in accordance with the ordinary meaning of the text and the overriding purpose of the treaty. The Supreme Court decision does not follow these interpretive requirements, and instead applied a special meaning to the term 'return' that is incompatible with the Refugee Convention's underlying humanitarian purpose. The Court's interpretation does not extend to an analysis of the phrase 'in any manner whatsoever', which arguably implies a broad application of the norm.<sup>86</sup> Furthermore, the majority's reliance on the travaux préparatoires is inconsistent with Article 32 of the VCLT, which specifies that supplementary materials should only be relied upon when the meaning of the article is 'ambiguous or obscure; or the interpretation leads to a result which is manifestly absurd or unreasonable'. The reasoning behind the ICJ's Advisory Opinion in the *Legal consequences of the Construction of a Wall in the Occupied Palestinian Territory* that the ICCPR applies extraterritorially, lends further support to the argument that the norm of *non-refoulement* applies extraterritorially.<sup>87</sup>

International law stipulates that where a state exercises 'effective control over an area [or individual] situated outside its national territory', it will be recognised as an extraterritorial exercise of the state's jurisdiction.<sup>88</sup> The level of control required is dependent on the facts of the individual case, however once established, a state is bound to act in line with its international obligations which have extraterritorial

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<sup>78</sup> *Sale* 509 U.S 155 (1993) 181.

<sup>79</sup> *Ibid* 182.

<sup>80</sup> *Ibid* 180.

<sup>81</sup> *Ibid* 184-187.

<sup>82</sup> Lauterpacht and Bethlehem, above n 19, 111; Michelle Foster, 'Protection Elsewhere: The Legal Implications of Requiring Refugees to Seek Protection in Another State' (2007) 28 *Michigan Journal of International Law* 223, 251; Gammeltoft-Hansen, above n 77, 58.

<sup>83</sup> *Hirsi Jamaa* (2012) ECtHR Application No 27765/09, 68-71.

<sup>84</sup> *Haitian Centre for Human Rights v. United States*, Case No. 10.675, Inter-Am. Comm'n H.R., Report No. 51/96, OEA/Ser.L/V/II.95 Doc. 7 rev [550]; *Access to assistance and protection for asylum-seekers at European seaports and coastal areas*, Recommendation 1645(2004), Council of Europe: Parliamentary Assembly, 6th stg (29 January 2004) [j].

<sup>85</sup> Opened for signature 23 May 1951, 1155 UNTS 331 (entered into force 27 January 1980).

<sup>86</sup> Foster, 'Protection Elsewhere,' above n 82, 251.

<sup>87</sup> [2004] ICJ Rep 136, [106]-[114].

<sup>88</sup> *Isaak and Others v Turkey (Admissibility)* (European Court of Human Rights, Grand Chamber, Application No 44587/98, 28 September 2006) [19].

effect.<sup>89</sup> States conducting interdiction and return operations in relation to asylum vessels generally exercise effective control, thus, are bound by the norm of *non-refoulement* in all maritime zones. In addition to this, they must comply with the legal obligations set out in the law of the sea.

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<sup>89</sup> *Hirsi Jamaa* (2012) ECtHR Application No 27765/09 [81]-[82].

## II THE LAW OF THE SEA

All vessels, including state vessels, are bound by the law of the sea. The law of sea stipulates that states can only interdict and assert control over foreign vessels in specific circumstances. These specific circumstances vary across the different maritime zones. When these specific circumstances are not met states often characterise their conduct as a ‘search and rescue’ (‘SAR’) operation. This Chapter outlines the different maritime zones under the law of the sea and the legal means of interdicting and returning foreign vessels within these zones. The second part of this Chapter examines the obligations flowing from maritime SAR operations.

### *A Maritime Zones*

In each maritime zone the law of the sea imposes different obligations and rights on states. Three key zones will be examined in this thesis: the territorial sea, the contiguous zone and the high seas. The exclusive economic zone (EEZ) and continental shelf will not be addressed as they are beyond the scope of this thesis.

#### *1 The High Seas*

The high seas are ‘all those areas beyond any of the other zones in which states exercise a certain measure of sovereign power.’<sup>90</sup> The high seas are free of state sovereignty and are governed by the principle of freedom of the seas, within which freedom of navigation operates.<sup>91</sup> The zone, however, does not operate in a ‘jurisdictional vacuum’.<sup>92</sup> Vessels on the high seas are subject to their flag state jurisdiction and other rules of international law.<sup>93</sup> Additionally, the freedom of navigation does not amount to an absolute freedom; vessels may be subject to the limited right of visit available to states.<sup>94</sup> Article 110 of *UNCLOS* permits states to board a foreign vessel if they suspect the vessel is engaged in piracy; engaged in the slave trade; engaged in unauthorised broadcasting; the ship is without nationality

#### *2 The Contiguous Zone*

The contiguous zone extends beyond the territorial sea to a limit of 24 nm.<sup>95</sup> The zone is conterminous with the EEZ and the continental shelf. As a result, the enshrined freedom of navigation of the high seas also applies within the contiguous zone.<sup>96</sup> Under an exception to the freedom of navigation principle, in this zone, coastal states

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<sup>90</sup> Mathew, above n 40, 223. See *UNCLOS* arts 86, 87.

<sup>91</sup> *UNCLOS* art 87.

<sup>92</sup> Donald Rothwell and Tim Stephens, *The International Law of the Sea* (Hart Publishing, 2010) 149.

<sup>93</sup> *UNCLOS* art 92.

<sup>94</sup> *Ibid* art 110.

<sup>95</sup> *Ibid* art 33(2).

<sup>96</sup> *Ibid* art 58.

are entitled to exercise rights over the ‘outward and inward bound movement of ships’.<sup>97</sup>

### 3 *The Territorial Sea*

The territorial sea extends up to 12 nm from the territorial sea baseline<sup>98</sup> of the coastal state<sup>99</sup> and within this zone coastal states can exercise complete sovereignty, subject to international law requirements. A key limitation on the coastal state’s sovereignty, however, is the right of innocent passage. When a foreign vessel exercises its right of innocent passage, a coastal state cannot interfere, unless the foreign vessel breaches ‘the laws [or] regulations of [the] coastal state’.<sup>100</sup>

Reaching the territorial sea is of crucial importance for individuals seeking asylum. The right to claim asylum arises only upon entering the state, including entering the territorial sea.<sup>101</sup>

## B *Interdiction and Return Policies*

### 1 *Definition*

The term ‘interdiction’ has been defined differently under varying branches of international law.<sup>102</sup> Guilfoyle has interpreted interdiction to be a two-step process. The first step involving the stopping and boarding of a vessel at sea and the second step involving the arresting of the vessel, passengers and cargo on board the vessel, if necessary.<sup>103</sup> This paper takes a differing approach, adopting a law of the sea definition of interdiction. It understands interdiction to involve states exercising a right of enquiry over foreign vessels. The term ‘returning’ involves a separate action. ‘Returning’ includes the assertion of authority over the vessel and the subsequent removal of the vessel to a different maritime zone. In practice, interdiction and returns occur when a vessel approaches a foreign vessel and after enquiring of the nationality of the vessel, proceeds to board it in order to tow or escort it to another location.<sup>104</sup>

### 2 *Legal Framework*

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<sup>97</sup> Rothwell and Stephens, above n 92, 80.

