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LEFT TO DIE AT SEA: STATE RESPONSIBILITY FOR THE MAY 2015 THAI, INDONESIAN, AND MALAYSIAN PUSHBACK OPERATIONS

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INTRODUCTION

In May 2015, 8,000 migrants were abandoned by their smugglers in the Andaman Sea and Bay of Bengal, left adrift in conditions of malnourishment, suffocation, dehydration, starvation, and violence.[1] Many of those on board were members of Myanmar's minority Rohingya population, who lack citizenship, endure systematic discrimination, have limited access to education and healthcare, and cannot move around freely. Their plight was worsened by the crudely-termed game of 'human ping pong', involving the Thai, Malaysian, and Indonesian authorities repairing the vessels, providing the migrants with food and water, and escorting them beyond their territorial seas.[2] The death toll is unknown, however Amnesty International estimates that these actions resulted in hundreds or even thousands of deaths.[3]

The scope of protection under international law to which these people were entitled is unclear. First and foremost, none of the states specially affected by this crisis are party to the 1951 Refugee Convention, which contains the refugee definition, sets out the rights

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[1] BBC News, 'Why are so many Rohingya migrants stranded at sea?' (18 May 2015), available at: http://www.bbc.co.uk/news/world-asia-32740637.

[2] BBC News, '"Ten deaths" on stranded Myanmar migrant boat' (14 May 2015), available at: http://www.bbc.co.uk/news/world-asia-32733963.

[3] Al Jazeera, 'Amnesty International says Rohingya death toll higher than US estimates' (21 October 2015), available at: http://america.aljazeera.com/articles/2015/10/21/amnesty-report-on-rohingya-migrant-deaths.html. UNHCR estimates that at least 70 people died as a result of the conditions on the boats and drowning and an additional 1,000 people who were thought to be at sea in May remain unaccounted for. UN High Commissioner for Refugees (UNHCR), *South-east Asia: Mixed Maritime Movements* (June 2015), available at: http://www.refworld.org/docid/55e6c1994.html.

associated with refugee status, and prohibits states from engaging in *refoulement*.[4] The relative lack of Asian states' participation in the Refugee Convention is particularly regretful in this context, as the Rohingya are clearly victims of persecution based on race and would thus most likely qualify as refugees if the Refugee Convention were applicable. Thus Asia is sometimes described as having 'rejected' refugee law.[5] In comparison, Europe is seen as having the most developed regional system of protection for those who choose to migrate by sea, as all states are party to the 1951 Refugee Convention and the European Court of Human Rights judgment of *Hirsi* explicitly states that push-back operations at sea engage the 1950 European Convention on Human Rights (ECHR).[6] Consequently, there is significant literature on refugee protection in Europe,[7] whereas very little has been written in relation to Asia. Likewise, although the term 'migrant crisis' makes regular headlines,[8] much of the media and political attention, and indeed many of the other papers in this volume, have focused predominately on refugees in Europe.

[4] Article 31, 1951 Convention Relating to the Status of Refugees 189 UNTS 13.
[5] SE Davies, 'The Asian Rejection?: International Refugee Law in Asia' (2006) 52 *Australian Journal of Politics and History* 562.
[6] *Hirsi Jamaa and Others v. Italy*, application no. 27765/09, 23 February 2012; 1950 European Convention for the Protection of Human Rights and Fundamental Freedoms 213 UNTS 221; see further discussion in F Mussi and N Feith Tan, 'Comparing Cooperation on Migration Control: Italy-Libya and Australia-Indonesia' in this volume at XXX.
[7] See, for example, G Butler and M Ratcovich, 'Operation Sophia in Unchartered Waters: European and International Law Challenges for the EU Naval Mission in the Mediterranean Sea' (2016) 85 *Nordic Journal of International Law* 235; S Klepp, 'A Contested Asylum System: The European Union between Refugee Protection and Border Control in the Mediterranean Sea' (2010) 12 *European Journal of Migration and Law* 1; Efthymios Papastavridis, '"Fortress Europe" and FRONTEX: Within or Without International Law? (2010) 79 *Nordic Journal of International Law* 75; S Klepp, 'A Double Bind: Malta and the Rescue of Unwanted Migrants at Sea, a Legal Anthropological Perspective on the Humanitarian Law of the Sea' (2011) 23 *International Journal of Refugee Law* 538; R Byrne, G Noll, and J Vested-Hansen, 'Understanding Refugee Law in an Enlarged European Union' (2004) 15 *European Journal of International Law* 355; V Moreno-Lax, 'Seeking Asylum in the Mediterranean: Against a Fragmentary Reading of EU Member States' Obligations Accruing at Sea' (2011) 23 *International Journal of Refugee Law* 174; T Gammeltoft-Hansen, 'The Refugee, the Sovereign and the Sea: European Union Interdiction Policies' in R Adler-Nissen and T Gammeltoft-Hansen (eds), *Sovereignty Games: Instrumentalizing State Sovereignty in Europe and Beyond* (Palgrave, 2008) 171; E Guild, 'The Europeanisation of Europe's Asylum Policy' (2006) 18 *International Journal of Refugee Law* 630; S Hamood, EU–Libya Cooperation on Migration: A Raw Deal for Refugees and Migrants?' (2008) 21 *Journal of Refugee Studies* 19.
[8] Terming the situations in Europe and the Bay of Bengal/ Andaman Sea as crises can be problematic for numerous reasons. For example, it draws attention away from the problem in the countries from which the refugees have fled, it strips decision-makers of responsibility, and it presents certain decisions and injustices as unavoidable. See H Cabot, 'Crisis and Continuity: "A Critical Look at the European Refugee Crisis"', 10 November 2015, available at: http://allegralaboratory.net/crisis-and-continuity-a-critical-look-at-the-european-refugee-crisis/.

This article is the first legal analysis of the international responsibility applicable to the May 2015 Andaman Sea/ Bay of Bengal boat 'crisis'[9] and it commences by setting out the factual circumstances surrounding the incident. The subsequent sections analyse the applicable law of the sea, refugee law, and human rights law framework, and in doing so reject the commonly-held perception that there is little or no legal protection available for refugees or migrants in Asia. This analysis clarifies the scope of important contested international legal issues such as the definition of effective control, the application of human rights treaties at sea, and the meaning of *refoulement*. The core argument put forward by this article is that there is a hierarchy of rights and obligations applicable to the situation in the Bay of Bengal/ Andaman Sea, with human rights obligations at its apex. Any right exercised pursuant to the law of the sea that is not in conformity with human rights law is a breach of both the substantive human rights provision(s) and the law of the sea provision(s). This article argues that Thailand, Malaysia, and Indonesia breached Articles 6 (right to life) and 7 (prohibition of cruel, inhuman, and degrading treatment) of the 1966 International Covenant on Civil and Political Rights (ICCPR) and thus, ipso facto, have no justification for their actions under the law of the sea or any other international legal framework. This article concludes by illustrating how these findings can be utilised by the survivors themselves, the victims' families, NGOs, states, and the UNHCR to pursue legal action and to put political pressure on the states involved to change their practices.

From an international law perspective, the location of a vessel is crucial in order to determine the applicable rights and obligations of the state(s) and individuals involved. In the context of the May 2015 Andaman Sea/ Bay of Bengal 'crisis' most news reports did not make it clear

[9] See the forthcoming paper by Nikolas Feith Tan 'The Rohingya and Refoulement in South East Asia' (on file with the author).

where a particular vessel was when it was intercepted,[10] whether any physical interaction between the coastal state's authorities and the vessel occurred, and where the vessel ended up post-interception. This is understandable as the location of interception is not a newsworthy fact, and can often be quite difficult to determine precisely. However, this article will take a broad approach by examining the legal consequences of interception both within and outside the territorial sea, and the legal framework applicable to both physical and non-physical interaction with the vessel. The latter examination is of particular importance as the literature has not yet dealt with legal responsibility for actions falling short of physical interception of a vessel, e.g. where a naval ship orders a migrant ship to turn back but does not physically push it back. Thus the arguments in this piece not only contribute to the discussion surrounding migration on the Andaman Sea/ Bay of Bengal, but also to all operations where a state operates extra-territorially but does not have physical control over individuals.[11]

I. THE 'CRISIS' IN THE BAY OF BENGAL AND THE ANDAMAN SEA

Migration by sea in Asia not a new phenomenon. The term 'boat people' was coined in the 1970s to identify the tens of thousands of people who fled Indochina in fishing boats after the Vietnam War. On many occasions, states prevented boats from landing and towed them back to the high seas.[12] The modern-day usage of the term 'boat people' more commonly refers to those leaving Myanmar and Bangladesh via the Bay of Bengal and the Andaman Sea towards Thailand, Malaysia, and Indonesia. Some of those on board the vessels are migrants from

[10] See S Tisdall, 'South East Asia faces its own migrant crisis as stats play human ping-pong' (14 May 2015), available at: http://www.theguardian.com/world/2015/may/14/migrant-crisis-south-east-asia-rohingya-malaysia-thailand; C Archambault, 'Estimated 8,000 migrants are at sea in Southeast Asia; over 120,000 Rohingya have fled Burma in past 3 years', 15 May 2015, available at: http://www.i24news.tv/en/news/international/asia-pacific/71232-150515-nowhere-to-go-as-asian-boatpeople-are-turned-away-amid-growing-crisis-at-sea.

