Non-Refoulement in Southeast Asia: The Impact of NGOs on Customary International Law

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Submitted to

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In partial fulfillment of the requirements for the degree of Master of Arts

Supervisor: Professor Boldizsár Nagy

Word Count: 17, 218

Budapest, Hungary
2013

Abstract

Thousands of refugees are scattered along the Thai-Myanmar border living in makeshift refugee camps under the supervision of non-governmental organizations (NGOs). Most states in Southeast Asia are not a party to the 1951 Refugee Convention and have no regional agreements or domestic legislation concerning the rule of non-refoulement. Non-refoulement asserts that states should not return refugees to their prior residence or country of origin if they have a well-founded fear of persecution. Scholars contend that non-refoulement has been elevated to the status of customary international law. This means that states should comply with non-refoulement regardless of their international agreements or domestic legislation. Historically, customary international law has been state-centric. Non-governmental organizations have not been considered in the development of customary international law, but this is no longer the case. Using Koh's concept of the transnational legal process, this research will model how NGOs inform, advocate, and investigate to push states into a deeper internalization of non-refoulement. Two waves of refugees in Thailand will be analyzed to show the progression of NGOs, non-refoulement, and customary international law over time- the Vietnamese refugees in the 1970's -1980's and the Karen refugees in the 1980's through the present day. Results will show the influence of NGOs in customary international law, but with a narrower conceptualization of non-refoulement.

Acknowledgements

Thank you to everyone who guided, assisted, and pushed me during this thesis-writing period. I learned so much, made some mistakes, and hopefully produced something of value in the end. I would like to thank Professor Nagy for shedding light on a problem (which will be discussed at great length in a couple of pages) that I did not know how to frame within international law before I arrived at CEU. His guidance and attention to detail gave me a more precise legal perspective that I will now carry with me.

Thank you to Academic Writing and Kristin for giving me the knowledge and tools to understand what it takes to write an M.A thesis. Thank you to my grandma for taking the time to edit my thesis. Thank you to everyone and everything that helped me during my writing process-the CEU library, Dzsem, the staff at the CEU Residence Center, and lots of coffee from the CEU Bisztro.

Finally, thank you to everyone in IRES for giving me a circle of friends to exchange ideas and discuss our theses ideas *ad nauseam*. It was all worth it.

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Abbreviations

AALCO- Principles Concerning Treatment of Refugees through the Asian-African Legal Consultative Committee

CCSDPT- Committee for Coordination of Services to Displaced Persons in Thailand

CIL- customary international law

CPA- Comprehensive Plan of Action

NGOs- non-governmental organizations

RTG- The Royal Thai Government

SPDC- State Peace and Development Council

TBC- The Thai Border Consortium

UNHCR- The United Nations High Commissioner for Refugees

Introduction

No one wants to be a refugee. No one wants to forcibly move from the life that they have always known due to natural disasters, systemic violence, or political upheaval. No one wants to be an outcast in a new country where they do not understand the language, culture, or have any means to support themselves. In spite of these disadvantageous prospects, there are approximately 36.8 million displaced persons according to the United Nations High Commissioner for Refugees (UNHCR) living day-by-day throughout the world as of 2011.[1] Displaced persons, asylum seekers, and refugees travel to safer states through numerous modes of transportation- overcrowded boats, precarious vehicles, international flights, or through long journeys by foot.[2]

At some point refugees will interact with state authorities in some voluntary or involuntary capacity-either by applying for refugee status or being intercepted by state authorities in the course of their trip. Here, one of the fundamental rules of refugee law occurs- non-refoulement. Non-refoulement asserts that states should not return refugees to their prior residence or country of origin if they have a well-founded fear of persecution.[3] The 1951 Geneva Convention Relating to the Status of Refugees and the 1967 Protocol are the primary, but not exclusive, treaties that address non-refoulement.[4]

Within public international law the question arises whether this fundamental rule of refugee law in the 1951 Refugee Convention has been elevated to the status of customary

1 *UNHCR Statistical Yearbook: Trends in Displacement, Protection, and Solutions*, Statistical Yearbook (UNHCR, April, 8th), http://www.unhcr.org/516282cf5.html: 30.

2 "All in the Same Boat: The Challenges of Mixed Migration," 2013, sec. Asylum and Migration, http://www.unhcr.org/516282cf5.html.

3 *Convention Relating to the Status of Refugees*, July 28, 1951, 189 U.N.T.S 150, [hereinafter 1951 Refugee Convention], (entered into force on April 22, 1954).

4 There are many other binding conventions and documents of soft law such as: The International Covenant on Civil and Political Rights and The Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment, and the 1967 Declaration on Territorial Asylum. Regional agreements relating to non-refoulement also exist in the form of: The European Convention for the Protection of Human Rights and Fundamental Freedoms, The American Convention of Human Rights, and the African Charter on Human Rights and Peoples'.

international law (CIL).[5] If non-refoulement has emerged as customary international law, then what actors are responsible for this change? To test these questions I look at the role of non-governmental organizations (NGOs) in the process of informing, advocating, and investigating for the principle of non-refoulement as CIL. NGOs represent a growing part of international civil society where groups have the ability to influence states on behalf of refugees who cannot represent themselves.[6] Furthermore, testing the role of NGOs in Southeast Asia is a definitive measure of non-refoulement as customary international law, since they are not party to the 1951 Refugee Convention and there is little to no regional or domestic legal precedence.

Aim of the Research

The aim of this research project has two main objectives. First, there should be a distinctive vision and reconceptualization of how to structure non-refoulement as customary international law. Most judicial and scholarly writings claim that non-refoulement must be defined in a meticulous way, since the implementation and procedure of non-refoulement were not specified in the 1951 Refugee Convention.[7] Preeminent scholars within the field have polarizing views on non-refoulement's status as customary international law. Hathaway determines that "there is no customary international legal obligation enjoining states not bound by relevant conventions to honor the duty of non-refoulement in relation to refugees and others facing the prospect of serious harm."[8] On the other hand, Lauterpacht and

[5] Elihu Lauterpacht and Daniel Bethlehem: *The scope and content of the principle of* non-refoulement in: Feller, Erika, Türk, Volker, Nicholson, Frances (eds*).: Refugee Protection in International Law UNHCR's Global Consultations on International Protection* Cambridge University press, Cambridge, 2003, (paras 54-158, only): 86.

[6] Benedict Kingsbury, "First Amendment Liberalism as Global Legal Architecture: Ascriptive Groups and the Problems of the Liberal NGO Model of International Civil Society," *Chicago Journal of International Law* 3, no. 1 (2002): 183.

[7] Guy S Goodwin-Gill, *The Refugee in International Law* (Oxford; New York: Clarendon Press□; Oxford University Press, 1996): 121.

[8] James Hathaway, "Leveraging Asylum," *Texas International Law Journal* 45, no. 3 (2009): 536.

Bethlehem state, "Non-refoulement is a fundamental component of customary international law."[9]

This research will present an alternative conceptualization to the relationship between non-refoulement as customary international law through a model to clearly visualize the process. The model reflects Harold Koh's conception of the transnational legal process of why nations comply with international law, but through the lens of CIL and non-refoulement.[10] Koh lays out three different planes from an interaction with a norm, to a broader interpretation of a norm, and then ultimately internalizing the norm into a more formalized structure.[11] There are two forms of the model. One is how the Article 33 definition of non-refoulement is incorporated into Southeast Asia as customary international law. The second is the broader interpretations of non-refoulement that may one day be incorporated into customary international law. More than anything, the model of non-refoulement and customary international law illustrates a revised notion of Article 33 as the interpretation phase of CIL within a vast majority of states. Core regional agreements represent the wider interpretations of states, which expands the scope of who has a right to non-refoulement and what are the grounds for persecution. Finally, domestic laws and legislation represents the deepest, internalization of non-refoulement. The goal of presenting non-refoulement as models is to depict a more accurate representation of how non-refoulement is practiced in the real world combined with the normative aspirations of scholars. Most approaches to both CIL and non-refoulement have a western bias. Applying this theory to Southeast Asia gives a much more well-rounded, realistic view of non-refoulement that can be applicable to the newly industrialized and the industrialized states.

[9] Lauterpacht and Bethlehem, "The scope and content of the principle of non-refoulement: Opinion," 86.
[10] Harold Hongju Koh, "Why Do Nations Obey International Law?," *The Yale Law Journal* 106, no. 8 (June 1, 1997): 2599–2659, doi:10.2307/797228: 2646.
[11] Ibid,.

The second objective is to explore the increased influence of non-governmental organizations in the traditionally state-centered process of customary international law and non-refoulement. Ultimately, states still determine customary international law, but the growing role of non-governmental organizations should be realized as a central contributor to refugee and customary international law. Essentially, the question about the relationship between NGOs, states, and individual refugees is a critical subject that has grave consequences for many refugees who are looking for a better life. Accepting non-refoulement as customary international law obligates states to comply with international custom, regardless of their ratification of the conventions.

The Roadmap to Southeast Asia

The first chapter will present with the continuous debates within the law community about the effectiveness of customary international law. Customary international law "results from general and consistent practice of states followed by them from a sense of legal obligation," also known as, state practice and *opinio juris*.[12] State practice is what states actually do.[13] *Opinio juris* is the obligation and necessity that states feel to abide by the norms.[14] Conventionally, state practice and *opinio juris* was solely state-centric, but the growing source of NGOs as leaders of presenting and disseminating information has added them to the process of forming CIL.

The second chapter will begin with the theoretical underpinnings of Koh's transnational legal process and how this can be combined with an Asian incorporation of global norms through non-governmental organizations. After the theoretical framework, the debates on the definition and scope of non-refoulement will be introduced. Within non-

[12] Restatement (Revised) of Foreign Relations Law on the United States, § 135 comment d (Tent Draft No.6 1985): note 32, 102, 2.
[13] Malcolm N Shaw, *International Law* (Cambridge, UK; New York: Cambridge University Press, 2008): 76-77.
[14] Ibid, 84.

refoulement, the issues of extraterritoriality and situations of mass influx are the most contested debates. It is important to delineate a clear concept of non-refoulement because the success or failure of states to adhere to CIL depends on the context of the concept. A model of the degrees of non-refoulement as CIL will be offered. This conceptualization captures the status of non-refoulement throughout CIL and international law.

Chapter three and four are dedicated to the role of non-governmental organizations in international law and will analyze the empirical research from NGOs. The main cases will compare two types of in Thailand- The Vietnamese in the 1970's-1980's and The Karens from the 1980's-present day. Both refugees attempted to escape the violence and political insecurity from Vietnam and Myanmar, but profiling these refugees will demonstrate the process of following customary international law with the assistance of NGOs. Vietnamese refugees were either turned away at sea or placed in a temporary refugee camp to wait a resettlement procedure, while most Karen refugees reside in refugee camps along the Thai-Myranmar border. Comparing the refugee minorities in Thailand demonstrates the success and the limitations of how non-refoulement as CIL is interpreted in Southeast Asia.

If there is a correlation between state practice and *opinio juris* during NGO directed activities, then it is not due to the 1951 Refugee Convention or judicial decisions, but the realization of customary international law. Reviewing NGOs media reports, work on the ground, and advocacy campaigns to find the instances of NGOs referring to the idea of non-refoulement as a form of custom is the main mechanism for the empirical research. I hypothesize that the non-refoulement rule is customary international law, even in Southeast Asia, but in a much more limited scope than is generally agreed upon in the literature. Instead, there is a gradation of the Article 33 definition being accepted as CIL by Southeast Asia, expanded forms of non-refoulement as regional CIL in other parts of the world, then domestic laws, judicial decisions, internalize non-refoulement in certain states.

Limitations

The Influence of NGO's on CIL

The main objective of the research is not to prove that NGOs are the lone actor impacting CIL. This research attempts to show that NGOs are a growing influence within non-refoulement and customary international law that has not existed previously. Customary international law has existed much longer than non-refoulement and NGOs in the international system. From this evaluation, I hope to clarify and streamline the bond between customary international law and non-refoulement, while appraising the reality of NGOs as a factor in non-refoulement's norm development.

The Scope of Non-Refoulement

Non-refoulement, as will be discussed in greater detail in Chapter Two, is limited in that it does not encapsulate many other aspects of refugee law related to refugee conditions inside the state. The focus of my research relates exclusively to the asylum-seeker's initial ability to enter a country of first asylum. Additionally, the conditions surrounding the resettlement and voluntary repatriation processes will be mentioned, but not the primary focus of the research. This does not discount the immense importance of the resettlement process in Southeast Asia, but non-refoulement is the first step in a long procedure to being recognized.

