

ASSESSING AUSTRALIA'S PUSH BACK THE BOATS POLICY UNDER INTERNATIONAL LAW: LEGALITY AND ACCOUNTABILITY FOR MARITIME INTERCEPTIONS OF IRREGULAR MIGRANTS

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Australia's Operation Sovereign Borders has significantly reduced the onshore arrival numbers of vessels carrying irregular migrants. The operational aspects of the Government's push back the boats policy has been shrouded in secrecy and prevented scrutiny, including scrutiny for Australia's compliance with international law. International law is one of the key frameworks for lawful maritime interceptions of irregular migrants. This article questions how the Australian Government may be conforming to international law standards in pushing back the boats under Operation Sovereign Borders. What legal arguments could possibly be raised to defend the policy? And how could the policy be legally challenged? It is shown that the Australian Government's legal bases are weak but potentially able to exploit a lack of short-term accountability in the international legal system.

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I INTRODUCTION

'...For those who've come across the seas
We've boundless plains to share;
With courage let us all combine
To Advance Australia Fair...'¹

The second verse of Australia's national anthem does not seem to be as well-known as the first verse. Certainly the vision of the country's attitudes towards migrants at sea enshrined in *Advance Australia Fair* is very different to the migration policy pursued by the Australian Government since the Coalition's

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¹ Peter Dodds McCormick, *Advance Australia Fair*. In 1998, Australia's then Human Rights and Equal Opportunity Commission published a report on Australia's detention policy of irregular migrants: Human Rights and Equal Opportunity Commission, 'Those Who've Come across the Seas: Detention of Unauthorised Arrivals' (Report, Human Rights and Equal Opportunity Commission, 1998).

accession to power in 2013. The numbers of vessels carrying irregular migrants² to Australia from Indonesia and other locations in Asia had increased in recent years.³ Consistent with its election promise to ‘Stop the Boats’,⁴ the Australian Government is now ‘pushing back the boats’ with the commencement of Operation Sovereign Borders in September 2013.⁵ This policy involves Australian officials preventing the passage of vessels carrying irregular migrants so they are unable to reach Australian territory. In particular, Australia has apparently moved irregular migrants into lifeboats with the intention of them returning to Indonesia.⁶ Australia also returned a vessel carrying 41 irregular migrants to Sri Lanka, the state of embarkation, after screening them on board the vessel.⁷ In a further incident, Australian officials held 157 irregular migrants who departed from India at sea for a month, before bringing them to Australia for initial processing and then transporting them to Nauru.⁸ This prolonged detention at sea triggered a challenge to the Government’s actions before the Australian High Court.⁹

² The term ‘irregular migrants’ is used in this article to encompass the trend of mixed migration whereby economic migrants, asylum seekers and refugees may all use the same routes to arrive in another country. The designation as ‘irregular’ migrants is intended to indicate that the arrival may not be in accordance with the migration laws and asylum processes of the destination country: Richard Perruchoud and Jillyanne Redpath-Cross (eds), ‘Glossary on Migration’ (Glossary, International Organization for Migration, 2011) 54.

³ In 2012, 17 202 irregular migrants arrived in Australia by boat, and 20 587 arrived by boat in 2013. By comparison, there were 2726 arrivals in 2009 and 6555 arrivals in 2010: Janet Phillips and Harriet Spinks, ‘Boat Arrivals in Australia Since 1976’ (Research Paper, Parliamentary Library, Parliament of Australia, 2013) 22; Refugee Council of Australia, *Statistics on Asylum Seekers Arriving in Australia* (February 2014) <<https://www.refugeecouncil.org.au/r/stat-as.php>>.

⁴ See Liberal Party of Australia and the Nationals, ‘The Coalition’s *Operation Sovereign Borders* Policy’ (Media Release, 26 July 2013) <<http://www.liberal.org.au/latest-news/2013/07/26/operation-sovereign-borders>>.

⁵ Government information on Operation Sovereign Borders may be accessed at: Australian Customs and Border Protection Service, Australian Government, *Operation Sovereign Borders* (2014) <<http://www.customs.gov.au/site/operation-sovereign-borders.asp>>. The operation began on 18 September 2013: Scott Morrison, Minister for Immigration and Border Protection, ‘First 100 Days of Operation Sovereign Borders Finishes with No Illegal Boat Arrivals’ (Media Release, 27 December 2013) <<http://www.minister.immi.gov.au/media/sm/2013/sm210487.htm>>.

⁶ See, eg, ‘Asylum Boat Washes up in Java after Australian “Push-Back”’, *The Australian* (online), 6 February 2014 <<http://www.theaustralian.com.au/news/asylum-boat-washes-up-in-java-after-australian-pushback/story-e6frg6n6-1226819865525>>; ‘Asylum Seekers Towed Back in Lifeboat: New Video Emerges as Defence Minister Criticises ABC’, *ABC News* (online), 18 March 2014 <<http://www.abc.net.au/news/2014-02-07/video-emerges-of-lifeboat-towback-operation/5245280>>.

⁷ See, eg, Matthew Knott, ‘Asylum Seekers Screened at Sea Returned to Sri Lanka’, *Sydney Morning Herald* (online), 7 July 2014 <<http://www.smh.com.au/federal-politics/political-news/asylum-seekers-screened-at-sea-returned-to-sri-lanka-20140707-3bh3x.html>>.

⁸ Dennis Shanahan, ‘Immigration Minister Scott Morrison Takes Hard Line: 157 Sent to Nauru’, *The Australian* (online), 2 August 2014 <<http://www.theaustralian.com.au/national-affairs/immigration/immigration-minister-scott-morrison-takes-hard-line-157-sent-to-nauru/story-fn9hmlgu-1227010765629>>.

⁹ *CPCF v Minister for Immigration and Border Protection*, Case No S169/2014 (2014) High Court of Australia <http://www.hcourt.gov.au/cases/case_s169-2014>.

Australia's current policy of pushing back the boats is not the first time Australia has pursued maritime interceptions of irregular migrants.¹⁰ The interception of the *Tampa* in 2001 triggered significant reforms to Australia's laws and processes relating to irregular migration.¹¹ The *Tampa* was a Norwegian vessel that had rescued 433 irregular migrants from an Indonesia vessel at the behest of Australian search and rescue authorities.¹² When the *Tampa* sought to enter port in distress within Australian territory, Australian Special Air Service officials boarded it and oversaw the disembarkation of those rescued in Nauru for processing. Following the *Tampa* incident, Australia pursued Operation Relex, which consisted of 'enhanced surveillance, patrol and response operations in international waters between the Indonesian archipelago and Australia'.¹³ The response operations at this time included intercepting vessels in Australia's contiguous zone and towing them to a point beyond Australia's contiguous zone or even to the edge of Indonesia's waters.¹⁴ It is unclear at this point to what extent Australia's experiences in Operation Relex, and Operation Relex II, have informed Operation Sovereign Borders.¹⁵ Certainly irregular migration by boat has continued to garner significant media and political attention in Australia since the *Tampa* incident and the ensuing changes to law and policy.

¹⁰ The United Nations High Commissioner for Refugees ('UNHCR') defines 'interception' as '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': United Nations High Commissioner for Refugees, Executive Committee of the High Commissioner's Programme, *Interception of Asylum-Seekers and Refugees: The International Framework and Recommendations for a Comprehensive Approach*, 18th mtg, UN Doc EC/50/SC/CRP.17 (9 June 2000) 2 [10] ('*Interception of Asylum-Seekers and Refugees*').

¹¹ For a critique of these laws, see, eg, Penelope Mathew, 'Australian Refugee Protection in the Wake of the *Tampa*' (2002) 96 *American Journal of International Law* 661; Mary Crock, 'In the Wake of the *Tampa*: Conflicting Visions of International Refugee Law in the Management of Refugee Flows' (2003) 12 *Pacific Rim Law & Policy Journal* 49.

¹² The facts and relevant legal principles are discussed in: Donald R Rothwell, 'The Law of the Sea and the MV *Tampa* Incident: Reconciling Maritime Principles with Coastal State Sovereignty' (2002) 13 *Public Law Review* 118; Anthony Heiser, 'Border Protection: UNCLOS and the MV *Tampa* Incident 2001' (2002) 16 *Australian and New Zealand Maritime Law Journal* 84.

¹³ John Howard and Philip Ruddock, 'Transcript of the Prime Minister the Hon John Howard MP Joint Press Conference with the Minister for Immigration the Hon Philip Ruddock MP — Sydney' (Joint Press Conference, 1 September 2001) <<http://www.sievx.com/articles/psdp/20010901HowardRuddockConf.html>>, cited in Peter D Fox, 'International Asylum and Boat People: The *Tampa* Affair and Australia's "Pacific Solution"' (2010) 25 *Maryland Journal of International Law* 356, 368 n 62. See also Senate Select Committee on a Certain Maritime Incident, Parliament of Australia, *Senate Select Committee on a Certain Maritime Incident Report* (2002) 13–14 [2.5]–[2.7].

¹⁴ Penelope Mathew, 'International Association of Refugee Law Judges Conference: Address — Legal Issues concerning Interception' (2003) 17 *Georgetown Immigration Law Journal* 221, 223, 227. Operation Relex was replaced by Operation Relex II, which continued until July 2006.

¹⁵ Aspects of Operation Relex were considered by a Senate Select Committee in 2002: Senate Select Committee on a Certain Maritime Incident, above n 13, ch 2. For a contrasting view on Operation Relex, see Australian Broadcasting Corporation, 'To Deter and Deny', *Four Corners*, 15 April 2002 (Debbie Whitmont) <<http://www.abc.net.au/4corners/stories/s531993.htm>>. For further discussion of Operation Relex, see Mary Crock, Ben Saul and Azadeh Dastyari, *Future Seekers II: Refugees and Irregular Migration in Australia* (Federation Press, 2006) 120–2.

Following the institution of Operation Sovereign Borders, the number of boat arrivals has dramatically dropped.¹⁶ Exactly how, where, when and why boats are being pushed back is unknown outside Government circles, and deliberately so. The Government has maintained that particulars of Operation Sovereign Borders cannot be fully revealed, as it would jeopardise security.¹⁷ One of the consequences of this lack of transparency is that Australia's actions cannot be readily scrutinised for their legality. While the Australian Government may be inclined to laud the success of Operation Sovereign Borders,¹⁸ the costs associated with this policy remain to be determined. These ancillary costs may be social, economic, moral and political, as well as reflecting on Australia's adherence to international law.

In a society committed to the rule of law, one must (or at least one would like to) assume that a legal assessment of pushing back the boats has been undertaken and was part of the advice proffered to the Australian Government in deciding to pursue the program. This legal advice undertaken by government lawyers would presumably be subject to legal professional privilege, and may additionally be classified as confidential under national security classifications.¹⁹ Unless the Government decides to release this information publicly, the legal basis for Australia's policy of pushing back the boats may remain obscure. Therefore, one purpose of this article is to consider what legal advice may have been given to the Australian Government to provide it with sufficient confidence to proceed with pushing back the boats. The program implicates international law as well as Australia's constitutional, administrative and, more specifically, migration laws. The focus of this article is on international law because it is the first point of reference in assessing activities at sea.²⁰ My central question is whether there are principles of international law that would support a policy of pushing back the boats?

If Australia risks violating international law, then a further question to consider is how that law may be enforced against Australia. That question focuses on Australia's accountability at law and the avenues through which Australia's actions may be challenged. It may be the case that a policy with only weak authority under international law may still be pursued because there is

¹⁶ See, eg, Simon Cullen, 'Government Claims Five-Year Record in Stopping Asylum Seekers from Reaching Australia', *ABC News* (online), 4 February 2014 <<http://www.abc.net.au/news/2014-01-24/government-says-36-day-run-stretch-without-asylum-seekers/5217866>>; Scott Morrison, Minister for Immigration and Border Protection, 'Operation Sovereign Borders Update' (Press Conference, 29 November 2013) <<http://www.minister.immi.gov.au/media/sm/2013/sm209908.htm>>.

¹⁷ See, eg, James Glenday, 'Asylum Seekers: Releasing Operation Sovereign Borders Details not in the National Interest, Scott Morrison Tells Senate Committee', *ABC News* (online), 4 February 2014 <<http://www.abc.net.au/news/2014-01-31/morrison-appears-before-senate-committee/5230836>>.