[11] See, for example, the pushback policy implemented by the Australian government, Andrew and Renata Kaldor Centre for International Refugee Law, 'Factsheet: "Turning Back the Boats"', 26 February 2015, available at: http://www.kaldorcentre.unsw.edu.au/sites/default/files/Factsheet_Turning_back_boats.pdf.

[12] GS Goodwin-Gill and J McAdam, *The Refugee in International Law*, 3rd edn (Oxford, Oxford University Press, 2011), 270.

Bangladesh who are not fleeing persecution. However, many of them are Rohingya, who have been historically discriminated against on the basis of ethnicity.

The term 'Rohingya' commonly refers to Muslims from Northern Rakhine State in Myanmar. They are an ethnic minority descended from a merging of Arakanese Buddhists, Chittagonian Bengalis, and Arabian sea-traders. Their dialect is Bengali in origin, yet distinct, with influences from Persian.[13] Repeated cycles of historical displacement, beginning with the Burmese invasion of Arakan and deportation of Arakanese in 1784, followed by returns and armed struggle in the British colonial era and further displacements after independence, formed a justification for the Myanmar government's labelling of Rohingya as 'illegal migrants' and forcing them out again on several occasions.[14] In 1982, the Burmese Government passed the Citizenship Act which rendered the Rohingya stateless.[15]

The Rohingya are the worst treated group in Myanmar today. An estimated 139,000 people – mostly Rohingya – are displaced in Rakhine state after violent clashes erupted between Rakhine Buddhists, Rohingya and other Muslims in 2012.[16] In its most recent report on Myanmar, Human Rights Watch describes the 'systematic repression' of the Rohingya, estimating that one million people along the border with Bangladesh continue to face restrictions on movement, employment, and religious freedom.[17]

In October 2014, the Myanmar government announced a new Rakhine State Action Plan,

[13] DS Mathieson, 'Plight of the Damned: Burma's Rohingya' (2009) 4 *Global Asia* 86, 88.
[14] S Cheung, 'Migration Control and the Solutions Impasse in South and Southeast Asia: Implications from the Rohingya Experience' (2011) 25 *Journal of Refugee Studies* 1, 51.
[15] Mathieson (n 13), 88.
[16] Amnesty International Report 2014/2015, 'Republic of the Union of Myanmar', 24 February 2015, available at: https://www.amnesty.org/en/documents/asa16/1065/2015/en/.
[17] Human Rights Watch, 'World Report 2015: Burma', available at: https://www.hrw.org/world-report/2015/country-chapters/burma.

which if implemented, would further entrench the discrimination and segregation of the Rohingya population.[18] The announcement of the plan appeared to trigger an increase in the number of people attempting to cross the Andaman Sea and the Bay of Bengal by boat, hoping to reach Indonesia, Malaysia, and Thailand.

Migration by sea carries with it a particularly high risk of death through drowning, malnourishment, suffocation, dehydration, unsanitary conditions, starvation, and violence.[19] In the Bay of Bengal and Andaman Sea, reports suggest that high numbers of women are raped, children are separated from their families and abused, and men are beaten and thrown overboard.[20] The situation of those on board was summarised by a New York Times article quoting Razli Puteh, a fisherman who had rescued 430 desperate migrants off the Indonesian coast; 'I broke down in tears as I watched them screaming, waving their hands and clothes. I could not let them die, because they are also human beings. Just like me.'[21]

The crisis reached its peak shortly after May 1 2015, following a Thai government crackdown on smuggling networks, which prevented smugglers from disembarking the refugees and migrants still at sea.[22] On or around 9 May, the captains decided to cut their losses by moving passengers into fewer boats and fleeing in the empty boats they salvaged.

[18] Amnesty International Report 2014/2015 (n 16).
[19] See A Campàs Velasco 'The International Convention on Maritime Search and Rescue: Legal Mechanisms for Responsibility-Sharing and Co-operation in the Context of Sea Migration?' in this volume at XXX; M Pugh, 'Drowning not Waving: Boat People and Humanitarianism at Sea' (2004) 17 *Journal of Refugee Studies* 50, 56. Human Rights Watch, 'World Report 2015: Burma' (n 17).
[20] United Nations Human Rights, 'Joint Statement by UNHCR, OHCHR, IOM and SRSG for Migration and Development', 19 May 2015, available at: http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=15976&LangID=E#sthash.TG48h6n4.dpuf.
[21] L Cook, 'The Boat People Crises in Europe and Asia – A Comparison', New York Times, 20 May 2015, available at: http://www.nytimes.com/aponline/2015/05/20/world/europe/ap-eu-europe-asia-migrants.html?_r=0.
[22] Human Rights Watch, 'Southeast Asia: End Rohingya Pushbacks', 14 May 2015, available at: http://www.hrw.org/news/2015/05/14/southeast-asia-end-rohingya-boat-pushbacks.

Over 8,000 people were left stranded at sea on at least 8 boats.[23] The abandoned passengers travelled towards the coasts of Indonesia, Malaysia, and Thailand, but their situation was worsened by the Thai, Malaysian, and Indonesian authorities repairing the vessels, providing food and water, and escorting them beyond their territorial seas.[24] One report described a fishing boat of about 350 people being refused entry into Thailand after the crew abandoned them and disabled the engine. They were stranded without food and water, resulting in ten deaths.[25] Indonesian authorities have admitted to pushing back one boat on May 11 and directing it to Malaysia after providing food and water to those on board.[26] Malaysian Deputy Home Affairs Minister Wan Junaidi Tuanku Jaafar stated that the government would turn back boats and deport those who land ashore.[27] The Thai government adopted a policy of pushing away boats from Thai shores after providing them with fuel, food, and water.[28]

A series of regional meetings was convened to address states' concerns over this issue, resulting in common outcomes that included prioritising saving lives, combating people smuggling and trafficking, and confronting the root causes of such movements.[29] Most notably, Malaysia and Indonesia agreed to offer temporary shelter to 7,000 stranded migrants but they asked for international assistance to resettle them after a year. Thailand also said it would no longer push back the stranded boats.[30] Of the 8,000 stranded at sea in mid-May 2015, 4,500 were known to have returned to shore.[31] As aforementioned, Amnesty

[23] BBC News (n 1).
[24] BBC News (n 2).
[25] ibid.
[26] Human Rights Watch (n 22).
[27] ibid.
[28] ibid.
[29] UNHCR Regional Office for South-East Asia, 'Mixed Maritime Movements in South-East Asia' (2015), available at: https://unhcr.atavist.com/mmm2015.
[30] BBC News, 'Missing Migrant Boat Found as Countries Offer Shelter', 20 May 2015, available at: http://www.bbc.co.uk/news/world-asia-32806972.
[31] 'The majority of Bangladeshi migrants rescued from the boats opted to be returned home, but more than 370 Rohingya refugees who came off the boats in Malaysia have been held ever since in the Belantik detention centre in Kedah in the northwest of the country. UNHCR is trying to convince Malaysian authorities to release

International believes that hundreds or thousands have died as a result of these actions.

The number of Rohingya refugees migrating by sea seems to have fallen since May 2015. This decrease can be attributed to a number of factors, including the abandonment of thousands of refugees and migrants at sea in May 2015, the discovery of mass graves along the Thailand-Malaysia land border, with the remains of over 200 presumed earlier arrivals, government crackdowns on smuggling networks and scrutiny of traditional departure and arrival points.[32] However, the mistreatment of the Rohingya in Myanmar has continued.[33] It is thus likely that this decrease in migration will be merely temporary and smugglers will soon find new ways to evade the authorities and transport those desperate to escape the persecution of their homelands. We have not seen the last of 'boat people' in the Bay of Bengal and Andaman Sea.

II. LAW OF THE SEA

The Law of the Sea is the clearest example of binding international law applicable to the states under discussion, and therefore shall be considered first.[34]

A. Enforcement jurisdiction

All of the states engaged in the Asian boat 'crisis' – that is, Thailand, Malaysia, Indonesia,

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the refugees and allow them to live in one of the country's sizeable Rohingya communities, but so far to no avail. In Indonesia, most of the Rohingya refugees who had been rescued last May off the coast of Aceh Province in the north have since disappeared from the temporary camps where they were being hosted. They are thought to have put their lives in the hands of smugglers once again in an effort to reach Malaysia and its better prospects for working in the informal economy. It is not known how many successfully made the journey, but some have approached UNHCR's Kuala Lumpur office and applied for asylum.' J Vit, 'Where are the Rohingya boat survivors now?',15 April 2016, available at: https://www.irinnews.org/news/2016/04/15/where-are-rohingya-boat-survivors-now.