The UNHCR

Likewise, there is no denying the immense influence of the UNHCR as progressive enforcer and advocate for refugee's rights. In this paper, the emphasis will be on the role of NGO's in customary international law and non-refoulement, but it is not a comparison or reflection of the impact of NGO's versus the UNHCR. Most of the time the UNHCR is

involved in funding and working side-by-side with NGO's, so it can be difficult to distinguish the work of the UNCHR from surrounding NGO's.[15] However, the role of the UNHCR in Thailand is limited due to restrictions in place by the Thai government. The goal here is to describe the exceptional influence of NGO's in CIL through many venues including monitoring, investigating, advocating, and informing states.[16]

[15] Roger Winter, "Assisting the World's Unprotected People: The Unique Role of Non-Governmental Agencies," *The Danish Center for Human Rights, Copenhagen* (1993): 256-257.
[16] Ibid,.

Chapter I

1. Debates and Implications of Customary International Law

Debates justifying, categorizing, and applying customary international law begin with its two fundamental components-state practice and *opinio juris*. The main debates that will be acknowledged here will identify what is composed of state practice and *opinio juris*. Customary international law has seen the inclusion of more unorthodox measures such as international agreements, non-governmental organizations, and individuals' speech acts. While critics, like Goldsmith and Posner, believe the entire process of "CIL lacks a central law maker, a centralized executive enforcer, and a centralized authoritative decision maker," [17] more scholars such as Philip Trimble say that customary international law functions at the international level and as a prominent device in domestic courts, "on the initiative of mere individuals."[18] However, most scholars concerning customary international law do not consider the role of NGO's or the possibility that the compliance to CIL is measured differently in other parts of the world. To illustrate this notion, non-conventional elements of customary international law will show how NGOs can be evaluated within CIL.

1.1 State Practice

State practice can be loosely or narrowly defined depending on whether state practice should only be defined through physical acts.[19] Hathaway claims that state practice can only be defined by the consent of a state to act and says "proponents of an exaggerated definition of state 'practice' deny the most elementary distinction between treaties and custom: custom is not just a simple matter of words wherever or whomever uttered, but it is a function of

[17] Jack L. Goldsmith and Eric A. Posner, "A Theory of Customary International Law," *The University of Chicago Law Review* 66, no. 4 (October 1, 1999): doi:10.2307/1600364, 1113.
[18] Philip Trimble, "Revisionist View of Customary International Law," *UCLA Law Review* 33 (1985): 684.
[19] Anthony D'Amato, "Trashing Customary International Law," *The American Journal of International Law* 81, no. 1 (January 1, 1987): doi:10.2307/2202136, 104.

what is happening in the real world."[20] More liberal approaches to state practice do include more than just physical acts by including statements, international agreements, and state actions within international organizations.[21] For instance, Charney asserts that international agreements can be evidence of customary international law by codifying and crystalizing existing law, or initiating the progressive development of new laws.[22] On the other hand, Byers claims that the rise of new, developing nations changes the essential function of state practice. Therefore, state practice in customary international law cannot be purely identified as the physical actions of the state.[23] He states that the power hierarchy between powerful and developing states causes a looser definition of state practice.[24] Developing states do not have the ability to full take accountability for their state practice. Consequently, developing states are more likely to work within the international community to maximize their power and legitimize their state practice.[25]

At the same time, defining state practice and measuring what constitutes as state practice can be difficult and ill conceived.[26] States do not have the ability to reflect on all forms of their practice. This accounts for many writers turning to third parties and non-governmental organizations as a source of observing state practice.[27] As Bodansky remarks, "attempting to induce the rules of customary international law directly from state practice would be a Herculean task."[28] A more subtle and realistic example relating state practice to CIL would be Bodansky's analogy to language:

[20] Hathaway, "Leveraging Asylum," 525.
[21] Andrew Guzman, "Saving Customary International Law," *Michigan Journal of International Law* (2005.): 125.
[22] Jonathan I. Charney, "International Agreements and the Development of Customary International Law," *Washington Law Review*, vol. 61 (1986): 975-979.
[23] Michael Byers, *Custom, Power and the Power of Rules: International Relations and Customary International Law [...] XD-US* (Cambridge [u.a.: Cambridge Univ. Press, 1999), 76-77.
[24] Ibid,.
[25] Ibid,.
[26] Guzman, "Saving Customary International Law," 126,
[27] Daniel Bodansky, "Customary (And Not so Customary) International Environmental Law," *Indiana Journal of Global Legal Studies* 3, no. 1 (October 1, 1995): doi:10.2307/20644611, 113.
[28] Ibid, 113.

> "Every time we speak, we apply an extremely complex set of customary rules of grammar and usage. These rules are not legislated or enforced by any centralized body…Instead they emerge and continue to evolve through the regular practice of language users. Like any type of customary rule, they need to be identified and learned if one is to participate effectively in society."[29]

Even though legal minds such as James Hathaway abhor the notion that state practice is more than what states do, this paper will reflect the conflict that arises between what states do and what states say.[30] Without a more open-minded definition, state practice would be impossible to measure accurately without finding exactly parallel events. For example, in order to establish state practice in the *Lotus Case* the French authorities needed to replicate their case being practiced by Turkey.[31] As Bederman concludes, the only possible way that France could have carried its burden was to have a documented case where a Turkish vessel had collided with a foreign ship, and that the foreign country had prosecuted a Turkish mariner.[32] Then Turkey had protested and prevailed.[33]

Additionally, many instances of adhering to CIL cannot be observed due to compliance with CIL.[34] It is necessary to consider the actors that perform state practice through international agreements, diplomatic messages, reports from international and non-governmental organizations, and accounts of events with news reports.[35] Jordan Paust contends that simply looking at states behavior does not show the genuine role non-state actors, like NGOs and individuals play in shaping state practice.[36] Similar to the idea of the transnational legal process, Paust's conclusion is that "each state, nation, group, and

[29] Daniel Bodansky, "Customary (And Not so Customary) International Environmental Law," 113.
[30] David J. Bederman, *International Law Frameworks*, 2nd ed. (New York, NY: Foundation Press Thomson/West, 2006): 17.
[31] Ibid, 20. The *Lotus Case* was brought to the Permanent Court of International Justice in 1926 in order to determine the jurisdiction of a boat collision that occurred in the high seas. A French vessel collided with a Turkish boat, causing eight Turkish deaths. The French vessel docked in Istanbul where the Turkish authorities arrested the French foreman. The French objected to Turkey taking criminal jurisdiction for the French foreman when the incident occurred on the high seas in a French vessel. The court ruled in favor of Turkey citing that there was not sufficient evidence to establish opinio juris.
[32] Ibid, 20.
[33] Ibid, 20.
[34] *Ibid*, 126-127.
[35] Ibid, 17.
[36] Jordan Paust, "Non-Actor Participation in International Law and the Pretense of Exclusion," *Virginia Journal of International Law* 54, no. 4 (2011), 1000.

individual being is a participant in both the attitudinal and behavioral aspects of dynamic customary…law."[37] Consequently, Müller argues that NGOs assist in state practice when states do not have the ability to politically or logistically act themselves.[38] Global issues, like refugee protection, can require states to use NGOs as an extension of themselves when they need or want help, but they do not have the resources or the political ability to perform.[39] A broader view of state practice reveals the work of NGOs as observers and collectors of vital, more unbiased information regarding states behavior or acting on behalf of states.[40]

1.2 Opinio Juris

The second aspect of customary international law is *opinio juris sive necessitates* simplified to, *opinio juris,* which is the psychological belief that a state feels an obligation to follow a particular custom.[41] The two main debates regarding *opinio juris* are what makes *opinio juris* and what weight does *opinio juris* have compared to state practice. It is argued that *opinio juris* is the "characterization"[42] of transforming a state's behavior into a "shared understanding of legal relevance."[43] Measuring *opinio juris* is difficult because the overarching consensus about identifying *opinio juris* is the 'you know it when you see it'[44] approach.

Many scholars give detailed accounts of *opinio juris* within court cases like the *Lotus Case,*[45] the *North Sea Continental Shelf Case,*[46] or the *Nicaragua Case,*[47] but very few

[37] Paust, "Non-Actor Participation in International Law and the Pretense of Exclusion," 1002.
[38] Till Müller, "Customary Transnational Law: Attacking the Last Resort of State Sovereignty.," *Indiana Journal of Global Legal Studies* 15, no. 1 (2008): 24.
[39] Ibid,.
[40] Steve Charnovitz, "Nongovernmental Organizations and International Law," *The American Journal of International Law* 100, no. 2 (April 1, 2006): 348–372, doi:10.2307/3651151, 352-353.
[41] Malcolm N Shaw, *International Law*, 75.
[42] A. V Lowe, *International Law* (Oxford; New York: Oxford University Press, 2007): 51.
[43] Byers, *Custom, Power and the Power of Rules*. 19.
[44] This term is derived from a statement made by Justice Potter Stewart in the Jacobellis vs. Ohio, 1964 Supreme Court case about pornography.
[45] As mentioned previously
[46] The case involved the delimitation of the continental shelf between Germany, Denmark, and the Netherlands about whether the equidistance principle was customary international law. Denmark and the Netherlands argued that Article 6 of the Geneva Convention had crystalized into CIL. The court ruled against the states

identify actual mechanisms to evaluate *opinio juris*. Lauterpacht and Bethlehem claim that the incorporation of domestic laws regarding non-refoulement is evidence of *opinio juris*.[48] Approximately 80 countries have domestic legislation about non-refoulement or aspects of the 1951 Convention or the 1967 Protocol.[49] Although this sounds robust and convincing there is not specific evidence for what the domestic legislation entails. On the other hand, Lowe asserts that *opinio juris* can be as simple as a public statement that verifies adherence to CIL.[50] He uses the public statements from the Channel Tunnel construction between United Kingdom and France reaffirming that "international law rights of passage and overflight through the Channel would not be affected."[51] At the same time, Lowe uses cooking, as an analogy for the abstract nature of *opinio juris* by formulating that *opinio juris* is not "just an ingredient in the recipe, "but" more accurately likened to a way of cooking the ingredients of state practice.[52]

A more nuanced approach made by Gunning is the inclusion of international institutions, especially non-governmental organizations, into the process of forming customary law.[53] As Gunning observed:

> "NGOs have played an important role in the development and execution of the international relief effort for refugees. Their contributions to the effort have greatly increased the capacity of the international community to address the refugee

argument, but they did concede that convention rules can be "norm-creating" and become opinio juris; "The Summary of the Summary of the Judgment of 20 Feb 1969," International Court of Justice, http://www.icj-cij.org/docket/index.php?sum=295&code=cs2&p1=3&p2=3&case=52&k=cc&p3=5.

[47] The Nicaragua Case was about whether the United States violated customary international law by arming the contras against the Nicaraguan government. The Court ruled in favor of Nicaragua, saying that the United States violated CIL of the non-use of force. In Anthony D'Amato's opinion, this ruling misinterpreted the meaning of state practice and opinio juris law "without even considering the practice of states and without giving any independent, ascertainable meaning to the concept of opinio juris;" Anthony D'Amato, "Trashing Customary International Law," 4-5.

[48] Lauterpacht and Bethlehem, "The scope and content of the principle of non-refoulement: Opinion,"69.

[49] Ibid,.

[50] Lowe, *International Law, 52*.

[51] *Ibid,*. The Channel Tunnel, a.k.a the Chunnel, is a 32-mile railway tunnel that was built beneath the English Channel in 1994. http://www.pbs.org/wgbh/buildingbig/wonder/structure/channel.html (accessed 5 May 2013).

[52] *Ibid,* 51.

[53] Brian D Lepard, *Customary International Law: a New Theory with Practical Applications* (Cambridge [U.K.]; New York, N.Y.: Cambridge University Press, 2010): 180-187.

