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Turn back boats! Turning back on 60 years of refugee protection, or a policy for the future regulation of displaced persons at sea?

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Turn back boats!

Turning back on 60 years of refugee protection, or a policy for the future regulation of displaced persons at sea?

By

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ABSTRACT

For over thirty years States have implemented policies whereby boats carrying asylum seekers are turned away from entering the maritime boarders of States. The aptly named 'Turn Back Boats' polices are fraught with problems concerning, amongst other things; cruel and degrading treatment, human rights violations, and people smuggling. Both the law of the sea and refugee law lack clarity and States continue to operate such policies in a grey area of the law. This piece critically analyses the legality of these policies and questions their effectiveness, concluding that there is no future for the boat returning policies in their current form.

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CHAPTER 1

INTRODUCTION

An undeniable rise in atrocities, occurring in the 21st century, has led to an increased number of persons being displaced and fleeing their homelands in volumes which have likely never been seen before[1]. With great volumes of displaced persons escaping gross human rights violations[2] and searching for freedom, more are taking to the seas than ever before[3]. As such the resultant rate of maritime migration is higher than ever before.[4] With so many persons now arriving by boat at the maritime borders of State the world over, the question has to be asked as to what could, should and must be done to protect these people. States have turned to policies such as turning back boats and towing them onto the high seas and no longer does it appear that international law provides a safe haven for displaced persons migrating by sea. There are numerous concepts that must be understood and laws which need to be interpreted and as a result, there are a number of angles which this question can be approached from. This piece critically analyses the key concepts and principles of the turn back boats polies and asks whether they are a legal and effective way of managing the international displacement of persons at sea. Drawing together the relevant areas of law, and considering the impact they have on resolving the associated problems, the future of such policies is questioned.

[1] 59.5 million people were forcibly displaced by the end of 2014. The greatest annual increase in history. *The Sea Route to Europe, UNHCR July 2015.*

[2] J Rehman, *International Human Rights Law* (2nd Ed, Pearson, 2010) 642

[3] 137,000 refugees and migrants crossed the Mediterranean Sea in the first six months of 2015 alone. *The Sea Route to Europe, UNHCR July 2015.*

[4] UNHCR, *The Sea Route to Europe* (July 2015)

1.1 Problems

By considering the current migrant situation globally and looking to the policy of turning back boats a greater understanding of the situation can be grasped. Critically evaluating the failings and successes of government across the globe; to curb, control and assist irregular migration, Chapter 2 gives a considered opinion of the current situation and the problems faced in a world where sea-borne migration is on the rise.[5] In doing so it clearly displays the problems associated with the turn back boat policies.

1.2 Current International Law

Without this, there is little to explore. The relevant law, both national and international plays a key role in the understanding of certain areas of maritime security and displays the fundamental obligations on States, upon persons within their jurisdiction. In considering the turn back boats policies, international law plays a role of upmost importance and the additional element of the high seas raises a key question with regard to scope and applicability of certain legislation. Where migration takes place on land, between States, it can be argued that the law has greater clarity; but the introduction of a jurisdiction free, non-sovereign body creates greater ambiguity. Not only this, but the sea also provides an additional level of danger; leave a displaced person outside overnight and there is a good chance they will still be there in the morning, but leave them in the sea overnight and there is little chance they shall not perish. Exploring both relevant law of the sea and refugee law, these chapters will uncover the legal provisions for the situation as it stands currently. Delving into the uncodified, the chapters will look at case, treaties, customary law and State practice to find whether States are breaching the legislation or whether the lack of clarity in the legislation in this area is leading to failings.

[5] http://www.regionalmms.org/index.php/research-publications/feature-articles/item/36-the-world-s-deadliest-frontier-the-growing-migration [Accessed 02-05-16]

1.2.1 Refugee Law

Chapter 3 looks at current refugee law and considers the obligations on States regarding non-refoulement and as the two are fundamentally connected[6]; the provision of basic human rights. Considering cases of refoulement relating to immigration by sea routes, the chapter evaluates the legal implications of such policies and the associated difficulties. Where the law fails to govern States' activities there must be systems in place which provide universal protection. Approaching the situation from multiple perspectives, the chapter considers '*the obligation which is central to the whole scheme of refugee protection'*;[7] the fundamental concept of refoulement, and the problems posed by certain maritime areas. The rights of refugees are explored and the core protections which States should be providing refugees are evaluated. Throughout the chapter the question of whether refugee law currently has the potential solve the associated problems is addressed.

1.2.2 Law of the Sea

In considering the management of internationally displaced persons at sea it is imperative that the law of the sea is considered. It is impossible to appreciate where State responsibility begins and sovereignty ends without consulting legislation such as the United Nations Convention on the Law of the Sea.[8] The chapter crafts an understanding of maritime territorial borders and the admissible actions of State authorities within these zones. Considering the key treaties in the area allows a greater comprehension of maritime rescue obligations and duties held by States.

[6] D Moeckli, *A Edwards, International Human Rights Law* (2nd Ed, OUP, 2014) 513

[7] G Clayton, *Immigration and Asylum Law (7th Ed, OUP, 2016) 441*

[8] United Nations Convention on the Law of the Sea (Montego Bay, 10 December 1982) 1833 UNTS 3

By critically analysing such legislation, it is possible to decide whether the law addresses the problems associated with the turn back boats policies.

1.3 Prospects

It is no secret that refugees cost States both financially and socially. There is a certain intolerance to refugees the world over, and even today in the developed world there are those who do not have the time to deal with refugees. This chapter critiques the stance of certain States who refuse entry to refugees and consider the laws which they may be breaching. Applying both law and custom, the practice of turning back boats and blocking refugee arrivals is considered and questions asked as to the viability and acceptability of such practices. The key focus of this chapter is on whether the turn back boats polices are in fact legally effective at limiting the numbers of irregular migrants arriving at the maritime boarders of States and whether they are only effective as a reflection of loopholes in international law.

In evaluating the turn back boat policies from a number of directions; considering the problems and the current legal provisions. Questioning extra territorial processing as an alternative to interdiction, it is possible to consider a framework for the future of such policies.

CHAPTER 2

EVALUATION OF POLICIES TURNING OR TOWING BACK BOATS

One of the greatest issues displaced persons escaping persecution by sea have faced in the past few decades has been an ever-growing tendency for States to adopt a policy of turning back boats. In effect, this means that after travelling many miles often by foot to exit a war torn country, and finding somebody to pay to get them away from everything, they reach the territorial waters of another State where they hope to seek refuge, only to be turned away within 25 miles[1] of their goal. Not only can this be devastating for the displaced person, there is considerable evidence to suggest the practice is against international law. This chapter examines the 'Turn Back Boats' policies; focusing particularly on Australia where the greatest effect has been seen, whilst also considering the policies of other States and regions. In doing so the problems with such policies are identified.

2.1 Australia

Although a growing trend the world over,[2] there has been considerable discussion relating to the apparently successful policies adopted by past and present Australian governments. In their most basic form the policies state that boats found to be containing persons who do not have the correct paperwork for entry into a State, for example passports and visas, should be returned to the high seas or to the border of the State where they have come from, apparently regardless

[1] Due to the nature of international law, in particular the law of the sea, maritime borders can stretch out to 24 nautical miles from the baseline, usually a State's coast. This is discussed in Chapter 4.

[2] The policies started appearing in America in the early 1980s and are now visible in the USA, Australia, Thailand, and more recently the UK since March 2016. These regions will be discussed in this chapter.

of their asylum status.[3] This has predominantly taken two forms; military or coastguard intervention, involving turn-around requests or the physical towing of vessels back onto the high seas or to the territorial seas of another State, a practice which is both morally and legally objectionable. These legal issues are discussed in Chapters 3, 4 and 5.

Operation Relex I[4] and Operation Relex II[5], policies of the Australian Howard Government, are considered to be some of the most significant operations of any coastal State[6]. Under Relex I[7], Suspected Illegal Entry Vessels (SIEVs) were intercepted in the contiguous zone[8] of Australia by the Royal Australian Navy and boarded so as to identify those who were attempting to get to Australia without a visa.[9] Once discovered that those on board had been smuggled out of Indonesia,[10] the boats, if seaworthy, were turned around and escorted back to Indonesia, or in the case of them being adrift, towed back to Indonesian Coastal waters to be rescued by the Indonesian authorities[11]. Fundamentally the greatest problem with this process

[3] In '*A Certain Maritime Incident Committee Report'* found in the Wednesday, 23 October 2002 Senate Extract of the Australian Hansard, the policies avoidance of Refugee Identification was described as 'not relevant', Hansard 5799.

[4] 3rd September 2001 – 13th March 2002

[5] 14th March 2002- 16th July 2006

[6] The Australian Operations have historically been larger than that of both the USA and China by considerable margins.

[7] Senate Select Committee, *Inquiry into a Certain Maritime Incident: Report* (23 October 2002) 2.61, 2.72.

[8] This is the 24nm limit of sovereign control where by a State may exercise specific duties outlined in the Convention on the Territorial Sea and Contiguous Zone 1958, to control matters of; customs, tax, sanitation and immigration.

[9] Senate Select Committee, *Inquiry into a Certain Maritime Incident: Report* (23 October 2002) 2.61, 2.72

[10] Indonesia is a popular State for escaping to Australia, where people believe they will be able to lead a far better life. (https://www.theguardian.com/world/2010/dec/15/refugees-6000-miles-better-life [Accessed 12-08-16])

[11] https://www.theguardian.com/world/2015/may/11/second-boat-off-indonesia-brings-asylum-seekers-rescued-in-two-days-to-1000 [Accessed 12-09-16]

was the risk. Over the five and a half year operation, seventeen boats were intercepted[12] off the Australian Coast. Of these, five boats were 'successfully' returned to Indonesian waters, three sank and the rest were taken to detention centres on Nauru, Christmas Island and Manus Island.[13] During the operation the numbers of recorded drownings soared with hundreds being recorded each year[14]. In the fifteen years between 1998 and 2013, over 1550 people were reported on public record to have died whilst attempting to enter Australia illegally by boat.[15] Another source suggests that between 1 in 50 and 1 in 30 drown as a result of attempting the crossing[16]. This clearly evidences that boat returning polices are unacceptably dangerous, as a risk of death is not to be regarded as acceptable on any level.

Even the 'successful' turnarounds were not simple. Reports of sabotage and self-harm were reported to be rife, with asylum seekers jumping overboard and drowning as well as setting fire to the cargo holds where they were holed up.[17] These actions were possibly due to a basic understanding of the law where rescue scenarios are treated differently to immigration matters. This is discussed in greater depth in Chapter 4. The last boat was turned around in November 2003 yet the operation continued until 2006[18], presumably to reinforce the message that Australia's doors were not open to displaced persons travelling illegally. Although the figures for the number of boats that were still making the crossings between 2006 and 2013 have been

[12] Senate Select Committee, *Inquiry into a Certain Maritime Incident: Report* (23 October 2002) 2.73

[13] Senate Select Committee, *Inquiry into a Certain Maritime Incident: Report* (23 October 2002) 2.73

[14] SIEVX Drownings Table http://www.sievx.com/articles/background/DrowningsTable.pdf

[15] M Hutton, Drownings Table [2013] 3

[16] https://www.lawyersalliance.com.au/news/clarity-needed-over-abbotts-turn-back-boats-policy [Accessed 28-08-16]

[17] Senate Select Committee, *Inquiry into a Certain Maritime Incident: Report* (23 October 2002) Appendix 1

[18] The Operation ceased on 16th July 2006 as it was decided that it had achieved success in stopping the boats and thus the resources could be used elsewhere.

unobtainable from the Australian Government due to data security concerns, it can be assumed that many hundreds of vessels were still making the trip undetected.[19] At the 2011 Senate Estimates Hearing[20], Vice Admiral Ray Griggs, Chief of Navy 2011-14, denounced the whole operation saying it had been fraught with risks[21]. Retired Admiral Chris Barrie, Chief of the Defence Force 1998-02, supported Griggs' position in 2012 in a Border Protection Command Report[22]. It seems perplexing therefore, that a future government would yet again pursue such techniques.

Yet, following the Relex Operations, the Abbott Government continued with the policy, launching Operation Sovereign Borders (OSB) in 2013. OSB[23] is largely a similar operation to Relex I and II but encompasses an 'if safe to do so' attitude, which was meant to make Australian citizens feel more comfortable with the idea that returning asylum seekers to a place of persecution, contrary to their human rights, was the appropriate measure to take[24]. OSB is meant to deal with certain areas of international law, which may have been overlooked in Operation Relex. For instance, the particular focus here was on the requirement for seaworthiness, a principle found in the International Convention for the Safety of Lives at Sea[25]

[19]http://theconversation.com/explainer-the-legality-of-turning-or-towing-back-asylum-boats-16201 [Accessed 01-08-16]

[20] Australian Government, *Hansard* (2012) 393

[21] The Senate Select Committee described the operation as having '*inappropriate levels of risk'*. Senate Select Committee, *Inquiry into a Certain Maritime Incident: Report* (23 October 2002)

[22]http://www.theaustralian.com.au/national-affairs/immigration/law-of-the-sea-versus-the-dictates-of-canberra/story-fn9hm1gu-1226295248652 [Accessed 01-08-16]

[23]https://www.border.gov.au/about/operation-sovereign-borders/counter-people-smuggling-communication/english/outside-australia/fact-sheet [Accessed 02-09-16]

[24] J Ireland, A Rose, *Defence Mistreated Asylum Seekers in Boat "Turn Back"*, *Sydney Morning Herald (*9 January 2014)

[25] International Maritime Organization (IMO), *International Convention for the Safety of Life at Sea* (1 November 1974) 1184 UNTS 3

(SOLAS). SOLAS makes a number of requirements for seaworthiness, which include build quality[26] and passenger or cargo capacity[27] and it is this which represents a significant change between the two Governments' operations. In an attempt to mitigate the sinking and drownings of Operation Relex I and II, Abbott's Government employed a disposable lifeboat system. In situations where the Royal Australian Navy found boats they were tasked to return; 'unseaworthy', they were to offload the passengers onto single use lifeboats and dispatch them back to their departure location[28]. Thus technically fulfilling the requirement under SAR[29] to provide a place of safety to the displaced persons as they were now in a seaworthy vessel. An interview between an asylum seeker and ABC news in Australia suggested that these vessels however were not suitable for the return of irregular migrants, with the asylum seeker stating; *'We will die in this orange boat, it's not suitable for passing the ocean'*[30] This remains a controversial but unquantified problem as there are no statistics for the security of these vessels and their likely success rates.

