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The 2015 Andaman Sea Boat 'Crisis': Human Rights and Refugee Law Considerations

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1. Introduction

At the nexus of state security and human security lies the concept of the 'refugee crisis' – persons fleeing their places of habitual residence to preserve their survival, and the state characterising the situation as a 'crisis' in order to shift the focus to, or at least to share the focus with, national security concerns.[1] While understandably, much of the recent literature has focused on what is termed a 'European crisis', the plight of persons fleeing Myanmar and Bangladesh by sea has been has been relatively under-studied. This crudely-termed game of 'human ping-pong' involved the Thai, Malaysian, and Indonesian authorities turning back boatloads of people, leaving about 8,000 people stranded at sea.[2] Many on board the ships were members of Myanmar's minority Rohingya population, who lack citizenship, endure systematic discrimination, have limited access to education and healthcare, and cannot move around freely.[3]

The scope of protection under international law to which these people are entitled is unclear. None of the states affected by this 'crisis' are party to the 1951 Refugee Convention which contains the refugee definition, sets out the rights associated with refugee status, and prohibits states from engaging in refoulement.[4] The lack of these states' participation in the Refugee Convention is particularly regretful in this context, as the Rohingya are clearly victims of persecution based on race and would thus most likely qualify as refugees if the Refugee Convention were applicable.

In this instance, the concept of national security appeared to override the needs of these individuals to escape threats to their lives and dignity. However, international law provides that national security interests can be curtailed by considerations of human security and the purpose of this brief chapter is to map out the legal protection applicable to those who were affected by the 2015 Andaman sea boat 'crisis.' First, this chapter will set out the nature the migration problem in the Andaman Sea. Second, it will go on to reject the commonly-held perception that that there is little or no legal protection available for refugees or migrants in the Andaman Sea. It will argue that the scope of the applicable Law of the Sea provisions is vague and that the customary prohibition of refoulement in Refugee Law was not breached in this instance. However, it will illustrate that human rights law forms the overarching framework within which interception activities may be carried out, and that the activities

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[1] Terming the situations in Europe and the Andaman Sea as crises can be problematic for numerous reasons. For example, it draws attention away from the problem in the countries from which the refugees have fled, it strips decision-makers of responsibility, and it presents certain decisions and injustices as unavoidable. See Heath Cabot, 'Crisis and Continuity: "A Critical Look at the European Refugee Crisis"', 10 November 2015, available at http://allegralaboratory.net/crisis-and-continuity-a-critical-look-at-the-european-refugee-crisis/

[2] BBC News, '"Thousands" of Rohingya and Bangladeshi Migrants Stranded at Sea', available at http://www.bbc.co.uk/news/world-asia-32686328, 11/5/2015.

[3] Human Rights Watch, 'World Report 2015: Burma', available at https://www.hrw.org/world-report/2015/country-chapters/burma

[4] 1951 Convention Relating to the Status of Refugees 189 UNTS 13, Art 31.

of Thailand, Malaysia, and Indonesia were in breach of Articles 6 and 7 of the 1966 International Covenant on Civil and Political Rights ('ICCPR').[5]

2. The 'Crisis' in the Andaman Sea

Migration by sea in Asia is not a new phenomenon. The term 'boat people' was coined in in the 1970s to identify the tens of thousands of people who fled Indochina in fishing boats after the Vietnam War. The modern-day usage of the term 'boat people' more commonly refers to those leaving Myanmar and Bangladesh via the Andaman Sea and the Bay of Bengal towards Thailand, Malaysia, and Indonesia. Some of those on board the vessels are migrants from Bangladesh who are not fleeing persecution. However, many of them are Rohingya, who have been historically discriminated against on the basis of ethnicity.