<sup>98</sup> The territorial sea baseline refers to the low-water line along the coast of the state.

<sup>99</sup> UNCLOS arts 2-3.

<sup>100</sup> Barbara Miltner, 'Irregular maritime migration: Refugee Protection Issues in Rescue and Interception' (2006) 30 *Fordham International Law Journal* 75, 101.

<sup>101</sup> The right to claim asylum is enshrined in Article 14 of the *Universal Declaration of Human Rights*, GA Res 217A (III), UN GAOR, 3rd sess, 183rd plen mtg, UN Doc A/810 (10 December 1948). Article 14(1) states ‘[e]veryone has the right to seek and to enjoy in other countries asylum from persecution.’

<sup>102</sup> Coppins, maritime interdiction, 344

<sup>103</sup> Douglas Guilfoyle, *Shipping Interdiction and the Law of the Sea* (Cambridge University Press, 2009) 4-5.

<sup>104</sup> This definition does not encompass activities that are classified as SAR operations.

Discussion surrounding interdiction and return incorrectly implies that the act of carrying migrants across the sea is a criminalised activity.<sup>105</sup> In fact it is the right of all individuals to freely move through the high seas. It is only upon entering the territorial waters of a state that unlawful migration may occur.<sup>106</sup> The analysis of the legal framework will be examined through the differing maritime zones to clearly establish the legal options available to states wishing to impose such interdiction policies.

*(a) The High Seas*

The freedom of navigation enshrined within the high seas<sup>107</sup> is not absolute as vessels can be subject to interference under permissive rules of international law. However, a vessel registered with its flag state is afforded protection by the flag state's enforcement of its jurisdiction over all activities on the vessel.<sup>108</sup> States cannot interdict a foreign vessel which has flag state protection and is acting in compliance with international law requirements, except if consent is given by the captain or flag state.<sup>109</sup> Asylum vessels often fall into the exceptions to these rules as they travel without state protection.

The concept of freedom of the high seas 'is usually expressed as a freedom common to states'.<sup>110</sup> Ships without nationality are ships without a state of registration ('stateless vessels'). Stateless vessels have no protection on the high seas as they are not directly bestowed any rights and have no jurisdiction to rely on to assert their sovereignty. The law of the sea is silent on the rights of stateless vessels, but has accepted that statelessness itself is not repugnant to the law of the sea.<sup>111</sup> Statelessness results in those vessels being subject to a high degree of scrutiny.

The right of visit is a key limitation on the freedom of navigation found within the high seas. The right empowers warships or duly authorised and marked government vessels to confirm a foreign vessel's nationality when there are 'reasonable grounds' for suspecting the vessel is involved in piracy; the slave trade; unauthorised broadcasting; or is without nationality.<sup>112</sup> This includes the right to check documents, and if suspicion remains, a right to further examination on board the ship.<sup>113</sup>

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<sup>105</sup> Efthymios Papastavridis, 'Interception of Human Beings on the High Seas: A Contemporary Analysis under International Law' (2009) 36 *Syracuse Journal of International Law and Commerce* 145, 163.

<sup>106</sup> Trevisanut, above n 13, 232.

<sup>107</sup> UNCLOS art 87.

<sup>108</sup> UNCLOS arts 91, 92.

<sup>109</sup> Jasmine Coppens and Eduard Somers, 'Towards New Rules on Disembarkation of Persons Rescued at Sea?' (2010) 25 *The International Journal of Marine and Coastal Law* 377, 400.

<sup>110</sup> Goodwin-Gill and McAdam, above n 15, 10.

<sup>111</sup> Robert Reuland, 'Interference with Non-National Ships on the High Seas: Peacetime Exceptions to the Exclusivity Rule of Flag-State Jurisdiction' (1989) 22 *Vanderbilt Journal of Transnational Law* 1161, 1198.

<sup>112</sup> UNCLOS arts 110(1),(2),(5).

<sup>113</sup> *Ibid* art 110(2)



The vessels used by asylum seekers are predominately small fishing boats. Due to their small size and expected use only within coastal waters these fishing boats are not registered with the state from which they originate.<sup>114</sup> A vessel that is not registered is assumed to be ‘assimilated to a ship without nationality’.<sup>115</sup> This means asylum vessels generally cannot claim protection from their state of origin. As such, they are subject to the vulnerabilities inherent in travelling as a stateless vessel.

The law of the sea does not expressly stipulate whether an interdicting vessel can assert its jurisdiction over a stateless vessel.<sup>116</sup> Two strands of opinion have developed on this issue. The first view, endorsed by the US<sup>117</sup> and the United Kingdom,<sup>118</sup> maintains that states may completely impose their jurisdiction on stateless vessels<sup>119</sup> as they ‘constitute a potential threat to the order and stability of navigation on the high seas’.<sup>120</sup> This permits states to board and control any stateless vessel found on the high seas. The extent of the power available to the interdicting state, under this view, extends beyond addressing the threat imposed by stateless vessels.

On a stronger legal footing, is the contrary assertion that states can assert their jurisdiction over stateless vessels only to ensure they are abiding by international regulations and norms.<sup>121</sup> This requires a jurisdictional nexus to be established before the interdicting state can assert its jurisdiction.<sup>122</sup> Once a nexus is established the interdicting state can only assert control to the extent allowed by the nexus.

The *Protocol against the Smuggling of Migrants by Land, Sea and Air, Supplementing the Convention against Transnational Organised Crime*<sup>123</sup> (‘Smuggling Protocol’) aims to prevent and combat the smuggling of migrants. Article 8(7) of the Protocol give states powers to board and search stateless vessels if there is a reasonable suspicion that the ‘vessel is engaged in the smuggling of

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<sup>114</sup> Ibid art 94.

<sup>115</sup> Goodwin-Gill and McAdam, above n 15, 271; *UNCLOS* art 92(2).

<sup>116</sup> Maarten den Heijer, *Europe and Extraterritorial Asylum* (PhD Thesis, Leiden University, 2011) 237.

<sup>117</sup> *United States v Marino-Garcia* 679 F 2d 1373 (1982) [1383].

<sup>118</sup> *Naim Molvan v Attorney General for Palestine* [1948] AC 351, [369].

<sup>119</sup> Papastavridis, ‘Interception’, above n 105, 160.

<sup>120</sup> *United States v Marino-Garcia* 679 F 2d 1373 (1982) [1382].

<sup>121</sup> Goodwin-Gill and McAdam, above n 15, 271; Mark Pallis, ‘Obligations of States towards Asylum Seekers at Sea: Interactions and Conflicts Between Legal Regimes’ (2002) 14 *International Journal of Refugee Law* 329, 331-333.

