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**Maritime Interception on Foreign Vessels Carrying Refugees and Asylum Seekers:
A Violation of UNCLOS and Non-Refoulement Principle?**

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Abstract

Each state has the right to protect their national security in every possible way, and illegal acts such as aliens entering their territory without permit is no exception. They implement regulations and policies to prevent people smuggling, including but not limited to maritime interception towards vessels under suspicion of carrying refugees and asylum seekers. Yet, in the implementation, human rights violations tend to happen towards the passengers. This study aims to analyze the legality of maritime interception on foreign vessels carrying refugee and asylum seekers, and whether the said conduct raised issues of state responsibility. This study was conducted by analyzing relevant international law instruments and principles such as non-refoulement and state responsibility. The analysis comes to the conclusion that states have certain jurisdiction to conduct interception operations at sea with the means of protecting their national security. Should the act of interception be proven to inflict threats of danger towards the lives of the intercepted refugees and asylum seekers, states should be held responsible for the damage bared to the refugees and asylum seekers. In conducting maritime interceptions, states should ensure the refugee identity of the intercepted vessel's passengers and should seek that they are entitled to international protection.

Keywords: Maritime Interception, Principle of Non-Refoulement, State Responsibility

**Pencegatan Maritim pada Kapal Asing yang Membawa Pengungsi dan Pencari Suaka:
Pelanggaran Terhadap UNCLOS dan Prinsip Non-Refoulement?**

Abstrak

Setiap negara mempunyai hak untuk melindungi keamanan nasionalnya dengan berbagai macam cara, dan tindakan ilegal seperti warga negara asing memasuki wilayah suatu negara tanpa izin bukan merupakan pengecualian. Negara-negara telah menetapkan seperangkat peraturan dan kebijakan untuk mencegah penyelundupan manusia, termasuk namun tidak terbatas pada pencegahan kapal di wilayah laut yang dicurigai mengangkut para pengungsi dan pencari suaka. Namun, dalam pelaksanaannya tindakan pencegahan seringkali menimbulkan pelanggaran hak asasi manusia kepada para penumpang kapal. Penelitian ini bertujuan untuk menganalisis legalitas pencegahan kapal yang mengangkut pengungsi dan pencari suaka. Penelitian ini dilaksanakan dengan menganalisa hukum internasional yang berkaitan. Penelitian ini

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menunjukkan bahwa negara mempunyai yurisdiksi tertentu untuk melaksanakan pencegahan di laut dengan tujuan untuk mempertahankan keamanan nasional. Selain itu, negara harus bertanggung jawab atas kerugian yang dialami oleh para pengungsi dan pencari suaka selaku penumpang kapal yang dicegat apabila pencegahan tersebut menimbulkan ancaman bagi hidup mereka. Dalam melaksanakan pencegahan di wilayah laut, negara-negara harus memastikan identitas para penumpang kapal yang dicegat, dan memberikan perlindungan internasional bagi mereka yang berstatus sebagai pengungsi dan pencari suaka.

Kata Kunci: Pencegatan Wilayah Laut, Prinsip *Non-Refoulement*, Tanggung Jawab Negara

A. INTRODUCTION

Contrasting opinion between two entities or more in a country may lead to violent confrontations. Confrontations occurring between governmental armed forces and the forces of one or more armed groups, or between such groups arising on the territory of a State party to the Geneva Conventions, are known as non-governmental armed conflicts.¹ This conflict has proven to be the most concrete cause of migration, resulting in the increasing amount of refugees and asylum seekers.² They tend to face persecution on the basis of political views, religion, ethnicity, social class, and gender.³

Of course, the inclining issue of refugee and asylum seekers does not go unnoticed by the international community, considering that the human rights violations they experience during their process of seeking international protection does not exactly align with the collective purpose of all nations, namely to maintain international peace and security.⁴ However, there have

been changes in the trend of the international community's attention towards refugees and asylum seekers. Countries who were previously welcome towards them, have started to limit the intake of foreign persons seeking asylum.⁵ This has been caused by the circumstances where people of certain nationalities fake their refugee or asylum seekers status.⁶ Undoubtedly, states should retain their territorial integrity and undertake actions to prevent such situations which are considered prejudice to their security. Aside from security issues, not all states have the same capacity to accommodate refugee and asylum seekers.

Most states have enacted, or at least have considered to implement laws and policies to process claims raised by refugees and asylum seekers for international protection, with marine interception of vessels as one of the methods. Such interception mostly occurs within the area of international waters or the territorial sea of a country.⁷ Within the sea area, states have to adjust their jurisdiction to comply with the prevailing international law

¹ ICTY, *The Prosecutor v. Dusko Tadic*, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, IT-94-1-A, 2 October 1995, para.70.

² Erik Melander and Magnus Obreg, "Forced Migration: The Effects of the Magnitude and Scope of Fighting", *Paper Presented at the 37th North American Meeting of the Peace Science Society (International)*, Ann Arbor-Michigan, November 14 to 16 2003, p. 5.

³ UN High Commissioner for Refugees (UNHCR), Guidelines on International Protection No. 12: Claims for refugee status related to situations of armed conflict and violence under Article 1A(2) of the 1951 Convention and/or 1967 Protocol relating to the Status of Refugees and the regional refugee definitions, 2 December 2016, HCR/GIP/16/12, available at: <https://www.refworld.org/docid/583595ff4.html>, accessed on 12th of May 2019.

⁴ Article 1(1) Charter of the United Nations, October 24, 1945.

⁵ Frances Nicholson and Judith Kumin, "Refugee Protection: A Guide to 7 International Refugee Law", United Nations High Commissioner for Refugees and Inter-Parliamentary Union, 2017, <https://www.unhcr.org/publications/legal/3d4aba564/refugee-protection-guide-international-refugee-law-handbook-parliamentarians.html>, accessed on 28th of September 2017.

⁶ Ministry of Home Affairs, "People-Smuggling Boat Returned to Sri Lanka", <http://www.minister.border.gov.au/peterdutton/Pages/people-smuggling-sri-lanka.aspx>, accessed on 24th of September 2017.

⁷ United Nations High Commissioner for Refugees Executive Committee, 10 Interception of Asylum Seekers and Refugees: The International Framework and Recommendations for a Comprehensive Approach, EC/50/SC/CRP.17, June 9, 2000, p. 2.

regime. However, a gap remains in the act of interception, which is prone to be misused by the intercepting states. Due to that gap, the refugees and asylum seekers intercepted may not possibly get the proper protection they are entitled to.