The term 'Rohingya' commonly refers to Muslims from Northern Rakhine State in Myanmar. They are an ethnic minority descended from a merging of Arakanese Buddhists, Chittagonian Bengalis, and Arabian sea-traders. Their dialect is Bengali in origin, yet distinct, with influences from Persian.[6] Repeated cycles of historical displacement, beginning with the Burmese invasion of Arakan and deportation of Arakanese in 1784, followed by returns and armed struggle in the British colonial era and further displacements after independence, formed a justification for the Myanmar government's labelling of Rohingya as 'illegal migrants' and forcing them out again on several occasions.[7] In 1982, the Burmese Government passed the Citizenship Act which rendered the Rohingya stateless.[8]

Today, the Rohingya are the worst treated group in Myanmar. An estimated 139,000 people – mostly Rohingya – remained displaced in Rakhine state for a third year after violent clashes erupted between Rakhine Buddhists, Rohingya and other Muslims in 2012.[9] In its most recent report on Myanmar, Human Rights Watch describes the 'systematic repression' of the Rohingya, estimating that one million people along the border with Bangladesh continue to face restrictions on movement, employment, and religious freedom.[10]

In October 2014, the government announced a new Rakhine State Action Plan, which if implemented, would further entrench the discrimination and segregation of the Rohingya population.[11] This plan triggered an increase in the number of people attempting to cross the Andaman Sea and the Bay of Bengal by boat, hoping to reach Indonesia, Malaysia, and Thailand. Many of these vessels had no, or limited, navigation aids or charts. They had unreliable engines and steering, and little by way of safety equipment. Women were raped, children were separated from their families and abused, and men

[5] 1966 International Covenant on Civil and Political Rights 999 UNTS 171.
[6] David Scott Mathieson, 'Plight of the Damned: Burma's Rohingya' (2009) 4 Global Asia 86.
[7] Samuel Cheung, 'Migration Control and the Solutions Impassed in South and Southeast Asia: Implications from the Rohingya Experience' (2011) 25(1) Journal of Refugee Studies 1.
[8] David Scott Mathieson, 'Plight of the Damned: Burma's Rohingya' 4 Global Asia 86.
[9] Amnesty International Report 2014/2015, 'Republic of the Union of Myanmar' available at https://www.amnesty.org/en/countries/asia-and-the-pacific/myanmar/report-myanmar/.
[10] Human Rights Watch, 'World Report 2015: Burma', available at https://www.hrw.org/world-report/2015/country-chapters/burma
[11] Amnesty International Report 2014/2015, 'Republic of the Union of Myanmar' available at https://www.amnesty.org/en/countries/asia-and-the-pacific/myanmar/report-myanmar/.

were beaten and thrown overboard.[12] The latest figures indicate that 88,000 people made the dangerous voyage by sea since 2014, including 25,000 who arrived in the first quarter of 2015 alone.[13]

Over 1,100 people are estimated to have died at sea along this route since 2014.[14] In addition, disease, severe malnourishment, and psychological distress affect many of those who have survived these voyages.[15] The situation has been worsened by the crudely-termed game of 'human ping-pong' involving the Thai, Malaysian, and Indonesian authorities turning back boatloads of people, leaving about 8,000 people stranded at sea in May 2015.[16] One report described a fishing boat of about 350 people being refused entry into Thailand after the crew abandoned them and disabled the engine. They were stranded without food and water, resulting in ten deaths.[17] Indonesian authorities have admitted to pushing back one boat on May 11 and directing it to Malaysia after providing food and water to those on board.[18] In Malaysia, Deputy Home Affairs Minister Wan Junaidi Tuanku Jaafar publicly stated that the government would turn back boats and deport those who land ashore.[19] Senior Thai officials announced the government adopted a policy of pushing away boats from Thai shores after providing them with fuel, food, and water.[20]

Following talks in Kuala Lumpur, Malaysia and Indonesia agreed to offer temporary shelter to 7,000 stranded migrants but they asked for international assistance to resettle them after a year. Thailand also said it would no longer push back the stranded boats.[21] Of the 8,000 stranded at sea in mid-May 2015, 4,500 were known to have returned to shore and the number of estimated deaths at sea during that period is unknown.