<sup>122</sup> Richard Barnes, ‘The International Law of the Sea and Migration Control’ in Bernard Ryan and Valsamis Mitsilegas (ed), *Extraterritorial Immigration Control: Legal Challenges* (BRILL, 2010) 103, 133; Efthymios Papastavridis, ‘Enforcement Jurisdiction on the Mediterranean Sea: Illicit Activities and the Rule of Law on the High Seas’ (2010) 25 *The International Journal of Marine and Coastal Law* 569, 583.

<sup>123</sup> Opened for signature 15 November 2000, 2241 UNTS 480 (entered into force 28 January 2004).

migrants'.<sup>124</sup> These same powers are available over flagged ships engaged in the smuggling of migrants, however the flag state must give permission for powers to be exercised over the vessel.<sup>125</sup> Smuggling of migrants is defined as 'the procurement... of the illegal entry of a person into a state... of which the person is not a national or permanent resident' in order to obtain a financial benefit.<sup>126</sup> Individuals attempting to move asylum seekers through maritime zones are likely to be liable under such a definition. States may utilise these provisions to establish the jurisdictional nexus required to assert jurisdiction over stateless vessels. Under the Protocol, if evidence of smuggling is found, states may take 'appropriate measures in accordance with relevant domestic and international law.'<sup>127</sup> Logically, it can be assumed that 'appropriate measures' include bringing the vessel to the domestic port and initiating criminal procedures under domestic legislation.<sup>128</sup> It is unlikely to permit states to remove the vessel to a foreign port, as the jurisdictional basis for the interdiction stems from the interdicting state's domestic law.<sup>129</sup> By asserting control, the interdicting vessel is also required to respect its international law obligations, including the norm of *non-refoulement*.<sup>130</sup>

#### (b) *The Contiguous Zone*

Agents of states acting in the contiguous zone have limited powers to conduct interdiction operations as the freedom of navigation principle is still applicable. The coastal state can 'exercise the control necessary' in the contiguous zone to prevent and punish 'infringements of its customs, fiscal, immigration or sanitary laws within its territorial sea.'<sup>131</sup> The control asserted over inward bound asylum vessels is likely to be limited to the prevention of infringements, as punishment is only available upon breach of a domestic law.<sup>132</sup> As such, a coastal state is only permitted to assert control to prevent the infringement, most likely by removing the asylum vessel to the edge of the contiguous zone.<sup>133</sup> However, in asserting this extraterritorial control the coastal state becomes bound by its international obligations, including the norm of *non-refoulement* and the duty to rescue those in distress.<sup>134</sup>

#### (c) *The Territorial Sea*

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<sup>124</sup> Jurisdiction can only be exercised if domestic legislation has criminalized people smuggling. *Smuggling Protocol* art 6.

<sup>125</sup> *Ibid* art 8(2).

<sup>126</sup> *Ibid* art 3(a).

<sup>127</sup> *Ibid* arts 8(2),(7).

<sup>128</sup> Papastavridis, 'Enforcement Jurisdiction', above n 122, 586.

<sup>129</sup> *Ibid*.

<sup>130</sup> *Smuggling Protocol* arts 9, 16.

<sup>131</sup> *UNCLOS* art 33(1)(a).

<sup>132</sup> However, some domestic laws prohibit the intention to commit a crime. If so, and the law operates extraterritorially, the punishment power may arise over an inward bound vessel.

<sup>133</sup> Goodwin-Gill and McAdam, above n 15, 165-166.

<sup>134</sup> Tom Obokata, 'The Legal Framework Concerning the Smuggling of Migrants at Sea Under the UN Protocol on the Smuggling of Migrants by Land, Sea and Air' in Bernard Ryan and Valsamis Mitsilegas (ed), *Extraterritorial Immigration Control: Legal Challenges* (BRILL, 2010) 151, 161.

Vessels can only legally enter the territorial sea when they invoke the right of innocent passage. An asylum vessel can legitimately exercise a right of innocent passage if their intention is to only pass through the territorial sea to reach a further state. However, asylum vessels are unlikely to invoke this right as they wish to disembark in violation of domestic migration laws. If the right of innocent passage was invoked by an asylum vessel wishing to disembark its passengers in Australia, this right would be breached by the intention to act contrary to Australian immigration laws.<sup>135</sup> This empowers the coastal state to take 'necessary steps' to prevent the legal infringement.<sup>136</sup> The coastal state can interdict, board and search the vessel and expel it to the edge of the contiguous zone. However, the exercise of this power is subject to the vessel's seaworthy condition.<sup>137</sup>

Coastal states are also empowered to suspend the right of innocent passage, as Australia did during the *Tampa* Incident in 2001. Under Article 25(3) of UNCLOS, coastal states may temporarily suspend the right of innocent passage for national security reasons. States may *attempt* to use this right to block the entry of asylum vessels into their territorial waters. Guilfoyle and Pallis reasonably question the extent of the security threat posed 'by the entry of a few hundred persons'.<sup>138</sup> Thus, although states have previously enacted such suspensions it is difficult to identify their legal justification for doing so, particularly, given the exercise of this right 'is not to be taken lightly'.<sup>139</sup> Furthermore, such actions conflict with the customary international law right of entry for vessels in distress.<sup>140</sup> This right places a limitation on coastal states wishing to prevent the entry of a foreign vessel into the territorial sea and also the removal of such a vessel. This right is likely to be invoked by asylum vessels as they often attempt to enter the territorial sea in an unseaworthy condition.

The norm of *non-refoulement* also places a forceful limitation on the right to expel ships from the territorial seas.<sup>141</sup> Individuals within the territorial sea are able to claim protection under the coastal state's international obligations.<sup>142</sup> This requires, at a minimum that the coastal state abides by the obligations set out under the norm in Chapter 1.

### 3 State Practice

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<sup>135</sup> UNCLOS art 19(2)(g).

<sup>136</sup> Ibid art 25(1).

<sup>137</sup> See discussion below on maritime search and rescue obligations.

<sup>138</sup> Guilfoyle, above n 103, 200; Pallis, above n 121, 358.

<sup>139</sup> Donald Rothwell, 'The Law of the Sea and the MV Tampa Incident: Reconciling Maritime Principles with Coastal State Sovereignty' (2002) 13 *Public Law Review* 118, 122.

<sup>140</sup> Guilfoyle, above n 103, 202; Robin Churchill and Alan Lowe, *The Law of the Sea* (Manchester University Press, 3rd ed, 1999) 63.

<sup>141</sup> Anja Klug and Tim Howe, 'The Concept of State Jurisdiction and the Applicability of the Non-Refoulement Principle to Extraterritorial Interception Measures' in Bernard Ryan and Valsamis Mitsilegas (ed), *Extraterritorial Immigration Control: Legal Challenges* (BRILL, 2010) 69, 93.

<sup>142</sup> Trevisanut, above n 13, 220.

As the law remains unclear it is necessary to examine the state practice on the issue. The EU, US and Australia will all be examined as they have the most significant state practice of interdiction.