> problem, and as a result, the input of these NGOs should be considered when determining whether the governing customary law has expanded its definition."[54]

The approach to CIL continues to be state-centric, so NGOs do not have the ability to be active participants as equals beside states. Byers points out that NGOs do not have "international legal personality," but are able to "mobilize public pressure" or force more government transparency. [55] As the authors have suggested, NGOs can contribute significantly to the responsibility states feel to follow non-refoulement. Chinkin emphasizes the importance of the NGO's exposing states' actions by noticing, "the NGO observer status and the publicity generated by NGOs enhanced the openness of the governmental proceedings and prompted claims of the democratization of international law-making by the inclusion of voices not generally heard in international arenas."[56]

Finally, Lepard gives examples of NGOs impacting *opinio juris* through creating a dialogue between themselves and states, similar to scholarly works.[57] Two sources of NGO's participation that result in *opinio juris* is investigating and advocating toward states.[58] So, revealing the possible misconducts of states and advocating for an issue through obtaining public support can be measures of *opinio juris*. Christine Chinkin reiterates this by discerning that NGOs are "a significant factor in maintaining informed pressure upon governments to comply."[59]

From this analysis of state practice and *opinio juris*, it is possible to see the effect NGOs can have on the both sets of process. It is regularly argued that state practice and *opinio juris* continuously fall into a circular trap how states can create new customary law through state practice, but states should also feel a sense of obligation to this CIL, which

[54] Isabelle Gunning, "Modernizing Customary International Law: The Challenges of Human Rights," *Virginia Journal of International Law* (1991 1990): 244–245.
[55] Byers, *Custom, Power, and the Power of Rules*, 86.
[56] Ibid, 29.
[57] Lepard, *Cusotmary International Law: a New Theory with Practical Applications*, 187.
[58] Ibid,.
[59] Christine Chinkin, "Normative Development in the International Legal System," in *Commitment and Compliance*, ed. Dinah Shelton (Oxford: Oxford University Press, 2000).

means the law should already exist.[60] This balance is important for the overall debate concerning CIL, but it does not concern the scope of this research since NGOs have an impact within state practice and *opinio juris*. Furthermore, the balance between state practice and *opinio juris* is normally highly debatable, like in the *Nicaragua Case*, but there is no need for an in depth discussion for the same reason.

Most importantly, defining, measuring, and analyzing the elements that form CIL are important for showing how state practice and *opinio juris* have been decided upon in the past and why the emergence of a more modern framework for CIL gives a voice to NGOs. To reiterate, NGOs have the ability to observe and inform states as a gauge of state practice, while having the means to investigate and advocate pursuing a state's *opinio juris*. These elements will be especially important regarding the status of refugees since they cannot inform, investigate, nor advocate without the help of NGOs. In the next chapter, I will present the basic debates of customary international law and the best way to consider CIL in terms of non-refoulement.

[60] Byers, *Custom, Power, and the Power of Rules*, 130-131.

CHAPTER II

2.1 A Theory of Customary International Law, Non-Refoulement, and NGOs

The combination of these three elements-CIL, non-refoulement, and NGOs- can be difficult to properly frame between the different arenas of customary law, refugee law, and sources of international law. However, Harold Koh's interpretation of the transnational legal process and the epistemic community provide a substantial, less culturally biased interpretation of why nations comply with international law.[61] The main argument states,

> "One or more transnational actors provokes[62] an *interaction* (or series of interactions) with another, which forces an *interpretation* or enunciation of the global norm applicable to the situation. By doing so, the moving party seeks not simple to coerce the other party, but to *internalize* the new interpretation of the international norm into the other party's internal normative system."[63]

As a first-generation Korean-American that has substantial experience with refugees,[64] Harold Koh frames the process of states' obedience and compliance with a more well-rounded understanding than neo-realists or liberals. Neo-realists like Kenneth Waltz separate the levels of analysis into the system, domestic politics, and individuals, but Koh contends these three arenas cannot be separated.[65] The three levels of analysis should be combined, like a "layer cake" that come together within these epistemic communities that work to exchange information with the state. Liberals like Anne Marie Slaughter look at the importance of state preferences and looking within the black box of domestic politics, but her heavy emphasis on a Western idea of democratization fails to measure alternate ideas of what

[61] Koh, "Why Do Nations Obey International Law?", 2646-2648.
[62] 'Provokes' is written in the original text, even though 'provoke' is grammatically correct.
[63] Ibid, 49.
[64] Koh was teaching at the Allard K. Lowenstein Human Rights Clinic at Yale Law School when his group sued U.S government officials claiming that "lawyers and clients have a right to communicate with one another before clients are returned to political persecution" in Harold Hongju Koh, "The 'Haiti Paradigm' in United States Human Rights Policy," *The Yale Law Journal* 103, no. 8 (June 1, 1994): 2391–2435, doi:10.2307/797051, 2395.
[65] Koh, "Why Do Nations Obey International Law?", 2649.

makes up domestic politics.[66] In an attempt to critique Koh's work, Slaughter accidentally gives the most precise definition of Koh's transnational legal process and how it applies to customary international law. She says, "internalization defines obedience, but also explains it."[67] This is exactly how Koh's transnational legal process can be applied to customary international law. There is not a causal relationship between customary law and states where one directly determines the other. States act in a particular manner, which shapes customary international law, but then CIL still shapes the behavior of states.

One of the important aspects of the transnational legal process is the role of epistemic communities to pressure, convince, and inform states to move from interactions, to interpretations, to internalization.[68] Epistemic communities are "networks and knowledge-based networks" that articulate the "cause-and-effect relationships of complex problems, help states identify their interests, frame the issues for collective debate, proposing specific policies, and identify salient points of negotiation."[69] These communities can be comprised of individual experts, and non-governmental organizations that inform states of issues.[70] Koh asserts that, "as governmental and non-governmental actors repeatedly interact with the transnational legal process, they generate and interpret international norms and then seek to internalize those norms domestically."[71] States and epistemic communities form a bond of information sharing and influence the decision making process.[72] There is a combination of factors that influence the state. Factors include systemic, institutional, and identity-driven

[66] Anne-Marie Slaughter, Andrew S. Tulumello, and Stepan Wood, "International Law and International Relations Theory: A New Generation of Interdisciplinary Scholarship," *The American Journal of International Law* 92, no. 3 (July 1, 1998): 367–397, doi:10.2307/2997914, 371.
[67] Kal Raustuala and Anne Slaughter, "International Law, International Relations and Compliance," in *The Handbook of International Relations*, ed. Walter Carlnaes, Thomas Risse, and Beth Simmons, vol. 2, Princeton Law and Public Affairs Papers 02 (Sage Publications, LTD., 2002), 541.
[68] Koh, "Why Do Nations Obey International Law?", 2648.
[69] Peter M. Haas, "Introduction: Epistemic Communities and International Policy Coordination.," *International Organization* 46, no. 1 (1992): 1.
[70] Koh, "Why Do Nations Obey International Law?", 2651.
[71] Ibid,.
[72] Haas, "Introduction: Epistemic Communities and International Policy Coordination," 6.

indicators all of which, when analyzed together as part of a whole, come together in the epistemic communities to create a complex process of complying with international law.

Koh identifies international human rights as one ideal example of using interaction, interpretation, and internalization as a better theoretical and explanatory model for justifying why states comply with custom.[73] Explaining the peculiar relationship between non-refoulement and customary international law can be seen through this process of transforming interactions into internalized actions. Another vital aspect of Koh's transnational legal process is the de-emphasis on validating successful instances of an internalized norm purely through laws. Most Western scholars justify customary law through court cases or the adaptation of international law within domestic law; however, different states, cultures, and regions view the legal process with a different perspective. What law is and what law does may not be the same in the United States, as it is in Thailand, Vietnam or Myanmar, so Koh includes different types of internalization. Social, political, and legal internalization are possible ways that norms can become custom.

To add a more depth and a view from Asia, Amitav Acharya wrote about the process of norm diffusion in Asia via localizing "foreign ideas by local actors" to align the norms with customs that were previously practiced in the region.[74] Acharya reiterates the difficulty, yet the importance of interacting with international norms, like non-refoulement, into Asia. One of the most legitimate means to implement this collaboration (localization by Acharya's definition) is through NGOs "whose primary commitment is to localize a normative order and whose main task is to legitimize and enhance that order by building congruence with outside ideas."[75] Hesitation and skepticism of Western institutions due to the history of colonialism makes Southeast Asian countries hesitant to adopt these institutional models that

[73] Koh, "Why Do Nations Obey International Law?", 2655-2566.
[74] Amitav Acharya, "How Ideas Spread: Whose Norms Matter? Norm Localization and Institutional Change in Asian Regionalism," *International Organization* 58, no. 02 (2004): 245.
[75] Ibid, 249.

the West considers valid.[76] This hesitation and emphasis on including domestic norms can explain the slow progress Southeast Asia has adopting the 1951 Refugee Convention, a regional convention, or a regional court, but their general adherence to the basic aspects of Article 33.

Another alternative explanation of Koh's transnational legal process that should be acknowledged is the reverse process of internalization, interpretation, and interaction. It can also be argued that states may move back and forth between the process of interaction, interpretation, and internalization. Koh does not address the possibility of norms regressing due to the views of the epistemic community. The strength of norms can waver during times of crisis, especially with refugees during a mass influx. The model is presented below is not a one-way street to deeper integration of norms. It is a constant push and pull of ideas by an epistemic community that influences the decision-making process of states. In order to observe this relationship between the epistemic community and the state, it is pertinent to define what constitutes as non-refoulement.

2.2 The Inconsistencies of Non-Refoulement

Non-refoulement has been called a peremptory rule,[77] a general principle of international law,[78] *jus cogens*,[79] and customary international law.[80] International agreements, judicial court decisions, and scholars are left with the task of figuring out how the framework of how non-refoulement applies to the real world. According to the 1951 Convention Relating to the Status of Refugees,

> "Non-refoulement is a concept which prohibits States from returning a refugee or asylum-seeker to territories where there is a risk that his or her life or freedom would

[76] Acharya, "How Ideas Spread: Whose Norms Matter? Norm Localization and Institutional Change in Asian Regionalism," 250.
[77] "Report of the 33rd Session:" UNHCR doc. A.AC.96/614, para 70.
[78] Lauterpacht and Bethlehem, "The scope and content of the principle of non-refoulement: Opinion," 70.
[79] Jean Allain, "The Jus Cogens Nature of Non- refoulement," *International Journal of Refugee Law* 13, no. 4 (October 1, 2001): 533–558, doi:10.1093/ijrl/13.4.533, 533.
[80] Guy Goodwin-Gill, "The Right to Seek Asylum: Interception at Sea and Non-Refoulement," *International Journal of Refugee Law* 13, no. 4 (2011): 443.

> be threatened on account of race, religion, nationality, membership of a particular social group or political opinion."[81]

Although the definition of non-refoulement seems clear, there is no exact implementation or enforcement mechanisms that are developed in the treaty. The main question is why? Why is there such a consensus and confusion over the importance of non-refoulement as an established norm? The answer seems to be that there is a gap between what states want, what states do, and external influences that push states toward a more human rights-oriented framework for non-refoulement. To deal with the inconsistencies of non-refoulement, it is most beneficial to consider the current arguments, and then unravel the messiness of non-refoulement into a more coherent structure.

The following section will summarize the debates regarding non-refoulement. Most pertinently, who precisely is protected; whether non-refoulement applies extraterritorially; and does non-refoulement still apply in the case of mass influxes? In the final paragraphs of the chapter, I will introduce flexible versions of non-refoulement as customary international law by modeling the concept with Article 33 as the first point of interaction, then building upon Article 33 with broader regional definitions, and then an internalized adaptation of non-refoulement through domestic institutions. Non-governmental organizations will be an important factor influencing in states into more encompassing application of non-refoulement.

2.3 Defining Non-Refoulement: One For All or All for One?

Non-refoulement as a right is a relatively new idea. It emerged in the 1930's in the Convention Relating to the Status of Refugees, which prevented states from "non-admittance of refugees at the frontier (non-refoulement)."[82] Originally, Article 33 in the 1951 Refugee Convention was a response to the large displacement and resettlement of 1,620,000

[81] *Convention Relating to the Status of Refugees, Art. 33: 32*.
[82] Guy Goodwin-Gill and Jane McAdam. *The refugee in international law*. Oxford: Clarendon Press, 1996. Pg. 118

predominately Jewish refugees after WWII.[83] Drafts of Article 33 in the 1951 Refugee Convention by the French representatives and the Secretary-General echoed the 1933 Refugee Convention, which confined non-refoulement to "refugees who have been authorized to reside regularly."[84]

Rather than adopting the French or Secretary-General's interpretations of non-refoulement, the Ad Hoc Committee on Statelessness and Related Problems chose the interpretation of Article 33 by a non-governmental organization, the Agudas Israel World Organization.[85] This interpretation of Article 33 included refugees lawfully in a country *and* refugees that unlawfully arrived to the frontier of their asylum state.[86] Here, the role of non-governmental organizations, not only influenced the non-refoulement, but produced the initial basic conceptualization of non-refoulement in 1950's. Working in conjunction with an NGO, the Committee recognized the potential contradiction in only allowing recognized refugees the right to non-refoulement by expanding the concept to refugees that had not received the consent of the asylum state prior to arrive at the border.[87] Determining who was eligible to receive refugee status still relied on Article 1 of the 1951 Refugee Convention.[88]

International and regional agreements have built upon and expanded Article 33's original criteria for determining who is entitled to non-refoulement. The 1984 Convention against Torture is the best illustration of non-refoulement in another international agreement by adding that refoulement should not take place when there are "substantial grounds for