3. Applicable Law

i. Law of the Sea

It would be remiss to examine the human rights and refugee law frameworks applicable without briefly setting out how they relate to the Law of the Sea. This is because there is a tension between the rights of the individual to leave their state and seek asylum and the right of the state to control its borders and in certain circumstances, to intercept vessels at sea. There is also an obligation on states to render assistance to persons in distress at sea.

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[12] United Nations Human Rights, 'Joint Statement by UNHCR, OHCHR, IOM and SRSG for Migration and Development', 19/5/2015, available at http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=15976&LangID=E#sthash.TG48h6n4.dpuf

[13] Joint Statement by UNHCR, OHCHR, IOM and SRSG for Migration and Development: Search and rescue at sea, disembarkation, and protection of the human rights of refugees and migrants now imperative to save lives in the Bay of Bengal and Andaman Sea, 19/5/2015, available at http://www.unhcr.org/555aee739.html.

[14] UNHCR, 'South-East Asia: Mixed Maritime Movements', April-June 2015, 2.

[15] Michael Pugh, 'Drowning not Waving: Boat People and Humanitarianism at Sea', (2004) 17(1) Journal of Refugee Studies 50, 56.

[16] BBC News, '"Ten deaths" on stranded Myanmar migrant boat' available at http://www.bbc.co.uk/news/world-asia-32733963, 14/5/2015.

[17] Ibid.

[18] Human Rights Watch, 'Southeast Asia: End Rohingya Pushbacks', available at http://www.hrw.org/news/2015/05/14/southeast-asia-end-rohingya-boat-pushbacks 14/5/2015.

[19] Ibid.

[20] Ibid.

[21] BBC, 'Missing Migrant Boat Found as Countries Offer Shelter', available at http://www.bbc.co.uk/news/world-asia-32806972. 20/5/2015,

If we take the case in favour of the push-back regime at its strongest, i.e. if we accept that it is permissible to push back ships carrying migrants present in the territorial seas as they are not engaged in 'innocent passage',[22] the actions of the Thai, Malaysian, and Indonesian authorities are still not in compliance with international law. The MV Saiga case held that: '[International law] requires that the use of force must be avoided as far as possible and, where force is inevitable, it must not go beyond what is reasonable and necessary in the circumstances. Considerations of humanity must apply in the law of the sea as they do in other areas.'[23] The use of force must also be proportionate to the objective in sight.[24] As force was the first response to many of these incoming migrant vessels, it is highly unlikely that the use of force was 'avoided as far as possible', i.e. that all other options were considered and/or exhausted.[25] The loss of life resulting from the pushback operation probably entails that the means used (i.e. pushback operations involving life-threatening measures) were not proportionate to the objective (interfering with the passage of a ship that not engaged in innocent passage as per Article 19 UNCLOS) and it is unclear from the facts whether the minimum force necessary was used. Most importantly, the actions were a clear violation of human rights law, as will be set out below, which forms the overarching framework within which interception activities may be carried out.

In addition, the states involved were under the obligation in both treaty and customary law to render assistance to any person found in distress at sea.[26] However it is problematic that international law does not stipulate the nature and scope of assistance to be provided. It was reported that in some instances refugees were given rice and water and pushed back out to sea.[27] Whether this would satisfy the obligation to render assistance is unlikely, as given the object and purpose of the obligation, which is to prevent the loss of life at sea, assistance which would only marginally prolong life would not be interpreting the obligation in good faith. In addition, it would fall foul of the principle of effectiveness, which provides that the obligation in a treaty is to produce an outcome which advances the aim of the treaty.[28] This is further supported by the obligation to apply considerations of humanity as outlined in the MV Saiga case above.[29]

That said, the obligation to rescue persons in distress at sea is very much compromised by the lack of equally rigorous obligation with respect to the disembarkation of persons rescued at sea. States are

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[22] Article 19, 1982 United Nations Convention on the Law of the Sea 1833 UNTS 3 (UNCLOS). The vast majority of migrant smuggling vessels are stateless, and therefore UNCLOS Art 110(1)(d) grants official vessels an express right of visit (a right to board and inspect) over those vessels that are stateless, but it does not specify what further actions, if any, may be taken by a state.