Countries that have implemented strict border regulations are the European Union countries and Australia. The European Union has established the European Border and Coast Guard Agency also known as Frontex. Frontex has the authority to coordinate marine operations.⁸ Italy, being one of the main destinations of refugee and asylum seekers, has entered into a bilateral agreement with Libya in 2017 in order to prevent illegal movement of persons from Libya to Italy.⁹ It enables both countries to intercept vessels suspected to carry refugee or asylum seekers.¹⁰ Before such agreement was in force, there had been other cases of refugee and asylum seeker interceptions. A concrete consequence of such agreement was observed in *Hirsi Jamaa and Others v. Italy*, where Italy's Maritime Rescue Coordination Centre instructed Libyan authorities to escort a stateless vessel back to Libya.¹¹ Carrying 15 Somalian and 13 Eritrean nationals, the vessel was intercepted by Italian coastguards in the high seas within Malta's designated search and rescue area. They were moved to the Italian warship and brought to Tripoli without being asked for identification and had their personal belongings seized by Italy's military officials. They were later handed over to the Libyan authorities who were already on standby in

Italy. The case was submitted to the European Court of Human Rights by the passengers and resulted in Italia having had to pay each of the applicants 15,000 Euro for the damages inflicted on behalf of the interception operation.

As for Australia, they have also formed a joint operation called *Operation Sovereign Borders Joint Agency Task Force* led by the military to eradicate people smuggling.¹² One of their main teams focuses on detecting, intercepting, and transferring passengers of a foreign vessel.¹³ *Ruddock v. Vadarlis*, also known as the MV Tampa case, was submitted to the Federal Court of Australia in 2001.¹⁴ The MV Tampa was a Norwegian vessel heading for Singapore, who encountered a wooden fishing boat sailing the Indonesian flag, carrying refugees from the Middle Eastern to Australia. The Indonesian boat was found distressed and almost sunk in the Indian Ocean, 140 kilometres north Christmas Island, Australia. MV Tampa's Captain Rinnan responded to a call from the Australian authorities with the instruction to rescue the passengers in that fishing boat. However, Australia refused Captain Rinnan's request to bring the rescued persons to Australia, and instead, closed their port on Christmas Island. The case resulted in the asylum seekers being moved to Nauru and New Zealand where they would be placed in refugee shelters, and that Australia had to pay the applicant's expenses for the trial.

This article aims to evaluate those practices done by states regarding the interception of foreign vessels carrying

⁸ European Union, European Border and Coast Guard Agency (Frontex), https://europa.eu/european-union/about-eu/agencies/frontex_en, accessed on 4th of February 2018.

⁹ Immigration and Law Policy, "The Italy-Libya Memorandum of Understanding: The 16 Baseline of a Policy Approach Aimed at Closing All Doors to Europe?", The Italy-Libya Memorandum of Understanding: The baseline of a policy approach aimed at closing all doors to Europe? – Immigration and Asylum Law and Policy (eumigrationlawblog.eu), accessed on 2nd of October 2017.

¹⁰ *Ibid.*

¹¹ Guy S. Goodwin Gill, *The Refugee in International Law*, Oxford: Clarendon Press, 1996, p. 450.

¹² Australian Government, Department of Home Affairs, "Operation 19 Sovereign Borders", <http://www.osb.border.gov.au/en/Operation-Sovereign-Borders>, accessed on 12th of May 2019.

¹³ *Ibid.*

¹⁴ Minister for Immigration and Multicultural Affairs & Others v. Vadarlis ("Tampa Appeal"), [2001] FCA 1329, Australia: Federal Court, 17 September 2001.

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refugees and asylum seekers. Several debates have arisen, considering that states indeed have the right to adopt immigration laws containing provisions on how foreign nationals could be expelled from the country's territory.

This article will consist of five parts. First, the author will discuss states' rights and duties at sea, especially in the practice of interception. It will then discuss the determination of refugees and asylum seekers, and how it correlates with the *non-refoulement* principle. It also assesses intercepting states' responsibilities over the passengers. This article will also elaborate the role of international organizations in mitigating maritime interception practices and how they facilitate the refugees and asylum seekers in the asylum countries. Parallel to the purpose of the study, analyses have been conducted to review relevant international legal instruments, which are UNCLOS 1982, Refugee Convention 1951, and ILC's Articles on State Responsibility 2001. Other conventions namely SOLAS and SAR Convention are also included.

To conclude, this study aims to offer recommendations for future legal circumstances in order to fill the gaps found in the analysis.

B. STATE RIGHTS AND DUTIES AT SEA

'Jurisdiction' refers to powers exercised by a state over persons, property, or events.¹⁵ Those powers may include, but not limited to, powers to legislate in respect of the persons, property, or events in question (legislative or prescriptive jurisdiction) and the powers of physical interference exercised by the

executive, such as the arrest of persons, seizure of property.¹⁶ The criminal jurisdiction of a state recognizes the territorial principle.¹⁷ Each state has jurisdiction over crimes conducted within their territory.¹⁸ When a conduct is commenced within a territory of a state, the state has jurisdiction under the subjective territorial principle.¹⁹ Meanwhile, the state where the act is completed has jurisdiction under the objective territorial principle.²⁰ Therefore, it is unquestionable that states have certain jurisdictions applicable at sea, especially within maritime zones such as territorial sea and high seas.²¹

The United Nations Convention on the Law of the Sea 1982 defines the rights and duties of states regarding their use of the world's oceans, regulating conducts of businesses, the environment, and the preservation of marine natural resources.²² A state has jurisdiction over its territorial waters, which extends up until twelve nautical miles measured from baselines.²³ Within a territorial sea, international law recognizes the right of innocent passage. Article 17 UNCLOS 1982 reads as follows.

"Subject to this Convention, ships of all States, whether coastal or land-locked, enjoy the right of innocent passage through the territorial sea."

Article 18(2) UNCLOS 1982 later then explains that a passage has to be continuous and expeditious. It may consist of stopping and anchoring, but only when ships are deemed in danger by *force majeure* or distress, or for the purpose of providing assistance to persons, ships or aircraft in danger or distress. In this context, the SAR Convention refers to distress to a situation wherein there is reasonable grounds that a person, a vessel or other craft

¹⁵ Peter Malanczuk, *Akehurst's Modern Introduction to International Law 1, Seventh Revised Edition*, New York: Routledge, 1997, p. 109.

¹⁶ *Ibid.*

¹⁷ Malcolm N. Shaw, *International Law, Sixth Edition*, New York: Cambridge University Press, 2008, p. 668.

¹⁸ Peter Malanczuk, *Op.Cit.*, p. 110.

¹⁹ *Ibid.*

²⁰ *Ibid.*

²¹ Malcolm N. Shaw, *Op. Cit.*, p. 653.

²² Peter Malanczuk, *Op. Cit.*, p. 173.

²³ Article 3 United Nations Convention on the Law of the Sea (UNCLOS) 1982.

is threatened by grave and imminent danger and requires immediate assistance.