[83] Convention relating to the Status of Refugees, 159 LNTS 3663, done Oct.28, 1933, Art. 3; Hathaway, James C. *The rights of refugees under international law*. Cambridge University Press, (2005):302.
[84] Ibid,.
[85] James C. Hathaway, "The Evolution of Refugee Status in International Law: 1920-1950," *The International and Comparative Law Quarterly* 33, no. 2 (April 1, 1984): 348–380, doi:10.2307/759064.
[86] Ibid,.
[87] If Article 33 only applied to recognized refugees within the state that were given preliminary recognition prior to their arrival, then states would put even more restrictions and limits to entering their territory. It would severely restrict refugee's freedom of movement.
[88] *Convention Relating to the Status of Refugees* Art. 1- "owing to well-founded fear of persecution for reasons of race, religion, nationality, membership of a particular social group or opinion, is outside the country of his nationality, and is unable, owing to such a fear, is unwilling to avail himself…".

believing that he would be in danger of being subjected to torture."[89] Regional agreements have much more explicit expansions of non-refoulement. The OAU Convention, the Banjul Charter, the 1969 American Convention on Human Rights, and the 1950 European Convention on Human Rights all widen the beneficiaries of non-refoulement through binding agreements.[90] For instance, the Banjul Charter deems in Article 12,

> "Every individual shall have the right, when persecuted, to seek and obtain asylum in other countries in accordance with the law of those countries and international conventions."[91]

While Article 5 of the Charter specifies,

> "Every individual shall have the right to the respect of the dignity inherent in a human being and to the recognition of his legal status. All forms of exploitation and degradation of man particularly slavery, slave trade, torture, cruel, inhuman or degrading punishment and treatment shall be prohibited."[92]

The Banjul Charter demonstrates the widest application of the principle of non-refoulement by granting asylum to any person who believes they are under persecution. Differences through regional agreements do show the normative impact of non-refoulement through various parts of the world, as Lauterpacht and Bethlehem suggest, but the wide variation between definitions also illustrates that lack of agreement between different regions of the world. Including all definitions of non-refoulement within the framework of customary international law does not reflect one of the foundations of validating CIL according to the *North Sea Continental Shelf case*, which stresses "extensive and virtually uniform"[93] state practice. If states are bound to different standards of state practice within their region, then states' actions cannot be extensive or uniform throughout the world. The only form of non-refoulement that is consistent within the various conventions is the general definition applied in Article 33.

[89] *Convention Against Torture, and Other Cruel, Inhuman, or Degrading Treatment or Punishment*, A/RES/39/46, December 10, 1984, http://www.un.org/documents/ga/res/39/a39r046.htm.
[90] Goodwin and McAdam, *The refugee in international law*,124-125.
[91] *African Banjul Charter on Human and Peoples' Rights, Human Rights Library*, 1981, http://www1.umn.edu/humanrts/instree/z1afchar.htm.
[92] Ibid,.
[93] Lauterpacht and Bethlehem, "The scope and content of the principle of non-refoulement: Opinion, 64"

Soft law is another mechanism that attempts to stretch the definition of non-refoulement. The 1967 Declaration on Territorial Asylum reinforces the same principles and was unanimously adopted by the General Assembly.[94] Lauterpacht and Bethlehem say the lack of reservations and objections by states confirms these international agreements as evidence of non-refoulement as customary international law.[95] Prosper Weil contests this view the best by asserting that state practice cannot merely be defined through 'quasi-universal' documents and treaties.[96]

Also, regional declarations in Latin American express a more "deep-rooted and generous tradition of asylum."[97] Due to the extensive post-WWII movement of Europeans coming to Latin America, then the political movements in the 1970's within Latin America, this region produced the most embracing declaration of the 1984 Cartagena Declaration.[98] It goes beyond the 1951 Convention by including five more general factors: "generalized violence, foreign aggression, international conflicts, massive violation of human rights, or circumstances seriously disturbing public order."[99]

Finally, there is only one regional partnership and declaration regarding the rights of refugees within Asia through the Principles Concerning Treatment of Refugees through the Asian-African Legal Consultative Committee (AALCO) in 1966. Myanmar and Thailand are both member states to the AALCO.[100] Unlike the previous regional agreements that expanded the conditions for refugees, the AALCO incorporated Article 33.1's definition into their arrangement without any additions to the original interpretation of the 1951 Refugee

[94] Guy Goodwin-Gill, *The 1967 Declaration on Territorial Asylum*, 2012, http://untreaty.un.org/cod/avl/pdf/ha/dta/dta_e.pdf: 1-3.
[95] Lauterpacht and Bethlehem, "The scope and content of the principle of non-refoulement: Opinion,".
[96] Prosper Weil, "Towards Relative Normativity in International Law?," *The American Journal of International Law* 77, no. 3 (July 1, 1983): 413–442, doi:10.2307/2201073, 434.
[97] B.S Chimni, *International Refugee Law: a Reader* (New Delhi□; Thousand Oaks, Calif: Sage Publications, 2000), 70.
[98] Ibid,.
[99] Ibid,.
[100] AALCO, "Member States," http://www.aalco.int/scripts/view-posting.asp?recordid=293, (Accessed 16 May 2013). Vietnam is not a member.

Convention.[101] These examples demonstrate the importance of rights for refugees in the international discussion and the desire to follow the baseline requirements in the 1951 Refugee Convention. However, the General Assembly and regional declarations cannot be the primary expression of state practice.

State practice requires more than signing international documents even though Lauterpacht and Bethlehem conclude that non-refoulement, as CIL should be that,

> "No person seeking asylum may be rejected, returned, or expelled in any manner whatever where this would compel them to remain in or return to a territory where they may face a threat of persecution or to life, physical integrity, or liberty."[102]

This definition comes from Lauterpacht and Bethlehem intertwining the previously mentioned international, regional, and forms of soft law into one overarching definition of non-refoulement.[103] Rather than show how uniform non-refoulement is through state practice, they actually expose the disagreements between different states as how to implement non-refoulement. Analyzing different documents and arriving at an alternative definition of who is eligible for non-refoulement cannot mirror reality or confirm the status of customary international law. A gradual and more varied conceptualization of non-refoulement as CIL would better clarify how non-refoulement is practiced as customary international law. Aside from determining eligibility, the next step is where should non-refoulement be applied? In the next section, a brief synopsis of the debates will be presented of non-refoulement in situations of the high seas.

2.4 Does Non-Refoulement Apply to the High Seas?

At what geographical point does a state have jurisdiction over refugees? Article 33 does not provide any geographical guidance about whether refugees must be physically on

[101] Chinmi, *International Refugee Law: a reader*, 71.
[102] Lauterpacht and Bethlehem, "The scope and content of the principle of non-refoulement: Opinion," 72.
[103] Hathaway, "Leveraging Asylum,509."

their territory.[104] This is less of a debate within the academic community and more of a point of frustration between the logic of the right to non-return on the high seas and state practice to the contrary.[105] Most scholars agree that non-refoulement does not only apply to the given territory and that refugees should be granted non-refoulement in the high seas as well.[106] This is not a realistic assumption. Instead, states create their own domestic regulation that frequently exercises interdiction on the high seas.[107] Two of the most apt examples of the frustration of non-refoulement on the high seas concerns judgments made in the U.S domestic court and the ECHR. In the following cases, the United States and Italy had separate bilateral agreements with Haiti and Libya that authorized returning people to questionable circumstances.[108] Both agreements came under fire during times of great conflict within both Haiti and Libya, but the two cases resulted in polar opposite judgments. The *Haitian Centers Council* and the *Hirsi Jamaa* cases exemplify the tension between states' circumventing their duty to non-refoulement and states upholding the rule of non-refoulement in the high seas.

2.41 Sale vs. Haitian Centers Council

The *Haitian Centers Council* case has been recalled, shunned, and cited extensively, so I will just give a brief analysis of the case. In 1981, the U.S and Haiti established an agreement of cooperation to interdict, screen, and return Haitians on the high seas that did not

[104] C. W. Wouters, *International Legal Standards for the Protection from Refoulement: a Legal Anlysis on the Prohibitions on Refoulement Contained in the Refugee Convention, the European Convention on Human Rights, the International Covenant on Civil and Political Rights, and the Convention Against Torture* (Antwerp□; Portland□: Portland, OR: Intersentia□; Distribution for the USA and Canada, International Specialized Book Services, 2009),49-50.
[105] UNHCR, "Brief as *Americus Curiae*," filed Dec. 21, 1992 in McCary v. *Haitian Center's Council Inc*, Case No. 92-344 (US SC), at 18, reprinted in (1994) 6 (1) *International Journal of Refugee Law* in Hathaway, *The Rights of Refugees Under International Law*, 338.
[106] Hathaway, *The Rights of Refugees Under International Law*, 340-341.
[107] Koh, "The 'Haiti Paradigm' in United States Human Rights Policy," 2393.
[108] Ibid,.

meet the standard definition of refugees in Article 33.[109] After the 1990 democratic election of Aristide and the military overthrow in 1991 Haiti thousands of Haitians fled to the U.S by sea. With the onslaught of Haitians arriving to its shores, the U.S interdicted 34,000 Haitians from February to October 1991.[110] In response to these actions, the NGO Haitian Centers Council sued the Southern District of Florida for an insufficient screening process of Haitians facing political persecution.[111] In the 8-1 decision, Justice Blackmun was the only dissenter in a ruling that claimed the U.S was not violating non-refoulement since 'expelling' refugees only applied to the U.S territory and not the high seas.[112] Blackmun gave one of the most memorable dissenting opinions by simple stating, "The terms are unambiguous. Vulnerable refugees shall not be returned."[113] One of the most disappointing judicial decisions has had long-lasting effects on U.S domestic and international law.

Intercepting Haitian boats on the high sea is still practiced,[114] and it has prevented the threshold for customary international law containing the high seas. The United States is one of the biggest recipients of refugees. As a major power they set an example for other parts of the world. If the United States intercepts refugees on the high seas, then why can't other states? At the same time, Southeast Asia is a major source of boat people with a long history of pushing back Vietnamese and Rohingya refugees.[115] If two significant regions of the world do not consistently practice non-refoulement on the high seas, then how refoulement on the high seas be considered customary international law? The rule of non-refoulement on

[109] *Sale v. Haitian Ctrs. Council*, 113 S. Ct. 2549, 113 S. Ct 2549, 125 L. (92-344), 509, U.S 155 (1993), http://www.law.cornell.edu/supct/html/92-344.ZS.html, Syllabus.

[110] *Sale v. Haitian Centers Council*, Inc. - 509 U.S. 155 (1993), U.S Supreme Court Center, http://supreme.justia.com/cases/federal/us/509/155/, 9.
[111] Koh, "The Haitian Paradigm in United States Human Rights Policy," 3-4.
[112] Justice Blackmun, Haitian Centers Council Case, Dissenting Opinion.
[113] Ibid,.
[114] 113 undocumented Haitian and Dominican immigrants were intercepted in the Mona passage on their way to the U.S.Government Security News in http://bpunion.org/locals/com-rsform-manage-submissions/3725/137-3725-news-stories/252-agencies-intercept-haitian-dominican, 23 April 2013.
[115] "Thailand: Fleeing Rohingya Shot in Sea by Navy," http://www.hrw.org/news/2013/03/13/thailand-fleeing-rohingya-shot-sea-navy, 13 March 2013.

the high seas cannot be incorporated into CIL unless the United States and Southeast Asian countries begin more positive state practice. Counterarguments to this view refer to the recent *Hirsi Jamaa and Others v. Italy* ruling in the European Court of Human Rights (ECHR) as confirmation of non-refoulement as an absolute right.[116]

2.42 Hirsi Jamaa and Others vs. Italy

The *Hirsi Jamaa* case is indicative of regional customary international law, but the inclusion of the high seas cannot be considered as a fact of CIL. As shown by the transnational legal process, states adopt non-refoulement with different levels of integration and the way the EHCR court utilized NGOs in this case validates the influence they can have in operationalizing a wider application of non-refoulement.