¹⁸ See, eg, Katharine Murphy, 'Coalition Trumpets Border Protection Success after No Boat Arrivals in 36 Days', *The Guardian* (online), 24 January 2014 <<http://www.theguardian.com/world/2014/jan/24/coalition-border-protection-success-no-boat-arrivals-36-days>>.

¹⁹ For information on potential classifications, see Attorney-General's Department (Cth), 'Information Security Management Guidelines: Australian Government Security Classification System' (Guidelines, Commonwealth of Australia, 2013).

²⁰ International law defines the rights and obligations that a state has over its maritime areas and is particularly relevant when assessing those rights and obligations vis-a-vis other states and vis-a-vis foreign nationals.

reduced concern as to the legal consequences that may arise. This article therefore considers, of the potential arguments, what could be the strongest legal case for Australia in supporting its policy of pushing back the boats, and assesses the potential accountability of Australia for its actions.

Part II assesses the relevant bodies of international law that apply in relation to maritime interceptions of irregular migrants: the law of the sea, search and rescue obligations, refugee law and international human rights law. It will be seen that there are arguments (of varying strength) to support the Australian Government's position, but they are dependent on certain factual conditions being satisfied. With the current lack of transparency around the details of the operations, it is impossible to make a final assessment as to whether boats are being pushed back legally. Part III considers avenues of redress against possible violations of these laws under the law of the sea and human rights regimes. The recent High Court challenge will be considered,²¹ as well as the options available under international law. It will be shown that gaps, inconsistencies and disconnections existing in international law, as well as a lack of short-term accountability, may be exploited as a matter of policy to support the legality of Australia's maritime interception policy pursued in Operation Sovereign Borders. This analysis is a clarion call for the need for reform and for a change of focus in the treatment of irregular migrants journeying by sea.

II LEGAL ASSESSMENT OF PUSHING BACK THE BOATS BY AUSTRALIA

At the outset, it may be noted that Australia is not alone among developed countries in seeking to externalise border control through the interception of irregular migrants at sea. In particular, anywhere between 100 000 and 200 000 irregular migrants cross the Mediterranean into Europe each year,²² and the United States has interdicted over 200 000 individuals over a 20 year period.²³ The practices of other destination states indicate how international law is interpreted and applied²⁴ and may also influence the development of customary international law. As such, state practice will inform the legal analysis of Australia's current policy.

²¹ *CPCF v Minister for Immigration and Border Protection*, Case No S169/2014 (2014) High Court of Australia <http://www.hcourt.gov.au/cases/case_s169-2014>.

²² Andreas Fischer-Lescano, Tillmann Löhr and Timo Tohidipur, 'Border Controls at Sea: Requirements under International Human Rights and Refugee Law' (2009) 21 *International Journal of Refugee Law* 256, 256. The Migration Policy Centre estimates an average of almost 40 000 persons per year over the period of 1998–2013, see Philippe De Bruycker, Anna Di Bartolomeo and Philippe Fargues, 'Migrants Smuggled by Sea to the EU: Facts, Laws and Policy Options' (Research Report No 2013/09, Migration Policy Centre, 2013). Common routes followed include through Libya or Tunisia to Malta or Italy; through the Maghreb to Spanish islands or directly to the coast of Spain; and from Turkey through the Dodecanese to Greece or Sicily in Italy: 'Reconciling Protection Concerns with Migration Objectives' (Background Discussion Paper, United Nations High Commissioner for Refugees, 23–24 May 2006), quoted in Efthymios Papastavridis, 'Enforcement Jurisdiction in the Mediterranean Sea: Illicit Activities and the Rule of Law on the High Seas' (2010) 25 *International Journal of Marine and Coastal Law* 569, 570.

²³ Legomsky references 209 477 persons interdicted at sea between 1982 and mid-2005: Stephen H Legomsky, 'The USA and the Caribbean Interdiction Program' (2006) 18 *International Journal of Refugee Law* 677, 684.

²⁴ *Vienna Convention on the Law of Treaties*, opened for signature 23 May 1969, 1155 UNTS 331 (entered into force 27 January 1980) art 31(3)(b) ('*Vienna Convention*').

A The Law of the Sea

The *United Nations Convention on the Law of the Sea* ('*LOSC*'), to which Australia, India, Indonesia and Sri Lanka are parties, is the primary international law instrument governing maritime activities.²⁵ This treaty sets out the rights and obligations of states over a variety of activities in different maritime zones, but does not provide the answer for every question that arises in relation to particular maritime activities.²⁶ Other treaties and agreements may be applicable to supplement the existing rules. The *LOSC* does nonetheless represent a key starting point for assessing the legality of conduct at sea under international law.

Under the law of the sea, it is critical to know where vessels are located to be able to determine what rights and obligations accrue to that vessel or to other states. Up to 12 nautical miles from the coast, coastal states have sovereignty over their territorial sea.²⁷ This sovereignty allows Australia to prescribe and enforce its laws, including its migration laws, and to intercept and arrest those vessels and individuals on board.²⁸

Foreign-flagged vessels are permitted to transit Australia's territorial sea as 'innocent passage'.²⁹ Such passage must not prejudice the peace, good order or security of the state,³⁰ and unloading persons in violation of migration laws is considered under art 19 of the *LOSC* as an activity in violation of the right of innocent passage.³¹ Australia is permitted to take 'necessary steps' in its territorial sea to prevent non-innocent passage.³² Hence, Australia could consider 'necessary steps' to include the escort or towing back of vessels that are engaged in non-innocent passage.

At present, we do not have information as to where exactly Australia has been intercepting vessels. It may seem unlikely from a policy or operational perspective that Australia is waiting for vessels carrying irregular migrants to approach so close to Australia before starting to turn them back. However, one news report has indicated that a vessel was 'nearly ready to disembark at Christmas Island when the Australian Navy sent them back'.³³ Australia's authority under the law of the sea to intercept a vessel and to take the necessary steps to prevent non-innocent passage is greatest when a vessel is so proximate to Australia's coast.

Australia may not be legally required to wait until a vessel carrying irregular migrants has reached its territorial sea. Under art 33 of the *LOSC*, Australia may

²⁵ *United Nations Convention on the Law of the Sea*, opened for signature 10 December 1982, 1833 UNTS 396 (entered into force 16 November 1994) ('*LOSC*').

²⁶ The preamble anticipates that matters not regulated by the *LOSC* 'continue to be governed by the rules and principles of general international law': *ibid* Preamble.

²⁷ *Ibid* arts 2–3.

²⁸ *Ibid* arts 27–8.

²⁹ *Ibid* art 17.

³⁰ *Ibid* art 19(1).

³¹ *Ibid* art 19(2)(g).

³² *Ibid* art 25(1). See also Richard Barnes, 'Refugee Law at Sea' (2004) 53 *International and Comparative Law Quarterly* 47, 57.

³³ George Roberts, 'Another Orange Lifeboat Carrying Asylum Seekers Arrives on Indonesia's Java Coast: Military Source', *ABC News* (online), 25 February 2014 <<http://www.abc.net.au/news/2014-02-25/another-orange-lifeboat-carrying-asylum-seeker-s-arrives-in-indo/5281484>>. Christmas Island is an Australian territory in the Indian Ocean, north-west of Australia and south of Indonesia.

still act in its contiguous zone, which extends up to 24 nautical miles from the coast, to 'prevent' infringements of customs and migration laws within its territory or territorial sea.³⁴ Australia has previously taken the view that it is allowed to 'remove vessels to the edge of the contiguous zone'.³⁵ In the contiguous zone, Australia may also 'punish' infringements of its migration laws committed in the territorial sea.³⁶ Before the High Court, Australia acknowledged intercepting the vessel with 157 irregular migrants within Australia's contiguous zone.³⁷

Competing arguments could be raised as to whether intercepting vessels in the contiguous zone is a permissible preventive measure or whether it is an impermissible punitive measure (impermissible because the vessels are stopped before they reach the territorial sea and violate Australian law). Ivan Shearer has suggested that the preventive control allowed against inward-bound vessels is 'limited to such measures as inspections and warnings, and cannot include arrest or forcible taking into port'.³⁸ Writing more recently, Donald Rothwell and Tim Stephens have observed that preventive action could include interdiction of a people smuggling vessel and removal from the contiguous zone in light of the interpretation of art 33 in state practice.³⁹ Although the point is not without controversy, there is international legal authority that would permit Australia to use necessary and proportionate force to effect law enforcement operations in both the territorial sea and the contiguous zone.⁴⁰ Australia could therefore put forward an argument that pushing back the boats in the contiguous zone is a lawful preventive measure and may be conducted with a proportionate amount of force where necessary. However, other interpretations of rights in the contiguous zone, such as Shearer's,⁴¹ would not appear to support this interpretation and undermine the international law validity of Australia's arguments in relation to this maritime zone.

If Australia is operating outside its contiguous zone then its actions must be assessed under the legal regime governing the high seas, a maritime area over

³⁴ LOSC art 33(1)(a).

³⁵ Department of Immigration and Multicultural and Indigenous Affairs, 'Principled Observance of Protection Obligations and Purposeful Action to Fight People Smuggling and Organised Crime: Australia's Commitment' (Paper presented by the Australian Delegation at UNHCR's Global Consultations on International Protection, 27–28 September 2001), cited in Mathew, 'Judges Conference: Address', above n 14, 224.

³⁶ LOSC art 33(1)(b).

³⁷ Emma Griffiths, Jessica Longbottom and Stephanie March, 'High Court Challenge: Government Admits Holding Asylum Seekers, Pledges 72 Hours' Notice on Any Deportation', *ABC News* (online), 9 July 2014 <<http://www.abc.net.au/news/2014-07-08/high-court-hearing-on-asylum-seekers/5581766>>.

³⁸ I A Shearer, 'Problems of Jurisdiction and Law Enforcement against Delinquent Vessels' (1986) 35 *International and Comparative Law Quarterly* 320, 330. See also Yoshifumi Tanaka, *The International Law of the Sea* (Cambridge University Press, 2012) 123.

³⁹ Donald R Rothwell and Tim Stephens, *The International Law of the Sea* (Hart, 2010) 80.

⁴⁰ *M/V 'Saiga' (No 2) (Saint Vincent and the Grenadines v Guinea) (Judgment)* (1999) 38 ILM 1323, [155] ('*Saiga (Judgment)*'). For discussion on use of force in law enforcement, see William C Gilmore, 'Narcotics Interdiction at Sea: UK–US Cooperation' (1989) 13 *Marine Policy* 218, 229; Patricia Jimenez Kwast, 'Maritime Law Enforcement and the Use of Force: Reflections on the Categorisation of Forcible Action at Sea in the Light of the *Guyana/Suriname Award*' (2008) 13 *Journal of Conflict & Security Law* 49, 65.

⁴¹ See above n 38.

which no state has sovereignty.⁴² Instead, states only have exclusive authority over vessels flying their flags.⁴³ This means Australia may not interfere with vessels flagged to another state and to do so would violate the freedom of navigation and exclusive authority of the flag state. The exclusive jurisdiction of the flag state over its vessels is prioritised under the law of the sea and there are only limited exceptions allowing for warships or other government vessels to interfere with foreign-flagged vessels outside their territorial sea. One such exception is the right of hot pursuit. If a vessel violates Australian law within its territorial sea, or violates a law for which Australia may act in the contiguous zone, then that vessel could be pursued outside Australian waters for the purposes of arrest. There are a number of conditions that must be met under art 111 of the *LOSC* for the lawful exercise of this right.⁴⁴

A second exception to exclusive flag state jurisdiction on the high seas is the right of visit, which allows a warship or other duly authorised government vessel to approach and potentially board and search a foreign-flagged vessel if there is a reasonable suspicion that the vessel has engaged in particular activities. Article 110 of the *LOSC* provides a basis for the right of visit in respect of piracy, slave trading, unlawful radio broadcasting, where a vessel is stateless or where questions arise as to the nationality of a particular vessel. States have concluded bilateral and multilateral treaties agreeing to the right of visit being conducted for other law enforcement activities, including drug trafficking, terrorism and, most significantly for present purposes, migrant smuggling and people trafficking.⁴⁵ The primary multilateral treaty of relevance is the *Protocol against the Smuggling of Migrants by Land, Sea and Air Supplementing the Convention against Transnational Organized Crime* ('*Migrant Smuggling Protocol*'),⁴⁶ adopted at the same time as the 2000 *Convention against Transnational Organized Crime*.⁴⁷

In relation to art 110 of the *LOSC*, Australia's approach and boarding of vessels carrying irregular migrants may be lawful if the small boats are not flagged or registered to any state.⁴⁸ Warships and other government vessels may

⁴² See generally *LOSC* art 89, pt VII. The Exclusive Economic Zone ('EEZ') overlaps with this maritime area, but as this zone primarily concerns the sovereign rights of the coastal state over natural resources, it is not relevant for the current discussion.