By 2014 it was thought that the Australian Government has spent over $2.5 million AUS[31] on these single-use vessels, but this was arguably a tiny fraction of the potential cost of processing all the asylum applications. Asylum seekers cost the Australian Government an estimated $70,000 each, to process and resettle, in 2013, representing a total of $1.5 billion in 2014 based

[26] Regulation 13, Part B*, International Convention for the Safety of Life at Sea* (1 November 1974) 1184 UNTS 3

[27] Regulation 2, *International Convention for the Safety of Life at Sea* (1 November 1974) 1184 UNTS 3

[28]https://www.asrc.org.au/wp-content/uploads/2013/07/Operation-Sovereign-Borders-May-2014.pdf [Accessed 12-09-16]

[29] International Maritime Organization (IMO), *International Convention on Maritime Search and Rescue* [27 April 1979] 1403 UNTS. (Herein SAR)

[30]http://www.abc.net.au/news/2014-03-17/asylum-seekers-give-details-on-operation-sovereign-borders/5326546 [Accessed 12-09-16]

[31] Senate Legal and Constitutional Affairs Legislation Committee, *Estimates* (25 February 2014) 1

on 40,000 new asylum applications[32]. This is in comparison with the 2009-10, $654 million bill created by addressing 'the problem of unauthorised boat arrivals',[33] suggesting that intercepting these vessels, although expensive is almost sixty percent cheaper than processing and resettling refugees. It is therefore understandable that in order to save money, governments might choose to forego human rights obligations and introduce cost saving policies such as that of turning back boats, however illegal or morally wrong they may be.

The turning back of boats has remained a key strategy for over 15 years in Australia with some of the most notable cases having come from boats intercepted off the coast of Australia in more recent years. In 2014 the authorities stopped two boats that appeared to have come from Sri Lanka. Both were subject to what was described as 'enhanced screening'[34] although it has since been questioned as to what this entails[35]. It has been suggested that it may not be particularly thorough, let alone enhanced at all.[36] The first vessel was returned to Sri Lanka but the second was a more drawn out affair. The 157 Tamil asylum seekers on-board were transferred to an Australian Customs Vessel moored off the territorial sea, and held there for a month whilst Australia appealed to India to take the asylum seekers back to the refugee camp from which they had fled. India did not wish to settle the matter in quite the same way as Australia and thus, after a short trip to the Australian mainland, where they were temporarily detained, the asylum seekers were transferred to detention centres on Nauru.[37] The circumstances of this

[32]http://www.news.com.au/national/australia-will-be-paying-70000-for-each-asylum-seeker-that-arrives/story-fncynjr2-1226655532914 [Accessed 27-08-16]

[33] J Phillips, *Border protection and combating people smuggling*, Budget Review 2009–10 (Parliamentary Library, Canberra, May 2010)

[34] http://www.kaldorcentre.unsw.edu.au/publication/turning-back-boats [Accessed 02-08-16]

[35] Australian Human Rights Commission, *The 'Enhanced Screening Process'* (June 2013)

[36] Kaldor Centre*, Factsheet on Enhanced Screening* (2014)

[37] J Om, *Asylum Seekers: A Timeline of the Case Involving 157 Tamil Asylum Seekers Intercepted at Sea,* ABC (4th August 2014)

event are of particular interest as one of the asylum seekers had a case made on their behalf. As the nature of international law creates a system in which, generally, only States can challenge other States' breaches of law and protect their citizens' rights.[38] Refugees have no State to represent them, as the reason they have fled their motherland is often the result of the collapse of their government. The case was therefore brought domestically against the Australian Government concerning the unlawful detention of asylum seekers at sea.[39] The High Court of Australia held that the detainment of the asylum seekers was not contrary to domestic law as there was no breach of the Maritime Powers Act 2013,[40] which allowed the authorities to deal with immigration matters at source.[41] There was, regrettably, no comment with regard to any violation of international law;[42] specifically whether Article 72(4) of the Maritime Powers Act 2013 was contrary to the principle of non-refoulement, found under the 1951 Refugee Convention. This is because Article 72(4) allows a maritime officer to detain or take a person 'to a place outside the migration zone, including a place outside Australia'[43]. It is unclear whether this means that the person may be returned to their country of origin, which may mean returning them to a State where they risk persecution. This is illegal under certain refugee laws and is examined in Chapter 3. The key point highlighted here however, is that States are using domestic law to try and answer the questions of grey areas in international law, a problem which in itself is causing greater ambiguity in the law.

[38] Even then, submitting the dispute to the International Court of Justice is consensual. (http://www.icj-cij.org/information/index.php?p1=7&p2=2 [Accessed 24-08-16])

[39] *CPCF v Minister for Immigration and Border Protection* (2015) HCA 1

[40] Australian Maritime Powers Act 2013

[41] Subdivision B—Exercising powers between countries, 41 Foreign vessels between countries, Maritime Powers Act 2013

[42] Commentary on the case of *CPCF v Minister for Immigration and Border Protection* (2015) HCA 1

[43] Article 72(4) of the Maritime Powers Act 2013

CPCF v Minister for Immigration and Border Protection echoes the sentiment of the *Ruddock v Vadarlis*[44] case of the previous decade. In this case, relating to the *Tampa* Affair, the Australian Government was held to account on the decision to put rescued asylum seekers into detention centres on Nauru as opposed to the Australian mainland. The case of the *Tampa* relates to a Norwegian Vessel, which acting upon the goodwill of the seafarer's code, made a rescue attempt on a sinking vessel containing 433 refugees fleeing Afghanistan, only to be told by the Australian Government that it would not be possible to deposit the rescued persons on the mainland due to sovereign control of access to maritime territories, and thus were forced to remain at sea, on a heavily overburdened vessel. This was strictly contrary to the advice given by the United Nations High Commissioner for Refugees (UNHCR)[45] which stated that keeping the asylum seekers on board was not permitted as under international law, 'the ship itself cannot be considered a 'place of safety''[46] and that 'carrying a large number of unscheduled passengers could endanger the crew and passengers themselves, owing to overcrowding, insufficient food and water and the tensions of life at close quarters'.[47] It could be considered therefore that the trend for Australia to ignore ethics, and possibly even international law, in relation to immigration is something of a policy in its own nature. Conversely, it could equally be argued that Australia's domestic law is enough for it to maintain that it is only defending its sovereignty. International law permits States the right to maintain effective control of their nation, within their territory, through the three branches of government to create laws, which in turn they have the power to execute. Thus, where Australia has created laws relating to

[44] *Ruddock v Vadarlis* [2001] FCA 1329

[45] The UNHCR (United Nations High Commissioner for Refugees) is the body responsible for refugee welfare advice the world over. Although not legally binding the suggestions of the UNHCR are generally considered to be the most sound, and beneficial to all to whom they apply.

[46] UNHCR, *Safeguarding asylum: The Tampa Affair: interception and rescue at sea* [2006] 1

[47] UNHCR, *Safeguarding asylum: The Tampa Affair: interception and rescue at sea* [2006]2

immigration, it may carry out its actions with little disruption. Should these laws be manifestly unfair, in theory, international law should play a part in denouncing this legislation? However, without a common executive to ensure that decisions are followed, international law can sometimes lack authority. This means that States are, in effect, able to enact legislation that is contrary to international law and escape punishment because there is little chance of another State bringing proceedings against them. Australia's policies of boat turning are something which may qualify this approach. As no State has questioned the legality of Australia's policies in court, the Australian Government is free to continue with such activities. It merits consideration that Australia is not the only State with such policies however, and there remain many questions with regard to who is responsible for querying State practice if every State follows suit. This is examined below.

2.2 Other States and Regions

The reasons behind States trying to stop mass asylum applications is not unclear. Each year States face tighter budgets and greater debts and the immigration situation in many States is arguably out of control.[48] Political parties all have different opinions on the matter and although legally there are certain rules that States must comply with in regard to immigration, following the letter of the law may not be politically popular. This is something which is clearly visible in the EU with the free movement principle. Many citizens do not appreciate foreign nationals moving around the EU to gain jobs or claim benefits. This behaviour is regardless of whether the law embodies moral right or not, States wish to show citizens that they are doing their best to save money and maintain sovereignty. In the United Kingdom, the recent referendum to exit the European Union was thought to have been heavily swayed by some voters' belief that an

[48]http://theconversation.com/explainer-the-legality-of-turning-or-towing-back-asylum-boats-16201 [Accessed 01-08-16]

exit would solve all immigration issues[49] and demonstrate the strength of UK sovereignty. It is for this reason that dealing with refugees, asylum seekers and migrants is so difficult. The moral or legal answer is often the least efficient or financially suitable, and there now exists a worldwide tendency to choose cost saving methods over ethical actions, as was seen above with Australia's OSB. The policy of States to turn back boats can now be seen across States in both the Southern and Northern Hemispheres, as seen below. This represents a shift, which is not only morally wrong, but one that is most likely illegal within international law.

2.2.1 America

The United States of America has one of the longest standing boat turning policies[50]. Since 1981 the USA has had a system in place in which any boat sailing from the Dominican Republic, Cuba or Haiti and carrying any person planning on moving to the US mainland, is returned to the country of origin. Unlike the Australian operations, which have a longstanding history of failing to make any agreements with Indonesia or Sri Lanka, the US system is based on strong ties with the other countries.[51]

However, the level of screening, or refugee determination, is one that, like Operation Relex, has come under much scrutiny[52]. A mixture of shout testing[53], in which displaced persons are returned unless they 'shout' that they are in direct fear of persecution, and interviews at

[49]http://www.newstatesman.com/politics/staggers/2016/07/four-ways-anti-immigration-vote-won-referendum-brexit [Accessed 28-08-16]

[50] US Coast Guard, *Alien Migrant Interdiction* (2013)

[51] Since the 1980s the US has had bilateral agreements with countries including Haiti and Cuba. For further information, consider the 'wet feet, dry feet' policies of the Clinton Government in 1995.

[52] A Dastyari, *'Abbott's Copycat Tow-Back Plan Won't Stop the Boats'*, The Age (15 July 2013)

[53] S Legomsky, '*The USA and the Caribbean Interdiction* Program' (2006) 18 IJRL 677

Guantanamo Bay[54] in Cuba are used. This in itself is obviously a questionable tactic as Guantanamo Bay Detention Centre has long been at the centre of enquiries into controversial practice; including interrogation and indefinite detention without trial.[55] This is clearly insufficient and is considered by many to violate international law.[56] The continual defence used by States, such as the USA, is that they are not necessarily turning back boats because the displaced people are asylum seekers but rather because they do not have visas. This sort of policy is not only fundamentally flawed but can be considered to be, at best, ethically inconsiderate. This is because people fleeing persecution are extremely unlikely to be in possession of visas, as they are fleeing the very governments that should be issuing such documents. This is highlighted by the mass migration of asylum seeking Cubans to the US during 1980.[57] It is a very significant problem because generally there is nothing wrong with requiring visitors and immigrations to have the proper travel documents, but it can be considered an extremely ignorant stance when it is considered that over 95% of these people travelling by boat have been found to be refugees when properly screened.[58]

[54] D M Kerwin, *The Faltering US Refugee Protection System: Legal and Policy Responses to Refugees, Asylum Seekers, and Others in Need of Protection*, Migration Policy Institute (2011) 31

[55] https://www.theguardian.com/uk/2006/feb/17/politics.world [Accessed 04-09-16]

[56] http://www.kaldorcentre.unsw.edu.au/publication/turning-back-boats [Accessed 03-08-16]

[57] http://www.uscg.mil/hq/cg5/cg531/amio/amio.asp (Accessed 14-09-16)

[58]http://www.border.gov.au/ReportsandPublications/Documents/statistics/asylum-stats-march-quarter-2013.pdf#search=stats%2013 (Accessed 27-08-16)

2.2.2 Europe

European Migrant Crisis[59] is one that has repeatedly seen military intervention[60] in an attempt to hold back a mass influx of displaced persons.[61] The Mediterranean Corridor acts as a crossing point between some of the world's most war-torn States and the relative safety of Eastern Europe. The geographical convenience, in that in some places the crossing is swimmable or very easily traversed in a small dingy, means that the amount of people trying to make the crossing is astonishing. In the first part of 2016 over 131,000 people successfully managed to cross from places such as Libya, Syria and Afghanistan to Europe.[62] This figure demonstrates how desperate people are to flee their countries of origin and the effectiveness of migration by sea. For many of these individuals the current systems in place are ineffective should they wish to pursue legal asylum claims and as there are restrictions on penalising asylum seekers there is little for them to loose legally, but everything in reality. The turn back boats policies governments put in place are thus potentially further endangering the lives of thousands of vulnerable, men, women and children every day.