For many international refugee lawyers, the *Hirsi Jamaa* case solidified non-refoulement on the high seas as a part of customary international law. However, this regional victory has not translated into other parts of the world where high seas refoulement is equally relevant.[117] Italy signed cooperation agreements with the Gaddafi regime in February 2009 to patrol Libya's territorial waters for undocumented boats.[118] No one knows what happened to the 600 returned boat people since there was no record of their whereabouts.[119] The *Hirsi Jamaa* case is about 11 Somalis and 13 Eritreans who were pushed back to Tripoli by Italian authorities without any legal recourse and no knowledge of their final destination.[120] The judgment assessed that Italian authorities should have known about the potential human

[116] Violeta Moreno-Lax, "*Hirsi Jamaa and Others v Italy* or the Strasbourg Court Versus Extraterritorial Migration Control?," *Human Rights Law Review* (October 4, 2012), doi:10.1093/hrlr/ngs024, 22.
[117] Professor Nagy included
[118] *Moreno-Lax, "Hirsi Jamaa and Others v Italy* or the Strasbourg Court Versus Extraterritorial Migration Control?" 3.
[119] Ibid,.
[120] *Hirsi Jamaa and Others v. Italy*, European Court of Human Rights, Grand Chamber, (23 Feb 2012): http://www.refworld.org/pdfid/4f4507942.pdf, 5.

rights violations in Libya and that "the interdiction of migrants on the high seas without consideration of the particular case of each individual is prohibited by the Convention."[121]

There are two important points to the *Hirsi Jamaa* case. The first is the central role of NGOs in reporting, investigating, and advocating for the right to non-refoulement as CIL and their observation of the deplorable conditions in Libya. The Human Rights Watch, the Columbia Law School Human Rights Clinic, The Center Advice for Individual Rights in Europe, Amnesty International, and the International Federation for Human Rights participated in the proceedings by submitting written observations to the court.[122] The Grand Chamber constantly referred back to NGO reports throughout the case and utilized the information from NGO's as a central factor to dismissing Italy's claim that Libya is a safe third country.

The second contribution of the *Hirsi Jamaa* case is that the judgment reinforced that "non-refoulement is an absolute obligation of all states."[123] Even though the addition of non-refoulement on the high seas only applies to the EU, it does show the influence of NGOs in crystalizing norms and the formation of interdiction on the high seas as regional custom due to Article 3 of the ECHR. The Strasbourg Court expands the right to non-refoulement to any person "incurring serious harm caused by any identified or unidentified person or public or private entity."[124] This even includes persons who are considered a risk to national security or public safety.[125] However, the Court admitted, "the concept of refugee contained in Article 33 of the United Nations Refugee Convention is less extensive than the one under international human rights law."[126] *Hirsi Jamaa* was a groundbreaking court decision for the rights of refugees and CIL may one day incorporate the EU's expansion of non-refoulement

[121] Moreno-Lax, "Hirsi Jamaa and Others v Italy or the Strasbourg Court Versus Extraterritorial Migration Control?" 22.
[122] Ibid, 4.
[123] *Hirsi Jamaa and Others v. Italy*, European Court of Human Rights, 67.
[124] Ibid, 63.
[125] Ibid, 68.
[126] Ibid, 65.

to person under serious harm and state's responsibility on the high seas, but this is not yet evident. There is still advocacy, reporting, and investigating that needs to be done by NGOs in order to help elevate the EU's criteria to others in the international community.

2.5 How Does Non-Refoulement Apply to Mass Influxes?

Unexpected outbreaks of catastrophic violence or environmental disasters can displace a large population leading to an overwhelming burden on refugees and their safe states.[127] One of the main problems with non-refoulement is that the 1951 Refugee Convention is essentially individual-centric with little guidance about how states should tackle these *ad hoc* situations.[128] There is no consensus over what number constitutes as a 'mass influx' or how to individually evaluate people during a mass influx.

Durieux and McAdam give a detailed account about two main difficulties in responding to mass influxes. The first elaborates of the difficulty of determining rights for refugees.[129]They conclude that even *prima facie* refugees should be entitled to the same rights as individual refugees.[130] Criticisms of the 1951 Refugee Convention point out that the language is geared toward individual refugees, but Durieux and Adam contend that the language does not explicitly deny the application of the 1951 Refugee Convention to mass influxes.[131] Working through international agreements, the authors believe there should be the inclusion of an *ad hoc* derogation to the 1951 Refugee Convention in times of 'emergency' situations.[132]

[127] Although the tragedy in Syria is not the focus of my research, the current flight of about 1,602,085 million Syrian refugees in Lebanon, Egypt, Iraq, Jordan, and Turkey should be realized as a present-day example of mass influxes with grave consequences for all parties involved,http://data.unhcr.org/syrianrefugees/regional.php
[128] Hathaway, *The Rights o Refugees Under International Law,* 356-57.
[129] Jean-Francois Duriex and Jane McAdam, "Non-Refoulement through Time: The Case for Derogation Clause to the Refugee Convention in Mass Influx Emergencies," *International Journal of Refugee Law*, Vol. 16, no. 1 (2004): 10.
[130] Ibid,.
[131] Ibid, 9.
[132] Ibid, 17.

One problem with the literature concerning mass influxes is that it revolves around international agreements and the notion that mass influxes are usually *ad hoc* circumstances. In Thailand, mass influxes of refugees escaping from Myanmar occur frequently without any international agreements or domestic legislation. This presents a contradiction between the 'ideal' international agreement in a scholar's mind and the reality of frequent cases of mass influx in conflictually- prone areas of the world. During times of mass influx, the role of NGOs should not be underestimated. It can even be argued that mass influxes of people and the flow of resources from NGOs can cultivate "economic assets and human capital."[133] Resources from NGOs like food aid have the capability to overflow into the local communities.[134] Furthermore, the increased workforce (although illegal) can benefit host countries in rural areas.[135] The point is not to argue the overwhelming benefits of mass influxes. Instead, looking into the role of NGOs during periods of mass influxes can lead to unconventional insight, like the idea that mass influxes of refugees can bring some positive effects. In Thailand this is uniquely relevant because there is an enduring refugee population that has occupied the Thai-Myanmar border for over 20 years. This leads to Durieux and Adams second consideration of non-refoulement and mass influxes over time.

Unlike Durieux and McAdam's adherence to the idea of mass influxes and international agreements, their analysis of non-refoulement through time provides much more relevance for Southeast Asia. The authors say that:

> "In the current state of affairs, we can safely submit that once refugees have been admitted and treated as refugees over a number of years…and no other State will assume responsibility for them, asylum states cannot hide behind the semantic ambiguity…"[136]

[133] Karen Jacobsen, "Can Refugees Benefit the State? Refugee Resources and African Statebuilding," *Journal of Modern African Studies*, vol. 40, no. 4 (Dec. 2002): 577-78.
[134] Ibid, 580-581.
[135] Ibid, 584-585.
[136] Duriex and McAdam, "Non-Refoulement through Time: The Case for Derogation Clause to the Refugee Convention in Mass Influx Emergencies," 15.

One of the most pressing problems for refugees in Southeast Asia is the constant "legal limbo" that refugees are experience.[137] Hopes and fears of repatriation or resettlement haunt refugees in Southeast Asia, especially along the Thai-Myanmar border. Consequently, states such as the Thai government, look to other states and NGOs to facilitate this process and intentionally keep refugees in limbo. The application of non-refoulement over time holds true in Southeast Asia, but there is a difficulty in determining where non-refoulement stops and where durable solutions begin. Analyzing non-refoulement through models may be the first step in understanding applies to the transnational legal process and the impact NGOs have on customary international law.

2.6 The Transnational Legal Process: Models of Non-Refoulement

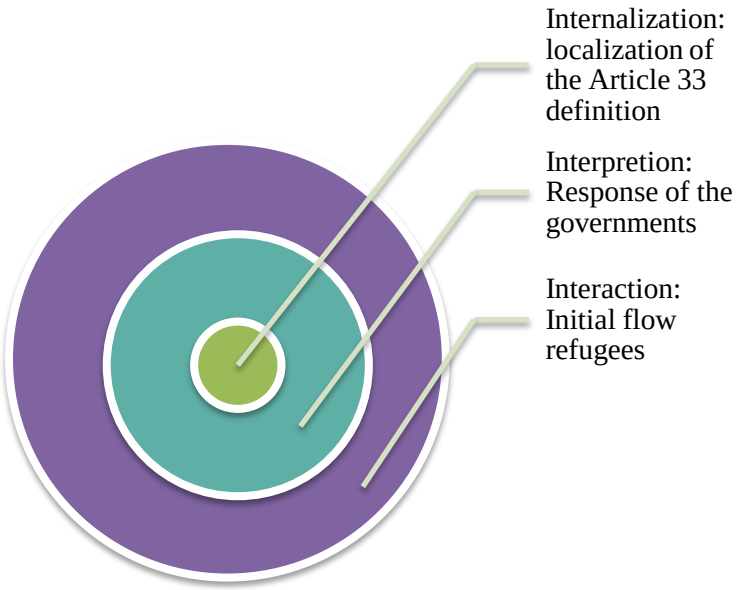
Non-refoulement and customary international law does not have to be all or nothing. The rigid nature of customary international law, especially in regards to non-refoulement, undermines the effectiveness of the CIL process. Robert Jennings identifies the biggest problem with international law [138] is that it is "easy to identify", but "difficult to change or develop."[139] Similarly, David Kennedy questions whether or not international law is "law abiding or law creating."[140] Especially, when applying these conundrums to customary international, it seems that all of the above are probable. From the basic rule of non-refoulement, it is evident that it can be law abiding and law creating. They are not mutually exclusive.

Similar to Hathaway's irritation with Lauterpacht and Bethlehem's all encompassing criteria of non-refoulement, there are limits to non-refoulement as customary international

[137] Duriex and McAdam, "Non-Refoulement through Time: The Case for Derogation Clause to the Refugee Convention in Mass Influx Emergencies," 13.
[138] Jennings was specifically speaking about the rigidity of custom.
[139] *Sources of International Law*, 58-88.
[140] David Kennedy, "Thesis about international Law Discourse," *German Yearbook of International Law*, 23, 382.

law. Hathaway's evaluation states that there is "no customary legal obligation enjoining states not bound by the relevant conventions to honor the duty of non-refoulement."[141] This research proposes an alternative view that there is no indication of non-refoulement as CIL. Rather, a transnational legal process facilitates a gradual widening and expansion of particular aspects of Article 33. Below displays simple models of how to conceptualize non-refoulement. The model can be used in two different forms. The first is a transnational legal process of incorporating the Article 33 definition of non-refoulement into a localized form. The second is the grander conceptualization of non-refoulement in international law.

Non-Refoulement as CIL

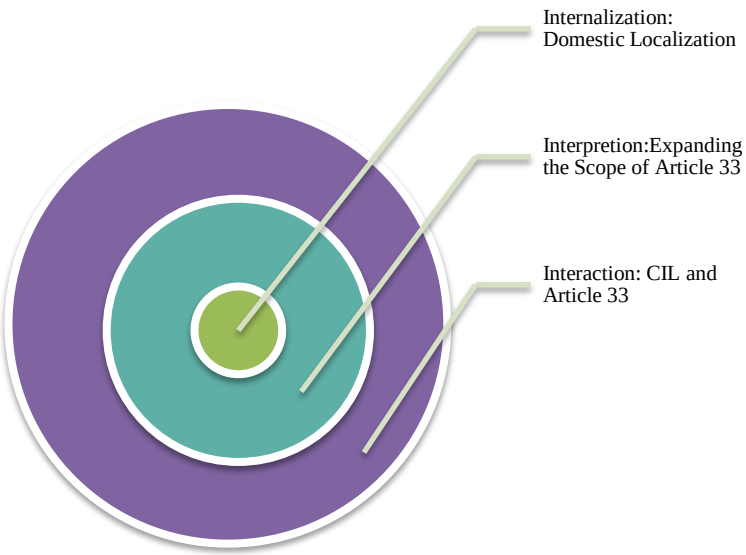


The model shown above will be much more indicative within Southeast Asia since there must be a internalization of non-refoulement as customary international law before states can proceed to the second model of non-refoulement in international law, as a whole. First, states encounter the inflow of refugees, either individually or in situation of mass influx. These interactions are self-evident simply by the crossing of refugees from one state to another, so it is not difficult to gauge the interaction phase of the transnational legal process. Secondly, epistemic communities forms and advocates for states to act in a manner

[141] Hathaway, "Leveraging Asylum," 536.

consistent with the local norms. This may include allowing all refugees to enter, formulating a screening process, or constructing sites to house the refugees. Finally, the internalization process is the organizational structures, like state authorities, the UNHCR, community organizations or NGOs that implement the state's policy toward non-refoulement. The Royal Thai Government calls upon NGOs and community organizations to prevent non-refoulement. Other states might employ different mechanisms, but the main function of localization in Southeast Asia is to put an emphasis on the epistemic community for internalization.

It's important to reiterate that this process can move back and forth if they are changes or a new government. This model is not set in stone. The transnational legal process demonstrates how states interact with these vague global norms, like non-refoulement. After the internalization process of non-refoulement is reached, then the second process becomes an important venue for expanding what can be thought of as non-refoulement. In this case, Southeast Asia touches upon the surface of non-refoulement; where as the members of the European Union have a much broader, internalized notion of non-refoulement within their regional and domestic law.