⁴³ *LOSC* art 92(1)

⁴⁴ These conditions are cumulative and must all be satisfied: *Saiga (Judgment)* (1999) 38 ILM 1323, [146].

⁴⁵ These agreements have been comprehensively analysed in Douglas Guilfoyle, *Shipping Interdiction and the Law of the Sea* (Cambridge University Press, 2009). Australia and Indonesia do not have a relevant bilateral treaty covering Australia's maritime interdictions in their adjacent maritime areas.

⁴⁶ *Protocol against the Smuggling of Migrants by Land, Sea and Air Supplementing the Convention against Transnational Organized Crime*, opened for signature 15 November 2000, 2241 UNTS 480 (entered into force 28 January 2004) ('*Migrant Smuggling Protocol*').

⁴⁷ *Convention against Transnational Organized Crime*, opened for signature 15 November 2000, 2225 UNTS 209 (entered into force 29 September 2003).

⁴⁸ *LOSC* art 110(1)(d). '[I]t is very often the case that the transportation of the persons in question is carried out using non-registered small vessels, without name or flag, ie stateless vessels': Efthymios Papastavridis, 'Interception of Human Beings on the High Seas: A Contemporary Analysis under International Law' (2009) 36 *Syracuse Journal of International Law & Commerce* 145, 159.

visit such stateless vessels on the high seas.⁴⁹ There is an important distinction drawn between the right of visit and the rights associated with the exercise of enforcement jurisdiction (such as detention and arrest). There must be a separate basis of authority to exercise this enforcement jurisdiction.⁵⁰ For example, art 105 of the *LOSC* provides states with authority to arrest pirate vessels. However, under art 99, if a vessel is being used to transport slaves then it is incumbent on the flag state to take enforcement action against the relevant vessel and those on board engaged in slave-trading. The *Migrant Smuggling Protocol* anticipates the visit of a suspect vessel and appropriate measures being taken only with the authority of the flag state.⁵¹

The general law on exercising enforcement jurisdiction over stateless vessels is unsettled. One argument is that because the vessel is stateless then the respect demanded for flag state rights is absent and so the enforcement jurisdiction of the visiting warship may instead be asserted.⁵² Yet it may also be argued that the individuals on board should still be afforded the protection of their state of nationality and a visiting warship should not enforce laws against them without a jurisdictional nexus.⁵³ Australia's jurisdictional nexus would be based on the protective principle, which enables states to exercise jurisdiction over actions prejudicial to the security of the state.⁵⁴ A valid query may be raised as to whether the arrival of irregular migrants by sea truly threatens the security of a state. While rights advocates would undoubtedly question such a view, social scientists have revealed the common policy trend involving the securitisation of migration.⁵⁵ Within this framework, states assert how threats may be perceived as jeopardising important national interests and warrant extraordinary measures in response.⁵⁶ Given that people smuggling is commonly perceived as a maritime security threat,⁵⁷ Australia does have grounds for relying on the protective principle. If that is accepted (and opponents of the policy would not accept it), then on either view assessing a state's authority in acting against stateless vessels Australia would be able to assert its actions are lawful.

⁴⁹ *LOSC* art 110(1)(d).

⁵⁰ This is also the position of Papastavridis: Papastavridis, 'Interception of Human Beings on the High Seas', above n 48, 161–2.

⁵¹ *Migrant Smuggling Protocol* art 8.

⁵² R R Churchill and A V Lowe, *The Law of the Sea* (Manchester University Press, 3rd ed, 1999) 214. See also Papastavridis, 'Interception of Human Beings on the High Seas', above n 48, 160.

⁵³ Churchill and Lowe, above n 52, 214.

⁵⁴ Malcolm N Shaw, *International Law* (Cambridge University Press, 6th ed, 2008) 666–8.

⁵⁵ For discussion of the securitisation of irregular migrants at sea, see Michael Pugh, 'Drowning not Waving: Boat People and Humanitarianism at Sea' (2004) 17 *Journal of Refugee Studies* 50, 52–8. See also Scott D Watson, 'Manufacturing Threats: Asylum Seekers as Threats or Refugees?' (2007) 3 *Journal of International Law and International Relations* 95, 101 (noting that the securitisation of migration has been well-established in the literature).

⁵⁶ This process has been described as securitisation, see Barry Buzan, Ole Wæver and Jaap de Wilde, *Security: A New Framework for Analysis* (Lynne Rienner, 1998) 32–3.

⁵⁷ *Oceans and the Law of the Sea: Report of the Secretary-General*, 63rd sess, UN Doc A/63/63 (10 March 2008) [89]–[97] ('*Oceans and the Law of the Sea Report*').

The position is not any clearer under the *Migrant Smuggling Protocol*, to which Australia is a party.⁵⁸ States are permitted to board and search a stateless vessel if it is suspected of people smuggling.⁵⁹ If it is established that the vessel is engaged in people smuggling, the boarding state is authorised to take ‘appropriate measures in accordance with relevant domestic and international law’.⁶⁰ The question then returns to what enforcement powers may be exercised against stateless vessels on the high seas and whether a jurisdictional link is necessary and may be established in any given situation.

If Australia is boarding stateless vessels transporting irregular migrants on the high seas and towing them to Indonesia, there is a further question as to where those vessels may be lawfully pushed back. An Australian warship may only enter Indonesia’s territorial sea if it is exercising its right of innocent passage.⁶¹ As noted above, a vessel violates the right of innocent passage if it is engaged in the unloading of persons in violation of the coastal state’s migration laws. Australian officials have acknowledged that they have inadvertently violated Indonesia’s territorial sovereignty.⁶² The full details of these incidents had not been revealed at time of writing, but it would appear that in transporting Australian-supplied lifeboats holding irregular migrants back to Indonesia, the Australian warships unlawfully entered Indonesia’s territorial sea.⁶³ To refrain from violating Indonesia’s territorial sovereignty, Australian officials would be limited to escorting or directing lifeboats or other seaworthy vessels to just outside Indonesia’s territorial sea with the hope that those on board would opt to return to Indonesia rather than putting out to sea again.

If the boats in question are in fact flagged to Indonesia (or any other state), Australia may not conduct a right of visit on the high seas under the *LOSC*. As indicated, the *Migrant Smuggling Protocol*, to which Indonesia and India are also parties,⁶⁴ does provide a basis for the exercise of the right of visit and the

⁵⁸ For the list of states parties to the *Migrant Smuggling Protocol*, see *Protocol against the Smuggling of Migrants by Land, Sea and Air, Supplementing the United Nations Convention against Transnational Organized Crime: Status* (20 October 2014) United Nations <https://treaties.un.org/pages/viewdetails.aspx?src=ind&mtdsg_no=xviii-12-b&chapter=18&lang=en>.

⁵⁹ *Migrant Smuggling Protocol* art 8(7).

⁶⁰ *Ibid*.

⁶¹ *LOSC* art 17

⁶² Australian Customs and Border Protection Service and Australian Defence Force, ‘Joint Review of Positioning of Vessels Engaged in Operation Sovereign Borders — Executive Summary’ (Report, 19 February 2014).

⁶³ See Lenore Taylor, ‘Indonesia Demands Suspension of Australia’s Asylum Operations’, *The Guardian* (online), 17 January 2014 <<http://www.theguardian.com/world/2014/jan/17/australia-apologises-patrol-boats-indonesian-waters>>. The Joint Review conducted by the Australian Customs and Border Protection Service and Australian Defence Force does not indicate whether or not the Australian naval vessels were towing back irregular migrants at the time: *ibid*. Media reports indicate that the vessels were being towed to within visible distance of Indonesian territory: Michael Bachelard, ‘Australia Turns Back Sixth Boat Carrying Asylum Seekers’, *Sydney Morning Herald* (online), 6 February 2014 <<http://www.smh.com.au/federal-politics/political-news/australia-turns-back-sixth-boat-carrying-asylum-seekers-20140206-323u7.html>>.

⁶⁴ *Protocol against the Smuggling of Migrants by Land, Sea and Air, Supplementing the United Nations Convention against Transnational Organized Crime: Status* (20 October 2014) United Nations <https://treaties.un.org/pages/viewdetails.aspx?src=ind&mtdsg_no=xviii-12-b&chapter=18&lang=en>. At the time of writing, Sri Lanka has signed, but not ratified, this agreement.

possibility of enforcement measures against foreign-flagged vessels. Article 8 sets out a mechanism for a warship with reasonable grounds to suspect that a foreign-flagged ship is engaged in illegal migrant smuggling to request the consent of the flag state and take necessary measures against that ship. In light of Indonesia's objections to Operation Sovereign Borders,⁶⁵ it appears that Australia has not sought Indonesia's consent and hence is not operating under the *Migrant Smuggling Protocol*.

As there are limited bases allowing states to intercept foreign-flagged vessels outside their territorial sea, destination states have sought consent to board vessels flagged to embarkation states through bilateral treaties. Examples of bilateral treaties permitting interdictions of irregular migrants on the high seas include those concluded by the US,⁶⁶ and by Spain with Mauritania, Senegal and Cape Verde.⁶⁷ Italy has also entered into bilateral agreements with Albania and Libya. The Albania–Italy agreement has been described as comparable to a 1981 agreement between Haiti and the US, as it allows the Italian navy to interdict vessels on the high seas, as well as conduct operations in Albania's territorial sea.⁶⁸ The Italian agreement with Libya, the *Treaty of Friendship, Partnership and Cooperation*, was supplemented by an *Additional Protocol* and provided for Italian and Libyan officials to patrol high seas as well as Libya's territorial waters and return intercepted vessels carrying irregular migrants to Libya.⁶⁹ Actions under this agreement were ultimately challenged before the European Court of Human Rights ('ECtHR') in *Hirsi Jamaa v Italy* ('*Hirsi*'), which is discussed in more detail below.⁷⁰ A bilateral agreement between Indonesia and Australia would provide considerable legal certainty for Australia's actions under the law of the sea.⁷¹

In sum, Australia can rightfully rely on the law of the sea to justify the interdiction of vessels carrying irregular migrants in its territorial sea and the removal of those vessels beyond the territorial sea. Australia may similarly take such actions within its contiguous zone if stopping and pushing back boats is understood as 'preventive' action. As discussed, there are differing views on this point. Australia is allowed to interdict stateless vessels on the high seas under art 110 of the *LOSC* and art 8 of the *Migrant Smuggling Protocol*. It may be argued that Australia does not have a jurisdictional nexus to act against stateless vessels carrying irregular migrants because these migrants do not threaten the security of

⁶⁵ See Bridie Jabour, 'Indonesian Military Chief Rejects Asylum Seeker Boat Turnback Policy', *The Guardian* (online), 10 January 2014 <<http://www.theguardian.com/world/2014/jan/10/indonesian-military-chief-rejects-boat-turnback-policy>>.

⁶⁶ See, eg, Joseph E Kramek, 'Bilateral Maritime Counter-Drug and Immigrant Interdiction Agreements: Is This the World of the Future?' (2000) 31 *University of Miami Inter-American Law Review* 121.

⁶⁷ See Papastavridis, 'Interception of Human Beings on the High Seas', above n 48, 182–3.

⁶⁸ *Ibid* 181.

⁶⁹ See *Hirsi Jamaa v Italy* [2012] II Eur Court HR 1, 112 [20] ('*Hirsi*').