[32] A Needham, 'UNHCR calls for safer alternatives to deadly Bay of Bengal voyages', 23 February 2016, available at: http://www.unhcr.org/56cc51c76.html.

[33] 'ECHO Factsheet: The Rohingya Crisis – May 2016', 29 May 2016, available at: http://reliefweb.int/report/myanmar/echo-factsheet-rohingya-crisis-may-2016.

[34] It is less clear if the threshold for effective control has been met to trigger the application of human rights law, and as aforementioned, most Asian states are not a party to the 1951 Refugee Convention.

and Myanmar – are parties to the United Nations Convention on the Law of the Sea (UNCLOS). As aforementioned, the reports concerning the Bay of Bengal/ Andaman Sea did not make it clear where the vessels were located at the time of interception. However, this information is of the utmost importance when identifying rights and obligations pursuant to UNCLOS, because the rights and obligations applicable are different in each zone or part of the seas (namely, the Territorial Sea, Contiguous Zone, Exclusive Economic Zone, and High Seas). Thus, the rights and obligations regarding interception in each respective zone will be examined in turn in the following paragraphs. It should be noted that where there is a breach pursuant to the provisions below, such a breach is 'technical' only – that is, the violation is towards the flag state, if there is one, rather than the persons on the boat.[35]

Territorial sea: The territorial sea is defined in Article 3 of UNCLOS as the area measuring up to 12 nautical miles from a state's baseline. The ability of a coastal state to prescribe and enforce laws and regulations in its territorial sea is limited only by the obligation to respect the right of other states' ships to innocent passage. Article 19 of UNCLOS prescribes that passage is 'innocent' 'so long as it is not prejudicial to the peace, good order or security of the coastal State.' Pallis and Jacobsen argue that vessels carrying migrants can hardly be described as being 'prejudicial to peace, good order or security' of a coastal state.[36]

On the other hand, paragraph 2(g) of Article 19 provides that passage will not be innocent if it engages in the loading or unloading of any person contrary to the immigration laws and regulations of the coastal state and it is argued here that a vessel carrying refugees who intend to request the protection of the coastal state removes that vessel from the category of innocent

[35] JL Jacobson, 'At-Sea Interception of Alien Migrants: International Law Issues' (1991-92) 28 *Willamette Law Review* 811, at 813 & 816.
[36] M Pallis, 'Obigations of States towards Asylum Seekers at Sea: Interactions and Conflicts between Legal Regimes' (2002) 14 *International Journal of Refugee Law* 329; Jacobson (n 35) 813.

passage. In another geographical context, the status of the passengers as refugees could entitle them to claim immunity from penalties under Article 31 of the 1951 Refugee Convention. However, as aforementioned, neither Thailand, Malaysia, nor Indonesia are parties to the 1951 Refugee Convention. Thus, the persons on board the vessels in the Bay of Bengal/ Andaman Sea would probably be characterised as illegal immigrants and the ship's passage would not be 'innocent' for the purposes of Article 19. The argument that the unloading of migrants would be a 'disturbance'[37] and not preclude a ship's passage as being characterized as 'innocent' is not applicable here. This article argues that the characterization of a ship's passage as innocent 'so long as it is not prejudicial to the peace, good order or security of the coastal State' applies to the inclusionary criteria, or the general rule, for determining whether passage is 'innocent.' Even if the unloading of migrants does not deprive the vessel's characterisation as being 'innocent', paragraph 2(g) is worded as an exception to this general rule and would thus disqualify a vessel from being engaged in 'innocent passage.'[38]

It is generally agreed that international law allows states to take all reasonable measures in the territorial sea to prevent the entry into port of a vessel carrying illegal immigrants, including the right to escort such a vessel outside its territorial sea, i.e. to the EEZ/ High Seas.[39] Thus, under UNCLOS, Thailand, Malaysia, and Indonesia were permitted to engage in pushback actions against the migrant ships in their territorial seas that were seeking to disembark on their territory. However, subsequent sections will illustrate that this right is not unlimited.

[37] Jacobson (n 35) 813; Goodwin-Gill and McAdam (n 12) 273.
[38] It should however be noted that there is not sufficient state practice to ascertain conclusively whether the list in Article 19(2) should be considered exhaustive. See AT Gallagher and F David, *The International Law of Migrant Smuggling*, (Cambridge, Cambridge University Press, 2014) 236.
[39] Goodwin-Gill and McAdam (n 12) 275; Gallagher and David (n 38) 413.

Contiguous zone: A state does not have to wait until a vessel carrying irregular migrants has reached its territorial sea. There is a strong interrelationship between policing the territorial sea and the contiguous zone (the area of seas between twelve and twenty-four miles from the baselines employed to delimit the boundaries of the territorial sea),[40] as Article 33 of UNCLOS provides a power to the coastal state to prevent an anticipated offence or to punish activities committed within its territory or territorial seas in violation of its customs, fiscal, immigration or sanitary laws and regulations. In the context of the Bay of Bengal/ Andaman Sea boat migration, it is most likely that disembarkation in Malaysia, Indonesia, and Thailand would entail a breach of domestic immigration law and thus pushback operations in respect of these vessels could possibly be justified under Article 33 UNCLOS.

A distinction is made between a vessel passing through the contiguous zone, and a vessel in the contiguous zone that is seeking to enter the territorial sea of the coastal state. In respect of the former, no enforcement jurisdiction is permissible.[41] Where a migrant smuggling vessel is in the contiguous zone and seeking to enter the territorial sea of the coastal state, the coastal state 'may exercise the control necessary to' prevent an anticipated violation of its immigration laws. There is academic debate about what actions may be taken pursuant to this anticipatory power of prevention. Goodwin-Gill argues that if there were reasonable and probable grounds to believe that a vessel's intended purpose is to enter the territorial sea in breach of the immigration law, then the coastal State may have the right to stop and board the vessel…action taken under these powers [include] inspection and redirection'.[42] Others argue that it may not be sufficient to justify anything but a very limited interdiction in the

[40] Art 24, 1958 Geneva Convention on the Territorial Sea and the Contiguous Zone 516 UNTS 205, now extended by Article 33 UNCLOS.
[41] *M/V 'Saiga' Case* (St Vincent and the Grenadines v Guinea), Provisional Measures (1998), Merits (1999), ITLOS, (1998) 37 ILM (1999) 38 ILM [15].
[42] However, he also notes that such actions might be objected to by the flag state. See GS Goodwin-Gill, *The Refugee in International Law*, 2nd edn (Oxford, Oxford University Press, 1996) 165-166.

contiguous zone such as inspections and warnings, and that it would not justify boarding or assuming control over the vessel.[43] However Article 33 allows states to 'exercise the control *necessary* to' punish or prevent violations of their fiscal, immigration or sanitary laws and regulations (emphasis added), and thus this article argues that the protection of a minor interest does not justify any kind of intervention. Consequently, once the coastal state exercises jurisdictional powers, it must consider whether the actions put the persons at risk of persecution, torture, or other inhuman treatment. The need for proportionality emerges in relation to the operations accomplished by states authorities on the high seas for combatting unlawful migration.[44] As will be discussed below, the actions of the Thai, Malaysian, and Indonesian authorities resulted in thousands of deaths at sea and consequently, their actions were most likely disproportionate and thus in breach of Article 33 UNCLOS.