(a) EU

Within the EU, coastal states monitor and control their borders both individually and in conjunction with the EU border management agency, Frontex. The majority of asylum seekers depart from North Africa,<sup>143</sup> heading for either Italy or Spain. These states conduct interdictions of asylum vessels in all three maritime zones.<sup>144</sup> Bilateral agreements forged with third states<sup>145</sup> regarding the repatriation of individuals on board asylum vessels form the legal basis for the EU's interdiction policy.

The EU conducts joint operations with North African states in their territorial waters. These operations are aimed at preventing asylum vessels from departing the territorial sea for Europe. This operation enables the EU to pass off refugee protection obligations to the North African states.

The EU also conducts interdictions within the high seas. Upon interdiction, the asylum vessels are forcibly returned to the country from which they embarked.<sup>146</sup> Generally no assessment of an individual's refugee status or the risks of returning an individual to the state of embarkation takes place.<sup>147</sup> When this policy was implemented by Italy, it was found to be illegal by the ECtHR. The ECtHR found that the policy resulted in the collective expulsion of aliens, which is prohibited under the ECHR, and it breached Italy's *non-refoulement* obligations.<sup>148</sup> The approach that will be taken by European states in light of this judgement remains unclear. The judgement also criticised the EU's policy of classifying interdictions as search and rescue operations.<sup>149</sup>

(b) US

The US has implemented different interdiction policies since the 1980s, predominately varying by the country from which the individuals have embarked.<sup>150</sup> The US primarily receives asylum vessels attempting to reach its shores from Haiti, the Dominican Republic, the Bahamas, and Cuba. As a result, the US has entered into bilateral treaties that empower the US Coast Guard to interdict and return asylum

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<sup>143</sup> Predominately from Libya and Algeria.

<sup>144</sup> Heijer, above n 116, 225.

<sup>145</sup> The EU and specific members states have bilateral agreements with Albania, Morocco, Mauritania, Senegal, Cape Verde, Gambia, Guinea and Guinea Bissau.

<sup>146</sup> Heijer, above n 116, 225.

<sup>147</sup> Ibid, 226.

<sup>148</sup> *Hirsi Jamaa* (2012) ECtHR Application No 27765/09, [134]-[135], [159]-[186].

<sup>149</sup> Ibid [145]-[158].

<sup>150</sup> Main interdiction operations include Haiti: 1981–1994, 2004–current; Cuba: 1994–1995; Dominican Republic: 1995–1997, 2003–2006.

vessels registered with these states. US interdictions that do not fall within the scope of these bilateral treaties are characterised as SAR operations.<sup>151</sup>

*(c) Australia*

Australia has had a fluctuating approach to maritime interdiction over the past decade due to varying government policies. All of these policies have been aimed at preventing the large number of asylum vessels that seek to reach Australia from Indonesia and, more recently, Sri Lanka. Operation Relex, implemented from 2001 until 2004, was the most recent use of an interdiction and return policy by Australia. Under Operation Relex, Australia interdicted asylum vessels found in the contiguous zone and territorial sea, and towed or escorted them, where possible, back to the Indonesian territorial sea or alternatively to Christmas Island or Nauru.<sup>152</sup> The Regional Cooperation Model between Australia and Indonesia provides a limited legal framework for such interdictions.<sup>153</sup>

Since the Labor government took power in 2007 the maritime interdiction programme has considerably changed. The current policy involves maritime interdiction of asylum vessels in the contiguous zone and territorial sea and transferral of the interdicted individuals to the Australian territory of Christmas Island, and more recently Papua New Guinea and the Republic of Nauru.<sup>154</sup>

*(d) Established Model of State Practice?*

Each of the state actors discussed above utilise bilateral agreements and/or characterise their interdiction and return measures as SAR operations so as to provide a legal basis for their actions. All three states avoid addressing the issue of stateless vessels by assuming the flag status of the vessel is that of the state from which it embarked (which is applied even when the vessel is not registered with the state).

### *C SAR Obligations*

The law of the sea imposes a customary law duty to provide assistance to those in distress at sea, in all parts of the sea.<sup>155</sup> This provides a safeguard for asylum vessels that often find themselves in situations of maritime distress.<sup>156</sup> This duty is binding on all vessels, including on agents of the state and private commercial vessels, and

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<sup>151</sup> Niels Frenzen, 'US Migrant Interdiction Practices in International and Territorial Waters' in Bernard Ryan and Valsamis Mitsilegas (ed), *Extraterritorial Immigration Control: Legal Challenges* (BRILL, 2010) 369, 388-389.

<sup>152</sup> Senate Select Committee, Parliament of Australia, *A Certain Maritime Incident* (2002), 13-30.

<sup>153</sup> Mathew, above n 40, 226-228.

<sup>154</sup> Chris Bowen (Press Conference, Canberra, 10 September 2012).

<sup>155</sup> UNCLOS arts 18(2), 58, 98(1); *International Convention on Maritime Search and Rescue*, opened for signature 27 April 1979, 1405 UNTS 23489 (entered into force 22 June 1985) annex 1, [3.1.9] ('SAR Convention'); *Convention for the Safety of Life at Sea*, opened for signature 1 November 1974, 1184 UNTS 1861 (entered into force 25 May 1980) ch v, reg 33(1) ('SOLAS Convention').

<sup>156</sup> Papastavridis, 'Enforcement Jurisdiction', above n 122, 587.

affords protection to any individual found.<sup>157</sup> The duty obliges any shipmaster that is aware of an emergency and is able to provide assistance to aid the vessel in distress.<sup>158</sup> The duty is only fulfilled when the rescued persons disembark in a place of safety. The primary authority and responsibility for disembarkation decisions lie with the state responsible for the regional coordination centre where the rescue operation occurs.<sup>159</sup>

The framework governing SAR obligations at sea was amended following the *Tampa* Incident that occurred in 2001. In August 2001 the *MV Tampa*, a Norwegian-flagged container ship rescued over 400 asylum seekers in the maritime zone between Indonesia and Australia at Australia's request. Upon doing so, the Captain of the *Tampa*, Captain Rinnan, declared the *Tampa* overloaded and as a result unseaworthy.<sup>160</sup> The *Tampa* headed towards the Indonesian port of Merak, before changing course and heading for the Australian territory of Christmas Island. The *Tampa* was refused entry into Australian waters and advised to dock in Indonesia. Three days after the initial rescue operation the Australian SAS boarded the *Tampa* to administer medical assistance and assert control over the ship's movements. After extensive negotiations New Zealand and Nauru agreed to take the asylum seekers.

Due to this impasse, in 2004 the Maritime Safety Committee of the International Maritime Organisation adopted amendments to the SOLAS and SAR Conventions, and issued a set of *Guidelines on the treatment of persons rescued at sea* ('MSC Guidelines').<sup>161</sup> The amendments specifically require the rescuing shipmaster to 'provide for the initial medical or other needs of the rescued individuals and to deliver them to a place of safety within a reasonable time'.<sup>162</sup>

The issue regarding what amounts to a place of safety is peculiar to refugees as individuals other than refugees are generally granted access to the closest port of call and have access to their own country's protection. The MSC Guidelines specify that a place of safety is a:

location where rescue operations are considered to terminate, where the survivors safety or life is no longer threatened, basic human needs (such as food, shelter and medical needs) can be met and transportation arrangements can be made for the survivors next or final destination.<sup>163</sup>

The MSC Guidelines advise that a 'place of safety' may be any country, including but not limited to the rescuing state's territory.<sup>164</sup> There is no initial obligation on the

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<sup>157</sup> Coppens and Somers, above n 109, 385.