On the outer periphery is the standard definition non-refoulement exemplified in Article 33 of the 1951 Convention. Article 33 of the treaty definition has been crystalized into CIL. Hathaway and Charney both reinforce that the *Asylum Case* paved the way for treaties to evolve into customary international law.[142] Additionally, the focus on refugees is a new field of international law (relatively speaking) that gained fruition in a post-WWII world where international treaties were the primary source of making rules.[143] Regardless of whether or not a state has ratified the 1951 Refugee Convention or the 1967 Protocol, all states are still bound to the text of Article 33 outlining non-refoulement. Most court decisions, scholars, regional organizations, the UNHCR, and NGOs agree upon this basic fact. However, there has been a great expansion of non-refoulement as CIL by these same actors to include all people facing any serious harm under a state's jurisdiction within their territory or on the high seas.[144] Although the expansion of non-refoulement to include the broadest definitions has not been expanded by Southeast Asia, NGOs provide a mouthpiece to push these states into deeper incorporation.

[142] Hathaway, "Leveraging Asylum," 508.
[143] Anthony D'Amato, "Human Rights as Norms of Customary International Law'" in Anthony D'Amato (ed.), International Law: Prospects and Process, pg. 123-47 in *Sources of International Law*, 324.
[144] Lauterpacht and Bethlehem, "The scope and content of the principle of non-refoulement: Opinion,"

Integration as the second phase of the process is a long task of working with the state, the region, and the epistemic community to negotiate how to actively apply non-refoulement. In terms of CIL, this can take many years through a multitude of different venues. How states make transactions within their state and through the international community determines how quickly channels of communication become obtainable.[145] In a developed democratic society like the United States individuals, the media, NGO's, corporations and politicians open these passageways to shape and advocate for different interpretation of norms, but in developing societies, like Thailand, the process takes more time with a greater international push. For non-refoulement, a solidification of the interpretation process would be signing the 1951 Refugee Convention or creating a regional agreement with ASEAN, similar to the Banjul Charter.

Finally, the internalization process would include domestic laws and legislation. Internalization does not mean that the work of the epistemic community is finished. Domestic laws being made and domestic laws being followed are two different things, but internalization does give non-refoulement a legal space where compliance can be regulated. Also, a lack of domestic legislation does not mean that NGOs in Southeast Asia have not been productive or have failed. It means that the transnational legal process is slower in Southeast Asia, but NGOs have influenced the initial process of complying with customary international law. The next chapter will apply the how NGOs influence non-refoulement as CIL in Southeast Asia. Two different refugee minorities will be analyzed in Thailand to understand the impact and the limitations of NGOs in non-refoulement as CIL.

[145] Koh, "Why Do Nations Obey International Law?", 2652.

Chapter III

3.1 NGOs to the Rescue: Vietnamese and Karen Refugees in Thailand

> *"In March 1979 my four little sons and myself were put on a military truck by an armed military unit. We were taken from our home to Mong Cay where my family and many others were concentrated. All of us were forced into sailing boats which were then towed by ships to the open sea."*[146]

[147]

To understand the gravity of the refugee situation in Southeast Asia and the influence of customary international law, the cases of two different types of refugees within Thailand will be analyzed. NGOs in Thailand will be the focus of the examination, as opposed to other Southeast Asian countries, due to the concentration of international, regional, and local NGOs in addition to the constant flow of refugees into the country. The first will be the Vietnamese refugees that began to flee into Thailand in the 1970's. There will be a concentration only on Vietnamese boat people and not all refugees from Cambodia and Laos. The second will be the Karen from the 1990's to the present day. Examining these cases will

[146] Nguyen Van Canh 1983, pg. 134 in Ibid, 72-73.
[147] "Southeast Asia Map", Accessed 22 May 2013,https://maps.google.com/maps?oe=utf-8&client=firefox-a&q=southeast+asia+map&ie=UTF-8&hq=&hnear=0x3233af605e720cd5:0x28a70f18542d1b91,South+East+Asia&ei=ormcUfyUEoq74AT_koHQBQ&ved=0CDAQ8gEwAA.

demonstrate the role NGOs and the Thai Government through time and the show the process of CIL.

Southeast Asia was selected as the most suitable assessment of the role of NGOs in non-refoulement as CIL because it lacks domestic, regional, judicial, or international precedence. This means that the only indication for complying with non-refoulement is CIL. Even though non-refoulement is observed on a modest level, NGOs are still heavily advocating for Southeast Asia to ratify international agreements and create domestic laws to facilitate a deeper interpretation and internalization.

3.2 Vietnamese Refugees in the 1970's

Between 1975 and 1979 approximately 600,000 Vietnamese fled Vietnam due to the South Vietnam's capitulation to the Communist Viet Cong in 1975 and the backlash against ethnic Chinese people in 1978.[148] Droves of politicians, intellectuals, middle-class, and anti-Communists fled to the coast of Thailand in search of a better life and the possibility of resettlement in 1975.[149] After a re-education policy and heavy discrimination of poorer merchants of primarily Chinese descent, a second wave began in 1978.[150] Many of the Chinese people were forcibly evicted from their homes and forced onto boats by the Vietnamese authorities.[151] Coined as 'the boat people,' most people fled on unstable boats that held 150 to 600 people at a time in horrendous conditions for five to seven days.[152]

The role of Thai authorities was a comprehensive pushback policy. In addition to the unhelpful Thai authorities, Thai pirates frequently boarded the boats to pillage, rape, and murder the boat people with no regulation by the Thai government and the slight advocacy by

[148] Arthur C. Helton, "Asylum and Refugee Protection in Thailand," *International Journal of Refugee Law* no. 1 (1989): 21.
[149] Carmen DeMichele,"Vietnamese Boat People," *The Making of Modern Immigration: An Encyclopedia of People and Ideas* 1 (2012):121.
[150] Ibid, 123.
[151] Linda Hitchcox, *Vietnamese Refugees in Southeast Asian Camps* (Basingstoke: Macmillan in association with St. Antony's College, Oxford, 1990), 72.
[152] Ibid, 122.

the UNHCR.[153] Although there were minimal UNHCR camps in Thailand, they were inadequate, so Thailand continued their complete pushback policy.[154] In June of 1979, the Vietnamese invaded the region and caused a full-scale war.[155] The large-scale refoulement and the gross human rights violations finally gained the attention of the international community and in 1979 the Geneva Conference was held to tackle the problems of the 'boat people.'[156]

In the Geneva Conference, one of the main concerns was to prevent further refoulement of 'boat people' by the Thai and Malaysian governments, but this was not successful in terms of preventing refoulement in Thailand.[157] Western countries agreed to resettle many of the refugees in camps, the Vietnamese government promised to stop encouraging the departures, and more money was allocated to improve the conditions of the camps.[158] The Thai government continued their inhumane policies since it resettled the boat people from their camps more quickly than states that gave more benevolent rights to the Vietnamese.[159] However, the refugee situation in Thailand steadily became more humanitarian in the beginning of the 1980's until a third wave of refugees from Vietnam came to the shores of Thailand.

3.3 Vietnamese Refugees in the 1980's

In the late 1980's there was a third wave of boat people from Vietnam and the reaction by the Thai authorities regressed to a far-reaching pushback policy and an upswing of piracy.[160] An increase in violence between in the Vietnamese-occupied Cambodian-Thai border and the Laotian-Thai border along with a decrease in third-country resettlements of

[153] DeMichele, "Vietnamese Boat People,"123.
[154] Ibid, 124 and Helton, "Asylum and Refugee Protection in Thailand," 25-26.
[155] Ibid,.
[156] Barry Stein, "The Geneva Conferences and the Indochinese Refugee Crisis," *International Migration Review* 13, no. 4 (December 1, 1979): doi:10.2307/2545184, 716–723.
[157] Helton, "Asylum and Refugee Protection in Thailand," 24-25.
[158] Ibid, 25.
[159] Stein, "The Geneva Conferences and the Indochinese Refugee Crisis.", 5-7.
[160] Ibid, 26.

refugees caused more excessive refoulement.[161] The terror of the seas, the volatility of piracy and the risk to Vietnamese boat people on the high seas are evident in one individual's account of their voyage to Thailand:

> "The men boarded our boat and threatened us until we gave them all the money we had. They raped some of the girls many times. I think they might have sunk the boat, but then another Thai fishing boat came along and the pirated ran off…. Another pirate boat found us. They tried to rob us but there was nothing left so they took the engine and the oil but they didn't hurt us. We drifted for three more days without any food and just a little water. On the ninth day we were washed up on the coast of Thailand."[162]

Instead of reacting with caution or concern, the Thai officials, especially the Interior Minister Prachaub Suntrangoon, ordered "[a]ll other vessels attempting to land will be sent back to the sea."[163] There was a collective effort by the Thai navy authorities and Thai fishermen to push back the Vietnamese boats because proof of assistance would lead to a $4,000 fine and up to tens years of imprisonment.[164] The Thai government changed their policy toward the Vietnamese refugees without notifying the UNHCR since they believed the UNHCR was encouraging Vietnamese refugees to enter the Thai shores.[165]

One of the most prominent NGOs that advocated for the Vietnamese refugees in the 1980's was the Lawyers Committee for International Human Rights,[166] which was direct by the previously cited Arthur C. Helton. Helton spoke as a mouthpiece for the organization and heavily denounced the 1988 pushback of Vietnamese refugees. He said, "no principle is more basic in international refugee law than that of non-refoulement, which requires that no refugee shall be returned in any manner whatever to a territory where his life or freedom

[161] Stein, "The Geneva Conferences and the Indochinese Refugee Crisis." 27.
[162] Interview in Phanat Nikhom, 15 June 1987 in Hitchcox, *Vietnamese Refugees in Southeast Asian Camps, 88*.
[163] Helton, "Asylum and Refugee Protection in Thailand," 27.
[164] Ibid, 28.
[165] Barbara Crossette, "Thailand to Turn Back Vietnamese Refugee Boats," *The New York Times*, January 30, 1988, http://www.nytimes.com/1988/01/30/world/thailand-to-turn-back-vietnamese-refugee-boats.html.
[166] Now known as Human Rights First

would be threatened."[167] This criticism prompted the Thai to the United Nations Ambassador Nitya Pibulsonggram to write an opinion article in the New York Times. Mr. Pibulsonggram stated: "Thailand has provided and continues to provide first refuge for them (Vietnamese boat people)." [168] Pibulsonggram also claimed that Thailand was cracking down on smugglers and racketeers, not the Vietnamese boat people and that once the Thai government realized it was targeting potential refugees, then the crackdown eased.[169] Whether or not the statement made by Thailand's U.N Ambassador is true, it does give insight into the role of NGOs in reaffirming *opinio juris* and a conscious effort by the Thai government to follow, or at least pretend to follow, customary international law.

The international community's response to this new wave of pushbacks resulted in a second Geneva Conference in which the role of NGOs was much more prominent. In 1989, the composition of NGOs in that were concerned with the Vietnamese refugees in Thailand was international NGOs. A statement sent to the Geneva Conference by 160 NGOs called the Indochinese Organizations in North American and Europe requested for the conference to reconfirm the right to non-refoulement and to ensure that asylum-seeking countries did not violate the spirit of Article 33.[170] The NGOs asked the host countries to protect Vietnamese from piracy, and allow the Vietnamese "to the right of non-refoulement" and to codify this in their "national laws and regulations."[171]

[167] Arthur C. Helton, "The Budget Makes Refugee Choices Necessary; Thai Brutality," *The N*, March 8, 1988, http://www.nytimes.com/1988/03/08/opinion/l-the-budget-makes-refugee-choices-necessary-thai-brutality-735988.html.
[168] Nitya Pibulsonggram, "Thailand Has Done Its Share for Refugees," *The New York Times*, March 14, 1988, http://www.nytimes.com/1988/03/26/opinion/l-thailand-has-done-its-share-for-refugees-546588.html.
[169] Ibid.
[170] Indochina Refugee Action Center, "Towards Humane and Durable Solutions to the Indochinese Refugee Problem" (The UC Irvine Libraries, June 13, 1989), http://www.oac.cdlib.org/view?docId=hb6n39p08d;NAAN=13030&doc.view=frames&chunk.id=ch01&toc.depth=1&toc.id=ch01&brand=oac4.
[171] Ibid,.