In 2012, the European Court of Human Rights[63] ruled that the actions of Italy, whereby it had been in a questionable bilateral agreement with the Libyan Transitional Government to secure a policy in which it returned any boats of escaped asylum seekers[64], was in breach of the

[59] UNHCR, *The sea route to Europe: The Mediterranean passage in the age of refugees* (2015)

[60]EUNAVFOR operation Sophia. https://eeas.europa.eu/csdp/missions-and-operations/eunavfor-med/pdf/factsheet_eunavfor_med_en.pdf [Accessed 15-09-16]

[61] http://www.bbc.co.uk/news/world-europe-32428500 [Accessed 27-08-16]

[62] Times of India, '*Over 131,000 migrants reached Europe by sea in 2016: UN'* (March 1 2016)

[63] *Hirsi Jamaa and Others v Italy*, ECHR (23 February 2012) App. No. 27765/09

[64] https://www.theguardian.com/world/2016/apr/25/italys-plan-to-combat-libyan-migrant-smugglers-could-mean-chasing-shadows [Accessed 13-09-16]

European Convention on Human Rights[65] regarding refoulement[66] and thus the operation had to stop[67]. In a lecture at the Palais des Academies, Brussels[68], in 2011, Gill suggested that other operations which had been occurring under the EU border management agency, Frontex, may too have flouted international law[69]. His suggestion was that Spain's special agreements with Senegal, Mauritania and Cape Verde; to return boats of displaced persons, lacked so much publicly available data that there was little chance the border agency had not violated the principle of refoulement[70]. The EU has a general policy on non-refoulement which echoes that of customary international law and that of treaty, effectively declaring that no person should ever be returned to a place of persecution regardless of their race, ethnicity, gender or age. In March 2016 European Commission President, Jean-Claude Juncker stated in a public hearing that the EU believes that all 'Refugees and asylum-seekers will have their requests handled individually, and will be able to lodge appeals. The principle of non-refoulement will be respected.'[71] Historically however, his has been questioned in a number of cases which will be explored in Chapter 3.

[65] Council of Europe, *European Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocols Nos. 11 and 14*, 4 November 1950, ETS 5

[66] Art. 3 ECHR: "No one shall be subjected to torture or to inhuman or degrading treatment or punishment."

[67] A Vogt, *'Italy Violated Human Rights by Returning Migrants to Libya, Court Rules'*, The Guardian (23 February 2012)

[68] G S Goodwin Gill, *'The Right to Seek Asylum: Interception at Sea and the Principle of Non-Refoulement'* (February 2011) Int J Refugee Law 443-457, 3

[69] G S Goodwin Gill, *'The Right to Seek Asylum: Interception at Sea and the Principle of Non-Refoulement'* (February 2011) Int J Refugee Law 443-457, 6

[70] G S Goodwin Gill, *'The Right to Seek Asylum: Interception at Sea and the Principle of Non-Refoulement'* (February 2011) Int J Refugee Law 443-457, 8

[71] http://ec.europa.eu/news/2016/03/20160319_en.htm [Accessed 12-09-16]

2.2.3 UK

March 2016 saw the first major entry by the United Kingdom into the discussions on turning back boats. Prime Minister David Cameron was reported by the mainstream media[72] to have been pushing for EU leaders to support the boat turning policy when he attended the EU leaders meeting to discuss intervention relating to the stream of migrants leaving Libya.[73] A British Navy vessel had already been dispatched to the Aegean Sea[74] to stop migrants travelling from Turkey to the EU as the Prime Minister wished to stop the problem at the source. RFA Mounts Bay, a Royal Navy Reserve intelligence monitoring ship, is only acting in an intelligence capacity in the Aegean Sea. Rather than physically stopping and returning vessels it will alert the Turkish Coast Guard to ships attempting to make the crossing and they will then exercise their immigration controls within the contiguous zone.[75] In an article in the Daily Telegraph, McTernan advocates a stronger stance here so that asylum seekers and people smugglers get the message that they will not successfully make the trip, echoing the sentiments of the Australian operations of the previous decades[76]. Former UKIP leader, Nigel Farage believed that a stronger stance should be taken in the UK and felt there were strong incentives to following the Australian lead, declaring that 'no migrant arriving on our shores by boat is allowed leave to remain.'[77] This displays a growing contempt for irregular migrants and it is

[72] https://www.theguardian.com/news/2016/mar/18/should-eu-adopt-australia-stop-the-boats-policy-guardian-briefing [Accessed 04-08-16]

[73] https://www.theguardian.com/world/2016/mar/18/refugee-boats-david-cameron-early-intervention-libya-migrants-mediterranean-eu-leaders [Accessed 04-08-16]

[74] http://www.independent.co.uk/news/uk/politics/refugee-crisis-uk-warship-dispatched-to-aegean-sea-to-turn-back-migrants-a6916106.html [Accessed 04-08-16]

[75] This will be discussed in detail in Chapter 4, The law of the Sea.

[76] http://www.telegraph.co.uk/news/uknews/immigration/12186028/The-Royal-Navy-must-turn-the-migrant-boats-back-even-if-that-puts-lives-at-risk.html [Accessed 27-08-16]

[77] http://www.theweek.co.uk/refugee-crisis/64108/refugee-crisis-cameron-in-child-refugee-u-turn [Accessed 28-08-16]

such attitudes which in the past, as displayed in Australia, have led to boat turning back policies being adopted.

2.3 Success of Boat Returning Policies

The question of the success of these policies depends on how success is measured. In terms of lowering the number of migrants entering States by boat, world leaders must believe the policies to be somewhat successful in order to continue investing money, regardless of their legality or morality. Owing to Australia's declaration that anyone found to be attempting to access its mainland without a visa would never be granted asylum[78], the number of boats making the trip has dropped[79] significantly.[80] As a result of Australia's zero tolerance attitude to illegal immigrants, even those claiming asylum, the detention centres in Nauru still play host to many of the illegal visitors that attempted to make the crossing by boat. The message here appears to be, that a tough political line and education of the displaced persons[81] is something which plays a vital role in successfully reducing migrant numbers. This is evidenced too by the reduction of deaths in Australian waters[82] over the same period as Operation Sovereign Borders was taking place, likely due to the drop in the number of boat crossings.

However, the success of such policies with regard to protecting the vulnerable and upholding migrants' human is questionable at best and categorically illegal at worst. To this end, there

[78]http://www.aph.gov.au/About_Parliament/Parliamentary_Departments/Parliamentary_Library/pubs/rp/rp1415/AsylumFacts [Accessed 10-09-16]

[79] http://beyondforeignness.org/fortress-australia-asylum-seeker-and-migrant-death-and-detention-statistics [Accessed 12-09-16]

[80] This was evidence by a drop in the number of vessels intercepted as part of the operation as recorded by the Operation Report of 2006.

[81] The Australian Government funded a PSA style mass advertising campaign to tell irregular immigrants they would 'never' settle in Australia.

[82] SIEVX Drownings Table http://www.sievx.com/articles/background/DrowningsTable.pdf

appears to be no evidence that the policies have been 'successful' in any of the above-mentioned States. The Guardian reported in May 2015 that some 8000 displaced persons were left trapped at sea in Australasia, on boats with little sanitation and dwindling food supplies[83] as none of the bordering States would allow them access. Not only that, but in some cases they were towed back to sea.[84] By the end of May 2015 the UNHCR was forced to release warnings to the related countries that if the boats were blocked from entering ports for much longer there was a real risk of the boats becoming 'floating coffins'. [85]

Of great issue is the fact that a lot of the people being towed back to sea are later found to be refugees[86]. Under international refugee law, refugees must be treated differently to economic migrants or illegal immigrants.[87] Economic migrants or illegal immigrants generally move to improve their standard of living, rather than having been forced to leave their country to escape persecution. Therefore, the problem has not necessarily been with the actual logic of the policies around the world but the undermining ethical and legal issues.

To put it simply, these policies have focussed on the possession of the correct papers to allow entry into States. In the same way any person without a passport and visa may not be allowed into a country under its sovereign powers, the people aboard these vessels have been refused entry if they do not have these papers. The key difference is that in most cases these people

[83] https://www.theguardian.com/law/2016/feb/24/australia-among-30-countries-illegally-forcing-return-of-refugees-amnesty-says [Accessed 04-08-16]

[84] https://www.theguardian.com/news/2016/mar/18/should-eu-adopt-australia-stop-the-boats-policy-guardian-briefing [Accessed 04-08-16]

[85] New York Post, Thousands of refugees stranded on 'floating coffins' in Southeast Asia (15th May 2015)

[86] http://www.smh.com.au/federal-politics/political-news/overwhelming-majority-of-boat-arrivals-deemed-to-be-refugees-20130519-2juty.html [Accessed 06-08-16]

[87] The specific treatment is something which is particularly nuanced and will be critically analysed in Chapter 3.

have nowhere to go once turned away. The floods of displaced people flowing through Indonesia, trying to get to Australia, have already come through another country. Common practice states that refugees should settle in the first safe country they arrive at and should not be able to pick and choose where they settle. Moving countries can have legal implications as asylum seekers are no longer evading persecution but travelling document free through States illegally. This is referred to as the 'safe third country' principle and avoids 'asylum shopping' where asylum seekers look for the best country to settle in.[88] By not allowing this, and forcing migrants to make asylum claims in the first State that offers protection, financial savings can be made by States avoiding multiple processing costs.

Whereas the UNHCR has identified the stream of people exiting Libya are fleeing from a direct risk of persecution[89], they must be treated as potential refugees and not simply people trying to illegally gain access to a country. It is for this reason that the screening process is of such importance. This key difference is something which must be, and is currently not being, considered; as without this concern, a dangerous path for boat returning policies is being forged.

Some of the issues which need to be addressed are in certain cases already covered by international law, but the law is vague and currently insufficient. In any case, it is this law which is being ignored in favour of quick-fix, bilateral agreements. A key example of this is the way in which David Cameron was reported to have formed a return deal with Libya[90] to send back EU bound asylum seekers. This is despite the political unrest in the country with

[88] http://reliefweb.int/report/world/what-safe-third-country [Accessed 26-08-16]

[89] http://www.unhcr.org/uk/libya.html [Accessed 27-08-16]

[90] https://www.theguardian.com/world/2015/apr/22/could-australia-stop-the-boats-policy-solve-europe-migrant-crisis [Accessed 05-08-16]

what appears to be four questionable governments all vying for power; the terrorist cell ISIS, a UN backed coalition, a rebel union and the official elected government whom have little respect or following[91]. The actual question of the policies' legalities is all based upon the people aboard the vessels. The situation is therefore further complicated by the varying nature of these passengers. Not only this but should the captains of these ships be seen as smugglers, which it has certainly been suggested they are[92], the question of States' responsibilities to stop these people and prosecute them is certainly one which must be explored. This is because these States have a universal responsibility for the people aboard under human rights obligations.

2.4 Summary

By critically analysing the policies of turning back boats it has become clear that a greater understanding of the current law must be had. Although there are many, significant, problems, International law relating to these problems is mainly to be sourced from two very different areas; refugee law and the law of the sea. There are additional implications from human rights and criminal law but they play a less significant role in understanding the legalities of the Turn Back Boats policies. The key focus of refugee law comes from the classification, or status, of the displaced persons. Whether they are economic migrants, travelling to find better wages, illegal immigrants trying to enter a country without the correct paperwork or asylum seekers with intentions to claim refugee status, the role of refugee law is to identify and protect those who are most vulnerable. The examination of refugee law in Chapter 3 will show that international law already goes a long way towards penalising States who refoule refugees and puts in place many guidelines and laws to protect the helpless.

[91] http://www.aljazeera.com/news/2016/01/libya-unity-government-160119093015333.html [Accessed 28-08-16]

[92] http://news.sky.com/story/migration-crisis-how-the-smugglers-operate-10346607 [Accessed 28-08-16]

The law of the sea plays a vital role in exploring the jurisdictions, territories and abilities of the different States as well as branching out to look at the obligations of States and mariners for those at sea within their maritime borders. Additionally, the law of the sea has key responsibilities relating to search and rescue at sea as well as vessel security, which play vital roles in addressing the policies of a growing number of States. In Chapter 4 the problems associated with flag State vessels, State responsibility and vessel safety will be explored and it will be made clear that there are already significant volumes of legislation already in place to protect those at sea.

The subsequent chapters will look into these nuanced areas to explore the laws behind the policy of turning back boats and identify areas where the law is perhaps insufficient to fulfil its role. By looking into the current legislation, clarity can be found in where the problems found in this chapter are as a result of lacking legislation and where the problems are caused by States acting in avoidance of the law.