As stated in Article 19 UNCLOS 1982, a passage is innocent if it does not impose threat to the peace, good order or security of the coastal state. However, it is considered prejudicial when it involves the loading or unloading of any commodity, currency or person contrary to the customs, fiscal, immigration or sanitary laws and regulations to the coastal state. According to that Article, a state's territorial sovereignty over its territorial waters is characterized by completeness and exclusiveness.²⁴ Coastal states have the right to implement laws and regulations in conformity with UNCLOS 1982 relating to innocent passage, emphasizing on the prevention of customs, fiscal, immigration, or sanitary laws and regulations.²⁵

While states have exclusive sovereignty over its territorial sea, their jurisdiction is limited within the international waters, for it is forbidden for states to claim any part of the high seas to its sovereignty.²⁶ The high seas are open to all states, whether coastal or landlocked.²⁷ All states are free to navigate peacefully, in compliance to the inquiries that they sail with a flag of a state, and has to be implemented with *due regard* to other countries' best interest.²⁸ In other words, a passage in high seas shall not be imposed by other states. Article 90 UNCLOS 1982 determines that states, whether coastal or land-locked, have the right to sail ships flying its flag on the high seas. For its navigation purposes, states have exclusive jurisdiction over ships flying their flags. Article 94(2)(b)

UNCLOS 1982 explains the duties of the flag state.

"1. Every State shall effectively exercise its jurisdiction and control in administrative, technical and social matters over ships flying its flag.

2. In particular, every State shall:

(a) Maintain a register of ships containing the names and particulars of ships flying its flag, except those which are excluded from generally accepted international regulations on account of their small size; and

(b) Assume jurisdiction under its internal law over each ship flying its flag and its master, officers and crew in respect of administrative, technical and social matters concerning the ship."

Considering that the flag state has a corresponding duty to exercise jurisdiction over ships flying its flag, no state may exercise jurisdiction over another state's vessel unless for the purpose of visiting and hot-pursuing. As such, states tend to exercise their Right of Visit when undergoing maritime interceptions.²⁹ The Right of Visit allows a state's warship to interfere with a foreign vessel's passage by verifying its right to fly its flag, examining the ship by boarding, or even seizing it.³⁰ This provision gives ground for military vessels to justify interception, especially when the intercepted vessels sail without a flag of a certain state. Flagless ships are one transport method relied on by refugees, asylum seekers, along with their smugglers or traffickers to cross borders.³¹

²⁴ Yoshifumi Tanaka, *The International Law of the Sea*, United Kingdom: 40 Cambridge University Press, 2012, p. 85.

²⁵ Article 21(1)(h) United Nations Convention on the Law of the Sea (UNCLOS) 1982.

²⁶ Article 89 United Nations Convention on the Law of the Sea (UNCLOS) 1982.

²⁷ Article 87 (1) United Nations Convention on the Law of the Sea (UNCLOS) 1982.

²⁸ Article 87 (2) United Nations Convention on the Law of the Sea (UNCLOS) 1982.

²⁹ Barbara Miltner, "Irregular Maritime Migration: Refugee Protection Issues in Rescue and Interception", *Fordham International Law Journal*, Vol. 30, Issue 1, 2006, p. 104.

³⁰ Article 110 United Nations Convention on the Law of the Sea (UNCLOS) 1982.

³¹ Barbara Miltner, *Op. Cit.*, p. 105.

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Despite such circumstances, state jurisdiction in regards to interception practices are limited by UNCLOS and other international regimes, namely the principle of *non-refoulement*.³² Intercepting states may face accusation of not abiding international law, if they enforced their interception conducts. This is supported by Article 8(5) of the Migrant Smuggling Protocol.

"A flag State may, consistent with article 7 of this Protocol, subject its authorization to conditions to be agreed by it and the requesting State, including conditions relating to responsibility and the extent of effective measures to be taken. A State Party shall take no additional measures without the express authorization of the flag State, except those necessary to relieve imminent danger to the lives of persons or those which derive from relevant bilateral or multilateral agreements."

Australia's conduct of intercepting the MV Tampa when it intended to enter their territorial waters is in compliance of Article 19(2)(g) UNCLOS 1982 which states that a passage is not considered innocent if it does not abide the national laws of the country whose territorial sea is about to be passed through. Therefore, Australia has the right to take appropriate measures against vessels whose passages are not innocent. They may also revoke said vessels' right to innocent passage in order to protect their security. Unfortunately, UNCLOS 1982 does not clearly explain if a distressed vessel has the right to enter a coastal state's port and if they are immune from the coastal state's law. However, Article 18(2) provisions that a vessel passing another state's territorial waters can stop and anchor themselves in circumstances of distress and *force majeure*.

Although having seen that the vessel they expelled was in grave condition and overloaded, Australia had still instructed them to continue their passage. This violates Regulation 19 Chapter I of the SOLAS Convention 1974.

"Every ship holding a certificate issued under Regulation 12 or Regulation 13 of this Chapter is subject in the ports of the other Contracting Governments to control by officers duly authorized by such Governments insofar as this control is directed towards verifying that there is on board a valid certificate ... the officer carrying out the control shall take such steps as will ensure that the ship shall not sail until it can proceed to sea without danger to the passengers or the crew."

Article 98 UNCLOS 1982 states that every state shall require vessels who fly its flag to render assistance to any person found at sea in danger of being lost, and to immediately rescue the persons in distress. This obligation is recognized widely as part of the customary international law and applies to all vessels sailing a flag of a state.³³ Hence, Australia as the intercepting state that has seen how the MV Tampa was distressed, should have rendered assistance rather than asking them to exit their territorial waters.

Meanwhile the UNCLOS has determined that states should render assistance for those in distress at sea, their existing instruments do not give guidance on where to locate the rescued passengers. The SAR Convention and its amendments only clarifies as much:

"Parties shall coordinate and cooperate to ensure that masters of ships providing assistance by embarking persons in distress at sea are released from their obligations with minimum further deviation from

³² *Ibid.*

³³ Seline Trevisanut, "The Principle of Non-Refoulement at Sea and the Effectiveness of Asylum Protection", *Max*

Planck Yearbook of United Nations Law, Volume 12, 2008, p. 208.

the ships' intended voyage, provided that releasing the master of the ship from the obligations does not further endanger the safety of life at sea. The Party responsible for the search and rescue region in which such assistance is rendered shall exercise primary responsibility for ensuring such coordination and cooperation occurs, so that survivors assisted are disembarked from the assisting ship and delivered to a place of safety, taking into account the particular circumstances of the case and guidelines developed by the [Intergovernmental Maritime Consultative] Organization. In these cases, the relevant Parties shall arrange for such disembarkation to be effective as soon as reasonably practicable."

The provision stated above emphasizes that states will have to coordinate to determine a search and rescue zone. In *Hirsi Jamaa*, EU countries prove that they have designated a search and rescue zone, dividing up certain areas to be governed by each of the countries. The interception in *Hirsi Jamaa* took place at the high seas, within Malta's search and rescue area. Nevertheless, the designation of the search and rescue zone had not covered the place of disembarkation. The responsibility of countries designing search and rescue areas only concerns the assurance of such coordination and cooperation takes place,³⁴ and gives ground to the rescuing state in ensuring the validity of a place of safety. The UNHCR stated that the problem rooted from the fact that disembarkation was "until recently considered so obvious that it was not

found necessary in any of the instruments [pertaining to rescue-at-sea] to stipulate an express obligation for the country of the first port of call to permit the disembarkation of rescued persons."³⁵ This was what happened in the *MV Tampa* case, with Australia refusing for the rescued asylum seekers to disembark on Christmas Island. Australia should have initiated to allow the *MV Tampa* to disembark the asylum seekers on their land, rather than abandoning them at sea.