High Seas:[45] The High Seas are beyond the jurisdiction or control of any one state. Generally speaking, vessels on the High Seas may be boarded only in very limited circumstances, one of which is where the vessel has no nationality.[46] This ground is highly relevant to this article, as the vast majority of migrant smuggling vessels are unregistered or improperly registered.[47] Where a vessel is stateless, UNCLOS grants official vessels an express right of visit (a right to board and inspect), but it does not specify what further actions, if any, may be taken by an intervening state.[48] There are various views on this point. The first is that stateless vessels do

[43] I Shearer, 'Problems of Jurisdiction and Law Enforcement against Delinquent Vessels' (1986) 35 *International and Comparative Law Quarterly* 320, 330. See also Y Tanaka, *The International Law of the Sea* (Cambridge, Cambridge University Press, 2012) 123; J Chia, J McAdam, and K Purcell, 'Asylum in Australia: "Operation Sovereign Borders" and International Law' (2014) 32 *Australian Yearbook of International Law* 33, 55.
[44] The M/V Saiga (No. 2) Case (Saint Vincent and the Grenadines v Guinea) (1999) ITLOS Case No 2, ICGJ 336 (ITLOS 1999) [155].
[45] For the sake of completeness, it is appropriate to mention the legal regime applicable in the Exclusive Economic Zone (EEZ). In the EEZ, with certain exceptions not applicable to ships carrying migrants, ships are entitled to high seas freedoms as set out in the next few paragraphs.
[46] Article 22, 1958 High Seas Convention.
[47] Vessels that are unregistered will not necessarily be stateless. Article 94 of UNCLOS recognises that some vessels may be 'excluded from generally accepted international regulations on account of their small size'.
[48] Article 110(1)(d), UNCLOS. Article 110(1)(d) gives this right to a 'warship', which is defined in Article 29 as

not enjoy the protection of any state and therefore may be subject to universal enforcement action.[49] The second is that states would have the right to board the vessel and perform verification *du pavillion*, but there is no automatic right to tow a vessel to another part of the sea and that states are nonetheless bound by the customary prohibition of *refoulement*.[50] The third view, which is widely endorsed in the literature, is that enforcement action such as interdiction is not permitted without some further jurisdictional link.[51] Given that people smuggling is commonly perceived as a maritime security threat;[52] Thailand, Malaysia, and Indonesia could rely on the protective principle of jurisdiction. However even if interception is illegal, there is a logical problem with the argument that states are prevented from interdicting stateless vessels on the high seas as the lack of nationality means that no state is likely to protest an assertion of jurisdiction.

The 2000 Protocol against the Smuggling of Migrants by Land, Sea, and Air supplementing the UN Convention against Transnational Organised Crime (Migrant Smuggling Protocol) is relevant in this context.[53] The central aim of the Protocol, to which Indonesia is bound, is for States Parties to cooperate in preventing and suppressing migrant smuggling 'in accordance with the international law of the sea.'[54] Pursuant to Article 8(2) the relevant state party may request authorization from the flag state to take 'appropriate measures' with regard to a vessel of which it reasonably suspects is engaging in migrant smuggling. No additional measures can be taken without express authorization of the flag state except on the basis of relevant

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'a ship belonging to the armed forces of a State bearing the external marks distinguishing such ships of its nationality, under the command of an officer duly commissioned by the government of the State and whose name appears in the appropriate service list or its equivalent, and manned by a crew which is under regular armed forces discipline.'

[49] E Papastravridis, 'The Right of Visit on the High Seas in a Theoretical Perspective: Mare Liberum versus Mare Clausum Revisited' (2011) 24 *Leiden Journal of International Law* 45, 65.

[50] Pallis (n 36) 351.

[51] R Churchill and V Lowe, *The Law of the Sea* 3rd Edition (Juris Publishing, 1999) 214.

[52] Chia et al (n 43) 56.

[53] *Protocol against the Smuggling of Migrants by Land, Sea and Air, Supplementing the United Nations Convention against Transnational Organized Crime*, 15 November 2000.

[54] ibid, Article 7.

agreements or 'to relieve imminent danger to the lives of persons.' Where a vessel is stateless, Article 8(7) allows the vessel to be boarded and searched where there are reasonable grounds to suspect that the vessel is engaged in the smuggling of migrants by sea. If evidence confirming that suspicion is found, the intercepting state 'shall take appropriate measures in accordance with relevant domestic and international law.'

The 'appropriate measures' referred to in Articles 8(2) and 8(7) are not defined by the Migrant Smuggling Protocol. However, Article 9(a) provides that where a State Party takes measures against a vessel, it shall 'ensure the safety and humane treatment of the persons on board.' This is reiterated in Article 16, which obliges states to protect 'in particular the right to life and the right not to be subjected to torture or other cruel, inhuman, or degrading treatment or punishment'. Finally, pursuant to Article 19, nothing in the Protocol affects the rights and obligations of states and individuals under international law.

To apply the above discussion (of the rights and obligations applicable in the three respective maritime zones) to the issue at hand, it could be argued by the coastal states that it is permissible to push back vessels carrying migrants present in the territorial seas as they are not engaged in 'innocent passage', whether or not the vessel in question is stateless.[55] However, even if we accept this argument, the actions of the Thai, Malaysian, and Indonesian authorities are still not in compliance with international law. This is because in all circumstances and regardless of location, any use of force must be (i) a measure of last resort; (ii) proportional to the objective in sight; and (iii) using the minimum force reasonably necessary.[56] As force was the first response to many of these incoming migrant vessels, it is

[55] Article 19, UNCLOS.
[56] The *MV Saiga* case held that force should be a last resort: '[International law] requires that the use of force must be avoided as far as possible and, where force is inevitable, it must not go beyond what is reasonable and necessary in the circumstances. Considerations of humanity must apply in the law of the sea as they do in other

highly unlikely that the use of force was 'avoided as far as possible', i.e. that all other options were considered and/or exhausted.[57] The loss of life resulting from the pushback operation probably entails that the means used (i.e. pushback operations involving life-threatening measures) were not proportionate to the objective (immigration control) and it is unclear from the facts whether the minimum force necessary was used. In addition, as this article discusses below, human rights law is applicable in all situations of interception at sea which requires, inter alia, account to be taken of the rights to life, liberty, and security of the person, and to freedom from torture, cruel, inhuman, and degrading treatment or punishment. With respect to many such rights no derogation is permitted, even in time of public emergency threatening the life of the nation.[58] Thus the degree of force which might be used would need to be determined in light of all the circumstances, taking into account the safety of passengers, the vulnerability of those on board, and the likely consequences of interdiction.[59]

B. The Rights of Ships in Distress

It is generally recognised that any foreign vessel in distress has a right of entry to any foreign port under customary international law.[60] The 1979 International Convention on Maritime Search and Rescue (SAR) considers that a vessel or the persons on board is in a phase of distress:

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areas.' The M/V Saiga (No. 2) Case (Saint Vincent and the Grenadines v Guinea) (1999) ITLOS Case No 2, ICGJ 336 (ITLOS 1999) [155].

[57] For example, in its concluding observations on Israel, the Human Rights Committee considered the targeted killing of suspected terrorists to be arbitrary since other measures to arrest the suspected person had not been exhausted (UN Human Rights Committee, 'Consideration of Reports Submitted by States Parties under Article 40 of the Covenant: Israel', UN Doc CCPR/CO/78/ISR, 21 August 2003) [15].

[58] Article 4(2), ICCPR. These rights have crystallised as customary international law. See UN Human Rights Committee, 'General Comment No. 24: General comment on issues relating to reservations made upon ratification or accession to the Covenant or the Optional Protocols thereto, or in relation to declarations under article 41 of the Covenant', CCPR/C/21/Rev.1/Add.6 (1994) [8].

[59] Goodwin-Gill and McAdam (n 12) 276.

[60] JM Van Dyke, 'Safe Harbour', *Max Planck Encyclopaedia of Public International Law* (2010); Tanaka (n 43) 83; JE Noyes, 'Ships in Distress' *Max Planck Encyclopaedia of Public International Law* (2007). When, however, a ship in distress might affect the lives of those living in coastal communities, or their economic livelihood, coastal States will need to make a political decision whether to allow the ship to find shelter in its coastal waters.

(i) when positive information is received that a vessel or a person is in grave and imminent danger and in need of immediate assistance; or

(ii) when, following the alert phase, further unsuccessful attempts to establish contact with the vessel and more widespread unsuccessful inquiries point to the probability that the vessel is in distress; or

(iii) when information is received which indicates that the operating efficiency of a vessel has been impaired to the extent that a distress situation is likely.[61]

This article argues that the determination of a situation of distress involves a balancing exercise between the threshold of potential harm and the element of choice involved. As outlined above, the vessels involved were unseaworthy, with unreliable engines and steering, lacking navigation aids or safety equipment. On or around 9 May, the refugees were concentrated into fewer boats, following the captains' decision to cut their losses and set the vessels adrift. These circumstances would give an arguable right of entry into the nearest coastal states' ports to those vessels, provided no other options were available to them. This approach is consistent with the exceptional nature of the right of entry.[62] However, as the news reports indicate, when the vessels attempted to approach other states' territorial waters, they were subjected to push-back operations once again. Thus there was no other option available to these vessels than to attempt to disembark at the nearest coastal state and they were entitled to invoke the customary right of a ship in distress to enter a foreign port. By denying their entry, Thailand, Malaysia, and Indonesia breached this provision.

C. Obligations to render assistance to persons found in distress

[61] 1979 International Convention on Maritime Search and Rescue 1405 UNTS 97, Article 5.2.1.3. Indonesia is a party to this Convention but Malaysia and Thailand are not. Therefore it will not be discussed in detail in this paper.

[62] R Barnes, 'Refugee Law at Sea' (2004) 53 *International and Comparative Law Quarterly* 47, 60.