⁷⁰ *Ibid*. See below nn 102–104 and accompanying text.

⁷¹ Australia concluded a regional cooperation arrangement with Indonesia in 2000 whereby irregular migrants would be prevented from leaving Indonesia by Indonesian authorities and assistance would be provided to those migrants in Indonesia at Australia's expense, see Savitri Taylor, 'Protection Elsewhere/Nowhere' (2006) 18 *International Journal of Refugee Law* 283, 295. Taylor notes 'the actual terms of the regional cooperation arrangement do not appear to cover persons returned to Indonesia as opposed to those intercepted there': at 296.

the state. Certainly irregular migrants could not be on par with an invading armed force or insurgents seeking to overthrow or destabilise the government of the day. However, the securitisation rhetoric in relation to irregular migration generally,⁷² and people smuggling specifically,⁷³ as well as the practice of destination states in intercepting irregular migrants at sea supports an interpretation of the protective principle applying in the migration context.⁷⁴ Australia would be in violation of international law if it interdicts Indonesian or Indian vessels on the high seas without the consent of those states, and Australia is further in violation of international law if it tows a vessel carrying irregular migrants into Indonesia's territorial sea or otherwise enters Indonesia's territorial sea for reasons other than the exercise of innocent passage.

While various aspects of the law of the sea could be relied upon to justify pushing back the boats in specific factual settings, the law of the sea is not the only frame of reference to be taken into account in assessing Australia's policy under international law. An alternative justification for lawful action could instead be based on rescuing vessels in distress, which is permissible pursuant to search and rescue obligations and is considered next.

B Search and Rescue Obligations

Under art 98 of the *LOSC*, Australia is bound by two key obligations. First, Australia is to proceed to the rescue of persons in distress and to render assistance to any person found at sea in danger of being lost. Secondly, Australia is to promote search and rescue services and, where circumstances require, cooperate with neighbouring states by way of mutual regional arrangements. No further details are laid out in the *LOSC* and there is scope for Australia to argue under this treaty that in stopping vessels and placing individuals on board in lifeboats, Australia has acted consistently with its duty to render assistance. In this regard, search and rescue operations are thereby distinguished from maritime interdictions, the former allowing for a wider scope of action than the latter.⁷⁵

The obligations relating to search and rescue are more fully stated in multilateral treaties to which Australia and Indonesia are parties, with operational arrangements as between Australia and Indonesia further set out in a 2004 bilateral agreement between the two countries.⁷⁶ The relevant multilateral treaties include the *International Convention for the Safety of Life at Sea* ('*SOLAS Convention*') and the *International Convention on Maritime Search and Rescue* ('*Search and Rescue Convention*'), which both set out an obligation

⁷² For discussion of securitisation, see above n 55.

⁷³ See *Oceans and the Law of the Sea Report*, UN Doc A/63/63, [89]–[97].

⁷⁴ Support for an expansive understanding could be drawn from the US relying on the protective principle in interdicting stateless vessels suspected of drug-trafficking, see Churchill and Lowe, above n 52, 139.

⁷⁵ Barbara Miltner, 'Irregular Maritime Migration: Refugee Protection Issues in Rescue and Interception' (2006) 30 *Fordham International Law Journal* 75, 92.

⁷⁶ International Maritime Organization, *Area Search and Rescue Plans: Notification of an Arrangement on Search and Rescue Regions and Co-Ordination of Search and Rescue Services in accordance with Paragraph 2.1.4 of the Annex to the International Convention on Maritime Search and Rescue, 1979, as amended*, IMO Doc SAR.6/Circ.22, (13 April 2004) annex ('*Arrangement between Australia and Indonesia for the Co-Ordination of Search and Rescue Services*').

to render assistance at sea.⁷⁷ Pursuant to these treaties, Australia is required to cooperate with other states and coordinate responses to calls of distress. A threshold question is whether a vessel carrying irregular migrants is necessarily in distress. Within the European Union, a 2010 Council Decision listed a range of factors that should be taken into account, including the seaworthiness of the vessel, the number of passengers relative to the size of the vessel and those passengers with special needs, the presence of qualified crew and the availability of navigation and other equipment.⁷⁸ If a vessel is not in fact in distress, the legality of the vessel interception should be assessed under the law of the sea, as analysed in the previous section.

If a vessel is in distress, Australia can request the assistance of nearby vessels to proceed to the site of the vessel and render assistance to those on board. Arrangements in place with Indonesia further provide the option of requesting assistance from Indonesian search and rescue services depending on the location of the vessel.⁷⁹ The *Search and Rescue Convention* defines rescue as retrieving persons in distress, seeing to their medical and other needs, and delivering them to a place of safety.⁸⁰ The status of the individuals on board as irregular migrants makes no difference to Australia's obligations in this regard.⁸¹ What matters for the legality of Operation Sovereign Borders in relation to search and rescue obligations is that Australia does have the authority to intercept a vessel that is in distress and to take steps to respond to the needs of those on board the vessel. It would be consistent with these duties to transfer the individuals to a seaworthy vessel if there was concern that the vessel in which the irregular migrants were travelling may be lost at sea.

The critical question that subsequently arises is whether placing irregular migrants on lifeboats and pushing those boats back to the outskirts of Indonesia's waters constitutes delivery to a place of safety.⁸² *Guidelines on the Treatment of Persons Rescued at Sea* ('*IMO Guidelines*'), adopted by the International Maritime Organization ('IMO') in 2004, indicate that a 'place of safety' is a

⁷⁷ *International Convention for the Safety of Life at Sea*, opened for signature 1 November 1974, 1184 UNTS 278 (entered into force 25 May 1980) annex ch V reg 10(a) ('*SOLAS Convention*'); *International Convention on Maritime Search and Rescue*, opened for signature 27 April 1979, 1405 UNTS 119 (entered into force 22 June 1985) annex para 2.1.1 ('*Search and Rescue Convention*').

⁷⁸ *Council Decision of 26 April 2010 Supplementing the Schengen Borders Code as regards the Surveillance of the Sea External Borders in the Context of Operational Cooperation Coordinated by the European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union* [2010] OJ L 111/20, annex 25 [1.3].

⁷⁹ See *Arrangement between Australia and Indonesia for the Co-Ordination of Search and Rescue Services*, IMO Doc SAR.6/Circ.22, annex arts 4–5.

⁸⁰ *Search and Rescue Convention* annex para 1.3.2.

⁸¹ *Ibid* annex para 2.1.10. The *SOLAS Convention* was also amended to this effect: Maritime Safety Committee, International Maritime Organization, *Report of the Maritime Safety Committee on Its Seventy-Eighth Session*, 78th sess, Agenda Item 26, IMO Doc MSC 78/26/Add.1 (4 June 2004) annex 3 para 3 ('*Resolution MSC.153(78) — Adoption of Amendments to the International Convention for the Safety of Life at Sea, 1979, as Amended*') ('*SOLAS Amendments*').

⁸² Barnes has contemplated this option whereby 'bringing the rescuees on board the rescue vessel or transferring them to another vessel amounts to delivery at a place of safety' but also noted that it 'is not always a satisfactory resolution of the matter': Barnes, above n 32, 52.

location where rescue operations are considered terminate; where the survivors' safety of life is no longer threatened and their basic human needs can be met; and is a location from which transportation arrangements can be made for their next or final destination.⁸³ Are these conditions met if Australia has transferred irregular migrants to a seaworthy vessel that is sufficiently provisioned for them to voyage to Indonesia? A lawyer for Australia could certainly argue to this effect as a valid interpretation of the *IMO Guidelines*. The opposing view would be that a 'place of safety' must entail safe delivery to a land location. The key difficulty with such an understanding is the absence of a requirement on any particular state to allow rescued individuals into their territory.

Australia's conduct in relation to the 41 irregular migrants from Sri Lanka and the 157 people from India may potentially be viewed as more consistent with the search and rescue obligations of the states concerned. For those coming from Sri Lanka, Australia had permission to return them to their state of embarkation. For the 157 irregular migrants from India, Australia reached an agreement with India to bring them to the Australian mainland to allow for Indian consular access and potentially return them to India.⁸⁴ In each instance, these destinations could be construed as a 'place of safety' for the purposes of search and rescue obligations. However, these instances raise important questions concerning Australia's adherence to its refugee obligations, which will be further addressed in the next Part.

It is clear that no state is subject to any duty to allow the disembarkation of irregular migrants rescued at sea within their territory. The *Search and Rescue Convention* provides that states 'should authorize, subject to applicable national laws, rules and regulations, immediate entry'.⁸⁵ There is no duty for a state to accept individuals who are rescued at sea just because it is the nearest port. Nor is there an obligation on the state that undertakes the rescue operation to receive those rescued into its territory. The 2004 amendments to the *SOLAS*⁸⁶ and *Search and Rescue Conventions*⁸⁷ only provide that the state responsible for the search and rescue region in which the vessel is rescued has the primary role for ensuring coordination and cooperation among parties to these treaties so as to alleviate the burden imposed on ship masters.⁸⁸ Australia is therefore not legally

⁸³ Maritime Safety Committee, International Maritime Organization, *Report of the Maritime Safety Committee on Its Seventy-Eight Session*, 78th sess, Agenda Item 26, IMO Doc MSC 78/26/Add.2 (4 June 2004) annex 34 para 6.12 ('*Resolution MSC.167(78) — Guidelines on the Treatment of Persons Rescued at Sea*') ('*IMO Guidelines*').

⁸⁴ Shanahan, above n 8.

⁸⁵ *Search and Rescue Convention* annex para 3.1.2 (emphasis added).

⁸⁶ *SOLAS Amendments*, IMO Doc MSC 78/26/Add.1, annex 3. These amendments entered into force on 1 July 2006.

⁸⁷ Maritime Safety Committee, International Maritime Organization, *Report of the Maritime Safety Committee on its Seventy-Eighth Session*, 78th sess, Agenda Item 26, UN Doc MSC 78/26/Add.1 (4 June 2004) annex 5 ('*Resolution MSC.155(78) — Adoption of Amendments to the International Convention on Maritime Search and Rescue, 1979, as Amended*') ('*SAR Amendments*'). As with the *SOLAS Amendments*, these amendments entered into force on 1 July 2006.

⁸⁸ See *SOLAS Amendments*, IMO Doc MSC 78/26/Add.1, annex 3 para 4. See also *SAR Amendments*, IMO Doc MSC 78/26/Add.1, annex 5 para 3.1.9. This responsibility was reinforced in 2009: see International Maritime Organization, *Principles relating to Administrative Procedures for Disembarking Persons Rescued at Sea*, IMO Doc FAL.3/Circ.194 (22 January 2009) [2.1], [2.3] ('*IMO Principles*').

required under search and rescue obligations to take individuals rescued at sea to Australian territory. It is thus arguable, albeit putting aside ethical and humanitarian considerations, that transferring the individuals to a seaworthy craft, taking them close to Indonesia and giving them sufficient provisions to reach Indonesian territory is lawful when consideration is given to existing search and rescue obligations. Return to the country of embarkation does, however, potentially violate requirements under refugee law and international human rights law, and states' actions should be judged under both bodies of law.

Establishing a duty of disembarkation on particular states seems an obvious gap to be filled in relation to search and rescue obligations. The fact that such a gap continues, despite various attempts at negotiations on this point,⁸⁹ reflects the lack of political will to accept such a position. Moreover, various instruments relating to search and rescue operations are non-binding and the continued resistance of destination states to accept specific obligations undermines the potential development of customary international law that may otherwise indicate that rescued individuals should be delivered to a land location as a place of safety. In light of the gaps and deficiencies in the international law framework for search and rescue operations, it should be expected that these obligations be read with other rules of international law. The obvious reference points are refugee law and international human rights law.