C. PRACTICE OF INTERCEPTION

Despite the rising tendency of interception practice, the international community has not determined its exact definition yet. Other terms that are frequently used within the context of interception are interdiction, push-backs, non-entrée, and non-admission measures.³⁶ In 2000, UNHCR defined interception as:³⁷

"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."

It was later redefined by UNHCR's Executive Committee as:³⁸

"... one of the measures employed by States to:

- i. Prevent embarkation of persons on an international journey;*
- ii. Prevent further onward international travel by*

³⁴ Irini Papanicopolulu, "The Duty to Rescue at Sea, in Peacetime and in War: A General Overview", *International Review of the Red Cross*, Vol. 98, No. 2, 2016, p. 500.

³⁵ UNHCR Executive Committee, *Problems Related to the Rescue of Asylum Seekers in Distress at Sea*, 1981, para. 61.

³⁶ Barbara Miltner, *Op. Cit.*, p. 79.

³⁷ UNHCR Executive Committee, *32 Interception of Asylum Seekers and Refugees: The International Framework and Recommendations for a Comprehensive Approach*, EC/50/SC/CRP.17, June 9, 2000, Para. 10,

³⁸ UNHCR Executive Committee, *Conclusion on Protection Safeguards in Interception Measures No. 97 (LIV)*, October 10, 2003.

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- persons who have commenced their journey; or*
- iii. *Assert control of vessels where there are reasonable grounds to believe the vessel is transporting persons contrary to international or national maritime law.”*

While marine interceptions tend to occur in a state's territorial waters, current practice shows that high seas interceptions are more favourable, considering that states are moving to take advantage of the legal gap in interception practice beyond their jurisdiction.³⁹ Based on UNHCR's proposed definitions, interception constitutes extraterritorial practice implemented by a state to prevent entry to its territory by undocumented persons. Thus, interception is categorized in two natures, which are administrative interception and physical interception.⁴⁰ Administrative interception covers a broad range of activities, including implementation of visa requirements, carrier sanctions, deflection, the posting of immigration officials in other countries' transit points, and determination of international zones.⁴¹ In contrast, physical interception consists of the prevention of ships entering a state's territorial waters, and could encompass acts of boarding, inspecting, seizing, and/or destroying the ships.⁴²

The UNHCR Executive Committee has attempted to distinguish the term interception and rescue. When vessels respond to persons in distress at sea, they are not considered intercepting.⁴³ This is based on the humanitarian character of rescue, rather than subjecting to the objectives of migration control policy. Nevertheless, an inadequate

distinction remains between rescue and interception activities. Protection gaps are also an issue in maritime interception, considering that there is a lack of uniform procedural standards in regards to governing intercepted persons. Until such provisions are adopted, identifying refugees and preventing *refoulement* remains a challenge.

In the MV Tampa case, Australia's conduct in stopping MV Tampa from entering their territorial waters fall into the category of interception. This is because they aimed to stop the movement of people not having the required documents to enter their borders. By boarding the intercepted vessel and refusing it of entrance, they have enforced administrative and physical interceptions. They applied 'deflection', by moving the asylum seekers to Nauru and New Zealand.⁴⁴ Those two countries are known as the 'third country of settlement', considering that the asylum seekers rescued by MV Tampa were later processed in those countries which are not their original destination. As for *Hirsi Jamaa*, Italy's procedure of interception was to board the intercepted vessel considering that they were sailing without a state flag. Although their action was rightful, they still violated international obligation by not identifying the identity of the passengers intercepted and instructed the Libyan authorities to return the asylum seekers back to Libya.

By the time this study concluded, there are no international instruments governing disembarkation within the interception issue. However, the international community and also UNHCR have relentlessly continued to initiate efforts in addressing and improving refugee protection at sea.

³⁹ Barbara Miltner, *Op. Cit.*, p. 81.

⁴⁰ Stephen Legomsky and Cristina M. Rodriguez, *Immigration and 40 Refugee Law and Policy Fifth Edition*, New York: Foundation Press, 2005, p. 1105.

⁴¹ Barbara Miltner, *Op. Cit.*, p. 84.

⁴² *Ibid.*

⁴³ UNHCR Executive Committee, *Op. Cit.*, para. 25.

⁴⁴ Mary Crock, "In the Wake of the Tampa: Conflicting Visions of International Refugee Law in the Management of Refugee Flows", *Pacific Rim Law & Policy Journal Association*, Vol. 12 No. 1, January 2003, p. 69.

D. REFUGEES, ASYLUM SEEKERS, AND THE PRINCIPLE OF NON-REFOULEMENT IN INTERNATIONAL LAW

Owing to the fact that interception does not always occur within a state's territorial waters, the intercepting state is not undoubtedly obliged to be the state that provides protection towards passengers of the intercepted vessel. However, they must see that those who are intercepted receive proper protection and fair treatment by the territorial state. International treaties such as the Refugee Convention 1951, SAR Convention 1974, and SOLAS Convention 1976 make sure that their contracting states are bound to those obligations. A refugee is entitled to the right of international protection. There are 4 elements that constitutes a refugee, which are:⁴⁵

1. A person who has a well-founded fear of being persecuted;
2. The persecution is based on the reasons of race, religion, nationality, membership of a particular social group or political opinion;
3. A person who is outside the country of his nationality due to said persecution; and
4. Is unable or unwilling to return due to the fear of being persecuted.

As for asylum seekers, they are generally persons who cross country borders in order to seek protection, but have not applied for refugee status or protection as stipulated in the Refugee Convention.⁴⁶ Therefore, they are not acknowledged yet as refugees. Asylum seekers will receive protection entitled to refugees once a country's immigration authorities have issued their refugee status. Although not all asylum

seekers are recognized as refugees, refugees were initially asylum seekers.

The Refugee Convention 1951 recognizes the principle of *non-refoulement*. The English translation of *non-refoulement* ranges from "the effort of not turning back" to "effort not to expel or return".⁴⁷ The principle is a reflection of the international community's commitment to fulfill international protection to those who need it, to be able to seek asylum from the act of persecution, which was stated in Article 14(1) of the Universal Declaration of Human Rights 1948. It was later adopted in Article 33(1) Refugee Convention 1951, which reads:

- "1. No Contracting State shall expel or return ("refouler") 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.*
- 2. The benefit of the present provision may not, however, be claimed by a refugee whom there are reasonable grounds for regarding as a danger to the security of the country in which he is, or who, having been convicted by a final judgement of a particularly serious crime, constitutes a danger to the community of that country."*

Several issues were raised in regards to the applicability of the principle. Intercepting countries have argued that the principle does not apply for countries who are not parties to the Convention, and that it does not apply in a '*res communis*' area of the sea. While it is a

⁴⁵ Article 1(A)(2) Convention Relating to the Status of Refugee 1951.