As discussed at some length by Velasco elsewhere in this volume, the obligation to render assistance to any person or vessel found in distress at sea is based in both treaty and customary law, and applies at all times and in all maritime zones to all personal and vessels regardless of nationality or legal status.[63] Article 98 of UNCLOS provides an obligation 'to render assistance to any person found at sea in danger of being lost' and 'to proceed with all possible speed to the rescue of persons in distress, if informed of their need of assistance, in so far as such action may reasonably be expected of him.'

To apply this legal framework to the Bay of Bengal/ Andaman Sea, the states involved were under a duty to assist the refugees. It is problematic that international law does not stipulate the nature and scope of assistance to be provided, however it seems clear that the duty is to render assistance, not necessarily to rescue, except in situations where rescue is both necessary and feasible.[64] It was reported that in some instances refugees were given rice and water and pushed back out to sea.[65] It is unlikely that this would satisfy the obligation to render assistance given the object and purpose of the provision, which is to prevent the loss of life at sea. Thus assistance that would only marginally prolong life would not be interpreting the obligation in good faith. In addition, it would fall foul of the principle of effectiveness, which provides that the obligation in a treaty is to produce an outcome which advances the aim of the treaty.[66]

D. Obligations in respect to the disembarkation of persons rescued at sea

In the words of Gallagher and David, 'the obligation to rescue persons in distress at sea is seriously undermined by the lack of an equally rigorous obligation with respect to the

[63] Goodwin-Gill and McAdam (n 12) 278; Campàs Velasco (n 19) at XXX.
[64] Gallagher and David (n 38) 449.
[65] Human Rights Watch (n 22).
[66] RK Gardiner, *Treaty Interpretation* (Oxford, Oxford University Press, 2008) 190.

disembarkation of persons rescued at sea.'[67] This was probably best illustrated by the MV Tampa incident, which involved a Norwegian ship participating in an Australian-coordinated Search and Rescue operation. The MV Tampa rescued 433 asylum seekers from a sinking Indonesian-flagged vessel 75 nautical miles off the Australian coast. When the Tampa began heading towards Christmas Island in Australian territory, the Australian authorities ordered the captain to change course towards Indonesia, warning that if the ship entered Australia's territorial sea to disembark the rescuees, he would be subject to prosecution under the Migration Act 1958 for people smuggling. The refugees were eventually loaded onto an Australian Navy vessel and transported to Nauru for determination of their asylum claims.[68]

In the aftermath of the Tampa incident, the 1974 International Convention for the Safety of Life at Sea ('SOLAS Convention') was amended in May 2004 to impose – for the first time – an obligation on states to 'cooperate and coordinate' to ensure that ships' masters are allowed to disembark rescued persons to a place of safety, irrespective of the nationality or status of those rescued, and with minimal disruption to the ship's planned itinerary (which implies that disembarkation should occur at the nearest coastal state).[69] However, contracting states are certainly not expressly obliged to accept disembarkation of rescued persons: their responsibility is limited to delivering such persons to a place of safety.

Common practice, legal opinion, and the UNHCR have interpreted 'place of safety' to mean the 'next port of call', which may not necessarily be the nearest or most convenient port of

[67] Gallagher and David (n 38) 452.
[68] For more information on Australia's current pushback policies, see Mussi and Feith Tan (n 6).
[69] ibid. Thailand, Malaysia, Indonesia, and Myanmar are all party to the SOLAS Convention (1974 International Convention for the Safety of Life at Sea 1184 UNTS 278, Chapter V, Regulation 33). The SAR Convention was similarly amended at this time. For a detailed discussion of obligations under the SAR Convention, see Campàs Velasco (n 19) at XXX.

call.[70] A ship's master must exercise discretion because the nearest port of call may be unsuitable, the next scheduled port of call too far away to relieve distress, and there has to be allowances for particular circumstances, including the safety of the rescue ship, the severity and nature of the survivors' distress and the rescue ship's ability to provide food, water, and medical requirements.[71] Although any policy that leaves rescued persons in unseaworthy boats or lifeboats on the high seas would be inconsistent with a state's obligations to ensure that rescued persons are delivered to a place of safety,[72] a refusal of disembarkation cannot be equated with a breach of the principle of *non-refoulement*, even though it may result in serious consequences for asylum-seekers.[73] It has been argued that human rights law could be engaged where, for example, persons are subjected to protracted confinement to a vessel under deteriorating conditions and that in certain circumstances, this could compel a state with primary responsibility to accept disembarkation.[74] The position of this article is that such an argument could only be applicable in the territorial sea, as the vessel would be within the coastal state's jurisdiction. As outlined in the section on human rights law below, where a vessel is outside of the territorial sea and not within the effective control of the coastal state (i.e. the ship has not been intercepted), as a general rule, the coastal state cannot be held responsible for the human rights violations on board the vessel.

III. REFUGEE LAW

The lack of Asian states' participation in the Refugee Convention is particularly regretful in this context, as the Rohingya are clearly victims of persecution based on race and would thus most likely qualify as refugees if the Refugee Convention were applicable. The reasons why

[70] See EXCOM Conclusion No 14 (XXX) (1979) [C]; EXCOM Conclusion No 15 (XXX) (1979) [c]; EXCOM Conclusion No 23 (XXXII) 1981 [3].
[71] International Maritime Organization, Resolution MSC.167(78) Guidelines on the Treatment of Persons Rescued at Sea ('IMO Guidelines'), 20 May 2004.
[72] Chia et al (n 43) 60.
[73] Goodwin-Gill and McAdam (n 12) 278; Barnes (n 62) 64.
[74] Gallagher and David (n 38) 456.

Asia has been reluctant to embrace the Refugee Convention are many and include the Eurocentric character of the Convention,[75] the 'ASEAN way', which encourages non-interference in domestic issues,[76] the historical peculiarity of the region, the lack of control over borders, the adherence to bilateral solutions to regional problems, the ethnic ties that exist across borders, and the lack of sufficient resources to implement a refugee protection framework.[77] A further distinctive element of Asia's relationship with international refugee law is that there have been no meaningful attempts to compensate for non-accession by introducing regional legally binding instruments.[78]

However Article 33 of the Refugee Convention, the prohibition of *non-refoulement*, is a customary norm,[79] and thus binds all states.[80] The principle of *non-refoulement* prohibits the expulsion of a refugee 'in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion.' This provision also applies to asylum-seekers,[81] and applies extra-territorially.[82] During the Indochinese refugee crisis in the 1970s, Malaysia and Thailand did not deny that they were bound by *non-refoulement*, arguing instead that

[75] SE Davies, 'The Asian Rejection?: International Refugee Law in Asia' (2006) 52 *Australian Journal of Politics and History* 562, at 566-70.
[76] C Abrar, 'Legal Protection of Refugees in South Asia' (2001) 10 *Forced Migration Review* 21.
[77] See further, BS Chimini, 'The Law and Politics of Regional Solution of the Refugee Problem: The Case of South Asia' (1998) RCSS Policy Studies 4.
[78] Davies (n 75), 566-70. For a useful explanation of refugee protection in South East Asia, see M Jones, 'Moving Beyond Protection Space: developing a law of asylum in South East Asia' in S Kneebone, D Stevens, and L Baldasser (eds), *Refugee Protection and the Role of Law: Conflicting Identities'* (Routledge, 2014).
[79] See, for example, A Duffy 'Expulsion to Face Torture? Non-refoulement in International Law' (2008) 20 *International Journal of Refugee Law* 373, 383; S Trevisanut, 'The Principle of Non-Refoulement at Sea and the Effectiveness of Asylum Protection' (2008) 12 *Max Planck United Nation Yearbook* 206, 215; Chia et al (n 43) 41; E Lauterpacht and D Bethlehem, 'The Scope and Content of the Principle of *Non-Refoulement*: Opinion' in E Feller, V Türk and F Nicholson (eds), *Refugee Protection in International Law: UNHCR's Global Consultations on International Protection* (Cambridge, Cambridge University Press, 2003) 87; Goodwin-Gill and McAdam (n 12) 345-54. For a different view, see JC Hathaway, 'Leveraging Asylum' (2010) 45 *Texas International Law Journal* 503.
[80] There is some controversy as to whether the principle of non-refoulement is a customary norm in Asia. See e.g. Feith Tan (n 9).
[81] UNHCR 'Advisory Opinion on the Extraterritorial Application of Non-Refoulement Obligations under the 1951 Convention relating to the Status of Refugees and its 1976 Protocol', 26 January 2007 [6].
[82] Pallis (n 36) 343.

they could turn back the boats on the basis of the security exception in Article 33(2) of the 1951 Refugee Convention.[83] It should be noted here that *non-refoulement* applies to refugees rather than migrants, thus a vessel carrying migrants alone would not be protected by the provision. However, where a vessel has both migrants and putative refugees on board,[84] *non-refoulement* would be applicable to the refugees on board the vessel and thus it would constrain the actions that can be taken vis a vis the vessel.