<sup>158</sup> *SAR Convention* annex 1, [3.13].

<sup>159</sup> *SAR Convention* annex 1, [3.1.9], [4.8.5].

<sup>160</sup> Sharon Pickering, 'Refugees and State Crime' Federation Press (2005), 70.

<sup>161</sup> IMO Res MSC 167(78), Annex 34, IMO Doc. MSC 78/26/Add.2 (20 May 2004) ('*MSC Guidelines*'). These guidelines are not legally binding.

<sup>162</sup> *SAR Convention* annex 1 [1.3.2].

<sup>163</sup> *MSC Guidelines*, IMO Doc. MSC 78/26/Add.2 [6.12].

<sup>164</sup> *Ibid* [6.14].

rescuing state to disembark the individuals on their own territory.<sup>165</sup> However, the rescuing state is obliged to accept the rescued individuals if no other place of disembarkation has been located.<sup>166</sup> In practice, what amounts to a place of safety is largely dependent on the individual circumstances of each case and the political context surrounding it.

The MSC Guidelines specify that shipmasters should 'ensure that survivors are not disembarked to a place where their safety would be further jeopardised'.<sup>167</sup> This premise is reiterated throughout the MSC Guidelines and has been affirmed by the ECtHR<sup>168</sup> and the ExCom.<sup>169</sup> In contrast, however, the MSC Guidelines also specify that delivery to a place of safety should take precedence over non-SAR concerns, such as refugee status deliberations, and that refugee status assessment should not 'unduly delay disembarkation'.<sup>170</sup>

Does this permit the rescuing state to disembark refugees without considering obligations under the Refugee Convention? Miltner argues that it does, stating that the MSC Guidelines provide a clear basis for the 'discharging of protection obligations' by states.<sup>171</sup> The Council of Europe acknowledged that the guidelines have been interpreted differently by member states,<sup>172</sup> but clarified and reinforced the view that in locating a 'place of safety', there must be a consideration of human rights norms.<sup>173</sup> As the MSC Guidelines have no legal status, the law is unclear in this area. However, even if not obliged to consider the norm of *non-refoulement* under the law of the sea, the rescuing state is obliged to do so under international refugee law.

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<sup>165</sup> Matteo Tondini, 'The legality of intercepting boat people under search and rescue and border control operations' (2012) 18 *The Journal of International Maritime Law* 59, 63.

<sup>166</sup> *Principles relating to administrative procedures for disembarking rescued persons at sea*, IMO Doc. FAL3/Circ. 194 (22 January 2009) [2.5].

<sup>167</sup> *MSC Guidelines*, IMO Doc. MSC 78/26/Add.2 [5.1.6], [6.12], [6.17].

<sup>168</sup> *Hirsi Jamaa* (2012) ECtHR Application No 27765/09, [134].

<sup>169</sup> *ExCom Conclusion 97* (2003) [a].

<sup>170</sup> *MSC Guidelines*, IMO Doc. MSC 78/26/Add.2 [6.19]-[6.20].

<sup>171</sup> Miltner, above n 100, 112.

<sup>172</sup> *Recommendation 1645 (2004)*, above n 84, [5].

<sup>173</sup> *The Interception and Rescue at Sea of Asylum Seekers, Refugees and Irregular Migrants*, Res 1821, Parliamentary Assembly of the Council of Europe, 22nd sitting (21 June 2011) [8].

### III AUSTRALIAN CONTEXT

The Coalition's proposed interdiction and return policy specifically envisions the return of asylum vessels to Sri Lanka and Indonesia. As this Chapter demonstrates, the policy can be implemented under the current Australian legal framework.<sup>174</sup> However, for the Coalition's policy to comply with international law, they must first establish an international legal basis for interdictions. Then, they must demonstrate that Indonesia provides effective protection to refugees and that there are no refugees on Sri Lankan asylum vessels. This policy, as demonstrated in this Chapter, does not comply with the norm of *non-refoulement*.

#### *A The Policy*

The Coalition have provided few details on their proposed policy to 'turn back the boats'. They have confirmed it will involve returning asylum vessels to their point of embarkation from the high seas and contiguous zone, where it is safe to do so.<sup>175</sup> For the purposes of this thesis, it will be assumed that the policy will involve operations similar to those conducted under 'Operation Relex'.<sup>176</sup> As such, the process will involve a request by Australian maritime officers to board an asylum vessel in order to escort or tow the vessel to the edge of either the Indonesian or Sri Lankan territorial sea.

#### *B Australian Legal Framework*

Sections 51(vi) and 51(xix) of the *Australian Constitution* empower the Commonwealth to enact legislation with respect to 'the control of the forces to execute and maintain the laws of the Commonwealth' (that is, the 'defence' power) and 'aliens', respectively. Additionally, s 61 assigns the executive government the power to 'engage in activities peculiarly adapted to the government of a nation',<sup>177</sup> including the power to act with respect to aliens.<sup>178</sup>

##### *1 Legislation*

The legislative framework providing for the interdiction of asylum vessels and the assessment of refugees is contained in the *Migration Act 1958* (Cth) and the *Maritime Powers Act 2013* (Cth). The *Migration Act* explicitly provides for the interdiction of all asylum vessels in the territorial sea,<sup>179</sup> but takes a restrictive approach to interdictions on the high seas and in the contiguous zone. In the high seas and in the

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<sup>174</sup> If the Coalition gets into power they will be unable to pass new legislation until at least July 2014 as they will not have control of the Senate.

<sup>175</sup> Hall, above n 6.

<sup>176</sup> Implemented under the Pacific Solution from 2001-2006.

<sup>177</sup> *Victoria v Commonwealth* (1975) 134 CLR 338, 397 (Mason J).

<sup>178</sup> *Ruddock v Vadarlis* (2001) 110 FCR 491, 541-544 (French J).

<sup>179</sup> *Migration Act 1958* (Cth) ss 198AB, 245. The *Customs Act 1901* (Cth) contains similar provisions.



contiguous zone, a Commonwealth ship can only interdict a foreign vessel under a bilateral treaty with the flag state.<sup>180</sup> Australian officers can only exercise as much power as is authorised under the terms of the bilateral agreement. As such, the Coalition can only rely on the *Migration Act* as a legal basis for their policy if a bilateral agreement has been formed with Indonesia and Sri Lanka. Additionally, the agreement must specifically allow for Australian officers to board and redirect or escort asylum vessels to their place of disembarkation.