[23] M/V Saiga (No. 2) Case (St Vincent and the Grenadines v Guinea) ICGJ 336 (ITLOS 1999), 1st July 1999 [155].

[24] M/V Saiga (No. 2) Case (St Vincent and the Grenadines v Guinea) ICGJ 336 (ITLOS 1999), 1st July 1999 [155]. Proportionality is also a crucial factor for determining whether there has been a violation of the right to life under international human rights law. See the case of McCann and Others v the United Kingdom (European Court of Human Rights) App. No. 18984/91, 27 September 1995 and Camargo v Columbia (UN Human Rights Committee) Communication No. 45/1979, U.N. Doc. CCPR/C/OP/1, 31 March 1982.

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

[26] Guy S. Goodwin-Gill and Jane McAdam, The Refugee in International Law (3 edn, Oxford University Press 2011), 278; Art 98 UNCLOS.

[27] Human Rights Watch, 'Southeast Asia: End Rohingya Pushbacks', available at http://www.hrw.org/news/2015/05/14/southeast-asia-end-rohingya-boat-pushbacks14/5/2015.

[28] Richard K. Gardiner, Treaty Interpretation (Oxford University Press 2008), 190.

[29] More generally, see Richard Barnes, 'Refugee Law at Sea', 53 International and Comparative Law Quarterly 47 (2004).

obliged to 'cooperate and coordinate' to ensure that ships' masters are allowed to disembark rescued persons to a place of safety, irrespective of the nationality or status of those rescued, and with minimal disruption to the ship's planned itinerary (which implies that disembarkation should occur at the nearest coastal state). However, a refusal of disembarkation cannot be equated with a breach of non-refoulement, even though it may result in serious consequences.[30] Nonetheless, human rights law could be engaged where, for example, persons are subjected to protracted confinement to a vessel under deteriorating conditions. It has been suggested that in certain circumstances, this could compel a state with primary responsibility to accept disembarkation.[31]

ii. Non-refoulement and Human Rights Law

Notwithstanding the fact that the relevant states involved in the Andaman Sea migration 'crisis' are not bound by the 1951 Refugee Convention, Article 33 of the Refugee Convention, the prohibition of non-refoulement, is a customary norm.[32] This principle prohibits the expulsion of a refugee 'in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion.' This provision also applies to asylum-seekers,[33] and applies extra-territorially.[34]

Goodwin-Gill and McAdam correctly argue that the simple denial of entry of ships to territorial waters cannot be equated with a breach of the principle of non-refoulement, which requires that state action have the effect or result of returning refugees to territories where their lives or freedoms would be in danger.[35] The key terms here are 'effect' and 'result', meaning that it is the outcome of the 'pushback' activities that will determine whether refoulement has occurred. It is argued here that the actions of the authorities on the Andaman Sea would not constitute refoulement. Although many of the refugees drowned, this was not 'on account of race, religion, nationality, membership of a particular social group or political opinion' as stipulated in the definition of refoulement, but rather because of the conditions at sea. In addition, the High Seas, to which they were sent, does not constitute the 'frontiers of territories', given that the High Seas are beyond the sovereignty of any one state,[36] and the nexus that exists between state sovereignty and territory.[37] This is distinguishable from the actual physical return of passengers to their country of origin, which would constitute