3.4 NGO's Responses

Most of the NGO's responses came from two types of organizations; either general human rights aid organizations, like the International Rescue Committee or Indochinese organizations that were formed as a reaction to the mass resettlements in the late 1970's.[172] The resettlement of the first and second wave of refugees spawned the foundation of many local American NGOs. Their primary role was advocacy in order to influence the content of the 1989 Comprehensive Plan of Action (CPA). The Comprehensive Plan of Action promised, "to provide first asylum to all asylum seekers until their status has been establish and a durable solution found."[173] After the implementation of the CPA there were no reports of pushbacks of Vietnamese boat people in Thailand after 1989.[174] There are a multitude of reasons for this drastic drop in pushbacks. A combination of enforcing legal immigrant procedures in Vietnam and more sustainable screening procedures in Thailand are two main reasons for the decline.[175] The CPA plan was so successful that the Vietnamese refugee camps officially closed in 1996.[176]

From the Vietnamese boat people's experience, the role of NGOs in advocating non-refoulement grew toward the end of the 1980's, but there still was not a formation of an epistemic community toward them. In the 1970's the first and second waves of Vietnamese boat people received less attention from NGO's or states until the first Geneva Conference in 1979. During the 1980's, the outcry from NGO's was much quicker and louder than the previous crisis due to the NGOs that were organized to handle the refugees in resettlement

[172] Indochina Refugee Action Center, "Towards Humane and Durable Solutions to the Indochinese Refugee Problem"
[173] Courtland Robinson, "The Comprehensive Plan of Action for Indochina Refugees, 1989-1997: Sharing the Burden and Passing the Buck," *Journal of Refugee Studies* 17, no. 3 (2004): 320.
[174] Ibid, 323.
[175] Ibid,.
[176] Robinson, "The Comprehensive Plan of Action for Indochina Refugees, 1989-1997: Sharing the Burden and Passing the Buck," 321.

countries, such as the United States. However, there was minimal contact between the Thai government and the representatives of NGO's. At the same time, the involvement of NGOs was distant and predominately advocacy based, while cooperating on an international scale. International human rights NGOs and local U.S based Indochinese NGOs functioned without substantial regional or local NGO communication in Southeast Asia. This prevented long-term state practice of non-refoulement in Thailand and initially caused a relapse of refoulement when Thailand was faced with thousands of Karen refugees.

The next chapter will illustrate the story of the Karen refugees from Myanmar coming into Thailand. NGOs began to speak up for the Vietnamese refugees in the 1980's, but a stronger network of local, regional, and international NGO's will be much more successful in assisting the Karen's in Thailand and the promoting customary international law. Here, the importance of aid organizations and regional NGO's play a more formidable role in forming CIL and directly prevented Thailand from violating CIL.

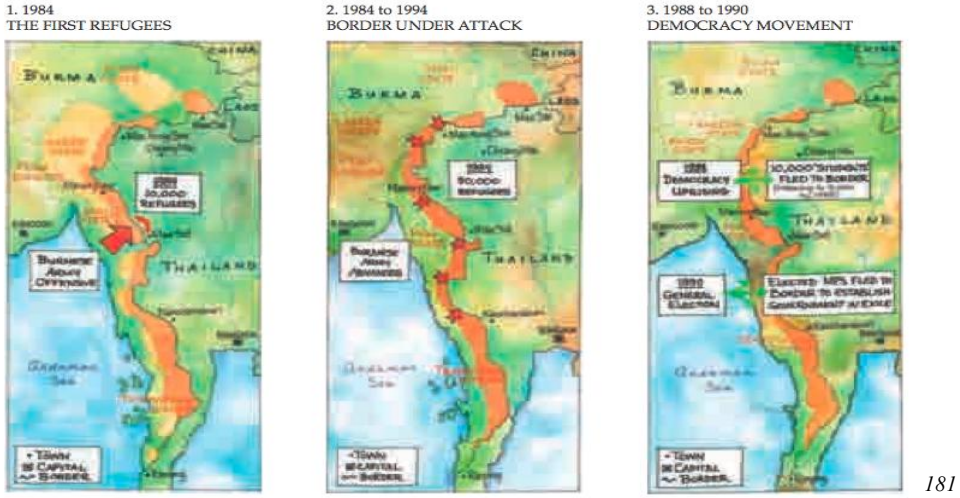
Chapter IV

4.1 The Plight of Karen Refugees

One of the most heart wrenching refugees situations revolves around the Karen minority from Myanmar that are forced to seek refuge in Thailand. During the British and Japanese fighting in World War II, the division between the Burmese and the Karen was exacerbated.[177] The Burmese allied with the Japanese and the Karen minorities fought under the British.[178] This division has led to years of violence and oppression in Myanmar and forced thousands of Karens across the Thai border by land.[179] A vast majority of the services provided to the Karen refugees are provided by NGOs, with government approval, since there is limited national capacity to perform these functions.

4.2 Karen Refugees: The Influx in the 80's

"It is better to run away. If they [SPDC] catch us they will be very mean to us. It is better to escape. It is better to live in Thailand, if you live in Burma now it is very, very bad."[180]



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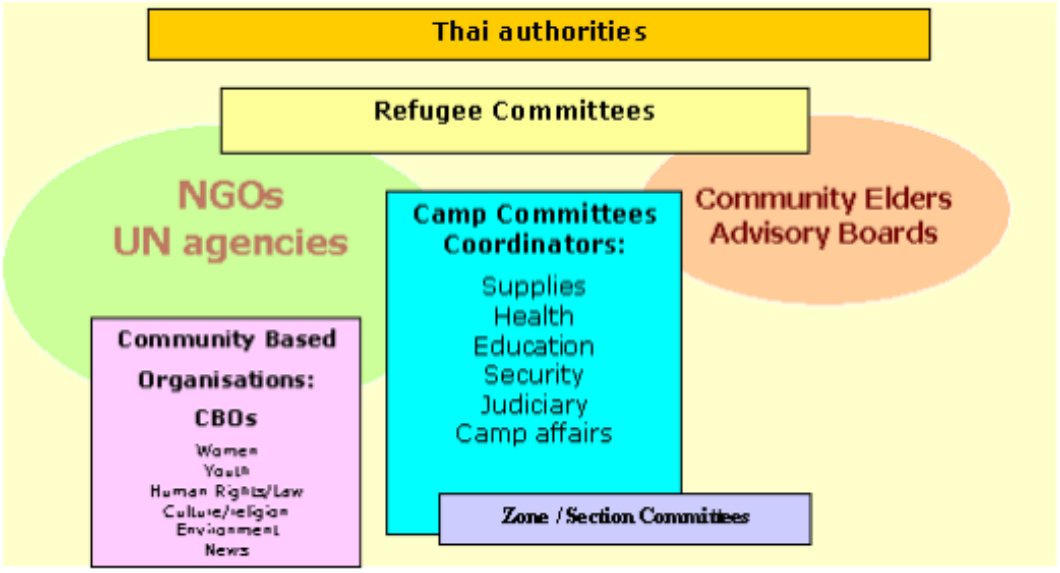
[177] Smith, *"All You Can Do Is Pray" Crimes Against Humanity and Ethnic Cleansing of Rohingya Muslims in Burma's Arakan State*.
[178] *The Karens of Burma: Forgotten Allies Still at War* (Worldwide Impact Now, 2010), https://www.youtube.com/watch?v=3rhCyZsPc6I.
[179] Ibid,.
[180] Naw M–, a 23-year-old female from K— village, Papun District, interviewed in February 2007; KHRG, 2008, p. 135 in "History of Armed Conflict and the Thailand-Burma Border," *Thailand-Burma Border SILENCED* (March 31, 2013), http://www.thailandburmaborder.org/overview-and-history-of-conflict-on-the-border/#.UZ9t3IL3xoM.

From around 1984, 160,000 refugees have been occupying the 2, 401 kilometer Thai-Myanmar border due to a longstanding conflict between the Burmese government and a multitude of other ethnic minorities, including the Karens.[182] Two main events caused the Karen minority to flee in the 1980's: military attacks in January 1984 and gradual forced relocation to eliminate rural villages of the opposition armies.[183] Unlike the Vietnamese refugees, the Karen minority knew what non-governmental organizations to reach out to and ask for help when the Karens were in danger.[184] In February of 1984, Thailand's Ministry of Interior recognized the flight of thousands of Karen minorities from the traditionally isolated country of Myanmar.[185] They sent NGOs under the Committee for Coordination of Services to Displaced Persons in Thailand (CCSDPT) to the Thai-Burma Border from the Cambodian and Laotian borders to assist with food and medical aid.[186] Since that period, the primary organization protecting and assisting the Karen refugees is called the Thai Burma Border Consortium.[187] Currently, there are ten acting organizations and over thirty additional donor NGOs and governments.[188]

The Thai government refused to allow the UNHCR in until 1998 on the Thai-Myanmar border and there was minimal interaction with the Thai police force.[189] A large portion of the Thai-Myanmar Border was coordinated by NGOs without the assistance of a U.N body.[190] In addition to the Thai Burma Border Consortium, another interesting and

[181] Jack Dunford, *Twenty Years on the Border* (Bangkok, Thailand: Burmese Border Consortium, 2004), http://theborderconsortium.org/resources/resources.htm, 16.
[182] Hazel J Lang, *Fear and Sanctuary: Burmese Refugees in Thailand* (Ithaca, N.Y.: Southeast Asia Program Publications, Southeast Asia Program, Cornell University, 2002), 7.
[183] Edith Bowles, *Assistance, Protection, and Policy in Refugee Camps on the Thailand-Burma Border: An Overview* (Refugees Studies Programme, Queen Elizabeth House: Oxford University Press, 1997), http://www.burmafund.org/Pathfinders/Research_Library/EdithBowlespaper.htm.
[184] Dunford, *Twenty Years on the Border, 17-18.*
[185] Ibid,.
[186] Ibid,.
[187] Ibid,.
[188] The ten acting organizations are: The Church World Service, The International Rescue Committee, ZOA Refugee Care, Act for Peace, Caritas, Christian Aid, DanChurchAid, Diakonia, the ICCO, and theNorwegian Church Aid
[189] Bowles, *Assistance, Protection, and Policy in Refugee Camps on the Thailand-Burma Border: An Overview*.
[190] Ibid,.

increasingly powerful NGO became the local representation of the Karen Refugee Committee.[191] The Karen Refugee Committee comprises of community leaders within the Karen population who organize community events and publish monthly reports about the ethnic breakdown of the camps to the Thai government's Ministry of the Interior.[192] Working together with the local Karen population and The Thai Burma Border Consortium made the refugee camps secure and accepting of people until 1995.[193] They range from community-based groups that coordinate activities to more politically active groups like the Karens Refugee Committee that directly interact with NGOs and the Thai government.[194] Encouraging the community organization and giving a voice to the Karen people had other positive impacts for the refugee camps.[195] Below is a visualization of the current organizational structure that is employed on the border:



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[191] Bowles, *Assistance, Protection, and Policy in Refugee Camps on the Thailand-Burma Border: An Overview*.
[192] Edith Bowles, "From Village to Camp: Refuge Camp Life in Transition on the Thailand-Burma Border," *The Forced Migration Review* 2 (n.d.): August 1998, 12-13.
[193] Although not the focus in this research, most of the Karen Refugee Committee and the Burmese Burma Consortium are Christian organizations. The Karens are Christian and Buddhist. Further research is available about the relationship between the Christian organizations and the Karen Buddhist population.
[194] Bowles, "From Village to Camp: Refuge Camp Life in Transition on the Thailand-Burma Border."
[195] Inge Brees, "Refugees and Transnationalism on the Thai–Burmese Border," *Global Networks* 10, no. 2 (2010): 282–299, doi:10.1111/j.1471-0374.2010.00286.x.
[196] The Thai Burma Border Consortium, (Accessed 24 May 2013) http://www.tbbc.org/camps/management.htm.

So, how does the organizations on the Thai-Myanmar border relate to NGOs, non-refoulement, and customary international law? First of all, the contact between the community organizations and The Thai Burma Border Consortium established an authority with the Royal Thai Government (RTG) as an essential actor in the border maintenance, since they provided regular informational and expertise on the ground. The late 80's and the early 90's was the formation of the epistemic community regarding refugee rights in Thailand. NGOs provided a platform for communication between the Karen people and the RTG. On the Thai-Myranmar border, forming networks of families, communities, and NGOs strengthened the ability of NGOs to inform the Thai government and to advocate for non-refoulement.[197] Strong ties between the refugee communities and the NGOs caused coordination, information sharing, and knowledge of the Karen refugees prior to their arrival on the Thai-Myanmar border.[198] By contributing to this internalization, the RTG complied with non-refoulement as a form of CIL and established longstanding relationships with NGOs that have lasted for over twenty years.