C *Refugee Law*

The central difficulty for Australia in developing a sound legal basis for pushing back the boats under international law is whether search and rescue obligations, as well as its rights and duties under the law of the sea, can be assessed in isolation from obligations arising under refugee law and international human rights law. The *IMO Guidelines*, for example, have noted the 'need to avoid disembarkation in territories where the lives and freedoms of those alleging a well-founded fear of persecution would be threatened'.⁹⁰

Any person claiming to be a refugee is entitled to have that claim assessed,⁹¹ and if the individual is found to meet the definition of a refugee, as set out in the *Convention relating to the Status of Refugees* ('*Refugee Convention*') and its *Protocol relating to the Status of Refugees* ('*Refugee Protocol*'),⁹² she or he is entitled to a range of protections. One protection is that a state must comply with a requirement of non-refoulement, an obligation not to return a refugee to a place

⁸⁹ For example, efforts at developing a regional agreement among Mediterranean states have progressed slowly. See discussion in: Jasmine Coppens, 'The Essential Role of Malta in Drafting the New Regional Agreement on Migrants at Sea in the Mediterranean Basin' (2013) 44 *Journal of Maritime Law & Commerce* 89.

⁹⁰ *IMO Guidelines*, IMO Doc MSC 78/26/Add.2, annex 34 para 6.17.

⁹¹ This right is implicit in the obligation of non-refoulement: Fischer-Lescano, Löhr and Tohidipur, above n 22, 284–5; Papastavridis, 'Interception of Human Beings on the High Seas', above n 48, 217.

⁹² *Convention relating to the Status of Refugees*, opened for signature 28 July 1951, 189 UNTS 150 (entered into force 22 April 1954) art IA(2) ('*Refugee Convention*'); *Protocol relating to the Status of Refugees*, opened for signature 31 January 1967, 606 UNTS 267 (entered into force 4 October 1967) art I(2) ('*Refugee Protocol*'). Australia is a party to both these instruments: United Nations High Commissioner for Refugees, 'States Parties to the 1951 *Convention relating to the Status of Refugees* and the 1967 *Protocol*' (Reference Document, 1 April 2011) <<http://www.unhcr.org/3b73b0d63.html>>.

of persecution.⁹³ For Australia, the most relevant question is at what point in time does this obligation arise? Is Australia required to assess an individual's request for protection the moment a vessel is intercepted, or does this obligation to determine refugee status only arise once an individual has reached the frontier? Australia's arguments before the High Court indicate that the Government does not accept that refugee obligations apply outside Australia's territorial sea,⁹⁴ and this position remains to be assessed at time of writing.

If a vessel is intercepted within the territorial sea, then as this maritime area is part of the sovereign territory of the coastal state, it is argued that the obligations set out in the *Refugee Convention* apply.⁹⁵ As states do not exercise sovereignty outside their territorial sea (as is the case in the contiguous zone), questions arise as to whether the *Refugee Convention* obligations still apply to states when operating on the high seas.

The US has telling experience in this regard. In response to continuing flows of Haitian irregular migrants throughout the 1960s and 1970s, the US concluded an exchange of notes with Haiti to interdict Haitian or US-flagged vessels.⁹⁶ Initially, the US undertook a preliminary screening of individuals to determine if they had credible refugee claims, but the sheer volume of irregular migrants led to a decision to repatriate any interdicted individuals without undertaking any refugee assessment process.⁹⁷ An Executive Order was issued in 1992 to the effect that, from the US perspective, its obligation of non-refoulement did not apply outside US land territory.⁹⁸ Australia could potentially point to this precedent as a valid interpretation of its own refugee obligations: that is, for its own decisions to return irregular migrants to the state of embarkation without assessing any claims to refugee status.

Australia could also seek to rely on similar practice among European states bordering the Mediterranean. Italy, Spain and Malta have interdicted vessels and sought to return those on board,⁹⁹ pursuant to bilateral agreements and pursuant to operations conducted by the EU border agency, known as Frontex.¹⁰⁰ These operations may be undertaken consistently with the law of the sea, and further

⁹³ There are other obligations considered implicit in the obligation of non-refoulement, including a right to temporary entry into a state and to effective legal protection.

⁹⁴ Minister for Immigration and Border Protection, 'Submissions of the Defendants', Submission in *CPCF v Minister for Immigration and Border Protection*, S169/2014, 30 September 2014, [20]–[21].

⁹⁵ Fischer-Lescano, Löhr and Tohidipur, above n 22, 262–3. In contrast, Guilfoyle considers this position to be unconvincing: Guilfoyle, above n 45, 226.

⁹⁶ *Exchange of Notes Constituting an Agreement concerning the Interdiction of and Return of Haitian Migrants*, United States of America–Haiti, 1537 UNTS 175 (signed and entered into force 23 September 1981).

⁹⁷ Guilfoyle, above n 45, 189–90.

⁹⁸ Exec Order No 12807, 57 Fed Reg 23133 (24 May 1992). See also *ibid* 190.

⁹⁹ Guilfoyle, above n 45, 209–26. See also Violeta Moreno-Lax, 'Seeking Asylum in the Mediterranean: Against a Fragmentary Reading of EU Member States' Obligations Accruing at Sea' (2011) 23 *International Journal of Refugee Law* 174, 178–85; Lori A Nessel, 'Externalized Borders and the Invisible Refugee' (2009) 40 *Columbia Human Rights Law Review* 625, 650.

¹⁰⁰ The European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union. See discussion in Violeta Moreno-Lax, 'The EU Regime on Interdiction, Search and Rescue, and Disembarkation: The Frontex Guidelines for Intervention at Sea' (2010) 25 *International Journal of Marine and Coastal Law* 621.

support the view that a state's obligations under refugee law do not apply during such interceptions.¹⁰¹

However, in the European context, the legality of maritime interception operations of irregular migrants has not been accepted in the 2012 decision of *Hirsi*, which was decided by the ECtHR.¹⁰² Eritrean and Somali asylum seekers challenged the legality of Italy's actions in bringing them on board an Italian vessel and returning them to Libya after a 10 hour journey. On the point of whether Italy was required to assess claims for asylum, Italy argued that as the irregular migrants had not made a formal claim for refugee protection, the obligation to provide such protection did not arise.¹⁰³ This position is consistent with the practice of the US in interdicting Haitians on the high seas.¹⁰⁴ The ECtHR disagreed with Italy's view, taking a much less formalistic approach and deciding that a formal claim for protection was not necessary and that the obligations towards the interdicted individuals arose based on the circumstances confronting Italy at the time. Australia is of course not formally bound by this decision, nor by the *Convention for the Protection of Human Rights and Fundamental Freedoms* ('*European Convention on Human Rights*').¹⁰⁵

The US position was challenged in *Sale v Haitian Centers Council Inc* ('*Sale*') where US actions in interdicting vessels carrying irregular migrants from Haiti and returning those migrants to Haiti without any consideration of their possible refugee status were upheld as lawful.¹⁰⁶ The US Supreme Court interpreted the *Refugee Convention* and US law to determine that the obligation of non-refoulement did not have extraterritorial force.¹⁰⁷ This authority, while not directly applicable in Australian law either, would support Australia pushing back the boats on the high seas without regard to its obligations of non-refoulement.

Yet it would be unwise of Australia not to take into account the heavy criticism of the *Sale* decision. Justice Blackmun, in the sole dissent, was highly critical of the majority's interpretation of the relevant statute and treaty provided.¹⁰⁸ The Inter-American Court of Human Rights in *Haitian Centre for Human Rights v United States* also reached a contrary conclusion to the US Supreme Court, deciding that state interdictions on the high seas brought the

¹⁰¹ Guilfoyle, writing in 2012, went so far as to suggest that the practice of destination states in the absence of protest from embarkation states was indicative of customary international law permitting interceptions without regard to refugee obligations: Guilfoyle, above n 45, 225–6.

¹⁰² *Hirsi* [2012] II Eur Court HR 1.

¹⁰³ *Hirsi* [2012] II Eur Court HR 1, 29 [96].

¹⁰⁴ Legomsky, above n 23, 682–3. Legomsky has noted that the US treatment of the Haitians stands in contrast to that afforded to Cubans, who are advised of their right to apply for asylum: at 684.

¹⁰⁵ *Convention for the Protection of Human Rights and Fundamental Freedoms*, opened for signature 4 November 1950, 213 UNTS 221 (entered into force 3 September 1953), as amended by *Protocol No 14 to the Convention for the Protection of Human Rights and Fundamental Freedoms, Amending the Control System of the Convention*, opened for signature 13 May 2004, 2677 UNTS 3 (entered into force 1 June 2010) ('*European Convention on Human Rights*').

¹⁰⁶ *Sale v Haitian Centers Council Inc*, 509 US 155, 158–9 (1993) ('*Sale*').

¹⁰⁷ See *ibid* 181–2.

¹⁰⁸ See, eg, Harry A Blackmun, 'The Supreme Court and the Law of Nations' (1994) 104 *Yale Law Journal* 39.

persons on board the interdicted vessel within the state's jurisdiction.¹⁰⁹ Commentators have also pointed to the dissonance of the decision with the language of art 33(1) of the *Refugee Convention*, which requires that states not return or expel an individual 'in any manner whatsoever'.¹¹⁰ The United Nations High Commissioner for Refugees ('UNHCR') has instead taken the position that '[t]he principle of non-refoulement does not imply any geographical limitation'.¹¹¹ The English Court of Appeal concluded that *Sale* was wrongly decided in *European Roma Rights Centre v Immigration Officer at Prague Airport* ('*Prague Airports Case*').¹¹²

As such, for Australia to establish that it is acting consistently with its refugee obligations in pushing back boats intercepted on the high seas, it would need to rely on the US interpretation of where the obligation of non-refoulement arises, maintain it is not bound by the decision of the ECtHR and otherwise rely on state practice that has involved intercepting vessels and turning away irregular migrants without regard to refugee obligations.¹¹³ Against such arguments are the negative responses to the *Sale* decision in the US and the more recent authority of the ECtHR interpreting the same refugee obligations. The *Hirsi* decision calls into doubt the legality of other maritime interception operations that have been conducted in Europe prior to 2012. A regulation has now been adopted within the European Union that seeks to implement human rights obligations for Frontex interception operations occurring in the territorial sea, the contiguous zone, on the high seas or in the course of search and rescue operations.¹¹⁴ The weight of legal authority cuts against Australia's position that it is not bound by an obligation of non-refoulement on the high seas, and particularly the requirement to assess whether an individual is entitled to protection against refoulement.

If it is accepted that the obligation of non-refoulement applies on the high seas as well as in the territorial sea, Australia could take the position that it is not in

¹⁰⁹ *The Haitian Centre for Human Rights v United States* (Inter-American Commission of Human Rights, Report No 51/96, Case No 10.675, 13 March 1997).

¹¹⁰ For discussion, see Harold Hongju Koh, 'Reflections on *Refoulement* and *Haitian Centers Council*' (1994) 35 *Harvard International Law Journal* 1; Legomsky, above n 23, 687–91. See also the concurring opinion of Judge Pinto de Albuquerque: *Hirsi* [2012] II Eur Court HR 1, 167–87.

¹¹¹ Executive Committee of the High Commissioner's Programme, *Interception of Asylum Seekers and Refugees: The International Framework and Recommendations for a Comprehensive Approach*, UN Doc EC/50/SC/CRP.17 (9 June 2000), 4 [23] (emphasis altered) ('*Interception of Asylum Seekers and Refugees*').

¹¹² *European Roma Rights Centre v Immigration Officer at Prague Airport* [2003] EWCA Civ 666 (20 May 2003) [34]. This position was not adopted by the House of Lords on appeal, however. *R (European Roma Rights Centre) v Immigration Officer at Prague Airport* [2005] 2 AC 1.

¹¹³ In *CPCF v Minister for Immigration and Border Protection*, the Government has argued that the High Court does not need to consider whether the US Supreme Court decision of *Sale* was wrong or not, but also acknowledged that 'the non-refoulement obligations arising from the *CAT* and *ICCPR* are not subject to any relevant territorial limitation': Minister for Immigration and Border Protection, 'Submissions of the Defendants', Submission in *CPCF v Minister for Immigration and Border Protection*, S169/2014, 30 September 2014, [20].