⁴⁶ UNHCR, UNHCR Protection Training Manual for European border and Entry Officials, UNHCR Bureau for Europe, Session 3 Manual, Belgium, 1 April 2011, p. 4.

⁴⁷ James C. Hathaway, *The Rights of Refugees Under International Law*, New York: Cambridge University Press, 2005, p. 316.

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well-known nature that a treaty should only be binding their state parties, the same treatment does not apply to the *non-refoulement* principle. The 1967 Protocol to the 1951 Refugee Convention removes the geographical and time limitations that normally restrict application of the Convention to persons who became refugees because of events occurring in Europe before 1 January 1951.⁴⁸

While it is argued that the prohibition of *refoulement* does not apply outside a country's territory, the international law does not seem to agree. It is embedded in the refugee and human rights law, international treaties, doctrines, and customary international law.⁴⁹ The prohibition of refugee expulsion is of a special nature. This is supported by Article 42(1) the 1951 Convention that excludes Article 33 from the act of reservation. The *non-refoulement* principle has been acknowledged as a customary international law norm based on the consistent practice and recognition from various countries.⁵⁰ The obligation that surfaced from the principle is a peremptory norm of the international law, also known as *jus cogens* and is the core part of the public international community's public order. *Jus cogens* is considered binding to all countries regardless of the existence of consent from countries. It is acknowledged in the formal recognition of refugee status and other forms of refugee protection, and it applies in actions taken by states within their land and marine borders.⁵¹ Thus, the prohibition of expulsion

stated in Article 33 of the 1951 Convention is deemed as a non-derogable obligation that describes the humanitarian foundation of the convention. Therefore, the principle of *non-refoulement* is considered attributable to the state beyond their borders.

The *non-refoulement* obligation is also found in other international legal instruments such as Convention Against Torture and many regional treaties. Article 3(1) of the Convention states that non state party 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. There are no extraterritorial nature in the article, but Article 2 requires states to take all possible measures in preventing acts of torture and applies it in any territory under a state's jurisdiction. The Committee Against Torture later emphasized that the provision extends to rights under CAT in regards to all persons under the effective control of its authorities. Thus, the *non-refoulement* nature of Article 3 should be assumed as having extraterritorial effect.⁵²

Several courts and international human rights mechanisms have interpreted the *non-refoulement* obligation to apply to a wide range of serious human rights violations, including torture, and other cruel, inhuman or degrading treatment, flagrant denial of the right to a fair trial⁵³, risks of violations to the rights to life⁵⁴, integrity and/or freedom of the person⁵⁵, serious forms of sexual and gender-

⁴⁸ UNHCR, The 1951 Convention relating to the Status of Refugees and its 1967 Protocol, August 2001, <https://www.unhcr.org/3bbdb0954.pdf>, accessed on 9th of January 2019.

⁴⁹ Guy S. Goodwin Gill, *Op. Cit.*, p. 444.

⁵⁰ UNHCR, Note on Non- 67 Refoulement (Submitted by the High Commissioner) EC/SCP/2, Executive Committee of the High Commissioner's Programme, Twenty-eighth session, August 23, 1977, <http://www.unhcr.org/excom/scip/3ae68ccd10/note-non-refoulement-submitted-high-commissioner.html>, accessed on 9th of March 2018.

⁵¹ *Ibid.*

⁵² Committee Against Torture, Conclusions and recommendations of the Committee against Torture, United States of America, U.N. Doc. CAT/C/USA/C/2, 2006.

⁵³ ECtHR, Othman (Abu Qatada) v United Kingdom, No. 8139/09, 17 January 2012, para 235, p. 258.

⁵⁴ UNHCR Human Rights Committee, General Comment No. 31, May 26, 2004, para. 12., <https://www.refworld.org/docid/478b26ae2.html>, accessed on 19th of January 2018.

⁵⁵ IACtHR, Pacheco Tineo Family v. Bolivia, Judgment of November 25, 2013, para 135

based violence⁵⁶, death penalty or death row⁵⁷, female genital mutilation⁵⁸, and prolonged solitary confinement.⁵⁹

There are two classifications to the act of *refoulement*, namely direct *refoulement* and indirect *refoulement*.⁶⁰ While *direct refoulement* occurs when a state returns a refugee to the state where they face persecution, *indirect refoulement* involves reallocation of refugees to a third country.⁶¹ In *Hirsi Jamaa*, Italy conducted a direct *refoulement* by returning the asylum seekers back to Libya. In addition to that, the passengers intercepted were subjected to inhuman and degrading treatment by not being provided the proper accommodation and food supply. While in the *MV Tampa* case, Australia applied indirect *refoulement* by moving the asylum seekers to two third countries, which are Nauru and New Zealand the intercepted asylum seekers were subjected to sexual and gender-based violence. Their children were also separated by the local authority during the processing of their refugee status.

E. STATE RESPONSIBILITY OVER THE ACT OF INTERCEPTING VESSELS

Interception, which tends to occur beyond the territory of the intercepting state, might involve several other states. It does not always correspond to international human rights and refugee law obligations of intercepting states, including the principle of *non-refoulement*.⁶² Some states even have the perspective that as long as the

interception is done by a private entity, whether it is a transport company staff or the crew of a non-state ship that has been instructed to rescue distressed passengers at sea, states cannot be deemed responsible.⁶³ Nevertheless, the understanding of state responsibility still prevails over any conduct initiated by states.

If a state is proven to have intercepted vessels carrying irregular migrants without inspecting their status as refugees through a refugee screening process, that state is said to have violated the provisions stated in the Refugee Convention 1951 along with its protocol. This means that they have done an internationally wrongful act which is attributable to the state. That act is attributable to the authorities, may it be the legislator, executor, or the judicator. As the consequence, the violating state should provide reparation to the violated party. Reparation could be a restitution, compensation, or satisfaction. However, in cases examined, compensation is deemed the most suitable form of reparation, considering that it may consist of reimbursement money for the damage which can be counted financially. That damage includes physical, mental, or material ones. Such reparation is supported in the Principle 5(d) Declaration of Principles of International Law on Compensation to Refugees 1992.

The International Law Commission's Articles on Responsibility of States for Internationally Wrongful Acts were adopted in 2001, codifying existing norms revolving countries' accountability. It constitutes the

⁵⁶ CAT, *Njamba and Balikosa v Sweden*, No. 322/2007, 3 June 2010, para 9.5.

⁵⁷ UNHCR Human Rights Committee, *v Human Rights Committee*, Judge *v Canada*, No. 829/1998, 20 October 2003, para 10.3; ECtHR, *Soering v United Kingdom*, No. 14038/88, 7 July 1989, para 111.