CHAPTER 3
REFUGEE LAW

As noted in Chapter 2, the current situation in the Mediterranean has bought refugee law to the front covers of many newspapers.[1] From the tabloids to the broadsheets, the terminology used has created a mystical air around migration, which could be considered to scare and confuse anyone but the most well-versed.[2] The use of varying terms to describe displaced persons, such as asylum seeker, migrant and refugee, coupled with their lack of understanding by the general populous, leads to dangerous misconceptions being formed which in turn lead to negative stereotyping. Popular myths include the belief that all refugees get a free house, phone or car, whereas State nationals only receive small benefit payments. Consequentially, societal divides have formed. As a result, a general negativity to migration and refugees has developed over the past decade as the public nurture a misinformed idea of laws surrounding refugees, as discussed in Chapter 3.1. This chapter will clarify the nuanced terminology surrounding refugee status, whilst examining the specific laws relating to asylum seekers and irregular migrants arriving at shores across the world by boat. In connection with Chapter 4, the question of whether the current law satisfactorily addresses the problems identified in Chapter 2 is asked.

3.1 Refugees, Asylum Seekers or Migrants?

To gain a basic understanding of the different definitions used in this area, the United Nations General Assembly Convention Relating to the Status of Refugees 1951[3] (Refugee Convention)

[1] http://www.bbc.co.uk/news/world-europe-35760115 [Accessed 23-07-16]

[2] C Nagarajan, *How politicians and the media made us hate immigrants,* Open Democracy, 13 September 2013

[3] UN General Assembly, Convention Relating to the Status of Refugees (28 July 1951) 189 UNTS 137

must be consulted. With regard to the definition of 'Refugee', Article 1 (2)[4] states that 'Refugee Status' applies to anyone 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 out- side the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it.

Once awarded 'refugee status' under the Convention, a refugee is entitled to rights such as juridical access[5], gainful employment[6] and welfare; including housing and public education.[7] However, the definition of refugee is quite narrow thus leading to much confusion, even within the mainstream media.[8] This confusion causes the incorrect use of terminology and thus widespread negativity to refugees[9]. Accordingly, it can mean that legislation is not applied correctly and thus the correct rights are not afforded to the relevant parties.

Europe is currently dealing with a larger than usual[10] influx of asylum seekers and migrants arriving by sea from countries such as Syria, Afghanistan, Eritrea, Somalia and Nigeria[11]. Though the Refugee Convention does not specifically identify a definition of asylum seeker, Migration Watch UK suggests it is a term used for persons who have fled from their own

[4] Article 1(2), Convention Relating to the Status of Refugees (28 July 1951) 189 UNTS 137, 14

[5] Chapter II, Art. 16, Convention Relating to the Status of Refugees (28 July 1951) 189 UNTS 137, 20

[6] Chapter III, Art. 17, Convention Relating to the Status of Refugees (28 July 1951) 189 UNTS 137, 22

[7] Chapter IV, Art. 21-22, Convention Relating to the Status of Refugees (28 July 1951) 189 UNTS 137, 24

[8] https://www.theguardian.com/media/greenslade/2015/dec/17/where-media-fails-on-the-reporting-of-migrants-and-refugees [Accessed 30/08/2016]

[9] C Nagarajan, How politicians and the media made us hate immigrants, Open Democracy (13 September 2013)

[10] A net average increase has been spotted in the last two years. (http://www.migrationwatchuk.org/statistics-net-migration-statistics [Accessed 29-08-16])

[11] UNHCR, 29 June 2015

country owing to a well-founded fear of persecution on account of race, religion, nationality, political belief or membership of a particular social group[12] but have not yet been granted refugee status. They must have applied for asylum under the 1951 Refugee Convention and remain asylum seekers for so long as the application is pending. Essentially these are people evading persecution from their country of origin by seeking refuge in another. As the majority of these people are coming from war torn countries they may well be granted refugee status under the requirements of the Refugee Convention, but, additionally, many of the arrivals may also be economic migrants; people who migrate for financial incentives. It is therefore imperative that persons arriving at the borders of other States are correctly processed prior to being authorised or denied access to ascertain whether they are in fact refugees or not. The issue discussed in Chapter 2.1 where the issues of processing may lead to failed status determination and thus the failure of States to deny certain rights to the refugees.

3.2 Processing Asylum Claims

The right to be correctly processed is one that can be extrapolated from Article 14 of the Universal Declaration of Human Rights (UDHR), which talks of the right 'to seek and to enjoy in other countries asylum from persecution'.[13] It is a right to *seek* asylum. There is no obligation upon a State to provide it. Brownlie reminds the reader that States are entitled to control immigration as part of their exercising of sovereignty[14]. This creates a conflict where the rights of individuals are put up against the obligations and freedoms of the State. Although States are permitted to exercise caution in whom they allow into their territories, they must also show diligence with whom they reject. Dealing with asylum claims is not only timely but also

[12] http://www.migrationwatchuk.org/briefingPaper/document/70 [Accessed 01-09-16]

[13] Art 14, Universal Declaration of Human Rights, 1948. [Herein UDHR]

[14] Ian Brownlie, Principles of Public International Law (4th Ed, OUP, Oxford, 2003) 293; this is something which will be explored in greater detail later in Chapter 4.

extremely expensive[15]. For this reason, States often attempt to avoid processing asylum claims.[16] Hathaway suggests that this avoidance violates all common sense.[17] These people are some of the most vulnerable on the planet; they are devoid of a State, unable to return home and often have very few possessions. These people are not illegal immigrants; they are the people that truly require international protection[18].

3.2.1 Dublin Regulation 2013

Within the EU there has been a notable change in attitudes with regard to the processing of asylum seekers arriving on the shores of southern Europe.[19] As the Northern European States attempt to push back the displaced persons there is a notable sense of distaste in the air.[20] An EU-wide strategy is in place to fingerprint all arrivals at source under the 2013 Dublin Regulation.[21] The hope is that costs can be saved in processing asylum seekers, as they would be forced to settle in the country of arrival and not continue moving on until they arrive in a country that has better access to services such as healthcare or benefits. This prevents dual processing and attempts to eliminate the practice of safe third countries. As a result, asylum seekers found on the EURODAC fingerprint database are returned to the first country they were registered in. In 2014 however, it was suggested that Italy had not been effectively

[15] Australian sources suggest status determination and resettlement can cost up to $70,000 per refugee. http://www.news.com.au/national/australia-will-be-paying-70000-for-each-asylum-seeker-that-arrives/story-fncynjr2-1226655532914 [Accessed 27-08-16]

[16] http://www.irinnews.org/analysis/2015/08/28/so-much-sanctuary-how-eu-asylum-rule-results-death [Accessed 30-08-16]

[17] J. Hathaway, *The Law of Refugee Status* (Cambridge UP, Cambridge, 2014)

[18] J. Hathaway, *The Law of Refugee Status* (Cambridge UP, Cambridge, 2014) 20

[19] UNHCR,The sea route to Europe: The Mediterranean passage in the age of refugees (2015)

[20] http://www.theweek.co.uk/refugee-crisis/64108/refugee-crisis-cameron-in-child-refugee-u-turn [Accessed 28-08-16]

[21] Regulation No. 604/2013

processing the new boat arrivals in the hope that the asylum seekers would move on. Regulations such as this are however playing an increasing role in the mistreatment of asylum seekers, as boat arrivals that have already passed one 'safe State' are more easily rejected from the third State and are thus returned. Although the Dublin Regulation is only EU-wide, the practice of halting refugees in the first State to provide safety can be seen worldwide and as discussed in Chapter 2, is a strong reasoning by Australia to turn back displaced persons to Indonesia and Sri Lanka. A UNHCR discussion on the matter has since suggested that moving asylum seekers to offshore facilities for processing does not affect this and as such, States are able to move asylum seekers to safe places for processing.[22]

3.2.2 A Right to Asylum

Unfortunately, there appears to be no international, nor national, law that suggests any right to be granted asylum. In fact, in searching for it there is only further evidence to the contrary. Not only do States have a sovereign right to control immigration, individuals only have the right to exit and return to their own country, not that of another.[23] This can be evidenced by the UDHR, under Article 13, which talks of freedom of movement within a State but fails to mention anything about trans State movements. In *The Refugee in International Law*[24], Gill concludes that State practice is also clear on the matter, there is no right to be granted asylum. Although now over 20 years old, State practice appears to have changed little, it could even be suggested that it is now more certain than ever before that States have the right to reject applications made for asylum.

[22] Executive Committee of the High Commissioner's Programme, Note on International Protection, 54th Session, UN doc A/AC 96/975 (2 July 2003) 4–5

[23] The Free Movement principle within the EU is an exception to this.

[24] G. Goodwin-Gill, *The Refugee in International Law (2nd ed, Oxford, OUP, 1996)*

3.3 Non-Refoulement

As highlighted in Chapter 2, the law of greatest significance in relation to refugees is that of non-refoulement. It is the prohibition on the return of vulnerable people, to be understood as asylum seekers or refugees, to the State from which they have fled. The prohibition is in place to stop States returning persons to areas where they will surely be persecuted for the reasons outlined in Article 1 A (2) of the Refugee Convention[25]. Regarded by many[26] as the single most important human rights principle, the prohibition on refoulement can be found in the Geneva Conventions on Refugee Status, the European Convention On Human Rights (ECHR) and the United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment (UNCAT)[27].

Article 3 of the UNCAT says that; 'No contracting State shall expel, return or extradite a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture' This is in line with the ECHR, as refouling an asylum seeker could expose them to treatment contrary to Article 3, which states; 'No one shall be subjected to torture or to inhuman or degrading treatment or punishment'. Most significantly it should be remembered that non-refoulement is all-encompassing, collating asylum seekers, refugees and vulnerable migrants together so as not to allow States to return persons to their maternal State, purely based on not having processed them.

[25] UN General Assembly, Convention Relating to the Status of Refugees, 28 July 1951, UNTS 189, 137

[26] V Staoyanova, The Principle of Non-Refoulement and the Right of Asylum Seekers to Enter State Territory (2008) 3.1 IJHRL 1

[27] UN General Assembly, *Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, [10 December 1984] UNTS 1465, 85

3.3.1 Refoulement at Sea

The concept of non-refoulement plays a key role with regard to asylum seekers and migrants at sea. Non-refoulement causes a number of problems for States when dealing with seaborne migrants, as it can in many ways be seen to pose a threat to their sovereignty; in that an obligation to take the asylum seekers in appears, although they not obliged to by international law. This creates a grey area in the law where it is not certain who is obliged to take action. The Refugee Convention gives asylum seekers the right to seek asylum in 'any State' but not necessarily 'any specific' State. This means they have the right to apply for refugee status anywhere but they do not have a right to be accepted. This is of particular importance as it is a possible justification that could be used by States to avoid processing migrants whom are attempting to access State territory. The logic here is that if an asylum seeker is denied entry to a State without being returned home they are able to naturally move to the next State, without being returned to a place of danger.

This is something which is seemingly often easier to do at sea as returning persons to extra-jurisdictional zones allow, in theory, persons to move on without crossing other States' territories. It could be suggested that by moving asylum seekers and migrants on, rather than taking them in and processing them, States are breaching Article 33 of the Refugee Convention[28] regarding non-refoulement as they have not been duly processed. However, Goodwin-Gill points to the comments of the Draft 1951 Refugee Convention[29] where the ad-hoc committee observed; '… 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

[28] Article 33, UN General Assembly, Convention Relating to the Status of Refugees, 28 July 1951, UNTS 189, 137

[29] UN General Assembly Draft Committee, Convention Relating to the Status of Refugees, 28 July 1951, UNTS 189, 137

return of a refugee ship, for example, to the high seas could not be construed as a violation of this obligation'[30] It is consideration such as this that creates the confusion in this area of the law. There is clearly an obligation not to refoule refugees but likewise there is the opportunity for States not to accept every person who seeks asylum. In effect, this option allows States to turn back boats of potential refugees prior to processing them and this creates a loophole for States to rid themselves of the obligations provided by the convention. Like many areas of international law, there must be the correct blend of legality, morality and common sense. Although it may not technically be refoulement to release a refugee vessel back onto the high seas, there is no way it can be deemed acceptable on moral grounds or more importantly grounds of human rights. Primarily as these people have not been duly processed and, as discussed in Chapter 2, this is the reason why the process of turning back boats is primarily unacceptable, not only is it morally wrong but it is likely illegal despite the existence of this loophole.

3.3.2 Refoulement at Sea: Case Law

To greater understand the issues relating to non-refoulement and refugee law, cases must be considered and their findings reflected upon. Although the majority of problems with boat turning policies can be identified through the actions of Australia over the past twenty years, as examined in Chapter 2, the majority of quality legal analysis can be sourced from Europe. The European Court of Human Rights has handled a number of cases relating to boats being turned or towed back without the displaced persons having a chance to be processed effectively and correctly documented. A landmark case is that

[30] UN doc. E/AC.32/L.32/Add.1 (10 Feb. 1950) Draft Article 28

of *Hirsi Jamaa and Others v. Italy*.[31] The case relates to a vessel carrying mainly Somali and Eritrean asylum seekers who had boarded a Libyan vessel and were en route to Italy. Around 35 nautical miles from the coast, they were intercepted by Italian authorities and transferred to Italian military vessels before being stripped of any documents or possessions and deposited back in Tripoli as part of an agreement with Libya.[32]

There were a number of issues raised here that highlight the fundamental flaws in current boat returning practice. As raised in the *Medvedyev ao v France*[33] judgment, the fact that the actions took place at sea does not mean that refugee law does not apply. The court stated; 'the special nature of the maritime environment relied upon by the [French] Government in the instant case cannot justify an area outside the law where ships' crews are covered by no legal system'. This makes it clear that the human rights laws, especially those relating to non-refoulement remain imperative regardless of the territory.[34] The judgment in *Hirsi* thus concluded that, when a State engages with irregular migrants at sea, it accepts the responsibilities to afford certain rights under human rights conventions it has ratified. Consequentially, Italy's defence that it was acting solely under the law of the sea search and rescue conventions it has signed and that it was affecting a maritime rescue operation; depositing the rescued to a place of safety in Libya, was thus held invalid. The discussion drew deeply into the realms of establishing *de jure* and *de facto*

[31] *Hirsi Jamaa and Others v. Italy* (Application no. 27765/09), 23 February 2012

[32] http://www.asylumlawdatabase.eu/en/content/ecthr-hirsi-jamaa-and-others-v-italy-gc-application-no-2776509

[33] *Medvedyev ao v France*, ECtHR judgment of 29 Mar 2010 [Grand Chamber]3394/03, 81

[34] See discussion on Flag State Principle in Chapter 4.

control[35] of other parties and it is for this reason that it is of landmark significance in relation to boat turning policies.