¹¹⁴ Council of the European Union, *Proposal for a Regulation of the European Parliament and of the Council Establishing Rules for the Surveillance of the External Sea Borders in the Context of Operational Cooperation Coordinated by the European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union*, EU Doc PE-CONS No/YY–2013/0016(COD).

violation of this requirement. As the irregular migrants travelling to Australia by sea are not usually Indonesian nationals, Australia could argue that even if those on board are refugees, it is not in violation of its obligation of non-refoulement because it is returning the irregular migrants to Indonesia, a safe third country, and not to the country of persecution.¹¹⁵ However, Indonesia's treatment of asylum seekers has been criticised for violating human rights standards.¹¹⁶ In *Hirsi*, the ECtHR examined the situation in Libya in this regard in determining Italy's responsibility for violating an obligation of non-refoulement.¹¹⁷ On a similar analysis, Australia would potentially be in breach of its obligations because of indirect non-refoulement, which requires that a refugee not be sent to a third country where there is a risk of them being returned to the place of persecution.¹¹⁸

For the 41 irregular migrants returned to Sri Lanka, concern has arisen that Australia violated its non-refoulement obligations because of the inadequacies of Australia's 'enhanced screening' procedure conducted at sea.¹¹⁹ The Government, on the other hand, has maintained its actions were (and are) consistent with its international law obligations.¹²⁰ The UNHCR has previously found Australia's enhanced screening processes to be in violation of refugee obligations.¹²¹ Once again, the lack of information about the incident renders a final assessment as to the legality of Australia's actions difficult. In a political climate that countenances a policy of 'pushing back the boats', it seems unlikely that Australia would have improved its enhanced screening processes, as previously assessed by the UNHCR, in a way that would be more supportive or favourable to the rights of irregular migrants.

Overall, the relevant principles of international law create somewhat of a paradox. Australia's actions under the law of the sea are on the strongest legal footing when interdictions occur in its territorial sea.¹²² But in this maritime zone, it is far more difficult to assert that refugee obligations do not apply and Australia has accepted it is so bound. If vessels are intercepted outside of Australia's territorial sea, either as law enforcement operations against people smuggling or in the context of search and rescue, Australia must argue that refugee obligations do not apply on the high seas if it is to maintain a position consistent with international law. There is state practice that supports this position. Yet such an argument runs counter to the views of the ECtHR and the

¹¹⁵ For discussion of Australia's practice in this regard, see generally Taylor, 'Protection Elsewhere/Nowhere', above n 71.

¹¹⁶ See, eg, Amnesty International, *Asylum Seekers in the Asia Pacific: A Solution* (14 October 2013) <<http://www.amnesty.org.au/refugees/comments/32990/>>; 'Poor Conditions in Indonesian Immigration Detention Centres Fuel Violence', *IRIN News*, 17 December 2013, <<http://www.irinnews.org/fr/report/99344/poor-conditions-in-indonesian-immigration-detention-centres-fuel-violence>>; Human Rights Watch, *World Report 2013: Indonesia* (2013) <<http://www.hrw.org/world-report/2013/country-chapters/indonesia>>.

¹¹⁷ See below nn 138–141 and accompanying text.

¹¹⁸ See, eg, Nessel, above n 99, 670–1.

¹¹⁹ United Nations High Commissioner for Refugees, 'Returns to Sri Lanka of Individuals Intercepted at Sea: UNHCR Statement' (Media Release, 7 July 2014).

¹²⁰ Knott, above n 7.

¹²¹ United Nations High Commissioner for Refugees, 'Returns to Sri Lanka of Individuals Intercepted at Sea: UNHCR Statement', above n 119.

¹²² See above nn 27–32 and accompanying text.

UNHCR,¹²³ and is only supported by controversial US jurisprudence. Even if Australia were to maintain that returning irregular migrants to Indonesia was permissible because it is a safe third country, the contrary view is that Indonesia's human rights record creates a situation of Australia being in violation of indirect non-refoulement. It is therefore possible for Australia to put together a legal argument to validate its actions under refugee law, but there are strong counterarguments undermining the identified potential arguments.

D International Human Rights Law

Even if specific protection obligations towards asylum seekers and refugees do not apply on the high seas, it remains the case that other international human rights obligations may still be applicable. The ECtHR in *Hirsi* addressed questions under the *European Convention on Human Rights* that reflected international human rights law found in international treaties, such as the *International Covenant on Civil and Political Rights* ('ICCPR')¹²⁴ and the *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* ('CAT').¹²⁵ Australia is a party to both treaties. In particular, the core obligation of non-refoulement is not limited to individuals who fall within the recognised definition of a refugee but applies to all persons who may be at risk of being subjected to torture or cruel, inhuman or degrading punishment if sent to a particular country.¹²⁶

Human rights bodies and courts have increasingly recognised the extraterritorial application of human rights obligations so as to avoid a situation whereby a state may violate human rights norms in activities or conduct that occurs outside its sovereign territory. The relevant test for extraterritorial application of human rights obligations is whether the state has effective control over an area or person.¹²⁷ This standard applies in relation to the ICCPR¹²⁸ and

¹²³ *Interception of Asylum Seekers and Refugees*, UN Doc EC/50/SC/CRP.17, 4 [23].

¹²⁴ *International Covenant on Civil and Political Rights*, opened for signature 19 December 1966, 999 UNTS 171 (entered into force 23 March 1976) ('ICCPR').

¹²⁵ *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, opened for signature 10 December 1984, 1465 UNTS 85 (entered into force 26 June 1987) ('CAT').

¹²⁶ Ibid art 3. The United Nations Human Rights Committee has interpreted art 7 of the ICCPR to the effect that states must not expose individuals to torture or cruel, inhuman or degrading treatment upon return to another country through refoulement: Human Rights Instruments, *Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies*, UN Doc HRI/GEN/1/Rev.1 (29 July 1994) 31 [9].

¹²⁷ This standard is also consistent with art 8 of the International Law Commission's *Draft Articles on Responsibility of States for Internationally Wrongful Acts*, which references persons 'acting on the instructions of, or under the direction or control of' the state: International Law Commission, *Report of the International Law Commission on the Work of Its Fifty-Third Session*, UN GAOR, 56th sess, Supp No 10, UN Doc A/56/10 (2001) ch IV(E) art 8 ('*Draft Articles on Responsibility of States for Internationally Wrongful Acts*') ('*Draft Articles on State Responsibility*').

¹²⁸ Human Rights Committee, *General Comment No 31: The Nature of the General Legal Obligation Imposed on States Parties to the Covenant*, 80th sess, UN Doc CCPR/C/21/Rev.1/Add.13 (26 May 2004) 4 [10]. See also Fischer-Lescano, Löhr and Tohidipur, above n 22, 272.

the *CAT*,¹²⁹ and was followed by the ECtHR in *Hirsi*.¹³⁰ The decision in *Hirsi* aligns with other judgments of the ECtHR whereby persons on board a vessel that was targeted for interdiction on the high seas were brought within the jurisdiction of the state conducting the interdiction.¹³¹

In *Hirsi*, Italy had argued that the case did not fall within the jurisdiction of the ECtHR because the obligation to save lives at sea, enshrined in the *LOSC*, 'did not in itself create a link between the State and the persons concerned establishing the State's jurisdiction'.¹³² However, the ECtHR considered that because the irregular migrants were on board Italian ships that were crewed entirely by Italian military, Italy had exercised de jure and de facto effective control in the time between the boarding and the handover to Libyan officials.¹³³ As such, the exercise of Italy's authority in these circumstances was sufficient to trigger Italy's human rights obligations and hence the jurisdiction of the Court to resolve disputes in relation to those obligations.

Australia may seek to distinguish its practice from that establishing control in *Hirsi*, but the threshold is arguably low. If Australia has in fact taken control of the vessel of irregular migrants, forced them aboard an alternative vessel and then towed them back to Indonesian waters, as journalists have reported,¹³⁴ such a scenario would seemingly be equivalent to Italy's level of control as discussed in *Hirsi*. A scenario where Australia diverts vessels or prevents their passage would perhaps avoid a conclusion that Australia has exercised control over those vessels.¹³⁵ Yet Fischer-Lescano, Löhr and Tohidipur have suggested:

¹²⁹ Committee against Torture, *Consideration of Reports Submitted by States Parties Under Article 19 of the Convention: Conclusions and Recommendations of the Committee against Torture: United States of America*, 36th sess, UN Doc CAT/C/USA/CO/2 (25 July 2006), 5 [20]. See also Fischer-Lescano, Löhr and Tohidipur, above n 22, 271. See also Committee against Torture, *Decision: Communication No 323/2007*, 41st sess, UN Doc CAT/C/41/D/323/2007 (21 November 2008) (where Spain was found in violation of its non-refoulement obligation as a consequence of its interception program as well as the extraterritorial examination of asylum claims). See also Mariagiulia Giuffrè, 'Watered-Down Rights on the High Seas: *Hirsi Jamaa and Others v Italy* (2012)' (2012) 61 *International and Comparative Law Quarterly* 728, 735–6.

¹³⁰ [2012] II Eur Court HR 1, 132 [77], 133 [81].

¹³¹ See, eg, *Medvedyev v France* [2010] III Eur Court HR 1 ('*Medvedyev*'); *Women on Waves v Portugal* (European Court of Human Rights, Second Section, Application No 31276/05, 3 February 2009); *Xhavara v Italy* (European Court of Human Rights, Fourth Section, Application No 39473/98, 11 January 2001).

¹³² [2012] II Eur Court HR 1, 129–30 [65]. Italy sought to distinguish the situation in *Hirsi* from that in *Medvedyev* as Italian authorities had provided the irregular migrants with humanitarian and medical aid, not used violence or weapons and not boarded the vessels: at 130 [66].

¹³³ *Ibid* 133 [81]. The period of 10 hours was a sufficient length of time during which the applicants were under the full authority of Italy to warrant a determination that they fell within the jurisdiction of Italy for the purposes of the *European Convention on Human Rights*.

¹³⁴ Irregular migrants have described this scenario occurring, see Australian Broadcasting Corporation, 'Passengers Describe Drama of Turning Asylum Seeker Boats Back', 7.30, 17 March 2014 (George Roberts, Mark Solomons and Lesley Robinson) <<http://www.abc.net.au/7.30/content/2014/s3965617.htm>>.

¹³⁵ Coppens considers that the *Hirsi* judgment leaves open the question as to whether diversion of a vessel would amount to effective control: Jasmine Coppens, 'The Law of the Sea and Human Rights in the *Hirsi Jamaa and Others v Italy* Judgment of the European Court of Human Rights' (2014) 30 *Ius Gentium* 179, 200, 202.

Effective control on the high seas can result when state vessels use their physical presence and strength in order to make smaller, more vulnerable or less manoeuvrable vessels move back or return to ports in the country of origin or transit country by threatening or exerting physical force.¹³⁶

On their interpretation, even blocking or diverting the passage of smaller vessels carrying irregular migrants could constitute 'effective control' for the purposes of establishing the application of human rights obligations. The standard is one that must be determined objectively, rather than by reference to the intention of the state undertaking the actions.¹³⁷ It is difficult to conceive of scenarios where the interaction of Australian authorities with the vessels of irregular migrants would not become a situation of effective control of those vessels. What has been reported to date indicates that Australian authorities are exercising considerable control over the vessels and extends as far as taking irregular migrants off their own vessels and on to Australian Government vessels. To ignore completely any vessel carrying irregular migrants would risk putting Australia in violation of search and rescue obligations, depending on whether the vessel was in distress or not.

When Australia does exercise effective control over vessels carrying irregular migrants or over the irregular migrants themselves, Australia is bound to follow international human rights obligations, which still include the obligation of non-refoulement. The ECtHR determined in *Hirsi* that Italy had violated its obligation of non-refoulement. In determining whether there was a real risk of the irregular migrants facing prohibited treatment on their return to Libya, the Court referenced facts that were known or should have been known at the time of removal.¹³⁸

Australia may respond to arguments criticising the return of irregular migrants to Indonesia by arguing that Indonesia cannot be put on par with Libya, as discussed by the ECtHR in *Hirsi*.¹³⁹ In that case, the Court commented on Libya's extremely poor treatment of irregular migrants, including its failure to separate out asylum seekers for potential protection.¹⁴⁰ The Court also had information before it regarding Libya's frequent collective expulsions of refugees and asylum seekers to their countries of origin.¹⁴¹ Indonesia, although not a party to the *Refugee Convention*, would still be subject to a customary international law obligation of non-refoulement.¹⁴² The presence of the UNHCR in Indonesia may be another factor on which Australia relies,¹⁴³ although this

¹³⁶ Fischer-Lescano, Löhr and Tohidipur, above n 22, 275–6. They go on to conclude: 'turning back, escorting back, preventing the continuation of a journey, towing back or transferring to non-European coastal regions all involve an exercise of jurisdiction requiring international human and refugee rights to be observed': at 284.