⁵⁸ CEDAW, General Recommendation No. 32, November 5, 2014, <https://www.refworld.org/docid/54620fb54.html>, accessed on 19th of January 2018.

⁵⁹ UNHCR Human Rights Committee, Human Rights Committee, General Comment No. 20, 1994, para 6.

⁶⁰ Douglas Guilfoyle, *Shipping Interdiction and the Law of the Sea*, United Kingdom: Cambridge University Press, 2009, p. 223.

⁶¹ *Ibid.*

⁶² Andrew Brouwer and Judith Kumin, "Interception and Asylum: When Migration Control and Human Rights Collide", *Canada's Journal on Refugees: Refuge*, Vol. 21 No. 4, 2003, p. 13.

⁶³ *Ibid.*

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highest authority for attribution of responsibility to states. Article 1 determines that: "Every internationally wrongful act of a State entails the international responsibility of the State." Article 2 proceeds to lay out the elements for a wrongful act, which are "when conduct consisting of an act or omission (a) is attributable to the State under international law; and (b) constitutes a breach of an international obligation of the State."

In regards to attribution of conduct to a state, three articles correspond to the interception context:

"Article 4(1): The conduct of any State organ shall be considered an act of that State under international law, whether the organ exercises legislative, executive, judicial or any other functions, whatever the position it holds in the organization of the State, and whatever its character as an organ of the central government or of a territorial unit of the State."

Article 5: The conduct of a person or entity which is not an organ of the State under article 4 but which is empowered by the law of that State to exercise elements of the governmental authority shall be considered an act of the State under international law, provided the person or entity is acting in that capacity in the particular instance.

Article 8: The conduct of a person or group of persons shall be considered an act of a State under international law if the person or group of persons is in fact acting on the instructions of, or under the direction or control of that State in carrying out the conduct."

In the context of extraterritorial applicability of international law, the Articles provide that state responsibility is attached to any internationally wrongful act that is suitable attributed to the state. This aligns with the opinion on the extraterritorial application of the 1951 Refugee Convention, which explains that a contracting state's own conduct and that those who act under its instruction are not limited to conduct occurring within its territory.⁶⁴ Lauterpacht and Bethlehem also point out a similar nature of the principle of non-refoulement:

"Persons will come within the jurisdiction of a State in circumstances in which they can be said to be under the effective control of that State or are affected by those acting on behalf of the State more generally, wherever this occurs. It follows that the principle of non-refoulement will apply to the conduct of State officials or those acting on behalf of the State wherever this occurs, whether beyond the national territory of the State in question, at border posts or other points of entry, in international zones, at transit points."

Based on those observations, it is safe to assume that the principle of state responsibility applies just as normally for actions taken beyond the borders of state territory, which in these cases, are done within a state's territorial waters and the high seas. When those international obligations are breached, states must cease that violation, followed by giving assurances and guarantees that such violations will not be repeated. States must also provide reparation for their damages inflicted by the violation.

⁶⁴ E. Lauterpacht and D. Bethlehem, "The Scope and Content of the Principle of Non-Refoulement" in *Refugee Protection in International Law: UNHCR's Global*

Consultations on International Protection, Cambridge: Cambridge University Press, 2003, p. 110.

In identifying the state responsible for protection of intercepted persons, UNHCR has established several guidance, such as the Conclusion on Protection Safeguards in Interception Measures.⁶⁵ The document offered that in order to identify the state responsible for protection of intercepted persons, it refers to the state within whose sovereign territory, or territorial waters, interception takes place. Therefore, the Executive Committee agreed when interception takes place in a state's territorial waters, it is assumed that the state's authority was the one conducting it. Hence, the state is responsible for the interception. They are also primarily responsible for addressing protection needs, including initial screening of the intercepted. Regrettably, the Conclusion did not discuss interceptions at high seas. However, case studies have shown that interception at high seas would trigger the responsibility of the intercepting state as the one exercising its jurisdiction over their vessel.

Considering that interception operations tend to result in financial damages such as the expenses of having to hire legal professionals, most reparations paid to refugees come in the form of compensation. The state responsible for its internationally wrongful act shall cover all the financially accessible damages.⁶⁶ At least, in the *Hirsi Jamaa* and *MV Tampa* case, each of the respondents proven to have conducted an internationally wrongful act, in these cases Italy and Australia, were both ruled to pay a substantial amount of money to the applicants or asylum seekers by the court.

F. THE ROLE OF INTERNATIONAL ORGANIZATIONS IN INTERCEPTION PRACTICE

International organizations such as IOM and UNHCR play a big helpful role in managing refugee and asylum seekers. UNHCR in coordination with the accepting countries, administers the status of immigrants looking to be verified as refugees and asylum seekers. IOM seeks that their needs are fulfilled, and occasionally provides vocational classes so that they can develop skills. IOM makes sure that the refugee and asylum seekers have proper living accommodation and facilitate returns to their home country. However, such international organizations still face challenges in doing their role due to the existing policies of the asylum countries.

1. United Nations High Commissioner for Refugees

One of the breakthroughs of international protection for refugees is the establishment of the United Nations High Commissioner for Refugees, also known as the UN Refugee Agency or UNHCR. Their main mandate was to assist displaced persons in World War II.⁶⁷ Now, UNHCR does not only protect displaced persons, but also promotes and develops international legal frameworks, strengthens asylum systems, enhances protection standards, and other activities related to the welfare of refugees.⁶⁸ UNHCR also has an administrative function in regards to the fulfilment of a refugee's rights. Article 25(1) Refugee Convention 1951 rules that:

⁶⁵ UNHCR Executive Committee, Conclusion No. 97, para. 25.

⁶⁶ Article 36 ILC Articles on the Responsibility of States for Internationally Wrongful Acts 2001.

⁶⁷ James C. Simeon, *The UNHCR and the Supervision of International Refugee Law*, New York: Cambridge University Press, 2013, p. 47.

⁶⁸ United Nations High Commissioner for Refugees, *Protecting Refugees 9 and the Role of UNHCR*, UNHCR Communications and Public Information Service: Switzerland, 2014, p. 17.

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“1. When the exercise of a right by a refugee would normally require the assistance of authorities of a foreign country to whom he cannot have recourse, the Contracting States in whose territory he is residing shall arrange that such assistance be afforded to him by their own authorities or by an international authority.”

UNHCR has the right to decide whether they are willing to be involved in an extraterritorial refugee procedure, or to assist in establishing a long-term solution regarding an asylum situation.⁶⁹ They also contribute on strategizing or developing a state's capacity in providing safe asylum.⁷⁰ It is safe to assume UNHCR's direct involvement is the manifestation of a comprehensive framework of cooperation.