The Indonesian Government has recently stated that it would not consent to such an agreement.<sup>181</sup> However, previously Indonesia has consented to the interdiction and return of asylum vessels despite no specific bilateral agreement existing.<sup>182</sup> In contrast, an agreement is likely to be formed with Sri Lanka as it wishes to form political ties with western nations, particularly with nations who do not criticise its human rights record such as Australia.<sup>183</sup>

The *Maritime Powers Act* provides a stronger legislative base for maritime interdictions on the high seas. A maritime officer is empowered to exercise powers over foreign vessels to administer or ensure compliance with a monitoring law or with an international agreement.<sup>184</sup> These powers include, but are not limited to, boarding, setting a specific course, taking the vessel to a specific place and detaining a vessel.<sup>185</sup> A breach of the monitoring law is not required to trigger the use of these powers. The maritime officer can exercise these powers whenever it is necessary to ensure compliance with a monitoring law.

The *Migration Act* amounts to a monitoring law under the *Maritime Powers Act*.<sup>186</sup> The *Migration Act* does not criminalise the act of seeking asylum but does prohibit individuals from entering Australian territory without a visa and criminalises the act of organising or facilitating people smuggling.<sup>187</sup> The master of an asylum vessel will have breached this prohibition by facilitating the proposed entry of refugees into Australia. Furthermore, all individuals on board will intend to disembark in conflict with the *Migration Act* provisions. Due to this, a maritime officer has a legal basis under Australian law to escort or forcibly return the asylum vessel to its point of embarkation to prevent these breaches of the *Migration Act* from occurring or from

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<sup>180</sup> *Migration Act 1958* (Cth) ss 254B(6), 245G(4).

<sup>181</sup> Lanai Vasek, Paul Maley and Brendan Nicholson, 'We can turn back boats if we want, says Tony Abbott', *The Australian* (online), 16 March 2012 <<http://www.theaustralian.com.au/national-affairs/immigration/we-can-turn-back-boats-if-we-want-says-tony-abbott/story-fn9hmlgu-1226301311544>>.

<sup>182</sup> See *A Certain Maritime Incident*, above n 148.

<sup>183</sup> James Jupp, 'Sri Lanka and human rights: Australia's CHOGM dilemma', *The Conversation* (online), 3 May 2013 <<http://theconversation.com/sri-lanka-and-human-rights-australias-chogm-dilemma-13893>>.

<sup>184</sup> *Maritime Powers Act 2013* (Cth) ss 8, 41(1)(e).

<sup>185</sup> *Ibid* ss 52, 54(1), 69.

<sup>186</sup> *Ibid* ss 8, 41(1)(d).

<sup>187</sup> *Migration Act 1958* (Cth) ss 42(1), 228B, 233A(1).

continuing to occur.<sup>188</sup> If such an action involves entering another state's territorial sea and permission is not sought from the other state, this may breach international law of the sea.

Under Australian law, international law only has domestic force through a specific act of incorporation into domestic law (with an associated legislative intent).<sup>189</sup> The *Migration Act* in s 36 has adopted the definition of a refugee from the Refugee Convention, and in *Plaintiff M70*, the High Court held that:

the *Migration Act* contains an elaborated and interconnected set of statutory provisions directed to the purpose of responding to the international obligations which Australia has undertaken in the Refugee Convention and the Refugees Protocol.<sup>190</sup>

This amounts to an incorporation of the definition and certain rights under the Refugee Convention, but not the Convention in its entirety.<sup>191</sup> There is no specific legislative intention to incorporate the Convention's *non-refoulement* provision with respect to refugees when the government is acting extraterritorially. However, recent jurisprudence suggests that the court may take a broad interpretation of the required legislative intent,<sup>192</sup> but this is unlikely. The *Maritime Powers Act* does not incorporate the Refugee Convention in any way. Thus, the domestic legal framework does not oblige the Australian government to consider the norm of *non-refoulement* when conducting interdiction and return operations extraterritorially.

## 2 Executive Power

If the Coalition's policy was subject to a judicial challenge, in the absence of a legislative power found by the court, the Coalition could rely on the executive power to justify their policy. In *Ruddock v Vadarlis*, French J concluded that the executive power could be used to 'restrain a person or boat from proceeding into Australia or compelling it to leave'.<sup>193</sup> French J stated that the executive power with respect to aliens extended beyond the prerogative powers because 'controlling who can enter the country' is so essential to nationhood and national sovereignty.<sup>194</sup> The case suggested that the power can be exercised coercively,<sup>195</sup> and thus, may extend to the return of vessels attempting to illegally enter Australian waters. Furthermore, French J found that the *Migration Act* did not 'cover the field', so there was no abrogation of the executive power.<sup>196</sup>

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<sup>188</sup> *Maritime Powers Act 2013* (Cth) s69(3)

<sup>189</sup> *NAGV and NAGW of 2002 v Minister for Immigration and Multicultural and Indigenous Affairs* (2005) 222 CLR 161, 174 ('*NAGV and NAGW*').

<sup>190</sup> *Plaintiff M70* (2011) 280 ALR 18, [90].

<sup>191</sup> *NAGV and NAGW* (2005) 222 CLR 161, 176-178.

<sup>192</sup> *Plaintiff M70* (2011) 280 ALR 18.

<sup>193</sup> *Ruddock v Vadarlis* (2001) 110 FCR 491, 544.

<sup>194</sup> *Ruddock v Vadarlis* (2001) 110 FCR 491, 540, 543.

<sup>195</sup> Leslie Zines (ed), *The High Court and the Constitution* (Federation Press, 5th ed, 2008), 359.

<sup>196</sup> *Ruddock v Vadarlis* (2001) 110 FCR 491, 540-546. Contra, *Ruddock v Vadarlis* (2001) 110 FCR 491, 500-501 (Black CJ).

Since *Ruddock v Vadarlis*, the *Migration Act* has been amended to resolve the legal uncertainties highlighted in the case. The *Migration Act* now explicitly states that it does not limit the executive power.<sup>197</sup> Recently, in *Pape v Federal Commissioner of Taxation*, French CJ (now in the High Court), suggested that the courts will take a more conservative approach to the coercive application of the executive power,<sup>198</sup> which could limit the use of the executive power against foreign nationals. Although there is a resultant uncertainty, it is likely that the executive power with respect to aliens will provide a sufficient basis for an interdiction and return policy.

The precise content of the executive power and the prerogative is a subject of extensive debate in Australia. The scope of the defence prerogative is unclear due to limited case law on the matter. Nevertheless, the *Maritime Powers Act* and the executive power with respect to aliens provide a sufficient basis for imposing a policy of maritime interdiction and return.

### *C International Legal Basis for Interdiction*

The Coalition's policy is directed towards asylum vessels which have embarked from Indonesia or Sri Lanka. These asylum vessels are predominately old fishing boats, crewed by nationals from the state of embarkation. If characterised as flagged vessels when they are on the high seas, Australia can *only* interdict and assert control over them with permission from the flag state. However, the vessels may also be characterised as stateless vessels as they are not officially registered with any state. Under the *Smuggling Protocol* Australia may assert control over stateless vessels, but cannot turn the vessel over to a foreign state. Thus, without a bilateral agreement, Australia cannot assert a legal basis for interdiction in the high seas. If the interdiction occurred in the contiguous zone or the Australian territorial sea the asylum vessel can be removed under the law of the sea, but only to the edge of the contiguous zone.