¹³⁷ *Hirsi* [2012] II Eur Court HR 1, 133 [81]. See also Irini Papanicolopulu, '*Hirsi Jamaa v Italy*' (2013) 107 *American Journal of International Law* 417, 420.

¹³⁸ *Hirsi* [2012] II Eur Court HR 1, 141 [121].

¹³⁹ In *Hirsi*, the Court stated that '[i]t is a matter for the State carrying out the return to ensure that the intermediary country offers sufficient guarantees to prevent the person concerned being removed to his country of origin without an assessment of the risks faced': *ibid* 146–7 [147].

¹⁴⁰ *Ibid* 142 [125].

¹⁴¹ *Ibid* 146 [143].

¹⁴² Mathew, 'Judges Conference: Address', above n 14, 231–2.

¹⁴³ *Ibid* 232.

aspect was dismissed in relation to Libya in *Hirsi*.¹⁴⁴ In any event, any assessment should entail considerations of the position of the individual concerned rather than broad assertions on human rights protections more generally.¹⁴⁵ On present reports, it does not appear that Australia is undertaking individual assessments of irregular migrants coming from Indonesia who are intercepted at sea as part of Operation Sovereign Borders.

Sri Lanka's human rights record also raises doubts as to whether Australia is conforming to its obligations in returning irregular migrants there. Sri Lanka is not a party to the *Refugee Convention*, although it is a party to both the *ICCPR* and the *CAT*. Australia has previously come out strongly against Sri Lanka's human rights violations, which include abductions and disappearances, as well as cases of abuse, torture or mistreatment by police and security forces.¹⁴⁶ Pushing back vessels of irregular migrants to their state of embarkation, as happened to the 41 irregular migrants discussed in this article, may also be in violation of a prohibition on collective expulsions, which has been read into the *ICCPR* and the *CAT*.¹⁴⁷ The ECtHR concluded in *Hirsi* that Italy was in violation of an obligation prohibiting collective expulsions, which is enshrined in Protocol 4 to the *European Convention on Human Rights*:

the Court considers that the removal of aliens carried out in the context of interceptions on the high seas by the authorities of a State in the exercise of their sovereign authority, the effect of which is to prevent migrants from reaching the borders of the State or even to push them back to another State, constitutes an exercise of jurisdiction within the meaning of Article 1 of the [*European Convention of Human Rights*] which engages the responsibility of the State in question under Article 4 of *Protocol No 4*.¹⁴⁸

The conclusion of the ECtHR is broad and could no doubt be used in arguments against maritime interceptions of irregular migrants by any state, not just those within the Council of Europe. Australia's strongest argument in the face of this finding is simply that it is not bound by any determination of the ECtHR. Yet this argument does not hold to the extent the *Hirsi* judgment reflects an interpretation of a human rights norm found in other international instruments, such as the *ICCPR*, the *CAT* or in customary international law.

For Australia to maintain that its push back the boats policy is consistent with international human rights law, it would need to argue that human rights obligations do not attach because Australia fails to exercise effective control over the vessels and the irregular migrants on board. Whether Australia exercises effective control is a question of fact, and Australia's refusal to provide

¹⁴⁴ [2012] II Eur Court HR 1, 143 [130], 147 [153]. See also *ibid* 241 (referencing the work of an expert panel discussing art 31 of the *Refugee Convention*).

¹⁴⁵ Mathew, 'Judges Conference: Address', above n 14, 233. For a discussion of the need to look at the personal circumstances of the applicant, see also *Hirsi*, [2012] II Eur Court HR 1, 141 [117].

¹⁴⁶ See Ben Doherty, 'Tamils to be Returned after Australia Accuses Sri Lanka of Torture', *Sydney Morning Herald* (online), 6 July 2014 <<http://www.smh.com.au/federal-politics/political-news/tamils-to-be-returned-after-australia-accuses-sri-lanka-of-torture-20140706-zsy1y.html>>.

¹⁴⁷ See, eg, Office of the High Commissioner for Human Rights, 'Expulsions of Aliens in International Human Rights Law' (Discussion Paper, Office of the High Commissioner for Human Rights, September 2006).

¹⁴⁸ [2012] II Eur Court HR 1, 155 [180].

information about its interception activities under Operation Sovereign Borders prevents a definitive assessment of the lawfulness or otherwise of Australia's conduct. When Australia does more than simply divert a vessel, as seems to have been the case with towing vessels and removing individuals into new vessels, as well as with the 41 people from Sri Lanka and the 157 people from India, it should be concluded that Australia has effective control. Once that is established, Australia is bound by international human rights law in its conduct of Operation Sovereign Borders, beyond the obligation of non-refoulement and extending to, *inter alia*, a prohibition on collective expulsion. Further factual information in relation to each individual's circumstances as well as the general conduct of Operation Sovereign Borders is needed to determine if Australia is liable for violating the human rights of the irregular migrants concerned.

III AUSTRALIA'S ACCOUNTABILITY UNDER INTERNATIONAL LAW

The analysis of Operation Sovereign Borders under international law has highlighted the legal bases on which Australia may seek to justify its action, although this assessment ultimately depends on the availability of further factual information about the steps taken. An assessment of the strengths and weaknesses of Australia's legal position should also take account of Australia's potential responsibility for its actions. There are undoubted weaknesses in Australia's legal position, but in the absence of a legal challenge Australia's policy may proceed unchecked. The main avenues for establishing Australia's responsibility under international law are discussed in this Part, and address challenges by Indonesia and by the irregular migrants subjected to Operation Sovereign Borders. At time of writing, the legal challenge relating to the 157 irregular migrants remained to be decided by the full High Court. As the Australian Government brought these irregular migrants into Australia and then transported them to Nauru for processing, the configuration of the original complaint had to be restructured and key claims now relate to non-statutory executive powers as well as interpretation of the *Maritime Powers Act 2013* (Cth) ('*Maritime Powers Act*').¹⁴⁹ The limited avenues for judicial intervention create a short-term lack of accountability. This allows the Australian Government to pursue its policy objectives even on questionable legal grounds.

A Challenge by Indonesia

Indonesia has strongly opposed Australia's pushing back the boats policy, arguing that it is not conducive to a comprehensive solution to people smuggling.¹⁵⁰ Would Indonesia pursue legal action against Australia for pushing back the boats? As Australia and Indonesia are both parties to the *LOSC*, there could potentially be recourse to the mandatory dispute settlement regime within that treaty.¹⁵¹ States parties to the *LOSC* may institute arbitration or adjudication

¹⁴⁹ Transcript of Proceedings, *CPCF v Minister for Immigration and Border Protection* [2014] HCATrans 156 (28 July 2014).

¹⁵⁰ George Roberts, 'Indonesia Says Second Asylum Seeker Boat Forced Back by Australian Navy', *ABC News* (online), 4 February 2014 <<http://www.abc.net.au/news/2014-01-07/indonesia-says-second-boat-forced-back/5189332>>.

¹⁵¹ See *LOSC* pt XV.

for disputes concerning the interpretation or application of that treaty.¹⁵² States are committed to compulsory procedures entailing binding decisions by virtue of being parties to the *LOSC* and do not need to consent separately to arbitration and adjudication, as is otherwise often the case in the international legal system. States have a choice of procedure, and for Australia and Indonesia the matter would be referred to ad hoc arbitration.¹⁵³

Some disputes are excluded from the scope of arbitration or adjudication under the *LOSC*. In the instance of a case brought by Indonesia against Australia, Australia may object to the jurisdiction of any court or tribunal over such proceedings on the basis that Indonesia would be questioning the actions of Australia's navy, and military activities may be excluded from the compulsory proceedings entailing binding decisions.¹⁵⁴ However, it is unlikely that this exception would apply when the actions of the navy are characterised as law enforcement, which is within the scope of jurisdiction,¹⁵⁵ or as search and rescue activities pursuant to the duty to render assistance under art 98.

If Indonesia instituted proceedings under the *LOSC*, consideration would have to be given to what claims Indonesia would make. The lack of information available may hamper Indonesia's efforts in formulating precise claims, even if it did have its own military intelligence available. Moreover, Australia may seek to rely on art 302 of the *LOSC*, which provides that a state may not be required to disclose information that would be 'contrary to the interests of its security'.

Indonesia may complain about the violation of its territorial sea through the tow back of vessels. Australia has admitted that its operations have inadvertently violated the territorial sovereignty of Indonesia and offered apologies for these actions.¹⁵⁶ It seems unlikely that Indonesia would achieve much more of a result if the matter were resolved through international adjudication or arbitration.¹⁵⁷

Indonesia may otherwise object that the vessels being interdicted are not in fact stateless but flagged to Indonesia and there are potentially Indonesian nationals on board over whom Australia may not exercise jurisdiction. Yet Indonesia would not have clean hands in asserting that Australia has violated the freedom of navigation and Indonesia's rights as flag state if Australia is able to show that the vessels in question were engaged in illegal migrant smuggling.¹⁵⁸ A counterclaim could potentially be raised that Indonesia had failed in its duties

¹⁵² Ibid art 286.

¹⁵³ As Indonesia has not specified a preferred forum, the default is arbitration under annex VII: ibid art 287.

¹⁵⁴ Ibid art 298. Australia has entered this reservation as required.

¹⁵⁵ Law enforcement activities in the EEZ that are related to fishing and marine scientific activities are explicitly excluded if a state so chooses under art 298. See Natalie Klein, *Dispute Settlement in the UN Convention on the Law of the Sea* (Cambridge University Press, 2005) 307–13.

¹⁵⁶ David Crowe, 'Australia Apologises to Jakarta for Territorial Waters Breach', *The Australian* (online), 17 January 2014 <<http://www.theaustralian.com.au/national-affairs/policy/australia-apologises-to-jakarta-for-territorial-waters-breach/story-fn9hm1gu-1226803863921>>.

¹⁵⁷ Indonesia may seek compensation, but the more likely remedy would be a declaration as to Australia's wrongdoing and seeking assurances of non-repetition.

¹⁵⁸ Referring to Australia's interdiction operations in 2001, Mathew commented to similar effect: 'Australia may simply be relying on Indonesia not to assert its rights in light of the involvement of people-smugglers': Mathew, 'Judges Conference: Address', above n 14, 228.

as a flag state to exercise proper jurisdiction and control over the vessel.¹⁵⁹ More to the point, would Indonesia be willing to expend the political, legal and financial capital in defending the rights of people smugglers operating from Indonesia? Australia's policy decision to push back the boats in the face of Indonesia's criticism would at least be fortified by the view that Indonesia would be unlikely to challenge the legality of Australia's operations before any international court or tribunal.

B Challenge by Irregular Migrants

Any other legal challenge to Australia's policy would most likely need to come from the irregular migrants themselves. It was irregular migrants who pursued the case against Italy to the Grand Chamber of the ECtHR. There is no comparable regional human rights framework available for irregular migrants seeking to enter Australia from Indonesia.¹⁶⁰ Instead, proceedings must be instituted before the Australian courts,¹⁶¹ and this course was adopted on behalf of the 157 irregular migrants from India. Given the lack of transparency around Operation Sovereign Borders, there are undoubted difficulties for any applicant to adduce sufficient evidence to establish a factual claim. However, questions still arise as to the Government's authority to detain, process and treat irregular migrants in the manner alleged.¹⁶² In this setting, an Australian court would potentially need to decide on the question of whether the obligation of non-refoulement applies to Australian authorities operating on the high seas.