2. International Organization for Migration

The International Organization for Migration or IOM is mandated to regulate the movement of refugees and people in need of immigration assistance in the form of an agreement between them and the relevant states.⁷¹ They also play a role in bridging states and migrants involved in irregular migration cases. Migration Crisis Operational Framework was developed to enhance and systemize IOM's functions in helping states and their partners in providing assistance and protection to those who need it.⁷² They provide

assistance by managing refugee shelters, which usually reside near local residencies. They also facilitate refugees and asylum seekers in fulfilling basic necessities. Refugees and asylum seekers who are looking to return to their home country can apply for IOM's Assisted Voluntary Return. IOM has also established an Information Note on International Migration Law in 2014, which covers *non-refoulement* principles, judicial remedies and suspensive effect, and specific human rights trigger points of the principal's application.⁷³

3. International Maritime Organization

International Maritime Organization or IMO is part of the United Nations' special agencies, bearing the responsibility to ensure safety and security of navigation and the prevention of marine pollution caused by ships.⁷⁴ They are the embodiment of Article (2) UNCLOS 1982, which stipulates that a competent international organization has the capability of adopting rules and international standards of navigation in respect of maritime safety, efficiency of navigation, and prevention and control of marine pollution. In other words, IMO has the duty to provide technical assistance in the form of cooperation with the government of the contracting states.

IMO was the first organization to raise awareness about the emerging issue of migrant trafficking. They adopted non-binding, temporary conclusions on trafficking activities or movements of

⁶⁹ United Nations High Commissioner for Refugees, *Rescue at Sea, Stowaways and Maritime Interception*, Selected Reference Materials, 2nd Edition, December 2011, Para. 60 – 62, p. 110.

⁷⁰ *Ibid.*

⁷¹ Article 1(1)(b) Constitution of the International Organization for Migration, October 19, 1953.

⁷² International Organization for Migration, *IOM Migration Crisis Operational Framework*, MC/2355, November 15, 2012.

⁷³ IOM, *International Migration Law Information Note*, April 2014, <https://www.iom.int/files/live/sites/iom/files/What-We-Do/docs/IML-Information-Note-on-the-Principle-of-non-refoulement.pdf>, accessed on 9th of May 2018.

⁷⁴ Article (1) Convention on the International Maritime Organization, March 6, 1948.

migrants by sea.⁷⁵ They heavily emphasized the obligation of the contracting states to be of compliance to the Safety of Life at Sea Convention, which determines that states have to take appropriate measures in collecting and inspecting information of vessels suspected to conduct unsafe practices in carrying migrants.

In regards to the MV Tampa case, the IMO adopted a resolution on “Review of safety measures and procedures for the treatment of persons rescued on the sea” which consists of recommendations to review procedures and requirements in caring for people rescued at sea.⁷⁶ Furthermore, they have adopted another resolution titled “Combating Unsafe Practices Associated with the Trafficking or Transport of Migrants by Sea” which aims to encourage governments in cooperating and enhancing their effort to reduce unsafe practices of irregular migration.⁷⁷ Seeing that these resolutions come in the form of recommendation, it does not have binding natures and therefore, are unable to be enforced in the international community.

G. CONCLUSION

States have the right to show interest in asserting control over irregular migration through interception activities, based on international treaty law such as UNCLOS 1982 and customary international law. They have the right to intercept vessels which allegedly violate their own immigration laws, as long as the interception respects their other international obligations. States who intercept vessels in their sovereign territories

have the responsibility to fulfill the needs of the passengers intercepted, through methods such as inspecting their legal identity. This is important to ensure that the persons intercepted will not face persecution. Moreover, the obligation stipulated in Article 98 UNCLOS 1982 acts as a customary law, which then proves to not only bind the contracting states but the non-contracting states as well.

On the high seas, interception is conducted by a warship of the intercepting state, if the intercepted state sails without identity or a certain country flag. In this case, the intercepting state has the main responsibility to ensure that the intercepted passengers have their rights intact and not violated, considering that exclusive jurisdiction falls to the state whose flag is sailed. Should the intercepted vessel sail with identity, but the intercepting state still suspects suspicious activity, the intercepting state should ask for consent from the intercepted vessel to inspect them. If the vessel doesn't allow it, the intercepting state cannot impose their intention unless the vessel is in distress.

Considering the *jus cogens* nature of the *non-refoulement* principle, countries who have practiced maritime interception which leads to human rights violations of sorts, are considered to have breached the ILC Articles on State Responsibility 2001. Interceptions are conducted in many ways, be it by an agent of the intercepting state, or authorities of other states under instruction from the intercepting state. The act of forbidding entry itself is a form of expulsion, and it gets worse by treating the refugees and asylum seekers inhumanely and not respecting their entitled international protection.

⁷⁵ Natalie Klein, *Maritime Security and the Law of the Sea*, New York: Oxford University Press, 2011, p. 124.

⁷⁶ IMO, Persons Rescued at Sea – Regulations and Guidance, <http://www.imo.org/en/OurWork/Facilitation/persons>

rescued/Pages/Default.aspx, accessed on 10th of April 2018.

⁷⁷ Annex 1, Interim Measures for Combating Unsafe Practices Associated with the Trafficking or Transport of Migrants by Sea, IMO Circular MSC/Circ. 896/ Rev. 1, June 12, 2001.

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Interception practices should be guided with certain considerations to ensure the legality of the action and the adequate treatment of refugees and asylum seekers as the passenger of the ships intercepted. This is supported by UNHCR Executive Committee Conclusion 97 (LIV) 2003 which provides that state authorities and agents acting on behalf of the intercepting state should apply appropriate measures when interception. The Conclusion provides the acknowledgement that intercepting states as well as their agents and authorities are bound by international law when intercepting foreign ships.

Overall, current development shows that state practice in conducting rescue operations as a means to intercept vessels is a dangerous maritime defence. Not only that the operation weakens what rescue operations truly mean, but it also invokes violations to the rights of the persons intercepted. Therefore, in conducting an interception, a state has to have a concise motive and clear reasons supported by strong legal certainty. Pursuant to the ILC Articles on State Responsibility 2001, when intercepting, states have to remain respectful towards obligations they are bound to.