What should be understood however is that where a State believes they have the right to take control of another State's vessel as in the case of the *Tampa* or *Marine I*[36], then significantly this right would also infer the implication of laws pertaining to non-refoulement, thus making the concept of returning the vessels nullified as to do so would be against international law, such as the UNCLOS.

The issue of requesting refuge is one which came to light in *Hirsi.* Italy attempted to claim that had the authorities been aware that the asylum seekers had indeed been such and not solely irregular migrants, then they would have been able to process them correctly. It was claimed the asylum seekers had never requested refuge in Italy. In a frank exchange, the court suggested that it was very unlikely that anyone leaving Libya was doing so for any other reason than to escape persecution and in any case, were they now to be returned there was little chance of their position being seen favourably on their return.[37] The *Corfu Channel*[38] case is of particular relevance here as it is regarded to be the source of public international law's 'knowledge' criteria, in that should a State be aware of the detrimental results of an action they should take all necessary steps to avoid that action, in the case of refugee law, States must determine the status of person before they return them as there is a growing chance the person could be being refouled to a place of persecution. Therefore, it should be considered that no State should refoule any person, should they

[35] M D Heijer, *Reflections on Refoulement and Collective Expulsion in the Hirsi* Case [2013] 25(2) Int J Refugee Law 265-290

[36] Tribunal Supremo, 17 Feb 2010 (Marine I) 548/2008

[37] *Hirsi Jamaa and Others v. Italy* (Application no. 27765/09), 23 February 2012

[38] *Corfu Channel Case* [1949] 18 ICJ Rep 22

have the knowledge that there is this chance. persecution. This highlights the continuing trend for States to act in the grey area of the law. A trend that is worryingly common. The dangers that these States are placing asylum seekers under are not acceptable and this further evidences the idea that the current law is unsatisfactory in addressing the problems highlighted in the previous chapter.

Following this, the court created inferred that *all* irregular migrants were to be treated equally, regardless of whether they attempted to claim asylum or not.[39] This is because both NGOs and the UNHCR[40] made strong cases that Libya was not a safe destination for returning displaced persons. *Hirsi* placed an extra burden upon Italian authorities because there was the added risk that the Libyans would push the asylum seekers back to Eritrea and Somalia. As Libya was not a party to the Refugee Convention, the European Court was concerned that the asylum seekers would be refouled indefinitely. The *MSS v Belgium and Greece*[41] had already raised the question of safe third countries and although outside the EU the court felt Italy had a duty to protect these individuals. As a result, the court held that the asylum seekers should be granted asylum in Italy. Of the 23 that applied to the court, only four made it to Italy. The rest were either lost in the Libyan system or died of 'Unknown Causes' prior to being repatriated.[42] In critically analysing the law, it is thus clear that it is absolutely failing to provide protection to defenceless and susceptible persons who have taken to the seas in an attempt to avoid persecution. The

[39] Hirsi Jamaa and Others v. Italy (Application no. 27765/09), 23 February 2012

[40] M D Heijer, *Reflections on Refoulement and Collective Expulsion in the Hirsi Case* (2013) 25(2) Int J Refugee Law 265-290

[41] *MSS v Belgium and Greece*, Judgment of Grand Chamber (21 Jan 2011) 30696/09

[42] http://www.asylumlawdatabase.eu/en/content/ecthr-hirsi-jamaa-and-others-v-italy-gc-application-no-2776509 [Accessed 30/08/16]

very convention designed to protect these people appears to fail as States choose to operate in a grey zone where the legislation leaves a number of loopholes.

3.3.3 Refoulement at Sea: Customary International Law

In attempting to establish the EU's stance and future actions regarding boat returning policies, Saliba questions whether non-refoulement has reached the level of customary international law.[43] There is growing evidence that State practice and case law is now sufficient to suggest that the principle of non-refoulement is now customary international law which by definition means that the law is universally accepted and thus applicable to all States, not just those who are party to the relevant conventions.[44] The question of custom is one of marked significance, and it is a question which has been posed many times[45] whilst considering the policies of countless governments returning boats against non-refoulement regulations. Renowned author in refugee law Professor Goodwin-Gill stated in 1996 that 'there is substantial, if not conclusive authority that the principle is binding on all States, independently of specific assent'[46]. Twenty years on there is little doubt this has changed.

Yet, the question is more profound than simply looking at custom, for when only the actions of States are considered, on the face of things it may seem that refoulement is

[43] https://epthinktank.eu/2015/05/13/non-refoulement-push-backs-and-the-eu-response-to-irregular-migration/ [Accessed 30/08/16]

[44] 1951 Refugee Convention with 1967 Additional Protocol, *Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* 1984.

[45] R Newmark, '*Non-Refoulement Run Afoul: The Questionable Legality of Extraterritorial Repatriation Programs*' [1993] 71 WULQ 833, 845

[46] G Goodwin-Gill, *The Refugee in International Law* (2 ed, Clarendon Press, Oxford, 1996) 167

indeed rife[47]. However, it is important to look at the nature of possible refoulement. It is seemingly impossible to find any case where a State has refused entry to an asylum seeker and simply returned them to their original State, without defence of their actions. With the nature of migration turning, to something of mass influx by sea rather than individuals escaping by land, and with entire nations becoming uprooted due to civil unrest, States are starting to use a string of loose defences to justify their actions.[48] As the sea becomes the transport method of choice to the 21st century refugee, States are often taking to reason, to explain why it is necessary to return the displaced persons, rather than offer them asylum. Although a minor detail at first appearance, it is a matter which needs to be considered. Should States have continued to refoule displaced people without defence it would be easy to prove that there was no custom due to insufficient State practice, but the fact that States attempt to defend their actions in turning back boats, ironically displays an acceptance of the principle of non-refoulement. Consequentially, State practice does to some extent prove that the principle of non-refoulement is now customary international law.

States are aware of the restrictions on returning vessels and in the majority of cases this is why migrant vessels are deposited back on the high seas, such as the cases of OSB in Australia, or 'safe third countries', as displayed by Italy. The idea that non-refoulement could ever become *jus cogens* is something which the UNHCR questions, but is deemed by scholars to be unlikely due to the varying nature of its acceptance. Brownlie suggests that *jus cogens* law must not only be fundamental but inherent to international law[49],

[47] See cases of boats being turned back across the world from Australia to the US and more recently Europe.

[48] http://metro.co.uk/2015/09/03/britain-is-full-of-refugees-and-we-cant-take-any-more-look-at-the-evidence-2-537427/ [Accessed 28-08-16]

[49] Ian Brownlie, *Principles of Public International Law* (OUP, Oxford, 2003) 514

something which repeated violations and a lack of clarity on the subject would suggest the principle of non-refoulement is not. The UNHCR has since suggested that 'States that have not yet acceded to these instruments should nevertheless apply the principle of non-refoulement in view of its universal acceptance and fundamental humanitarian importance.'[50] This seems an attempt by the UNHCR to re-engage a discussion relating to non-refoulement in light of the growing situation in the Mediterranean.

3.4 Conclusion

It is therefore clear that refugee law plays a key role in understanding the legalities relating to turn back boats policies. The principle of non-refoulement on land and at sea is something which is becoming increasingly important with the recent growths in irregular migrant travel by sea and one that still requires further discussion. The suggestion that non-refoulement is law of a customary nature, yet is still regularly circumvented, is significantly worrying in an age where tolerance and education can be considered to be at an all-time high. It is likely that the lack of clarity in this area has led to States taking advantage of the situation and as the obligation to process asylum seekers properly is more necessary than ever, the lengths to which States will go to avoid these costs is becoming more and more worrying. The question of sovereignty is one which now highlights the confusion in international law, a confusion which highlights the failing of refugee law to appropriately address the problems created by boat returning policies. The extent to which States can choose to control their borders is thus more important than ever, and this is something which can be more easily explained under the law of the sea. Its role in defining territory and allowable actions aids the comprehension of how and

[50] http://www.unhcr.org/uk/excom/scip/3ae68ccd10/note-non-refoulement-submitted-high-commissioner.html [Accessed 29-08-16]

why boats are being towed back out to sea or turned around at ports and borders and is something which Chapter 4 explores further. The morality behind States' choices is once again bought into question and further exploration into legality of these policies must be made. It has become clear that refugee law alone is grossly inadequate in managing internationally displaced persons at sea and furthermore, it fails to efficiently address many of the problems associated with the policies. The grey areas created cause dangerous loopholes in the law which States are free to exploit and it is for that reason that the law of the sea must also be considered, to realise where liability and responsibility lay, with regard to the actions taken by States.

CHAPTER 4
LAW OF THE SEA

When considering policies, such as that of boat turning, it is imperative that they are considered from many perspectives. The significant fact of the previous chapter is that currently refugee law, in itself, is insufficient to make the legalities of boat turning, as a whole, clear. It is therefore necessary that the law of the sea is considered, so the probable illegality of such policies can be displayed through a combination of multiple disciplines of international law. The law of the sea plays a vital role in the understanding of State obligations and duties with regard to displaced person arriving by sea. The laws contained in both custom and treaty format go a certain distance to provide suggestions as to how persons should be treated and where they should be deposited. Equally however, it could be argued, that the law does not go far enough and that it is insufficient in its current form. This chapter will aid the critical evaluation of the 'turn back boats' policies by creating an understanding of the jurisdictions defined by international law in addition to the restrictions and obligations imposed on States. Accordingly, in conjunction with Chapter 3, the question of whether the law sufficiently provides for the problems created by the turn back boats policies can be answered

4.1 Scope

When investigating the laws behind the policy of turning back boats it is necessary to understand the scope of applicability. Simply put, to be able to appreciate which laws are applicable and to who, it must first be established where States rights to access and exercise come into play. In terms of boat turning; when do States have the authority to board vessels and turn or tow them away? The primary source of law of the sea comes from the 1982 United

Nations Convention on the Law of the Sea (UNCLOS)[1]. It was heralded as one of the greatest steps forward in legislating in the area of Sea Law and is 'a comprehensive regime of law and order in the world's oceans and seas establishing rules governing all uses of the oceans and their resources.'[2] It has however been accused of lacking depth and clarity in a number of areas fundamental to the interpretation of relevant laws.[3]

The UNCLOS has very little to say on the matter of turning boats back in cases relating to refugees or asylum seekers directly, yet it does provide insight into a number of key areas which relate directly to migrant and refugee sea transport. Of particular interest to this discussion is that of coastal territory and flag States.

4.1.2 Coastal Territory

To understand where States have the right to legislate and exercise sovereign rights the UNCLOS is of great importance. Born out of the necessity to establish a defined maritime border between mainland territories and the high seas, Part II, Section I of UNCLOS establishes the territorial sea; a 12 nautical mile band of water[4], where the State has full sovereign control.[5] This means that within the 12 nautical mile band of water following the shoreline of any coastal Nation, the State has the power to legislate in the same fashion as it would on the mainland. There remains a right to innocent passage[6] for merchant vessels to pass through the territorial

[1] United Nations Convention on the Law of the Sea (Montego Bay, 10 December 1982) 1833 UNTS 3

[2]International Maritime Organisation Website on UNCLOS. http://www.imo.org/en/OurWork/Legal/Pages/UnitedNationsConventionOnTheLawOfTheSea.aspx [Accessed 26-06-16]

[3] http://www.un.org/depts/los/general_assembly/contributions_texts/58reportingmaterial.pdf [Accessed 2-9-16]

[4] Article 3, UNCLOS (Montego Bay, 10 December 1982) 1833 UNTS 3, 27

[5] Article 1, UNCLOS (Montego Bay, 10 December 1982) 1833 UNTS 3, 27

[6] Article 17, UNCLOS (Montego Bay, 10 December 1982) 1833 UNTS 3, 30

seas of a State however. This can sometimes be controversial, and is a very complex matter in itself.[7] Outside this area, the contiguous zone[8] can be found. Stretching to 24 nautical miles from the baseline[9], the contiguous zone gives the coastal State the right to exercise the control necessary to prevent infringement of its customs, fiscal, immigration or sanitary laws and regulations.[10] Furthermore, Article 33(1b) of UNCLOS allows States to punish infringement of the above laws and regulations committed within its territory or territorial sea. As described, UNCLOS therefore allows States to manage immigration issues within 24 miles of the shoreline. With reference to boat turning policies, this allows States to take action against vessels arriving at it shores packed full with persons who do not have the correct permissions, under normal circumstances, to legally enter the country. That is, that they do not have the correct papers such as passports and visas. The further question of law comes from a States right to board these vessels as, outside territorial waters, UNCLOS goes further to introduce the idea of flag State vessels.