Furthermore, without a bilateral treaty in place Indonesia is not obliged to accept returned asylum seekers. Indonesia is not a party to the Refugee Convention and the individuals on board vessels embarking from Indonesia are generally non-nationals.<sup>199</sup> As such, Indonesia may refuse to accept returned asylum vessels, particularly given recent conflict of this nature.<sup>200</sup>

When no clear legal basis for interdiction can be established states often characterise their interdiction as a SAR operation. Australia has a maritime SAR region covering

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<sup>197</sup> *Migration Act 1958* (Cth) s 7A. A similar provision can be found in *Maritime Powers Act 2013* (Cth) s 5.

<sup>198</sup> *Pape v Federal Commissioner of Taxation* (2009) 238 CLR 1,10.

<sup>199</sup> If the individuals on board the asylum vessels were Indonesian nationals Indonesia would be obliged to accept them when returned by Australia.

<sup>200</sup> See Tom Allard and Phillip Coorey, 'Indonesia governor rebels on refugees', *Sydney Morning Herald* (online), 28 October 2009 <<http://www.smh.com.au/world/indonesia-governor-rebels-on-refugees-20091027-hj39.html>>.

10% of the world's surface and is responsible for any vessels in distress within this region. Accordingly, in order to establish a legal basis for interdiction, Australia may attempt to characterise its operations as a SAR procedure.

### *D International Maritime Safety Obligations*

The majority of asylum vessels interdicted by states are found to be in poor physical condition, often overcrowded and generally unseaworthy.<sup>201</sup> The physical condition of a vessel is likely to deteriorate upon towing or further movement through the high seas.<sup>202</sup> Given this, the Coalition's policy will be difficult to implement, as Australia will be obliged to rescue individuals on board an asylum vessel as soon as a situation of maritime distress occurs.

### *E Norm of Non-Refoulement*

#### *1 Does the Norm Apply?*

Under the Coalition's policy, Australian officers, acting on behalf of the state, will be asserting control over asylum vessels and the individuals on board. This continuous physical control will extend to dictating the direction in which the vessels travel and may result in the removal of individuals onto Australian flagged vessels. This conduct amounts to an assertion of effective control and triggers the obligations flowing from the extraterritorial norm of *non-refoulement*.<sup>203</sup>

#### *2 Duty to Evaluate*

The Australian legislation outlined above does not require individual evaluations to occur before asylum vessels are returned to their place of embarkation. Additionally, the Coalition has not stated that they intend to conduct evaluations under their policy. The norm of *non-refoulement* will be breached if individual evaluations are not conducted for every person on board claiming refugee status. The norm will also be breached when evaluations are carried out, but they do not meet the standard required under international law. Given the policy's aim is to prevent refugees from reaching the mainland, presumably any evaluations would have to occur whilst at sea. Chapter 1 outlines the issues that may arise from sea-based evaluations.

#### *3 Indonesia: A Safe Third State?*

The Coalition's policy is primarily based on the return of Indonesian asylum vessels to Indonesia. They must therefore be able to demonstrate that Indonesia can

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<sup>201</sup> Commonwealth, *Senate Estimates (Foreign Affairs, Defence and Trade Legislation Committee)*, 19 October 2011, [109]-[110] (Ray Griggs).

<sup>202</sup> Papastavridis, 'Interception', above n 105, 204.

<sup>203</sup> *Hirsi Jamaa* (2012) ECtHR Application No 27765/09, [81]-[82].

guarantee: protection from *refoulement*; an effective refugee-processing regime and that Indonesia will treat refugees according to basic human standards.<sup>204</sup>

Indonesia is obliged under customary international law and a number of international law treaties<sup>205</sup> to abide by the norm of *non-refoulement*. Despite this, Indonesia has not incorporated this obligation into its domestic legal framework nor has it become a party to the Refugee Convention. Although ratification of the Refugee Convention is not necessary under the effective protection regime, when a state is not a party to the Convention, a higher proof of *non-refoulement* is required.<sup>206</sup> This proof must reflect the practical realities of the situation not just legal obligations.<sup>207</sup> Indonesia has rarely returned refugees in breach of the *non-refoulement* norm. However, the UNHCR<sup>208</sup> in 2004 and Human Rights Watch<sup>209</sup> in 2002 noted that Indonesia could not guarantee protection from *refoulement*. More recently, in February 2012 there were unconfirmed reports of *refoulement* of 13 Iranian refugees.<sup>210</sup> Given a higher standard must be applied, it can be concluded that Indonesia cannot guarantee protection from *refoulement*.

As the Indonesian government has not implemented a RSD procedure, the UNHCR is currently undertaking this role. The UNHCR in Indonesia is regularly overwhelmed with refugee claims. This results in lengthy delays in the status determination process, with some individuals waiting up to two years to receive a response.<sup>211</sup> Individuals in immigration detention face delays before even submitting an application for refugee status with the UNHCR. The UNHCR has also been criticised for using incompetent interpreters and for consistently failing to specify refusal reasons.<sup>212</sup> Indonesia is not bound to permit nor to recognise UNHCR determinations.<sup>213</sup> Thus, there is no guarantee that RSD procedures will continue long-term. This prevents the UNHCR from providing refugees with durable solutions. Considered together, these deficiencies indicate that Indonesia's refugee processing system is unlikely to satisfy the requirements under the effective protection regime.

The final requirement of the effective protection regime is that the third state must treat the refugee according to basic human standards. The *Indonesian Constitution*

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<sup>204</sup> *Lisbon Round Table*, above n 53, [15].

<sup>205</sup> Including the *CAT* and *ICCPR*.

<sup>206</sup> *Hirsi Jamaa* (2012) ECtHR Application No 27765/09 [147]; William Maley, 'Dimensions of Effective Protection: Some Reflections' in 'The Principle of Effective Protection Elsewhere' (Discussion Paper No. 1, UNHCR Australia, 2004) 1-2.

<sup>207</sup> *Plaintiff M70* (2011) 280 ALR 18, [67].

<sup>208</sup> 'UNHCR Views on the Concept of Effective Protection as it Relates to Indonesia' (Effective Protection Update, UNHCR, 2 December 2004).

<sup>209</sup> "'Not for Export' Why the International Community Should Reject Australia's Refugee Policies' (Report, Human Rights Watch, 26 September 2002).

<sup>210</sup> Aditva Muharam, 'Respect the Principle of Non-refoulement', *The Jakarta Globe* (online), 21 February 2012 <<http://www.thejakartaglobe.com/archive/respect-the-principle-of-non-refoulement/>>.

<sup>211</sup> Savitri Taylor and Brynna Rafferty-Brown, 'Difficult Journeys: Accessing Refugee Protection in Indonesia' (2010) 36 *Monash University Law Review* 138, 154-156.