REFERENCES

Books

- Goodwin-Gill, G.S. & J. McAdam, *The Refugee in International Law*, Oxford: Clarendon Express, 1996.
- Guilfoyle, Douglas, *Shipping Interdiction and the Law of the Sea*, United Kingdom: Cambridge University Press, 2009.
- Hathaway, James C., *The Rights of Refugees Under International Law*, New York: Cambridge University Press, 2005.
- Klein, Natalie, *Maritime Security and the Law of the Sea*, New York: Oxford University Press, 2011.
- Legomsky, Stephen dan Cristina M. Rodriguez, *Immigration and Refugee Law and Policy* Fifth Edition, New York: Foundation Press, 2005.
- Malanczuk, Peter, *Akehurst's Modern Introduction to International Law*, Seventh Revised Edition, New York: Routledge, 1997.
- Shaw, Malcolm N., *International Law*, New York: Cambridge University Press, 2008.
- Simeon, James C., *The UNHCR and the Supervision of International Refugee Law*, New York: Cambridge University Press, 2013.
- Tanaka, Yoshifumi, *The International Law of the Sea*, Cambridge University Press, Cambridge, 2012.
- Other documents**
- Amnesty International, Australia allegedly complicit in people smuggling, 18 June 2015, <https://www.amnesty.ca/news/australia-allegedly-complicit-people-smuggling>.
- Amnesty International, Australia-Pacific Offending Human Dignity - the Pacific Solution, 25 August 2002.
- Australian Government, Department of Home Affairs, "Operation 19 Sovereign Borders", <http://www.osb.border.gov.au/en/Operation-Sovereign-Borders>.
- Australian Minister for Immigration and Border Protection, People Smuggling Boat Returned to Sri Lanka, 17 August 2016, <http://www.minister.border.gov.au/peterdutton/Pages/people-smuggling-sri-lanka.aspx>.
- Brouwer, Andrew dan Judith Kumin, "Interception and Asylum: When Migration Control and Human Rights Collide", *Canada's Journal on Refugees: Refuge*, Vol. 21 No. 4, 2003.
- CAT, Njamba and Balikosa v Sweden, No. 322/2007, June 3, 2010.
- CEDAW, General Recommendation No. 32, November 5, 2014, <https://www.refworld.org/docid/54620fb54.html>.

- Crock, Mary, "In the Wake of the Tampa: Conflicting Visions of International Refugee Law in the Management of Refugee Flows", *Pacific Rim Law & Policy Journal Association* Vol. 12 No. 1, 2003.
- ECtHR, Othman (Abu Qatada) v United Kingdom, No. 8139/09, January 17th, 2012.
- ECtHR, Soering v United Kingdom, No. 14038/88, July 7, 1989.
- European Court of Human Rights, Hirsi Jamaa and Others v. Italy, No. 27765/904 [GC], 23 February 2012.
- Federal Court of Australia, Minister for Immigration and Multicultural Affairs & Ors v. Eric Vadarlis, 2001, <http://www.imo.org/en/OurWork/Facilitation/personsrescued/Documents/MS-C.1-Circ.896-REV1.pdf>.
- Goodwin-Gill, Guy S, "The Right to Seek Asylum: Interception at Sea and the Principle of Non-Refoulement", *Oxford University Press International Journal of Refugee Law*, Vol. 23 No. 3, 2011.
- IACtHR, Pacheco Tineo Family v. Bolivia, Judgment of November 25, 2013.
- Immigration and Asylum Law Policy, "The Italy-Libya Memorandum of Understanding: The 16 Baseline of a Policy Approach Aimed at Closing All Doors to Europe?", <http://eumigrationlawblog.eu/the-italy-libya-memorandum-of-understanding-the-baseline-of-a-policy-approach-aimed-at-closing-all-doors-to-europe/>.
- IMO, Persons Rescued at Sea – Regulations and Guidance, <http://www.imo.org/en/OurWork/Facilitation/persons-rescued/Pages/Default.aspx>.
- International Maritime Organization, Adoptions of Amendments to the International Convention on Maritime Search and Rescue, 1979, as amended, May 2004.
- International Maritime Organization, Interim Measures for Combating Unsafe Practices Associated with the Trafficking or Transport of Migrants by Sea, June 2001.
- International Organization for Migration, Assisted Voluntary Return and Reintegration, <https://www.iom.int/assisted-voluntary-return-and-reintegration>.
- IOM, International Migration Law Information Note, April 2014, <https://www.iom.int/files/live/sites/iom/files/What-We-Do/docs/IML-Information-Note-on-the-Principle-of-non-refoulement.pdf>.
- Klein, Natalie, "Assessing Australia's Push Back the Boats Policy under International Law: Legality and Accountability for Maritime Interceptions of Irregular Migrants", *Melbourne Journal of International Law* Vol. 15, 2014.
- Lauterpacht, E and D. Bethlehem, "The Scope and Content of the Principle of Non-Refoulement" in *Refugee Protection in International Law: UNHCR's Global Consultations on International Protection*, Cambridge: Cambridge University Press, 2003.
- Melander, Erik dan Magnus Oberg, "Forced Migration: The Effects of the Magnitude and Scope of Fighting", *Uppsala Peace Research Papers No. 8*, Department of Peace and Conflict Research, Uppsala University, 2009.
- Miltner, Barbara, "Irregular Maritime Migration: Refugee Protection Issues in Rescue and Interception", *Fordham International Law Journal* Vol. 30, Issue 1, 2006.
- Minister for Immigration and Multicultural Affairs & Others v. Vadarlis ("Tampa Appeal"), [2001] FCA 1329, Australia: Federal Court, 17 September 2001.
- Papanicopolulu, Irini, "The Duty to Rescue at Sea, in Peacetime and in War: A General Overview", *International Review of the Red Cross*, Vol. 98 (2), 2016.

Maritime Interception on Foreign Vessels Carrying Refugees and Asylum Seekers: A Violation of UNCLOS and Non-Refoulement Principle?

Trevisanut, Seline, "The Principle of Non-Refoulement at Sea and the Effectiveness of Asylum Protection", *Max Planck Yearbook of United Nations Law* Vol. 12, 2008.

UN GA Resolution on Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law, March 21, 2016.

UN GA Resolution on Responsibility of States for Internationally Wrongful Acts, 2001.

UN GA Resolution on Statute of the Office of the United Nations High Commissioner for Refugees, 14 December 1950, A/RES/428/V.

UN GA Resolution on the Contribution of the International Maritime Organization (IMO) to the Secretary-General's Report on Oceans and the Law of the Sea, February 2009.

UNHCR Human Rights Committee, General Comment No. 31, May 26, 2004, <https://www.refworld.org/docid/478b26ae2.html>.

UNHCR Human Rights Committee, Human Rights Committee, General Comment No. 20, 1994.

UNHCR Human Rights Committee, v Human Rights Committee, Judge v Canada, No. 829/1998, 20 October 2003.

United Nations High Commissioner for Refugees Executive Committee, Interception of Asylum Seekers and

Refugees: The International Framework and Recommendations for a Comprehensive Approach, 9 June 2000.

United Nations High Commissioner for Refugees, Conclusion on Protection Safeguards in Interception Measures No. 97 (LIV) – 2003, 10 October 2003, No. 97 (LIV) – 2003, <http://www.unhcr.org/excom/exconc/3f93b2894/conclusion-protectionsafeguards-interception-measures.html>.

Legal Documents

Charter of the United Nations, 1945.

Constitution of the International Organization for Migration, 1953.

Convention on the International Maritime Organization, 1948.

Convention Relating to the Status of Refugees, 1951.

International Convention on Maritime Search and Rescue with Annex, 1979.

International Covenant on Civil and Political Rights, 1966.

Montevideo Convention on the Rights and Duties of States, 1933.

Protocol against the Smuggling of Migrants by Land, Sea and Air, supplementing the United Nations Convention against Transnational Organized Crime, 2000.

Treaty on Friendship, Partnership and Cooperation between Italy and Libya, 30 August 2008.

United Nations Convention on the Law of the Sea, 1982.