4.1.3 Flag States

The concept of flag States is laid out in Part VII of UNCLOS. The idea being that a State's jurisdiction applies to any registered vessel, flying its flag on the high seas. This implies a sovereign right meaning there are few reasons why another State's authorities should have any reason to board the vessel. This however is only applicable on the high seas and some of these rights are forgone when travel takes the vessel inbounds of the coastal State's territory. The key reason this is of such significance is that it could be argued that States, such as Australia

[7] Owing to the nature of International Law, UNCLOS goes much further than discussed in this piece. For further details and to gleam a greater understanding of any particular area, the Instrument should be viewed separately.

[8] Article 33, UNCLOS (Montego Bay, 10 December 1982) 1833 UNTS 3, 35

[9] Article 33 (2), UNCLOS (Montego Bay, 10 December 1982) 1833 UNTS 3, 35

[10] Article 33 (1a), UNCLOS (Montego Bay, 10 December 1982) 1833 UNTS 3, 35

in Operation Sovereign Borders did not have a right to board these vessels as under flag State privilege, and thus illegally intercepted the vessels on the high seas in order to tow them back to Indonesia. The coastal State does not have the right to exercise the rights conveyed under Article 33, The Contiguous Zone, until the vessels arrive within the coastal State's contiguous Zone. Conversely, the exceptions laid down under Article 110, Right of Visit, may perhaps allow this. Article 110 states that no right to board the vessel of another State is permitted unless the vessel falls into one of a number of strict categories; '(a) the ship is engaged in piracy; (b) the ship is engaged in the slave trade; (c) the ship is engaged in unauthorized broadcasting and the flag State of the warship has jurisdiction under article 109; (d) the ship is without nationality'[11]. Of interest here is the fact that no mention is made to refugees or asylum seekers, it could be suggested that as the only legal refugee systems are put in place by the government, and therefore the people aboard are being smuggled, there is a question to be had as to whether there are elements of piracy and slavery[12] to be considered. Unfortunately, no case has tested this hypothesis thus far. In avoiding such violations, naval forces have discreetly claimed to be acting in a rescue capacity, freeing asylum seekers of unseaworthy vessels[13].

4.2 Seaworthiness

The International Convention for the Safety of Lives at Sea (SOLAS)[14] is regarded as the primary instrument in maritime safety matters. It provides a number of provisions for construction quality, operational requirements, equipment standards but also details

[11] Article 110, UNCLOS (Montego Bay, 10 December 1982) 1833 UNTS 3, 63

[12] Y Tanaka, The International Law of the Sea (2nd Ed, Cambridge, 2015) 168

[13] http://www.telegraph.co.uk/news/10555392/Australia-sends-in-its-navy-to-push-asylum-seeker-boats-back-to-Indonesia.html [Accessed 06-09-16]

[14] International Maritime Organization (IMO), International Convention for the Safety of Life at Sea [1 November 1974] 1184 UNTS 3

responsibilities of the master for the security of the vessel. This means that the ship's master must maintain the vessel in a seaworthy and safe manner. This is called the requirement of seaworthiness. Further powers are awarded to convention parties to inspect the quality of other member States vessels to ensure universal security, this is known as port State control. This effect has an unforeseen impact on the migration by sea of displaced persons in that it attempts to ensure all vessels are of a seaworthy build and are not operating above capacity. This is important because, in relation to boat turning policies, turning an unseaworthy vessel away could potentially be construed as a violation of the refugees right to life. In that, as already established in the International Convention on Search and Rescue at Sea, rescued persons, including asylum seekers, have a right to be taken to a place of safety, and towing them back to sea could potentially result in the vessel sinking and the refugees drowning. A problem discussed in Chapter 2. As previously discussed, this practice is morally wrong, but it can't truly be said to be illegal. It is for this reason that the policies, which act in the grey area of the law, are so dangerous and must be considered in depth.

4.3 Rescue

It must therefore be asked, in cases where the boat intended to be turned away is unseaworthy what the appropriate action is. The assumption based on maritime code and customary law is that of rescue. The requirement to rescue vessels is one that is clearly defined in all law of the sea treaties.

4.3.1 SAR Convention

The International Convention on Search and Rescue at Sea[15] is the principal instrument in detailing the procedures and operations for the rescue of lives at sea and the ensuing search procedures. The SAR convention describes rescue as the '*operation to retrieve persons in distress, provide for their initial medical or other needs, and to deliver them to a place of safety.'*[16] This is where the requirement for a place of safety is to be found. The debate regarding the 'place of safety' is one which has never fully been addressed. As discussed in Chapter 2, in recent years Australia has attempted to remove people from unseaworthy vessels and put them onto lifeboats before setting them back off in the direction of the State they left.

4.3.2 UNCLOS

In dealing with rescue, the UNCLOS, under Article 98; Duty to render assistance declares that;

> 1. Every State shall require the master of a ship flying its flag, in so far as he can do so without serious danger to the ship, the crew or the passengers;
> (a) to render assistance to any person found at sea in danger of being lost;
> (b) to proceed with all possible speed to the rescue of persons in distress, if informed of their need of assistance, in so far as such action may reasonably be expected of him;

There is little distinction in many areas of the Law of the Sea Convention with regard to the classification of the person to which it applies. The purpose is to set out provisions for persons who are obliged to do things, States, and thus who they are obliged to do them for, the persons who may need rescuing. It does this without discriminating between mariners, military seamen or refugees. It therefore follows that Article 98 places a duty on states to provide assistance to vessels in distress. This is something which in practice falls not upon the state but commercial vessels. This transfer of obligation is created by domestic law. All states must be registered to

[15] International Maritime Organization (IMO), International Convention on Maritime Search and Rescue (27 April 1979) 1403 UNTS [Herein SAR Convention]

[16] SAR Convention at Chap 1.3.2

a flag State under Article 94 of UNCLOS which says that 'Every State shall effectively exercise its jurisdiction and control in administrative, technical and social matters over ships flying its flag.' As a result, States tend to create legislation obliging commercial vessels to partake in rescue mission of other vessels in distress. In the United Kingdom this obligation is found under Section 92 of the 1995 Merchant Shipping Act[17], which makes it a criminal offence for the master of a vessel in the position to do so, not to proceed to the aid of the respective vessel. The only defence for this is if it would be unreasonable or unnecessary to do so[18].

4.3.3 SOLAS

With regard to rescue obligations, SOLAS is very clear;

> The master of a ship at sea which is in a position to be able to provide assistance on receiving information from any source that persons are in distress at sea, is bound to proceed with all speed to their assistance, if possible informing them or the search and rescue service that the ship is doing so. This obligation to provide assistance applies regardless of the nationality or status of such persons or the circumstances in which they are found.[19]

Of course, here, the last sentence noting the necessity to disregard nationality or status can be understood to particularly focus on the fact that refugee vessels must still be aided where practical, without distinction.

As seen in the Tampa case however the existence of law does not always lead to the observance of law. As discussed in chapter 2, over 150 asylum seekers were left at sea for a considerable time whilst a 'place of safety' was found for them to move to. This is because of the lack of obligation in refugee law, as discussed in Chapter 3, regarding to the acceptance of

[17] Merchant Shipping Act 1995

[18] Section 92(4), Merchant Shipping Act 1995

[19] Regulation 33, International Maritime Organization (IMO), International Convention for the Safety of Life at Sea, 1 November 1974, 1184 UNTS 3

asylum seekers. The obligation is that of non-refoulement. States therefore have certain options; such as that of closing their ports.

4.4 Port Closure

One option available to States is to close the State's ports to incoming traffic. As ports are under sovereign control, it is domestic law which governs such actions. The right to refuse entry to merchant traffic or any other vessel lies with the coastal State. Generally speaking, it is for reasons such as environmental protection such as that in the case of *Saudi-Arabia v ARAMCO.*[20] In the past the question of innocent passage has been raised with regard to the closing of territorial waters. The right to close ports was explicitly identified by the *Nicaragua Case*[21] where the ICJ declared[22] internal waters sovereign and 'by virtue of its sovereignty that the coastal State may regulate access to its ports.' There is no right of access granted by UNCLOS or the Convention on the Territorial Sea and Contiguous Zone and as such only treaties or State practice can give ships access to foreign ports.

The only exception to the right of States to close ports comes in the form of distress. Distress is regarded as the sole reason for a ship to be permitted into the port of a coastal State who has closed its internal waters. Broadly describable in two forms, *force majeur* and humanitarian need, the logic provides that a ship will only be permitted entry should the lives of those on board be at risk. Established in *The Creole* in 1853[23] and reinforced by the findings of *The Kate*

[20] Saudi-Arabia v. ARAMCO [1963] 27 ILR 117

[21] Case Concerning Military and Paramilitary Activities In and Against Nicaragua (Nicaragua v. United States of America); Merits, International Court of Justice (ICJ), 27 June 1986.

[22] ICJ Reports [1986] 14 ICJ Rep 212.

[23] Moore, International Arbitration 824

E Hoff Case in 1929[24] the distress requirement is one thoroughly supported by authors such as Churchill and Lowe[25], who reiterate the necessity for life preservation and not that of anything else, such as cargo. The requirement for life preservation on humanitarian grounds is one which is of particular interest. The turn back boats policies of the last two decades have seemingly lacked moral forethought. Little action appears to have taken place with regard to asylum seeker welfare and the question of whether States should in fact be rescuing these people on humanitarian grounds is one which must be asked. Yet, the extent to which states are expected to go with regard to search and rescue operations is an area of the law of the sea for which is at best unclear. States may be responsible for coordinating rescue efforts but as they offload this burden upon private vessels in many cases there is a certain degree of detachment from the actual operations. Furthermore, the disembarkment of those rescued is at the discretion of the coastal State, not the rescuing party.

4.5 Rights and Obligations

The UNCLOS puts the scope of applicability upon the High Seas; under Article 55(2) and The EEZ; under Article 86. Of particular note is the lack of reference to the Territorial Sea. Oxman[26] suggests this is most probably technical oversight, but is more likely to be as a result of the sovereign duties the State holds under the right of Innocent Passage. The responsibility of the State in the Contiguous Zone; as defined by the Convention on the Territorial Sea and Contiguous Zone[27] 1958, to control matters of customs, fiscal, sanitary and immigration is one of great significance here. It can be argued, partially with the rescue of persons of unknown

[24] The Rebecca, VI RIAA 444

[25] R. R. Churchill and A. V. Lowe, The Law of the Sea (3rd edn, Manchester University Press, 1999) 63

[26] BH Oxman, 'Human Rights and the UN Convention on the Law of the Sea' (1997) 36 Colum.J.Transnat'l L. 399, 414

[27] Convention on the Territorial Sea and Contiguous Zone 1964 (Geneva, 29 April 1958) 516 UNTS 205

status, asylum seekers and other migrants that States may interpret the persons as a threat to immigration and the security of the State. In theory, the UNCLOS definition of innocent passage found under Article 18[28] only allows vessels to 'pass innocently' through the territorial waters of a coastal State. However, there is an allowance for vessels to stop or enter internal waters '*for the purpose of rendering assistance to persons, ships or aircraft in danger or distress.'* This is a position supported by the SAR Convention which details at length the degree to which vessels may encroach on territorial waters. The guidance in the SAR Convention can be found under paragraph 3.1.2 which decrees that;

> Unless otherwise agreed between the States concerned, a Party should authorize, subject to applicable national laws, rules and regulations, immediate entry into or over its territorial sea or territory of rescue units of other Parties solely for the purpose of searching for the position of maritime casualties and rescuing the survivors of such casualties. In such cases, search and rescue operations shall, as far as practicable, be co-ordinated by the appropriate rescue co-ordination centre of the Party which has authorized entry, or such other authority as has been designated by that Party.[29]

This is a clear and comprehensive guideline to States to suggest that they should forgo their sovereign control to allow rescue vessels to search for distressed parties in all maritime territories; the territorial sea, Contiguous Zone, the EEZ and on the High Seas. What is still unclear though is when the rescue has been effected, where to deposit the rescued.

The problem is predominantly one of access and it is a problem which has come about as a collection of laws of equal standing appear to contradict each other. The obligation to take ships to a place of safety is seemingly trumped by the right of passage. The right of passage in the territorial sea is predominantly one of passing. Ships are permitted under certain strict rules

[28] Article 18, United Nations Convention on the Law of the Sea (Montego Bay, 10 December 1982) 1833 UNTS 3

[29] Paragraph 3.1.2, International Maritime Organization (IMO), International Convention on Maritime Search and Rescue (27 April 1979) 1403 UNTS

to pass through the territorial seas of other States in a 'continuous and expeditious' manner.[30] Additionally, vessels are permitted to travel through the territorial sea to arrive at ports or roadsteads where they have the appropriate permissions. It remains that without good reason however, a State should not refuse entry to a vessel unless it believes it to be a threat of some form. These threats are found Article 19 of UNCLOS which disclose activities that are 'prejudicial to the peace, good order or security of the coastal State'. In these cases, outlined in Article 19, the passage is not deemed to be innocent. Examples here include threats to security, immigration, customs, fiscal or environmental concerns. With the case of rescued persons there is clearly no reason why they should be refused entry to ports. This does not mean that States are unable to close ports. If they duly publish changes to legislation, temporary entry bans can be upheld.[31] This is stated under UNCLOS Article 25 (3) which says;

> The coastal State may, without discrimination in form or in fact among foreign ships, suspend temporarily in specified areas of its territorial sea the innocent passage of foreign ships if such suspension is essential for the protection of its security, including weapons exercises. Such suspension shall take effect only after having been duly published.