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[30] Goodwin-Gill and McAdam, 278.
[31] Anne T. Gallagher and Fiona David, The International Law of Migrant Smuggling, (Cambridge University Press 2014) 456.
[32] See, for example, A. Duffy 'Expulsion to Face Torture? Non-refoulement in International Law' (2008) 20(3) International Journal of Refugee Law 373, 383; Seline Trevisanut, 'The Principle of Non-Refoulement at Sea and the Effectiveness of Asylum Protection', (2008) 12 Max Planck UNYB 206, 215.
[33] UNHCR 'Advisory Opinion on the Extraterritorial Application of Non-Refoulement Obligations under the 1951 Convention relating to the Status of Refugees and its 1976 Protocol' (26 January 2007), [6].
[34] Mark Pallis, 'Obligations of States towards Asylum Seekers at Sea: Interactions and Conflicts Between Legal Regimes' (2002) 14(2 and 3) International Journal of Refugee Law 329, 343.
[35] Guy S. Goodwin-Gill and Jane McAdam, The Refugee in International Law (3 edn, Oxford University Press 2011), 277. This is supported by the convention's travaux preparatoires, which reads: '… the obligation not to return a refugee to a country where he was persecuted did not imply an obligation to admit him to the country where he seeks refuge. The return of a refugee-ship, for example, to the high seas could not be construed as a violation of this obligation.'[35] See UN Doc. E/AC.32/L.32/Add.1 (10 Feb 1950), comment on draft article 28 (expulsion to country of persecution.)
[36] Art 89, UNCLOS.
[37] Pallis, 343.

refoulement.[38] However, if a pushback operation would leave refugees with no option but to return to their country of origin, or to a third state that would return them, this would constitute refoulement.[39] Those on board the vessels in the Andaman Sea, were not able to reach any territory, as every state that they tried to reach attempted to push them back out to sea and those that eventually survived remained stranded until Malaysia and Indonesia agreed to allow them to come ashore as a temporary solution.

The ICCPR is also applicable to the situation in the Andaman Sea.[40] The most relevant rights in the ICCPR are Article 6, which protects the right to life; and Article 7, which prohibits cruel, inhuman or degrading treatment. Thailand and Indonesia are a party to the ICCPR, whereas Myanmar and Malaysia are not. However the latter states are also bound by these articles as they represent customary international law.[41]

These provisions may be applicable in two respects. First, there is a significant amount of jurisprudence setting out that where a state exercises control outside of its territory in a way that could have an impact on the enjoyment of human rights, that state is bound by human rights provisions.[42] There can be little doubt that interdiction of a ship which involves conduct such as boarding the vessel or pushback operations fall within this test.[43] Coercive actions that threaten or result in loss of life whether deliberate (such as the pushback of an unseaworthy vessel) or accidental would appear to be in violation of the positive obligation attached to the right to life in Article 6. Where migrants are subject to deteriorating conditions on board, pushback operations could also be a violation of Article 7. More controversially, read together with the provisions of the Law of the Sea as outlined above regarding the assistance of those in distress at sea, an argument could be made that Article 7 would be violated through the failure of a state that is in a position to do so to come to the aid of migrants who are at risk of physical harm.[44] However, as the state would not be in effective control of the migrants, this chapter does not assert that Article 7 would be violated in such circumstances.

Secondly, there is an implied obligation of non-removal under the ICCPR which has been emphasised repeatedly by the Human Rights Committee. In General Comment 31, the Committee stated that states are obliged:

> '[...] not to extradite, deport, expel or otherwise remove a person from their territory [...] where there are substantial grounds for believing that there is a real risk of irreparable harm, such as that contemplated by articles 6 and 7 of the Covenant, either in the country to which removal is to be effected or in any country to which the person may subsequently be removed.'[45]

[38] Hirsi Jamaa and Others v. Italy, ECtHR, application no. 27765/09, 23 February 2012.
[39] Pallis, 349.
[40] 1966 International Covenant on Civil and Political Rights 999 UNTS 171.
[41] UN Human Rights Committee, 'General Comment No. 24: General comment on issues relating to reservations made upon ratification or accession to the Covenant or the Optional Protocols thereto, or in relation to declarations under article 41 of the Covenant', CCPR/C/21/Rev.1/Add.6 (1994) [8].
[42] See, for example, Al-Jedda v United Kingdom, ECtHR, application no. 27021/08, 7 July 2011; Hirsi Jamaa and Others v. Italy, ECtHR, application no. 27765/09, 23 February 2012.
[43] Anne T. Gallagher and Fiona David, The International Law of Migrant Smuggling, (Cambridge University Press 2014) 471.
[44] Pallis, 335.
[45] UN Human Rights Committee, 'General Comment No. 31: The Nature of the General Legal Obligation Imposed on States Parties to the Covenant' (2004) CCPR/C/21/Rev.1/Add. 13 [12].