<sup>212</sup> *Ibid.*

<sup>213</sup> *Plaintiff M70* (2011) 280 ALR 18, [125].

recognises the right to seek political asylum.<sup>214</sup> Nevertheless, Indonesia has not implemented a domestic legal framework recognising and protecting refugees as required under the norm.<sup>215</sup> As a result, refugees can be imprisoned for up to five years for illegally entering Indonesia.<sup>216</sup>

Many refugees are also subject to imprisonment in the form of indefinite immigration detention. The International Organisation for Migration ('IOM') acknowledges that these detention facilities have been 'in a state of disrepair for many years'.<sup>217</sup> Refugees are not granted access to education or any form of employment.<sup>218</sup> Some refugees receive minimal financial support from the UNHCR and IOM, however the resources of these organisations are limited and do not extend to all refugees. The rights and living conditions provided to refugees in Indonesia threaten their ability 'to live in dignity and to subsist'.<sup>219</sup> As such, Indonesia does not meet the minimum criteria required under the effective protection regime.

#### 4 *Refoulement to Sri Lanka?*

Returning asylum vessels to Sri Lanka is substantially different from returning vessels to Indonesia due to the composition of individuals on board the vessels. Vessels embarking from Sri Lanka are largely comprised of Sri Lankan nationals. This raises direct *non-refoulement* issues if any individuals on board are refugees. Individuals on board asylum vessels embarking from Sri Lanka who are not Sri Lankan nationals raise issues similar to those facing return to Indonesia.<sup>220</sup>

Asylum vessels can only be returned to Sri Lanka when the Australian government is satisfied that none of the Sri Lankan nationals on board fear persecution from returning to Sri Lanka. A large number of the Sri Lankan nationals that have already arrived in Australia by boat have been refused refugee status. The Deputy Leader of the Opposition, Julie Bishop, has classified these individuals as economic migrants

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<sup>214</sup> *The 1945 Constitution of the Republic of Indonesia* [Ministry of Foreign Affairs (Indonesia) trans, *Undang-Undang Dasar Republik Indonesia* (July 2003)

<[http://www.wipo.int/wipolex/en/text.jsp?file\\_id=181087](http://www.wipo.int/wipolex/en/text.jsp?file_id=181087)> art 28(1).

<sup>215</sup> *Plaintiff M70* (2011) 280 ALR 18, [126]-[136].

<sup>216</sup> *Law of the Republic of Indonesia, Number 6 of 2011 concerning Immigration* (Indonesia) [Ministry of Law and Human Rights (Indonesia) trans, *Undang-undang Nomor 6 Tahun 2011 (English Version)* (2011) <<http://www.imigrasi.go.id/phocadownloadpap/Undang-Undang/uu%20nomor%206%20tahun%202011%20-%20%20english%20version.pdf>>] ss 8(2), 83(1), 119.

<sup>217</sup> 'Annual Report: Indonesia' (Annual Report, International Organisation for Migration, 2010), 64.

<sup>218</sup> '2011 Country Reports on Human Rights Practices – Indonesia' (Report, United States Department of State, 24 May 2012) 18.

<sup>219</sup> Jane McAdam et al, Submission to Senate Standing Committee on Legal and Constitutional Affairs, Parliament of Australia, *Inquiry into the agreement between Australia and Malaysia on the transfer of asylum seekers to Malaysia*, 15 September 2001, 25. Stated in reference to Malaysia.

<sup>220</sup> The impact and legal consequences of returning non-Sri Lankan nationals to Sri Lanka is not examined in this paper.

and has said that she can see little reason for individuals fearing persecution in Sri Lanka.<sup>221</sup>

It is difficult to reach a general conclusion as to whether returning asylum seekers to Sri Lanka is in breach of the norm of *non-refoulement* as it is dependent on a number of circumstances. Assuming that accurate RSD (one not marred by political concerns) occurs for all individuals on board the vessels and none are found to be refugees, then the vessel can be returned to Sri Lanka and will not breach the norm of *non-refoulement*. However, it may breach other international obligations not addressed in this paper, such as the right to leave one's country,

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<sup>221</sup> Jane Hutcheon, Interview with Julie Bishop (Television Interview, ABC24, 8 May 2013).

## IV CONCLUSION

The legal framework protecting refugees who transit across the seas has developed significantly over the past decade. Nevertheless, uncertainty remains in a number of areas, including: the extent of rights protected by the effective protection regime, the legality of disguising interdiction measures as SAR operations and the extent to which refugee law should be considered when determining a 'place of safety' under the law of the sea. Irrespective of these uncertainties, this thesis concludes that the Coalition's proposed maritime interdiction and return policy does not comply with international refugee law.

The policy, as it currently stands, will breach the norm of *non-refoulement*, as the standards of the effective protection regime are not met. The Coalition's policy does not require individual examinations to be conducted and as such there is no way of ensuring *refoulement* will not occur. Furthermore, under Indonesian law refugees are not protected. Consequently, if Australia engages in such policies it will be liable for the *refoulement* of all returned refugees who fear or face persecution in Indonesia or Sri Lanka. Finally, Australia does not currently have a legal basis for interdicting asylum vessels and returning them to Sri Lanka or Indonesia. However, to resolve these issues, this thesis proposes that the Coalition's policy be amended to ensure its legal compliance.

First, Australia must enter into binding agreements within Indonesia and Sri Lanka. These agreements must specifically permit Australian maritime officers to interdict and assert control over Indonesian and Sri Lankan asylum vessels found on the high seas and in the contiguous zone. It is necessary for such agreements to have legal force, as political documents will not be sufficient. In the absence of such an agreement the Coalition's policy cannot be legally implemented.

Second, Australia must also conduct individual evaluations of all asylum seekers interdicted to ensure they face no specific persecution or vulnerabilities if returned to their place of embarkation. The nature of the individual evaluations will vary depending on whether the vessel is to be returned to Sri Lanka or Indonesia. If it is to be returned to Sri Lanka an in-depth refugee processing examination must take place. If the individuals are to be returned to Indonesia, an individual evaluation of the risks associated with returning the individual must occur. All assessments conducted must be of a high quality.

More specifically, in relation to returns to Indonesia, the legal agreement formed must also contain legal assurances that Indonesia will comply with the principle of *non-refoulement* and provide refugees with the rights guaranteed under the Refugee Convention. Australia must ensure that Indonesia implements domestic laws recognising and protecting refugees. These laws must recognise the decisions of the UNHCR refugee status scheme. Indonesia must guarantee that refugees are not imprisoned for illegally entering the country and that the living standards in immigration detention are at an internationally acceptable level. If these requirements



are met and all maritime safety procedures are practised the policy will comply with international law requirements.

However, if the Coalition implements this policy without the proposed amendments, it may create a momentum for change in the law. The international legislative change that followed the *Tampa* Incident highlights how extreme breaches of international law can trigger action to secure the international legal framework. If implementation of the Coalition's policy resulted in the development of a stronger legal framework supporting the norm of *non-refoulement* it would provide a silver lining for refugees and refugee advocates around the world.

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