The matter to be discussed here is the strict nature of the phrase '*essential for the protection of its security'*. This is because it is not right to assume that a boat carrying rescued persons is necessarily a threat to national security. The coastal State without distinction is still able to board a ship and inspect it to see if it carries a threat as outlined by Article 25 (1) of UNCLOS which allows a State to take the necessary steps in its territorial sea to prevent passage and thus potentially leading States to indirectly affect refoulement back to countries of danger. By considering the current law and asking if addresses the problems of the turn back boats policies

[30] Article 18, United Nations Convention on the Law of the Sea (Montego Bay, 10 December 1982; 1833 UNTS 3)

[31] Article 21(3), United Nations Convention on the Law of the Sea (Montego Bay, 10 December 1982) 1833 UNTS 3

it is clear that once again international law has triumphed in overcomplicating the matter. Like refugee law, the law of the sea manages to leave wide voids, which are open for State interpretation. As mentioned in Chapter 2, these loopholes allow States to almost legitimately ignore the rights of the most vulnerable and fail to control the activities of States effectively.

4.6 Conclusion

In refusing entry to asylum seeking vessels, and making attempts to return them, the law of the sea remains unclear, it is for this reason why attempts to turn back boats have been relatively successful. This is due to the fact, as suggested in Chapter 2, that the people aboard the vessels have little to no legal support or knowledge, meaning they are unaware of any right to gain legal assistance; aiding them to gain asylum. It is clear that the law of the sea, in isolation, much like that of refugee law, is currently insufficient to stop States taking actions in line with such policies. More significantly however, is the idea that even in conjunction, both areas of law fail to protect these people in a way that may seem natural to any lay person. Chapter 5 follows this thought and considers the legal effectiveness of the law relating to the turn back boats policies as well as looking at areas where the law has failed the ‘boat people’ over the past few decades.

CHAPTER 5

PROSPECTS

The past two chapters, on refugee law and the law of the sea, have made it clear that considerable volumes of relevant law in both areas exist, yet it is difficult to clearly answer whether or not policies in which boats are turned around or towed back are, in fact, illegal. Drawing together the relevant legislation, the concluding thought is that there is a noticeable failing in any instrument to clearly State that the practice is illegal. The greatest problem identified however, is that the line between legality and morality is indeed very blurred. State behaviour that one would expect to be banned is not, and States can manipulate the law to support their questionable actions.

Refugee law raises questions relating to non-refoulement. Lacking a sufficient framework, questions have been left unanswered relating to the strict definition of refoulement and the relationship with sea passage. The majority of refugee law appears to have been centred on a land migration model, not that of the sea. The legislation behind refugee law principles, such as that of refoulement, is much clearer when a land border is involved. If a State chooses to refoule a person at the border, they simply remain in a State where they may face persecution, there is a clear border line on a map which shows a violation of refugee law has occurred. Yet the ambiguity of the sea creates a grey area where States are seemingly free to act on convenience rather than obligation. The high seas act as a holding area, a 'global commons' where there isn't the legislation in place to control the situation. Although there exists no clear reason why there is no legislation in place on the high seas, for the protection of refugees, it can be assumed that at the time of drafting the sea routes were not such viable means of

migration. Alternatively, the grey area of international waters exists as a result of jurisdictional limits and State sovereignty.

Within the law of the sea, the lack of distinction between asylum seekers, refugees, migrants and rescued mariners appears to neglect the vulnerable by including all status' of people equally, this is primarily because it is not the vehicle to decide the status of migrants, this is the role of the Refugee Convention. everyone equally. All of these groups have greatly differing requirements and thus must be assessed differently as discussed in Chapter 3. Additionally, there are gaps in the law with regard actions that must be taken and the locations of such activities; particularly that of asylum processing, as discussed in Chapter 2. It further remains unclear when – or indeed if - sea travellers and the rescued should be repatriated or processed.

The vagueness of the law, as discussed in the preceding chapters, leaves a palpable grey area of the law in which the legality of these actions is unclear and it is this which, without reform, will continue to allow States to act outside of moral acceptability. This chapter will question whether turn back boats policies are legally effective in limiting numbers of irregular migrants arriving at the maritime borders of States, before asking if there is a future for these policies were the law to be reformed.

5.1 Effectiveness and Success of the Policies

There is little to question in deciding that turning back boats, as a policy, is effective. Whether it is morally right or legal, however, are completely separate discussions. Taking Australia as an example, it is clear to see that over the past decades, save for the times when the policies were not in force, there has been a noticeable drop in irregular migrant activity in Australian

waters[1]. More specifically, fewer boats of asylum seekers have been making the trip, arriving at the maritime borders. The question of much international debate[2] is that of success versus effectiveness. It is not wrong to declare the policies as effective; they have clearly reduced volumes of irregular migrant activity whilst educating the asylum seekers and deterring the smugglers. Although Australia has published no official figures, widely acknowledged statistics[3] suggest that during the Australian Labour Government from 2008 and 2013, over 1000 people drowned[4] attempting to make the crossing with a further 50,000 attempting to make the crossing. This shows that whilst the policies were not in operation the numbers increased, demonstrating that they are indeed effective. However, the question of success is something marred by the ethics and morality of such actions.[5] Success infers a sense of completion through total satisfaction, where everything has worked, everyone remains happy and a goal has been achieved; this is not something that can be said about the boat turning policies of the Abbott and Howard governments.

5.2 Criticisms of The Policies

In evaluating the legal effectiveness of boat turning policies it is important to appreciate the associated problems. Suggestions that the policies 'follow textbook rules for the administering of cruelty'[6] lead to deeper considerations of the policies being made. This thesis has identified

[1] Global Commission on Irregular Migration, Report: Irregular migration, State security and human security [2005] 15

[2] http://www.spectator.co.uk/2015/09/if-you-want-a-genuinely-humane-approach-to-refugees-follow-tony-abbotts-australia/ [Accessed 02-09-16]

[3] http://www.spectator.co.uk/2015/09/if-you-want-a-genuinely-humane-approach-to-refugees-follow-tony-abbotts-australia/ [Accessed 02-09-16]

[4] http://artsonline.monash.edu.au/thebordercrossingobservatory/publications/australian-border-deaths-database/ [Accessed 02-09-16]

[5] http://www.nytimes.com/2016/05/24/opinion/australias-offshore-cruelty.html [Accessed 02-09-16]

[6] R Cohen, *Australia's Offshore Cruelty*, New York Times [23 May 2016]

that such policies are far from ideal, but as previously discussed it remains unclear as to the legalities of the actions. The definitive answer as to whether non-acceptance is deemed to be an action of refoulement, as discussed in Chapter 3, is one of mixed clarity. It rests that everyone has the right to seek asylum under Article 13 of the UDHR, but States retain the sovereign right to make immigration decisions on a democratic level. As such the actions of States, in terms of pure refutation, cannot be seen to be refoulement within the law but equally are not an ideal solution.

The issue of this grey area in the law remains key. Most significantly, without clarity the law cannot truly be considered effective. That is, that which is not present cannot bind a State; without further legislation, States are free to make morally questionable actions as discussed in depth earlier in this piece.

The idea that interdiction is a power bestowed upon a State under its sovereignty, is also one of debate. It is evident that the greatest problem is that the law has become outdated. It was created upon a land based model and although sea borne refugees is not a new issue, the 1951 Refugee Convention[7] in addition to 1982's UNCLOS[8] do not sufficiently support a sea based model of refugee migration. The idea that any coastal State has the ability to legally interdict refugee-carrying vessels, thus forfeiting the requirement to process the passengers aboard, is something which international law never allowed for.[9] The UNHCR Executive Committee defined interdiction as;

[7] UN General Assembly, Convention Relating to the Status of Refugees [28 July 1951] 189 UNTS 137

[8] UN General Assembly, Convention on the Law of the Sea [10 December 1982] 1833 UNTS 3

[9] An exception to this could be the interception of flagged vessels as discussed in Chapter 4.

> Encompassing all measures applied by a State, outside its national territory, in order to prevent, interrupt or stop the movement of persons without the required documentation crossing international borders by land, air or sea, and making their way to the country of prospective destination.[10]

In the words of Legomsky;[11]

> The theory of interdiction is simple. By heading off the vessel before it can reach the shores of the destination State, the policy effectively prevents the passengers from gaining access to that State's domestic asylum system and any associated procedural rights. Governments hope, moreover, that interdiction will deter the flows of boat people in the first place.

This statement from one of refugee law's most respected commentators identifies this key issue relating to the 'Turn back boats' policies; that the crude gap in the law allows States to avoid certain obligations by passing the problem onwards. Fundamentally, this is the problem that now needs addressing. It is not a problem that is as likely to occur on land, as it is hard to force asylum seekers away, without first refouling them, an action which would openly breech refugee law. This problem will remain one of the sea until it is directly answered by the international community, an action which is unlikely to happen as the key players are the ones who would be most affected.

5.3 The Operation of the Current Law in a Modern Context

In deciding if there could ever be a future for boat turning polices, it is necessary to approach the scenario from two angles. What has been learnt, and what must be done. To do this, the law, as discussed in chapter 3 and 4, must be applied to a modern scenario to appreciate its

[10] UNHCR Exec Comm, Interception of Asylum-Seekers and Refugees: The International Framework and Recommendations for a Comprehensive Approach [(9 June 2000] Doc. EC/50/SC/CRP 17 para. 10

[11] S Legomsky, An Asylum-Seeker's Bill of Rights for a Non-Utopian World [2000] 14 *Geo.Immigr.L.J.* 619, 627

shortcomings. It is then possible to critically evaluate the current legal framework.

In critically analysing a modern scenario, such as the crisis evolving in Europe, the boat turning policies can be deconstructed and a framework developed to suggest reform. The turn back boats policies of the United States and Australia of the past 50 years have created vast discussion on the legalities and practicalities of such actions. With current instability in Afghanistan, Libya and Syria, the Mediterranean is seeing truly unprecedented levels of migrant activity. The question as to whether boat turning policies provide solutions for controlling irregular migration within Europe is still one that needs great thought. Due to the infancy of this crisis there remains little academic discussion in this area and as such many opinions are only to be sourced from the media, something which in itself has been accused of skewing the truths.[12] Following the deaths of over 800 asylum seekers in the Mediterranean in April 2015, the Australian Prime Minister told reporters the only way to stop mass immigration by sea was 'in fact, to stop the boats'.[13] It is an idea that has, from Italy's demonstration, been explored in Europe but one which is not being fully engaged for fear of the consequences[14].

There are two key reasons it can be argued that the policy should not be allowed to function as it does in Australia. Firstly, the geopolitics of the situation. Unlike Australia, where the majority of asylum seekers are coming from Indonesia, in Europe the mass influx can be traced to Libya and other war stricken territories. Indonesia, although migrants have no rights, is still a relatively safe country, whereas displaced persons returned to Libya, as discussed in Chapter

[12] T Magner, A less than 'Pacific' Solution for Asylum Seekers in Australia [2004] 16 (1) IJRL 53, 83

[13] http://www.smh.com.au/federal-politics/political-news/tony-abbott-urges-europe-to-adopt-boat-turnbacks-in-response-to-refugee-crisis-20151027-gkk6z9.html [Accessed 06-09-16]

[14] M Guiffre, State Responsibility Beyond Borders: What Legal Basis for Italy's Push-backs to Libya? 24(4) Int J Ref Law 692

3, risk direct persecution. This means that unlike Australia where the law regarding refoulement is difficult to establish, in Europe there would be clear cases for refoulement,[15] as seen in *Hirsi Jamaa and Others v. Italy*, discussed in Chapter 3. Secondly, and quite significantly, it has been suggested that the perception of success, or as discussed in 5.1, legal effectiveness, may only be relevant to certain States. One article in The Guardian[16] contemplates whether the boats arriving at Australian maritime borders did in fact stop, or merely changed direction and headed to other States; a case of passing the issue on, rather than preventing it. This question poses an interesting turn on the subject that makes the policies seem much less effective, thus concluding that the policies would not work in Europe with any less problems than in Australia. Barrett, a former secretary for Australian defence, suggested part of the issue in Europe is caused by the lack of acceptance of the 'boat people' in Australia.[17] They have just continued round the globe until they reach the 'safe haven' offered by international law. It appears that the safe haven is now offered, not by the State where the asylum seekers first arrive, but by the last State which fails to turn the vessels away before they reach territorial waters. This categorically displays that the policies in their current format do not have a place in the modern legal system and a better framework must be created.