A challenge to Australia's interdictions necessarily prompts an analysis of the *Maritime Powers Act*. Section 18 of the *Act* allows the exercise of maritime powers to ensure compliance with a 'monitoring law'. A 'monitoring law', according to the definition provided in s 8, includes the *Migration Act 1958* (Cth), which prohibits a maritime arrival without a visa.¹⁶³ Under the *Maritime Powers Act*, actions taken as 'maritime powers' include boarding, searching, seizing, detaining vessels and individuals, as well as moving and placing persons.¹⁶⁴ Maritime powers may be exercised against vessels without nationality (ie stateless vessels),¹⁶⁵ or against foreign vessels when in the contiguous zone or to ensure compliance with a monitoring law.¹⁶⁶

Under this legislation, maritime officers have the power to board vessels,¹⁶⁷ and require the person in charge to stop, manoeuvre or adopt a specified

¹⁵⁹ See *LOSC* art 94(1). Arguments concerning clean hands have not yet been accepted as a basis of inadmissibility before the International Court of Justice.

¹⁶⁰ Instead, irregular migrants may ultimately be able to pursue proceedings to United Nations human rights treaties bodies. See discussion below nn 174–179 and accompanying text.

¹⁶¹ Following the *Tampa* incident, proceedings were instituted by the Victorian Council for Civil Liberties seeking the release of the irregular migrants by filing a writ of habeas corpus: *Victorian Council for Civil Liberties Inc v Minister for Immigration and Multicultural Affairs* (2001) 110 FCR 452. The order for release was then overturned on appeal: *Ruddock v Vadarlis* (2001) 110 FCR 491.

¹⁶² In *Ruddock v Vadarlis*, the Federal Court determined that the Australian Government's actions in seizing the *Tampa* and preventing it from landing in Australia were consistent with the scope and capacity of its executive powers.

¹⁶³ *Migration Act 1958* (Cth) ss 5AA, 13–14.

¹⁶⁴ *Maritime Powers Act 2013* (Cth) s 50(a), (c)–(f).

¹⁶⁵ *Ibid* s 21(1).

¹⁶⁶ *Ibid* s 41(c)–(d).

¹⁶⁷ *Ibid* s 52(1).

course.¹⁶⁸ Authority is further granted to detain vessels so that the vessel may be taken to a port or other place considered appropriate, ‘even if it is necessary for the vessel ... to travel outside Australia to reach the port, airport or other place’.¹⁶⁹ Section 72 authorises Australian officials to detain irregular migrants at sea and potentially tow them to another location.¹⁷⁰

One of the few safeguards afforded to the individuals concerned under the legislation is found in s 74, which requires that a maritime officer not ‘place or keep a person in a place, unless the officer is satisfied, on reasonable grounds, that it is safe for the person to be in that place’. This requirement would align with the ‘place of safety’ aspect of the *Search and Rescue Convention* and arguably could be read to incorporate an obligation of non-refoulement.¹⁷¹ On this reading, the maritime officer would be required to ensure that the return of any individual did not put her or him at risk of persecution, torture or cruel, inhuman or degrading treatment. The other main articulation of human rights protections within the *Maritime Powers Act* is a broad requirement of ensuring that a detained person is ‘treated with humanity and respect for human dignity, and is not subjected to cruel, inhuman or degrading treatment’.¹⁷² This provision may buttress an interpretation that incorporates the obligation of non-refoulement, particularly when it is also recalled that statutes should be interpreted consistently with international law where possible.¹⁷³

In sum, the *Maritime Powers Act* prima facie allows for the push back of vessels from Australia’s waters, including Australia’s contiguous zone. It is then arguable that any such operation should still have regard for Australia’s human rights obligations, because of the need to ensure the safety of an individual in any particular location they may be placed. As a matter of international law, it should be recalled that a state cannot rely on its domestic law as a justification for violating its treaty obligations.¹⁷⁴

In *CPCF v Minister for Immigration and Border Protection*, the plaintiffs sought interim relief before the High Court while they were detained at sea on board an Australian vessel. At the time the case was filed, the immediate concern was that the 157 irregular migrants would be disembarked in Sri Lanka and relief was sought to restrain the Government from delivering the plaintiffs to the Sri Lankan navy. Before a single judge of the High Court, counsel for the defendants stated: ‘The Commonwealth would not and has no plans to involuntarily release any of the persons directly from our vessel to Sri Lanka’.¹⁷⁵ Once the plaintiffs were released from the vessel, the hearing before the full High Court was

¹⁶⁸ Ibid s 54(1)(a)–(b).

¹⁶⁹ Ibid s 69(1)–(3).

¹⁷⁰ Ibid s 72(1)–(5).

¹⁷¹ The Government has proposed a narrow, practical interpretation of this clause and rejected the importation of the concept of non-refoulement into s 74: Minister for Immigration and Border Protection, ‘Submissions of the Defendants’, Submission in *CPCF v Minister for Immigration and Border Protection*, S169/2014, 30 September 2014, [34].

¹⁷² Ibid s 95.

¹⁷³ See, eg, *Al-Kateb v Godwin* (2004) 219 CLR 562, 589–91 [63]–[65] (McHugh J); 627 [185] (Kirby J). Doubts on this position were expressed by Hayne J (at 642 [238]), Callinan J (at 661 [297]) and Heydon J (at 662–3 [303]).

¹⁷⁴ *Vienna Convention* art 27.

¹⁷⁵ Transcript of Proceedings, *CPCF v Minister for Immigration and Border Protection* [2014] HCATrans 153 (23 July 2014).

deferred and the questions put to the Court have focused on the powers of a maritime officer to detain persons for the purposes of taking them to a place other than Australia, and what rights those detained persons had to be heard in relation to the exercise of that power.¹⁷⁶ At time of writing, the case was still pending before the High Court.

These issues must be resolved within the Australian courts before any international avenue of review may be pursued because of the need to exhaust local remedies for any such international claim to be admissible.¹⁷⁷ Individuals may consider referring their case to the Human Rights Committee or the Committee against Torture, as Australia has accepted these mechanisms under the *ICCPR* and the *CAT*, respectively.¹⁷⁸ Under the *Optional Protocol to the International Covenant on Civil and Political Rights*, the author (claimant) files a written submission raising a complaint of a violation of the *ICCPR*, which would likely be art 7 in the current context,¹⁷⁹ and written pleadings are exchanged with Australia. The Human Rights Committee adopts 'Views' on the case, determining its admissibility and, if admissible, the merits of the complaint.

The Views reached by the committees are not formally binding but are expected to carry weight with the states concerned and would be pursued in future interactions between the Committee and state party.¹⁸⁰ The difficulties associated with pursuing a matter to the Human Rights Committee or the Committee against Torture include the time delay involved and the possibility that Australia will not heed either committee's opinion.¹⁸¹ Ultimately, in the absence of a successful challenge before the Australian High Court, the Government has scant cause for concern in pursuing a legally weak policy.

IV CONCLUSION

In examining different bodies of international law, I have indicated the different arguments that Australia could rely on to establish the legality of its push back the boats policy under international law. Both the law of the sea and international laws governing search and rescue operations do provide bases for maritime interceptions of irregular migrants, provided certain facts are established regarding the location, nationality and condition of the vessels being

¹⁷⁶ See High Court of Australia, *Short Particulars* (14 October 2014) <http://www.hcourt.gov.au/assets/cases/s169-2014/S169-2014_CPCF.pdf>. See also Human Rights Law Centre, *High Court Hearing on Lawfulness of High Seas Detention of 157 Tamils* (20 October 2014) <<http://hrlc.org.au/high-court-hearing-on-lawfulness-of-high-seas-detention-of-157-tamils/>>.

¹⁷⁷ As set out, for example, in: *Draft Articles on State Responsibility*: UN Doc A/56/10, ch IV(E) art 44.

¹⁷⁸ See *Optional Protocol to the International Covenant on Civil and Political Rights*, opened for signature 19 December 1966, 999 UNTS 171 (entered into force 23 March 1976); *CAT* art 22.

¹⁷⁹ Violations concerning obligations to provide due process and rights regarding detention could also potentially be asserted: *ICCPR* arts 9, 14.

¹⁸⁰ Ivan Shearer, 'Human Rights as a Subject of International Litigation' in Natalie Klein (ed), *Litigating International Law Disputes: Weighing the Options* (Cambridge University Press, 2014) 366–7.

¹⁸¹ See Brian Opeskin, 'Managing International Migration in Australia: Human Rights and the "Last Major Redoubt of Unfettered National Sovereignty"' (2012) 46 *International Migration Review* 551, 570–3; Phil Lynch, 'Australia's Duplicitous Approach to the UN', *The Drum* (online), 13 August 2012 <<http://www.abc.net.au/unleashed/4190968.html>>.

intercepted. It is clear, for example, that Australia may take the necessary steps to prevent the passage of a vessel in its territorial sea when that vessel is intending to unload migrants illegally. As a further example, Australia may intercept a vessel in distress outside its territorial sea and deliver those onboard to a place of safety just outside Indonesia's territorial sea, which may be on a life vessel that is provisioned to reach Indonesian territory, because Australia is not obligated to disembark rescued individuals within its own territory.

The central and overriding weakness in Australia's case is the lack of adherence to international human rights obligations: because pushing back the boats inevitably involves exercising control over the individuals concerned, at the very least assessments must be made as to whether an individual is entitled to refugee protections.

The legality of Australia's policy remains to be tested. Unlike examples of maritime interdictions by the US and European countries where agreements were usually reached with the states of embarkation for the return of irregular migrants, Indonesia has not accepted such a procedure. As Indonesia does not have a strong history of participation in international litigation, it seems more likely that diplomatic paths will be pursued. Legal proceedings before Australian courts provide an opportunity to test the language of the *Maritime Powers Act*. The High Court should ensure Australia's adherence to international human rights norms in considering whether an individual is being taken to a place of safety, as discussed above,¹⁸² rather than endorsing the Government's regressive approach that prevents the universal application of human rights. Certainly the *Hirsi* judgment could be considered as a 'landmark judgment' so as to 'serve as a guidance for other States within or outside the Council of Europe in order to re-modulate their interdiction operations along the lines and in consonance with the standards of refugee and human rights law'.¹⁸³ Whether such an opportunity is embraced in Australia remains to be seen.

As international law is just one facet of international relations, it would be unwise not to consider how potential violations of international law may have ramifications for Australia beyond the possibility of national or international litigation. In pursuing the push back the boats policy, Australia is continuing a practice that has been condemned by the ECtHR, as well as by different international bodies.¹⁸⁴ Australia's reputation for respect for human rights is thereby damaged and this may affect its relationship with other states and in the context of multilateral negotiations on related issues.¹⁸⁵

Australia has a strong history of resilience in the face of criticism against its migration policies. Perhaps one positive outcome from Australia's pursuit of its

¹⁸² See above nn 168–172 and accompanying text.

¹⁸³ Giuffré, above n 129, 729.

¹⁸⁴ 'UNHCR Warns Abbott's Boat Turn-Backs May Breach International Law', *News.com.au* (online), 12 January 2014 <<http://www.news.com.au/national/unhcr-warns-abbotts-boat-turn-backs-may-breach-international-law/story-fncynjr2-1226799851514>>.

¹⁸⁵ See, eg, Philip Wen, 'China Criticises Abbott Asylum Seeker Policy', *Sydney Morning Herald* (online), 20 February 2014 <<http://www.smh.com.au/world/china-criticises-abbott-asylum-seeker-policy-20140220-hvd73.html>>. Australia's return of the 41 irregular migrants to Sri Lanka provoked media attention across the world: see Sarah Whyte, 'Global Media Turns Focus on Return of Sri Lankan Asylum Seekers', *Sydney Morning Herald* (online), 8 July 2014 <<http://www.smh.com.au/federal-politics/political-news/global-media-turns-focus-on-return-of-sri-lankan-asylum-seekers-20140708-3bk9y.html>>.

push back the boats policy in the face of Indonesia's opposition will be reform to international agreements to articulate definitive requirements in search and rescue scenarios and to reaffirm the universal applicability of international human rights law, including at sea. Given the support other countries in the region have provided to Australia in pursuit of its migration policies, such reform cannot be readily anticipated. Clearly revisions of international law are needed to ensure that states are required to apply human rights obligations in conjunction with the rules regarding maritime interdictions and search and rescue obligations. Maritime interception operations against irregular migrants cannot be assessed for their legality when they are divorced from international human rights and refugee obligations. These bodies of international law must instead be harmonised in order to achieve the goals of both state security and human dignity.