The use of the phrase 'such as' implies that the non-removal obligation is not limited to violations of Article 6 and 7. It is argued that this non-removal obligation also applies to pushback operations conducted at sea. The underlying rationale of non-removal obligations as developed in numerous cases is that states cannot turn a blind eye to the consequences of their removal decisions where it exposes individuals to treatment in violation of international human rights norms. This is in line with the object and purpose of the ICCPR, which is inter alia to recognise 'the inherent dignity and … the equal and inalienable rights of all members of the human family.' It is irrelevant that the quoted extract from General Comment 31 refers to removal from one territory to another (as opposed to removal from one area of the seas to another). The fact that the Human Rights Committee is primarily concerned with the potential harm at issue (rather than geographical location) is evident from the fact that the terms 'territory' and 'country' are used interchangeably to elaborate on the same principle, whereas the phrase 'real risk' is used consistently in its General Comment and jurisprudence.[46] Thus the proposition that a state can remove an individual to the High Seas to face terrible conditions and possibly death is permitted by international law is unsustainable, and moreover, highly undesirable, as it would create a dangerous loophole for states wishing to prevent aliens from entering their territory.

4. Conclusion

The discussion in this brief chapter reveals that Articles 6 and 7 of the ICCPR have most probably been violated by the authorities of the states involved with respect to their pushback policies. The practical impact of the findings of this research suffers from many of the shortcomings of the system of international law as a whole, namely, the lack of enforcement at an international level. This is due to a general lack of standing of individuals in the international judicial system and the lack of regional human rights court in Asia. However, the arguments put forward in this piece can nonetheless be of valuable assistance to those who have been treated unlawfully by the Thai, Malaysian, and/or Indonesian authorities. First, the issue could be raised by individual states, the UN, and/or NGOs during Thailand, Indonesia or Malaysia's Universal Periodic Review before the Human Rights Council. Second, the arguments put forward in this piece can be employed at a domestic level. For states such as Indonesia and Thailand that operate a dualist legal system, the national legislature must 'transform' the international obligation into a rule of national law, and the national judge will then apply it as a rule of domestic law.[47] However, a domestic judge should interpret that domestic rule in accordance with its original source as an international instrument.[48] Third, the arguments put forward in this piece can be used to put diplomatic pressure on Indonesia, Malaysia, and Thailand to change their policies toward migrants at sea. By condemning their actions within the framework of international law, it puts significant weight behind the argument that these actions were wrong and should never be repeated. Finally, on a more general theoretical or epistemological level, the arguments put forward in this piece form part of the 'remarkable revival'[49] of the concept of human security. Although the state remains the fundamental purveyor of security, discussion surrounding the plight of those who flee by sea bolster the shift in attention from the security of the state to the

[46] UN Human Rights Committee, Kindler v Canada Communication No. 470/1991 (1993) UN Doc CCPR/C/48/D/470/1991.
[47] Eileen Denza, 'The Relationship between International and National Law', in Malcolm D. Evans (ed), International Law, (OUP, 2nd Edition, 2006), 429. It is unclear whether Indonesia operates a monist or dualist system, as its Constitution is silent on the matter. See Simon Butt, 'The Position of International Law within the Indonesian Legal System' (2014) 28(1) Emory International Law Review 1.
[48] See the discussion of Lord Bingham in Horvath v. Secretary of State for the Home Department [2000] UKHL 37 with regards to the 1951 Convention Relating to the Status of Refugees 189 UNTS 137.
[49] Amaratya Sen, 'Birth of a Discourse' in Mary Martin and Taylor Owen, Routledge Handbook of Human Security (Routledge 2014), 17.

security of people,[50] and thus provides a theoretical underpinning for legal accountability and enforcement.

[50] Amaratya Sen, 'Birth of a Discourse' in Mary Martin and Taylor Owen, Routledge Handbook of Human Security (Routledge 2014), 27.