5.4 Developing Turn Back Boats Policies

To decide whether turn back boat policies have a place in the modern international legal sphere, the previous three chapters must be greatly appreciated. The problems identified in Chapter 2, when considered alongside the law of Chapters 3 and 4 show that the policies are emphatically

[15] M Den Heijer, *Reflections on Refoulement and Collective Expulsion in the Hirsi Case* (2013) 25(2) Int J Ref Law 265

[16] https://www.theguardian.com/world/2015/apr/22/could-australia-stop-the-boats-policy-solve-europe-migrant-crisis [Accessed 06-09-16]

[17] https://www.theguardian.com/world/2015/apr/22/could-australia-stop-the-boats-policy-solve-europe-migrant-crisis [Accessed 06-09-16]

outdated and ethically unsuited to a world where human rights exist and State obligations are unavoidable. However, as long as the law remains a grey area and open to interpretation, these practices may continue. The definitive answer as to whether non-acceptance is deemed to be an action of refoulement, as discussed in Chapter 3, is one of mixed clarity. It remains that everyone has the right to seek asylum under Article 13 of the UDHR, but States retain the sovereign right to make immigration decisions on a national level. Consequentially, further thought must be given regarding legal asylum.

Nicholls suggests that there remains a feeling of distrust and hostility towards migrants arriving illegally by boat rather than by official channels; he describes their actions as being perceived akin to 'queue jumping'[18]. It must still be recognised however that for some refugees this illegal passage is the only *bona fide* way of seeking asylum away from persecution.[19] Yet, Australia remains one of the world's most exemplary resettlers of refugees.[20] This demonstrates that in some cases, harsh actions have to be taken to gain net advantages over an ever-increasing tide of refugees. The current situation in Syria has seen tens of thousands, being resettled all over the globe from Australia to Aberystwyth[21]. Governments the world over have committed to accepting certain numbers of refugees who are then flown to their respective nation to be resettled. This legal resettling is what governments aim for as, in the now famous words of former Australian president Howard, it allows States to decide 'who comes to [their] country and the circumstances in which they come'.[22] Reviled at the time, this statement does run true.

[18] G Nicholls, Unsettling Admissions: Asylum Seekers in Australia (1998) 11 FRS 61

[19] T Magner, A less than 'Pacific' Solution for Asylum Seekers in Australia (2004) 16 (1) IJRL 53, 61

[20] http://www.unhcr.org/uk/statistics/unhcrstats/573b8a4b4/resettlement-statistical-database-portal.html [Accessed 05-09-16]

[21] http://www.telegraph.co.uk/news/2016/09/02/meet-the-syrian-refugees-living-in-aberstwyth-thank-you-for-welc/ [Accessed 05-09-16]

[22] http://electionspeeches.moadoph.gov.au/speeches/2001-john-howard [Accessed 05-09-16]

Without Sovereign control of immigration, countries could potentially become over run with migrants, lowering economic growth and limiting available resources, leading to civil war and a vicious circle of asylum enveloping. Although a worst-case scenario, this is not something that is as unreasonable as it may at first seem. It is only necessary to look at Greece or Turkey, to see what an effect the uncontrolled mass influx of refugees has had upon the States.[23]

5.5 A Reformed Legal Framework

The following suggestions provide a basis for the building of a new framework that could go some way to shut down human trafficking, protect the vulnerable and provide equal treatment for all. Without the reform suggested below, the grey area of the law will continue to be operated in and if current trends are followed little may be done to stop this.

One of the identified drawbacks of international law is the grey area of refoulement at sea and the ability of States to interpret international legal systems domestically, by exercising national law. As demonstrated in *Sale v. Haitian Centers Council*[24], the US Supreme court case where it was decided that interdiction did not constitute refoulement under US domestic nor international treaty obligation, States are not prepared to accept moral responsibility in areas where there are potential loop holes in the law.[25] It is too easy for them to take the action that costs the least, financially. It is therefore necessary that new refugee law be created to at least amend the 1951 Refugee Convention, if not replace it. This would need to efficiently stop States from refouling any displaced person at sea with the same securities as they are

[23] https://www.brookings.edu/blog/order-from-chaos/2016/02/05/greeces-frightening-inability-to-deal-with-the-refugee-influx/ [Accessed 06-09-16]

[24] *Sale v. Haitian Centers Council* (1993) 509 US 155, 163

[25] The wording of Article 33 of the 1951 refugee convention allows for different interpretations of certain nuanced terms which could potentially give States opportunities to select a cheaper alternative to processing asylum seekers, interdiction.

guaranteed on land. The right to effective processing would therefore be implicit and penalties for refoulement would need to be unavoidable.

Another pressing issue is that of detainment. Under Article 31 of the Refugee Convention, States are not permitted to enforce 'penalties, on account of their illegal entry or presence, on refugees'. This is owing to the fact that they are 'coming directly from a territory where their life or freedom was threatened'. However, should they be in the 'territory without authorization, … they [must] present themselves without delay to the authorities and show good cause for their illegal entry or presence'[26] As a result, States do not legally have the option to prosecute asylum seekers who arrive illegally but have good cause to do so. This however is something which is indirectly still occurring as States currently detain asylum seekers, sometimes indefinitely, for 'processing'. A key factor in developing a framework would introduce time limits for States to process and either resettle or return detainees. This decision would ultimately be made by effective refugee status determination.

With regard to the law of the sea, UNCLOS currently makes no reference to refugee vessels or States' obligations to treat their transit any differently to commercial ships. To combat this, changes must be made to shipping conventions that would allow States to give access to asylum seeking vessels directly to processing facilities. This raises the issue of potential extraterritorial processing. The concept of processing at sea or in third countries is something raised by Garlick[27] in her paper on 'The Potential and Pitfalls of Extraterritorial Processing of Asylum Claims'. The point is made that were a EU funded arrangement be set up, in North Africa for

[26] Article 31, UN General Assembly, Convention Relating to the Status of Refugees [28 July 1951] UNTS 189, 137

[27] Garlick, 'The Potential and Pitfalls of Extraterritorial Processing of Asylum Claims' [March 15] Migration Policy 2

example, there would have to be strict safeguards in place to ensure anyone whose claim was rejected was then not refouled. Additionally, Garlick raised the question of distribution of the successful claimants; a EU decision would mean the 28 member States would need to work out some system of division. Finally, she reminds the reader of potential consequences of a rise in asylum applications as a result of bringing the processing closer to home. The idea therefore that States would process more claims offshore, is one that can be proposed. Unlike the detention camps of Nauru and Christmas Island, these centres would need to be open to all to make claims without fear of detention, yet be effective in curbing selective mass migration by asylum seekers. Legomsky suggests that there would need to be a 'substantial permanent resettlement program' introduced.[28] To make these processes most effective however there would need to be a system of mass education and eradication of people smuggling. Asylum seekers would have to be educated in these new processing centres, so they are knowledgeable about the process and the set-up would have to be so efficient that people did not try to make the trips themselves. This is something which could take years to legislate for and decades to implement. After critically evaluating the current law and concluding that is legally inefficient, it can be suggested that the only solution to solving the problems caused by these policies is to create a better and more rigid framework for the treatment of asylum seekers arriving at maritime borders by boat. Without universal cooperation, the likelihood that this quandary will ever be resolved, is small.

5.6 Conclusion

It therefore remains that only way to advance from this problem is to address the difficulties of international law. The turn back boat policies are based upon the age-old practice of interdiction and it is unacceptable that it has been able to continue for such significant amounts of time. It

[28] S Legomsky, *The USA and the Caribbean Interdiction Program* [2006] IJRL 677, 695

has also become clear is that the policies fail to address the root causes[29] of the above outlined problems, namely the cause of mass human displacement and for this reason they are fundamentally unserviceable. The greatest issue however is engaging States, to get the change put in motion. A reformed legal framework, as suggested, is something which will take much thought and time to complete and may take many generations to perfect, but ultimately is the only way that policies turning back boats, could ever be acceptable. Measures need to be in place to direct vulnerable people to places of safety, international 'palming off' policies must therefore be eradicated, as they obviously no longer have a place in international law. This chapter has critically considered where failings in the current law allow unregulated activity to occur. Looking at the policies explored earlier on in the thesis, suggestions have been considered for the future of such policies and their practical usage in the current day. It has become further clear that the situation is one which is very difficult to answer, simply as there are a number of options which it appears few States are prepared to consider. A crucial point of international relations has been reached where no State wishes to progress for fear of creating greater problems than the sum of their constituent parts. The following chapter will conclude the findings of this piece and provide a final analysis of the situation.

[29] A Schloenhardt, *Turning Back the Boats': Australia's Interdiction of Irregular Migrants at Sea* (2015) 27(4) *Int J Ref Law* 536, 572

CHAPTER 6

CONCLUSION

National turn back boat policies are symptomatic of the developing problems with global immigration and armed conflict. With such policies being used by an increasing number of States it is necessary to contemplate their function and legality. The first research sub-question asked what problems are caused by turn back boat policies? As illustrated by Chapter 2, the results are clearly dangerous. With reports of thousands of migrants drowning and many more being left unaccounted for[1], the legality and effectiveness of such policies must be considered. Accordingly, this dissertation examines the question as to whether turn back boat policies are a legal and effective way of managing the international displacement of persons by sea? In order to sufficiently answer this question, both elements must be critically analysed in turn: whether these policies are legal, and whether they are effective.

By considering the current law relating to turn back boats policies and addressing the associated problems, a greater understanding of the protections provided by international legislation is fostered. In examining the law of the sea in addition to refugee law in Chapters 3 and 4, it is clear that there remains a number of key failings in current international legislation. Refugee law critically lacks a broad and all-encompassing definition of refoulement. Although the Refugee Convention prohibits all actions relating to the return of refugees to States where they risk persecution, there is no discussion of refouling these vulnerable people to the high seas or safe third countries. This creates a grey area, which States have tended to exploit, and such practices of boat returning have been allowed to continue. Resultantly, States have continued to remove migrants from close to, or within, their maritime borders without due determination of their status. This avoidance of asylum processing has at best led to increased periods of somewhat unregulated detention, in dire conditions, and at worst, lives being lost at sea. As States

[1] http://data.unhcr.org/mediterranean/regional.php [Accessed 21-09-16]

adjust immigration systems in an effort to appear more understanding, questions have been raised regarding detainment. Refugee law prohibits punishment but provides no requirement for acceptance or time constraints on asylum determination. As a result, the relevant refugee law appears to be legally ineffective in relation to the displacement of persons by sea. The law of the sea cannot be seen to provide sufficiently for potential refugees either. The lack of status determination leads to an ambiguity amongst those of varying status and means that there is little done to cause States to respond to maritime refugee requests any differently than those of illegal entrants or marooned seamen. This oversight means that States continue to ignore relevant refugee law in favor of the practicalities of search and rescue conventions. From this analysis, the conclusion can be formed that the current law does not address the problems of refoulement at sea satisfactorily, answering the second research sub-question.

The third research sub-question asked whether the policies have been effective in limiting numbers of irregular migrants arriving at the maritime borders of States. From certain perspectives, figures show that the policies remain effective. Boat arrivals to States which implement interdiction policies are recorded to have significantly dropped or even stopped altogether. Suggestions that the policies are therefore of a problem passing, rather than solving, nature are thus to be expected. In terms of success, it is clear that causing vessels to avoid one State's borders, in favour of another's, is only ever to been seen as victory by one State. The humanitarian cost is one that is impossible to calculate and thus it is only possible to conclude that these policies are not safe to operate in their current form. To answer the fourth and final sub-question, it must be accepted that, even were the law to be clarified, eliminating the grey area identified, for the policies to have a satisfactory future there would need to be significant changes relating to the welfare of those involved and better considerations of the ethics of such policies. In light of current trends, it is impossible to say that such policies would ever have a satisfactory future.

In answering the primary question, as to whether turn back boat policies are a legal and effective way of managing the international displacement of persons by sea, there can only be one answer. In their

current state, these policies are not fit for purpose and are a danger to the wellbeing of vulnerable humans. They do not effectively manage the international displacement of persons by sea; they merely pass the problem onwards to other States or cause refugees to be indirectly refouled by returning home. Arguments that such policies combat migrant smuggling through the elimination of people-trafficking routes are therefore unfounded and the dangers faced by asylum seekers are only increased. For there ever to be a legal and effective way of managing the international displacement of persons by sea through a policy of turning back boats, the considerations in place would need to fall in line with a comprehensive framework which does not yet exist, proposals for which are made in Chapter 5.

To conclude, it is of the upmost importance to understand that this thesis only scratches the surface of what is required to make these policies work in a fair, legal and humane manner. Ultimately, a framework needs creating that provides a best practice guide for States of how to deal with situations involving maritime migration. It needs to be recognised that in the majority of cases the responsibility to deal with the situation falls upon the international community and not solely the State that is facing the brunt of the problems. A study of the current Mediterranean crisis may allow an in depth look into the way that States deal with such problems on a multinational level and allow suggestions to made with regard to quotas, limits and best practice.

Any framework advanced to manage this problem must give a clear and coherent answer to States as to what they must do, what they should do, and what they can do. States will then know the services they are expected to provide, how they can deal with sudden influxes, and scenarios when they are able to refuse entry to displaced persons. This is where the current law fails. As this issue primarily focuses on persons seeking asylum at sea there will possibly be much crossover with existing refugee law. It is only that maritime borders are harder to control that makes it a different problem: people trying to cross from one State to another is one thing, if they are left they are still reasonably stable, but it should not be possible to leave people fending for themselves on the high seas. A system involving an out of State

processing centre that is equal and accommodating is possibly the best solution for asylum seekers looking for refuge, but as mentioned in Chapter 5 this would require total State cooperation, something which remains uncertain. The only thing that remains definite, is that without any steps taken to ameliorate this situation, States will continue to pursue loopholes in the international system and thousands of vulnerable, displaced persons will be left to perish at sea.

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