Goodwin-Gill and McAdam correctly argue that the simple denial of entry to vessels to territorial waters cannot be equated with a breach of the principle of *non-refoulement*, which requires that state actions have the effect or result of returning refugees to territories where their lives or freedoms would be in danger.[85] The key terms here are 'effect' and 'result', meaning that it is the outcome of the 'pushback' activities that will determine whether *refoulement* has occurred. This is supported by the convention's *travaux preparatoires*, which can be relied upon to confirm the meaning of a provision, pursuant to Article 32 of the VCLT:

> '… the obligation not to return a refugee to a country where he was persecuted did not imply an obligation to admit him to the country where he seeks refuge. The return of a refugee-ship, for example, to the high seas could not be construed as a violation of this obligation.'[86]

It is argued here that the actions of the authorities in the Bay of Bengal/ Andaman Sea would not constitute *refoulement*. The places to which they were sent do not constitute the 'frontiers

[83] Trevisanut (n 79) 215, 216.
[84] There were reports of vessels carrying Rohingya and Bangladeshi migrants that were not of Rohingya origin. See Tisdall (n 10).
[85] Goodwin-Gill and McAdam (n 12) 277; P Hyndman, 'Developing International Refugee Law in the Asian Pacific Region: Some Issues and Prognoses' (1991) 1 *Asian Yearbook of International Law* 19, 31.
[86] See UN Doc. E/AC.32/L.32/Add.1 (10 Feb 1950).

of territories'; given the nexus that exists between state sovereignty and territory.[87] The terms 'territory' or 'territories' are referred to in 22 articles in the Convention, and all of these references imply exclusive sovereignty over territory. For example, Articles 27 and 28 concern the state's power to issue travel documents or identity papers respectively; Article 31 concerns the state's power to impose penalties, and Article 14 refers to the state's power to protect artistic rights and industrial property. Given that the Exclusive Economic Zone and High Seas are beyond the sovereignty of any one state,[88] they cannot constitute the 'frontiers of territories' within the meaning of the 1951 Refugee Convention.[89] This is distinguishable from the actual physical return of passengers to their country of origin (i.e. to the control of another state) which could constitute *refoulement*.[90]

However, this article argues that if a pushback operation would leave refugees with no option but to return to their country of origin, or to a third state that would return them, this could constitute *refoulement*.[91] In addition, if the refugees were returned not to the High Seas, but to another state's territorial sea where their lives or freedoms were threatened on the grounds specified in Article 33, that could also constitute *refoulement*. This is because the sovereignty of a coastal state extends to its territorial sea.[92] In this case, the individuals on board the vessels in the Bay of Bengal/ Andaman Sea were pushed out to the EEZ/ High Seas, and thus *refoulement* did not occur. To conclude otherwise would be to apply the provision in an

[87] Pallis (n 36) 343. Although the principle of non-refoulement binds states acting outside their territories, it is argued here that it does not apply where an individual is sent to a place outside of states' territories. This is because (i) the prohibition applies to states acting 'in any manner whatsoever'; (ii) the principle explicitly identifies where persons should not be sent ('territories'), but does not place a territorial limitation on where the principle applies.
[88] Art 89, UNCLOS.
[89] The EEZ cannot constitute 'frontiers of territories' for the purposes of the 1951 Refugee Convention. Pursuant to Article 65 of UNCLOS, the coastal state has limited rights in the EEZ mainly concerning the exploitation of natural resources, but other states also have rights within the EEZ such as the freedom of navigation and laying of submarine cables and pipelines, pursuant to Article 58 of UNCLOS. Thus the EEZ is not subjected to the sovereignty of any one state and EEZ waters are treated as the High Seas for purposes outside of economic activities.
[90] *Hirsi* (n 6).
[91] Pallis (n 36) 349.
[92] Art 2, UNCLOS.

entirely different manner to which its drafters intended.

A brief discussion of the 1948 Universal Declaration of Human Rights (UDHR) is also relevant in this context.[93] Article 14 of the UDHR provides for the right of an individual to seek asylum, which is essentially the right of an individual to leave his country of residence in pursuit of asylum. However, the individual has no 'general' right of asylum against the state. Scholars agree that this provision merely affords the individual a right to seek asylum without specifying whose duty it is to give effect to that right.[94] This is supported by the drafting history of the UDHR, whereby the original draft provided that 'everyone had a right to seek and be granted' asylum.[95] This would have vested individuals with the right of asylum vis a vis the state. By substituting the words 'to enjoy' for the words 'to be granted', the drafters indicated their desire not to oblige states to grant asylum for individuals. Thus there cannot be a breach of the right to leave and seek asylum of these individuals, as the right is one which has not yet crystalized as customary in nature.

IV. HUMAN RIGHTS LAW

A. Jurisdiction

Human rights can extend to persons outside the territory of the state provided they are 'within the jurisdiction' of the state party.[96] Where a vessel is in a state's territorial sea, that vessel is within the state's jurisdiction.[97] Outside of the territorial sea, the intercepting state must have effective control of the vessel and whether effective control is exercised is a question of

[93] 1948 Universal Declaration of Human Rights, UN Doc 217 A (III), 10 December 1948.
[94] R Boed, 'The State of the Right to Asylum in International Law' (1994) 5 *Duke Journal of International and Comparative Law* 1, 9; Goodwin-Gill and McAdam (n 12) 358-65.
[95] Boed (n 94) 9.
[96] D McGoldrick, 'The International Covenant on Civil and Political Rights' in F Coomans and MT Kamminga (eds), *Extraterritorial Application of Human Rights Treaties* (Intersentia, 2004) 55.
[97] 'Provided States have supreme authority within their territory, the plenitude of internal jurisdiction, their immunity from other States' own jurisdiction and their freedom from other States' intervention on their territory (Art. 2 (4) and (7) UN Charter), but also their equal rank to other sovereign States are consequences of their sovereignty.' S Besson, 'Sovereignty' (2011) *Max Planck Encyclopedia of Public International Law*.

fact.[98] Previous jurisprudence has established that effective control is established from the moment the vessel is boarded.[99] It is also clear that conduct such as towing the vessel, removing individuals on to new vessels,[100] detaining persons on board, or removing them to another state constitute effective control and thus fall 'within the jurisdiction' of the acting state.[101]

Thus coercive actions that threaten or result in loss of life or cruel, inhuman or degrading treatment, whether deliberate (such as the pushback of an unseaworthy vessel) or accidental, would appear to trigger a state's international obligations, such as the ICCPR (discussed below). However, the news reports do not make it clear the nature of the coastal states' interaction with the vessels. Would there be a breach of international human rights law where persons are 'left to die' on vessels? Pallis argues that Article 7 of the ICCPR would be violated through the failure of a state that is in a position to do so to come to the aid of migrants who are at risk of physical harm, and Papstravidis makes a similar argument when a distress call is received by the coastal state.[102] However, this argument is controversial because the respective authorities would have no physical control of the vessel. On this basis, Gallagher and David argue that such a failure to act would probably not satisfy the test for effective control.[103]

This author argues that where there is no interaction with the vessel whatsoever, there cannot

[98] *Hirsi* (n 6) [73]; *Al-Jedda v United Kingdom*, application no. 27021/08, 7 July 2011.
[99] *Hirsi* (n 6) [81].
[100] The Haitian Centre for Human Rights et al. v. United States, Case 10.675, Report No. 51/96, Inter-Am.C.H.R.,OEA/Ser.L/V/II.95 Doc. 7 rev. at 550 (1997) 171.
[101] Gallagher and David (n 38) 471; N Klein, 'Assessing Australia's Push Back the Boats Policy under International Law: Legality and Accountability for Maritime Interceptions of Irregular Migrants' (2014) 15 *Melbourne Journal of International Law* 1, 21; Committee against Torture, *JHA v Spain*, Communication No. 323/2007, 21 November 2008 [8.2].
[102] Pallis (n 36) 335; Efthymios Papastavridis, 'The "Left-to-Die Boat" incident of March 2011: Questions of International Responsibility arising from the Failure to Save Refugees at Sea', (2013) *Refugee Law Initiative Working Paper* 10, 13.
[103] Gallagher and David (n 38) 471.

be a breach of international human rights law (although there may be a breach of the Law of the Sea provisions described above, particularly with regards to rendering assistance to persons in distress at sea). However, non-physical interaction may nonetheless trigger a state's obligations, which is best illustrated by the case of *Medvedyev*.[104] This case involved the interception by the French authorities of a Cambodian-flagged ship called 'the Winner' that was suspected to be transporting drugs. When the ship was spotted, the pursuing ship issued several warnings and fired warning shots, before firing directly at the merchant ship, under orders from France's maritime prefect for the Atlantic. The merchant ship then answered by radio and agreed to stop.[105] When they boarded the Winner, the French commando team was obliged to use their weapons to defend themselves, and subsequently kept the crew members under their exclusive guard and confined them to their cabins during the journey to France.[106] The European Court of Human Rights held that 'this was a case of France having exercised full and exclusive control over the Winner and its crew, at least de facto, from the time of its interception, in a continuous and uninterrupted manner until they were tried in France, the applicants were effectively within France's jurisdiction.'[107] However, it is unclear what the Court regarded as the time of the ship's interception: Was it when the warning was issued; when a shot was fired at the ship; when the ship was stopped; or when the ship was boarded? One way to read the judgement is to suggest that the Court implicitly viewed the interception as separate to the boarding. It refers to the Cambodian authorities providing permission for 'the interception and boarding of the Winner',[108] and again refers to the diplomatic note in question 'confirming the authorization to intercept, inspect, and take legal action against it.'[109] Thus prior to boarding, the ship was intercepted,

[104] *Medvedyev v France*, Application no. 3394/03, 29 March 2010.
[105] ibid [13].
[106] ibid [66].
[107] ibid [67].
[108] ibid [40].
[109] ibid [99].

and thus under effective control. An analogy can be made to the Committee against Torture's understanding of effective control, which includes where an individual is under the de facto control of the state.[110]

Therefore, although it is established that a vessel can be under effective control prior to boarding, the case law does not tell us what actions short of boarding would trigger effective control. However, this article argues that interception is a continuous act and that any actions that alter the course of the vessel be it an order to stop, a warning shot, or possibly even the physical presence of a naval ship could amount to interception which would trigger the intercepting state's human rights obligation. This is supported by the UNHCR's interpretation of interception, which encompasses any measure employed to 'prevent further onward international travel' which could be taken to mean anything with the object of interfering with the path of navigation.[111] The threshold for this is therefore quite low, considering that where a naval vessel intercepts a vessel of asylum seekers, there is more often than not a significant disparity of knowledge and perceived authority between the individuals in each vessel. Regardless of whether the authorities are acting within their rights under international law in ordering or indicating for a vessel to turn back, a migrant vessel will most likely feel obliged to adhere to its commands.[112] This line of reasoning is supported by the Human Rights Committee, which found that a State Party may be responsible for extra-territorial violations of the ICCPR 'if it is a link in the causal chain that would make possible violations in another jurisdiction.'[113] This argument is further supported by drawing analogies with the criminalisation of forced displacement, whereby 'force' is not limited to physical force. For

[110] '[j]urisdiction must also include situations where a State party exercises, directly or indirectly, de facto or de jure control over persons in detention'. *JHA v Spain*, [8.2].
[111] UNHCR, 'Conclusion on Protection Safeguards in Interception Measures' No. 97 (LIV) (2003).
[112] R Dias, 'The Parameters of Refoulement on the High Seas,' University of Sheffield (2016), 9 (on file with the author).
[113] *Munaf v Romania*, Communication no. 1539/2006, UN Doc CCPR/C/96/D/1539/2006, 30 July 2009 [14.2].

example, the ICC 'Elements of Crimes' document provides that '[t]he term "forcibly" is not restricted to physical force, but may include threat of force or coercion, such as that caused by fear of violence, duress, detention, psychological oppression or abuse of power against such person or persons or another person, or by taking advantage of a coercive environment.'[114] We can also draw an analogy with the argument that Israel 'occupies' Gaza (in the sense that Israel owes legal obligations to Gazans under the law of belligerent occupation),[115] despite Israel's disengagement. Even though Israel is not physically present on Gazan territory; it is 'occupying' Gaza because Israel guards the land, sea and airspace around Gaza.[116] Thus in engaging in interception without actually boarding the vessel, states may still be in breach of human rights law. To conclude otherwise would be contrary to the principle of good faith and would conflict with the Convention's object and purpose, which is to recognise 'the inherent dignity and … the equal and inalienable rights of all members of the human family.'[117]

Moreover, there is an implicit obligation of non-removal under the ICCPR which has been emphasised repeatedly by the Human Rights Committee. In General Comment 20, the

[114] International Criminal Court, Elements of Crimes, Official Records of the Assembly of States Parties to the Rome Statute of the International Criminal Court, First session, New York, 3-10 September 2002 (United Nations publication, Sales No. E.03.V.2 and corrigendum), part II.B
Article 6(e),

[115] The ICRC also considers that Israel remains an occupying power in the Gaza Strip, taking the view that "[w]hile the shape and degree of this military occupation have varied, Israel has continuously maintained effective control" over the territory. Peter Maurer (as President of the ICRC), "Challenges to international humanitarian law: Israel's occupation policy", International Review of the Red Cross, vol. 94, Winter 2012, pp. 1504-05, 1506

[116] See, e.g., UN HRC, 'Human Rights in Palestine and other Occupied Arab Territories: Report of the United Nations Fact Finding Mission on the Gaza Conflict', 15 September 2009, A/HRC/12/48 [278], [279]. Notably, in the Bassiouni case, the Israeli Supreme Court held that although there is no longer an occupation in Gaza, Israel has certain ongoing responsibilities toward Gaza (including in relation to the supply of fuel and electricity) due to "the degree of control exercised by the State of Israel over the border crossings between it and the Gaza Strip" as well as the historical relationship of dependency by Gaza on Israel for electricity [12]. See 'Situation on Registered Vessels of Comoros, Greece and Cambodia, Article 53(1) Report', 6 November 2014, OTP [26] [27]. For a different view, see M Milanovic, 'European Court Decides that Israel is not Occupying Gaza', *EJIL Talk!* [online], 17 June 2015, available at: http://www.ejiltalk.org/european-court-decides-that-israel-is-not-occupying-gaza.

[117] Preamble, ICCPR.

Committee rejected the possibility that States Parties could 'expose individuals to the danger of torture or cruel, inhuman or degrading treatment or punishment upon return to another country by way of their extradition, expulsion or *refoulement'*.[118] This was reaffirmed in General Comment 31, where the Committee stated that the ICCPR obliges states:

> '[...] not to extradite, deport, expel or otherwise remove a person from their territory [...] where there are substantial grounds for believing that there is a real risk of irreparable harm, such as that contemplated by articles 6 and 7 of the Covenant, either in the country to which removal is to be effected or in any country to which the person may subsequently be removed.'[119]

The use of the phrase 'such as' implies that the non-removal obligation is not limited to violations of Article 6 and 7. Indeed, the case of *Kindler v. Canada* [1991] illustrates that the non-removal obligation may, in theory, be invoked in conjunction with any Covenant article:

> '[...] [i]f a State Party extradites a person within its jurisdiction in circumstances such that as a result there is a real risk that his or her rights under the Covenant will be violated in another jurisdiction, the State Party itself may be in violation of the Covenant.'[120]

This article argues that this non-removal obligation also applies to pushback operations conducted at sea. The underlying rationale of non-removal obligations as developed in numerous cases is that states cannot turn a blind eye to the consequences of their removal

[118] UN Human Rights Committee, 'General Comment No. 20: Replaces General Comment No. 7 Concerning Prohibition of Torture and Cruel Treatment or Punishment' (1992) UN Doc HRI/GEN/1/Rev.1 7.
[119] UN Human Rights Committee, 'General Comment No. 31: The Nature of the General Legal Obligation Imposed on States Parties to the Covenant' (2004) CCPR/C/21/Rev.1/Add. 13 [12].
[120] *Kindler v. Canada*, Communication No. 470/1991, U.N. Doc. CCPR/C/48/D/470/1991 (1993) [13.1].

decisions where it exposes individuals to treatment in violation of international human rights norms. This is in line with the object and purpose of the ICCPR, which is inter alia to recognise 'the inherent dignity and … the equal and inalienable rights of all members of the human family.'[121] It is irrelevant that the quoted extract from General Comment 31 refers to removal from one territory to another (as opposed to removal from one area of the seas to another).[122] The fact that the Human Rights Committee is primarily concerned with the potential harm at issue (rather than geographical location) is evident from the fact that the terms 'territory' and 'jurisdiction' are used interchangeably to elaborate on the same principle, whereas the phrase 'real risk' is used consistently.

B. Applicable rights

The most relevant rights in the 1966 International Covenant on Civil and Political Rights (ICCPR) to the circumstances described above are Article 6, which protects the right to life; and Article 7, which prohibits cruel, inhuman or degrading treatment.[123] Thailand and Indonesia are a party to the ICCPR, whereas Myanmar and Malaysia are not. However, the latter states are also bound by these articles as they represent customary international law.[124] Once jurisdiction is established, pushback operations resulting in death and exposure to malnourishment, suffocation, dehydration, starvation, and violence would most certainly breach Articles 6 and 7 of the ICCPR.

These rights are reinforced by the broader customary notion of 'temporary protection.' This is an 'overarching principle of protection, sufficient to accommodate all those instances where

[121] Preamble, ICCPR.
[122] Chia et al (n 43) 43.
[123] 1966 International Covenant on Civil and Political Rights 999 UNTS 171.
[124] UN Human Rights Committee, 'General Comment No. 24: General comment on issues relating to reservations made upon ratification or accession to the Covenant or the Optional Protocols thereto, or in relation to declarations under article 41 of the Covenant', CCPR/C/21/Rev.1/Add.6 (1994) [8].

states are obliged to act or refrain from action in order that individuals or groups are not exposed to the risk of certain harms'.[125] It is less about their formal admission, and more about their non-return to danger.[126] Thus the proposition that a state can remove an individual to the High Seas to face terrible conditions and possibly death is permitted by international law is unsustainable, and moreover, highly undesirable, as it would create a dangerous loophole for states wishing to prevent aliens from entering their territory.

It is also important to determine whether there has been a breach of the prohibition of collective expulsion, which refers to any measures compelling non-nationals, as a group or groups, to leave a country or the territory of a country, except where such a measure is taken on the basis of a reasonable and objective examination of the particular case of each individual member of the group.[127] This principle has been described as a general principle of law and is also enshrined in the Migrant Worker's Convention,[128] to which Indonesia is a party, and in the ICCPR to which Thailand and Indonesia are parties.[129] It is clear that where the coastal states intercepted the migrants in their territorial seas without complying with the provision's obligation of 'due process', the prohibition of collective expulsion was breached. Where the vessels were intercepted on the High Seas, however, it is argued that this principle was not breached. Although the ECtHR in *Hirsi v Italy* found that the prohibition of collective expulsion was breached, owing to pushback operations conducted on the High Seas, this was on the basis that the formulation in Article 4 of Protocol 4 of the prohibition

[125] GS Goodwin-Gill 'Non-*refoulement*, Temporary Refuge, and the "New" Asylum Seekers' in DJ Cantor and J-F Durieux, *Refuge from Humanity? War Refugees and International Humanitarian Law* (Brill, 2014) 458.
[126] ibid, 435-436.
[127] Gallagher and David (n 38) 477.
[128] 1990 International Convention on the Protection of the Rights of All Migrants Workers and Members of their Families, A/RES/45/158.
[129] Article 22 of the Migrant Workers' Convention (to which Indonesia is a party, but Malaysia and Thailand are not) provides that: 'Migrant workers and members of their families shall not be subject to measures of collective expulsion. Each case of expulsion shall be examined and decided individually.' However Article 22(2) provides that 'Migrant workers and members of their families may be expelled from the territory of a State Party only in pursuance of a decision taken by the competent authority in accordance with law.'

'contains no reference to the notion of "territory"'.[130] In contrast, all of the international (as opposed to regional)[131] instruments' provisions on collective expulsion use the term territory in the formulation of the prohibition.[132] This principle is limited to where individuals are present on the territory of the state or in a state's territorial waters given the nexus between state sovereignty and territory.

CONCLUSION

The above discussion has assessed the actions of the Thai, Malaysian and Indonesian authorities against the complex legal framework applicable to pushback operations at sea. This article argued that notwithstanding its customary status, the principle of *non-refoulement* was not breached by the respective states as they did not send the migrants back to the 'frontiers of territories.' In addition, this article accepted that the states could in theory rely on Article 19 UNCLOS which establishes the right to push back vessels carrying migrants present in the territorial seas, as such vessels are not engaged in 'innocent passage'.[133] However, this article argued that the exercise of this right by Indonesia, Thailand and Malaysia was unlawful as it was not a measure of last resort; it was disproportionate to the objective; and did not use the minimum force reasonably necessary.[134] They also violated the individual's exceptional customary right to enter the ports of the coastal state in situations of distress, although it is not clear whether the coastal states also had an obligation to disembark them. Nonetheless, by providing them with food, water, and pushing them back to sea they did not satisfy the obligation under Article 98 UNCLOS to assist these individuals, as the

[130] *Hirsi* (n 6) [173].
[131] Protocol no 4, ECHR; 1969 American Convention of Human Rights 1144 UNTS 123, Art 22(9); 1992 African Charter on Human and Peoples' Rights 21 ILM 58, Art 12(5).
[132] Migrant Workers Convention, Art 22; ICCPR, Art 13.
[133] Article 19, UNCLOS.
[134] The *MV Saiga* case held that force should be a last resort: '[International law] requires that the use of force must be avoided as far as possible and, where force is inevitable, it must not go beyond what is reasonable and necessary in the circumstances. Considerations of humanity must apply in the law of the sea as they do in other areas.' The M/V Saiga (No. 2) Case (Saint Vincent and the Grenadines v Guinea) (1999) ITLOS Case No 2, ICGJ 336 (ITLOS 1999) [155].

provision of assistance that would only marginally prolong life would not be interpreting the obligation in good faith. In addition, it would fall foul of the principle of effectiveness, which provides that the obligation in a treaty is to produce an outcome which advances the aim of the treaty.

This article also established that interception is a continuous act, and thus any actions that alter the course of the vessel could amount to interception. As human rights law is applicable to all situations of interception at sea, any right exercised pursuant to UNCLOS or the SOLAS Convention that is not in conformity with human rights law is a breach of the substantive human rights provision as well as to the obligation to interpret UNCLOS and SOLAS in line with existing obligations.[135] Therefore, in breaching Articles 6 and 7 of the ICCPR, ipso facto, the Thai, Malaysian, and Indonesian authorities have no justification for their actions under international law. Where there is no interaction with the vessel whatsoever, there is no breach of international human rights law (although there may be a breach of the Law of the Sea provisions described above, particularly with regards to rendering assistance to persons in distress at sea).

The practical impact of the findings of this research suffers from many of the shortcomings of the system of international law as a whole, namely, the lack of enforcement at an international level. However, the arguments put forward in this paper nonetheless make a significant practical impact for the following reasons. First, even if international redress is difficult or impossible, the arguments put forward in this piece can be employed at a domestic level. Those who survived, or the families of those who perished, for example, could take a case through local courts and tribunals. For states such as Indonesia and Thailand that operate

[135] Article 31(3)(c), 1969 Vienna Convention on the Law of Treaties 1155 UNTS 331.

a dualist legal system, the national legislature must 'transform' the international obligation into a rule of national law, and the national judge will then apply it as a rule of domestic law.[136] A domestic judge should nonetheless interpret that domestic rule in accordance with its original source as an international instrument. As was stated by Lord Hope of Craighead in the United Kingdom House of Lords with reference to the 1951 Refugee Convention:[137]

> 'The point is commonly made in regard to the Convention that it is not right to construe its language with the same precision as one would if it had been an Act of Parliament. The Convention is an international instrument […] its choice of wording must be taken to have been the product of the inevitable process of negotiation and compromise […] And the general rule is that international treaties should, so far as possible, be construed uniformly by the national courts of all states. This point also suggests that the best guide to the meaning of the words used in the Convention is likely to be found by giving them a broad meaning in the light of the purposes which the Convention was designed to serve.'[138]

Second, the issue could be raised by individual states, the UN, UNHCR, and/or NGOs during Thailand's, Indonesia's or Malaysia's review of their human rights records (Universal Periodic Review) before the Human Rights Council.[139] Third, the arguments put forward in

[136] E Denza, 'The Relationship between International and National Law' in MD Evans (ed), *International Law*, 2nd edn (Oxford, Oxford University Press, 2006) 429. It is unclear whether Indonesia operates a monist or dualist system, as its Constitution is silent on the matter. See S Butt, 'The Position of International Law within the Indonesian Legal System' (2014) 28 *Emory International Law Review* 1. If it has a monist system, international law is directly applicable in the domestic legal system and thus the arguments canvassed in this article are similarly directly applicable in a domestic court.
[137] Refugee Convention (n 6).
[138] *Horvath v. Secretary of State for the Home Department* [2000] UKHL 37.
[139] The Universal Periodic Review (UPR) involves a review of the human rights records of all UN Member States. The UPR is a State-driven process, under the auspices of the Human Rights Council, which provides the opportunity for each State to declare what actions they have taken to improve the human rights situations in their countries and to fulfill their human rights obligations. Of particular relevance to this piece is the opportunity for UN bodies and NGOs to provide observations on the states' human rights records.

this piece can be used to put diplomatic pressure on Indonesia, Malaysia, and Thailand to change their policies toward migrants at sea. Since the inception in 2002 of the Bali Process on People Smuggling, Trafficking in Persons and Related Transnational Crime (Bali Process), the issue of people smuggling in particular is high on the agenda of the international community. Following the events of May 2015, Thailand, Malaysia, and Indonesia's reputation for respect for international law is damaged, and this may affect their relationship with other states and in the context of multilateral negotiations on related issues. By condemning their actions within the framework of international law, this article puts significant weight behind the argument that these actions were wrong, should never be repeated, and provides a disincentive for states to engage in similar practices in the future.