4.3 Turbulent Times in 1995: Violence on the Border

The relationship between the RTG, NGOs, and the Karen minority was tested in 1995 when the ceasefire in Myanmar crumbled and the Burmese army came to the Thai border and instigated violence with 90,000 Karen people living on the border.[199] Government forces overtook the Karen rebel headquarters in Myanmar, allowing for an unprotected Myanmar border for the first time since 1948.[200] During this time, around 8,000 Karen minorities fled

[197] Inge Brees, "Refugees and Transnationalism on the Thai–Burmese Border,".
[198] Bowles, *Assistance, Protection, and Policy in Refugee Camps on the Thailand-Burma Border: An Overview*.
[199] Dunford, *Twenty Years on the Border, 26-27*. And KERRY DEMUSZ, "From Relief to Development: Negotiating the Continuum on the Thai-Burmese Border," *Journal of Refugee Studies* 11, no. 3 (January 1, 1998): 231–244, doi:10.1093/jrs/11.3.231, 233.
[200] Bertil Linter, "Recent Developments of the Thai-Burma Border," *IBRU Boundary and Security Bulletin* (April 1995), http://www.dur.ac.uk/resources/ibru/publications/full/bsb3-1_lintner.pdf, 72.

to the Thai border.[201] Here is a map depicting the fall of the Karen rebel headquarters in Myanmar to the government's army.[202]

As the map shows, the longstanding buffer zones between the Thai-Myanmar border were gone and the Burmese Army launched attacks on the refugee camps.[203] The Thai government consolidated the refugee camps from a village organization, to larger compounds for security reasons.[204] This greatly increased the possibility of refoulement and made the Karen refugees much more reliant on NGOs. The Karens could no longer be self-sufficient. Also, the lack of free movement made newly arriving Karen people more susceptible to refoulement because they had to go through of more rigorous process to become registered.[205] The ensuing violence led to a confusion of people fleeing into Thailand, so Thai authorities would periodically send people back to Myanmar.[206]

The turmoil in 1995 validates the change that can occur within the transnational legal process when certain events trigger a regression or a push toward internalizing non-

[201] Ibid.
[202] Ibid.
[203] Dunford, *Twenty Years on the Border, 27*.
[204] Ibid.
[205] Bowles, *Assistance, Protection, and Policy in Refugee Camps on the Thailand-Burma Border: An Overview*.
[206] Philip Shenon, "Burmese Raid Border Camps In Thailand," *The New York Times*, May 14, 1995, http://www.nytimes.com/1995/05/14/world/burmese-raid-border-camps-in-thailand.html.

refoulement. The self-sufficient village system changed into a consolidation of the Karen minority into huge refugee camps and made NGOs more important than ever before. A counter argument is that the Thai government still acted lawfully. The exception to non-refoulement is if refugees threaten a states national security under Article 33.2 of the 1951 Refugee Convention and Article 3.2 of the AACO's Status and Treatment of Refugees.[207] A diplomat in Bangkok said, "Thai soil is being invaded almost daily by the Burmese Army, and the Thais feel they are powerless to do anything about it."[208] After the violence dissipated, the UNHCR was finally granted permission to enter the Thai-Burma border in 1998. The point is less about the instances of refoulement. This outbreak of violence was not indicative of normal circumstances on the border. Instead, the conflict on the Thai-Myanmar border in 1995 elevated the role of NGOs in coordinating with the government and the refugees.

4.4 The 2000's The Success and Struggles of NGOs to Prevent Refoulement

In the 2000's, NGOs became more active in investigating and advocating to prevent non-refoulement on the Thai-Myanmar border. NGOs successfully prevented Thai officials from refouling Karen refugees and internalized non-refoulement as customary international law by reporting the actions in order to monitor the Thai authorities. NGO's advocacy, investigating, and reporting pushed the RTG to retract their threats of refoulement due to the repugnance of the international community. Furthermore, the role of the internet and technology should not be underestimated in the success of NGO's ability to impact state practice and *opinio juris*. The effects of the internet on advocacy is the not focus of the research, but this is a powerful source of influencing states and putting them on a level playing field with NGOs. Some may even argue the networks created through NGOs and the

[207] *Convention Relating to the Status of Refugees* says there maybe an exception when there are 'reasonable grounds' for regarding refugees as a threat to national security.
[208] Shenon, "Burmese Raid Border Camps In Thailand."

internet is "the most powerful engine of change in the relative decline of states and the rise of non-state actors."[209]

In addition to the NGOs that reside on the Thai-Myanmar border, international human rights NGOs like the International Rescue Committee and a growing number of regional NGOs focused on refugees in Southeast Asia. All based in Bangkok, The Asia Pacific Refugee Rights Network, The Human Security Alliance, and Forum-Asia are significant regional NGOs that report and advocate for human security and non-refoulement in Southeast Asia.[210] These organizations provide a network between local and international NGOs, exchange information and reiterate the importance of non-refoulement. For instance, the Asia Pacific Refugee Rights Network and the Burma Border Consortium both contributed to the Human Rights Watch Report.[211] Giving the ethnic breakdown of the camps and the relaying instances of upheaval gives an exchange of information and reflects on the Royal Thai Government's sporadic practice.[212]

The Thai government has steadily allowed refugee camps and the influx of the Karen minority, in spite of their hollow threats to the contrary. The lines below illuminate these conflicts of interests.

> "General Khajadpai says the government's policy is to close the camps and send the people back home. But non-governmental border relief agencies say they do not want to send the Burmese back, citing the country's uncertain political and economic outlook, and reports and clashes of violence by pro-Burmese government groups opposing greater Karen autonomy."[213]

The constant push and pull between the epistemic community and the RTG cause anxiety and frustration, but the NGOs prevail due to their knowledge on the ground and the international pressure. The success of the NGOs to support, promote, and advocate for non-refoulement as

[209] Jessica T. Matthews, "Power Shift," 76 *Foreign Aff.* (1997), 50-51 in MÜller, "Customary Transnational Law: Attacking the Last Resort of State Sovereignty, 22."
[210] Asian Pacific Refugee Rights Network, http://www.aprrn.info/1/, Asian Network for Human Rights and Development http://www.forum-asia.org/, Human Security Alliance http://www.hsa-int.net/.
[211] Bill Frelick, *Ad Hoc and Inadequate: Thailand's Treatment of Refugees and Asylum Seekers* ([New York, N.Y.]: Human Rights Watch, 2012).
[212] Ibid.
[213] *Voice of America News*, Aug. 19, 2000 in Hathaway, *The Rights of Refugees Under International Law*, 284.

customary international law can be seen in the events leading up to the Burmese elections in November 2010. The Royal Thai Government reaffirmed their commitment to give temporary refuge to the Karen in Myanmar and halted the initial return by Thai authorities of Karen minorities due to a significant influence by NGOs.[214]

A combination of fighting within the Karen state and fear about the November 7, 2010 elections caused instability on the Thai-Myanmar border. Over 28,000 Karens were forced out of their homes by the Burmese army and many fled across to Thailand.[215] Violence was so intense that the U.N Special Rapporteur requested an inquiry by the U.N to determine whether these events constituted crimes against humanity.[216] In conjunction with the Irrawaddy Magazine,[217] the Asia Pacific Refugee Rights Network reported on the struggles of the Karen minority in Burma:

> "Now more and more soldiers of the DKBA (Democratic Karen Buddhist Army) are arriving where we used to live. It has made life unbearable for everyone because they take our food, our money and force us to work as porters." Every month, he says, villagers are dragged out of their homes by the DKBA soldiers and forced to carry rice to the front lines."[218]

The Royal Thai government's actions concerning the inflow of Karen refugees were positive for a vast majority of the people seeking protection, but there were reports of limited refoulement.[219] The beginning and the end of 2010 were the tense moments when there were concerns about local Thai authorities' behavior toward the fleeing Karen refugees. Radio Free Asia reported in February 2010 that 3,000 Karen refugees came over the Thai border, living in temporary housing.[220] Local Thai authorities were accused of threatening

[214] *Programme Report* (Bangkok, Thailand: The Thailand Burma Border Consortium, December 2010), 10.
[215] Ibid, 13.
[216] Ibid.
[217] The Irrawaddy Magazine is an NGO newspaper ran by reporters who fled Burma and escaped into Thailand.
[218] Irrawady Magazine, "Thai-Burmese Border Camps Braced for New Refugee Flow," *Asia Pacific Refugee Rights Network*, February 10, 2010, http://www.aprrn.info/1/index.php/news/56-thai-burmese-border-camps-braced-for-new-refugee-flow.
[219] Sarah Jackson-Han, "Karen Said To Face Danger," *Radio Free Asia*, February 2, 2010, http://www.rfa.org/english/news/myanmar/karen-02032010160245.html.
[220] Ibid,.

'repatriation'[221] and taunting the Karen refugees with the possibility of going back to Myanmar.[222] One of the major fears of refoulement is the threat of landmines throughout the Karen state.[223] The Karen's Women Organization recounted, "they [the Karen] are now living in fear of imminent forced repatriation into any area which is heavily landmined, and where active conflict can reignite at any point."[224] At the same time, the Burma Campaign UK called for the Thai government to be more aware of the actions of their local authorities. The Burma Campaign UK said, "Although the Royal Thai Government and local and military representatives have officially stated that they will not force people to return, in practice they are applying significant pressure on the refugees to return."[225]

In response to meetings between the Thai military, the local government, and numerous NGOs,[226]Thai authorities agreed to halt the idea of 'repatriation' indefinitely due to the threat of landmines and forced labor.[227] A common response by the local Thai authorities is to threaten repatriation or non-refoulement. Even though the investigation and advocacy of the threats to the international community stops the Thailand from violating non-refoulement. The next two examples directly highlight NGO's advocating non-refoulement as customary international law and the Thai government conceding to their demands.

In September of 2010, Thailand's foreign minister Kasit Piromya gave a speech in the United States in the wake of the elections in Myanmar. During the speech at the Asian Society, he stated:

> "I am going back to Bangkok and one of the first things I will be doing is to launch a more comprehensive program for the Myanmar people in the camps, the displaced

[221] Most NGO sources alternate between the word repatriation and refoulement. Repatriation might be easier to understand for non-academic audiences, but the NGO's still refer to the customary law in regards to non-refoulement. I am aware that they mean different things in legal terms.
[222] Ibid,.
[223] Ibid,.
[224] Ibid,.
[225] Ibid,.
[226] The Thailand Burma Border Consortium, The Karen National Union, and the International Rescue Committee
[227] "Thailand- JRS Keeps Track of Karen Refugees," *Jesuit Refugee Services*, February 16, 2010, http://myanmarrefugeesinternational.blogspot.hu/2010/02/thailand-jrs-keeps-track-of-karen.html.

> persons, the intellectuals that run around the streets of Bangkok and Chang Mai province, to prepare them to return to Myanmar after the elections."[228]

Proclaiming this statement to an international audience drew fierce criticisms from the international community, especially NGOs. NGOs believed it symbolized a future of forcible 'repatriation' of refugees after the November 7th elections. Human rights organizations cited non-refoulement as a principle of international law that should not be violated, even if Myanmar would become a "half-democracy."[229] Groups like Amnesty International Southeast Asia spoke out and said, "Amnesty is confident that Thailand will not allow false hopes to triumph over reality on the protection of Burmese refugees."[230] The prominent human rights lawyers in Thailand, Somchai Homlaor,[231] also became concerned with the possibility of refoulement by citing that "any such plan would be against Thai Law and international law."[232] He also reiterated specifically that it contravenes the principle of non-refoulement.[233]

The Thai Foreign Ministry quickly responded to public outcry by decreeing the Foreign Minister Piromya's statement was "misinterpreted" and no such plan exists.[234] The RTG also proclaimed that they wanted to "help better prepare Myanmar people now residing in Thailand, including Myanmar displaced persons, in terms of training, education and capacity building."[235] An awareness of the individuals and NGOs by the Thai Foreign Ministry to recant their statement about refoulement reveals how NGOs utilize CIL. NGOs have the

[228] Banyan, "Burmese Refugees in Thailand Welcome Withdrawn," *The Economist*, October 15, 2010, http://www.economist.com/blogs/banyan/2010/10/burmese_refugees_thailand.
[229] Ibid.
[230] "Thailand to Send Refugees and Opposition Back to Burma?," *The Irrawaddy*, October 2, 2010, http://www.simonroughneen.com/asia/seasia/thailand/thailand-to-send-refugees-and-opposition-back-to-burma-the-irrawaddy/.
[231] He was the Secretary-General for the Campaign for Popular Democracy and the Asian Forum for Human Rights and Development. For more details see: https://www.amnesty.org/en/news-and-updates/feature-stories/human-rights-defender-thailand-somchai-homlaor-20081209.
[232] "Thailand to Send Refugees and Opposition Back to Burma?".
[233] Ibid,.
[234] "Will Thailand Deport Burmese Refugees after the Election? Part II," *Bangkok Pundit*, October 22, 2010, http://asiancorrespondent.com/41758/will-thailand-deport-burmese-refugees-after-the-election-part-ii/.
[235] Francis Wade, "Thailand 'will Not' Return Burma Refugees," *Democratic Voice of Burma*, October 8, 2010, http://www.dvb.no/news/thailand-%E2%80%98will-not%E2%80%99-return-burma-refugees/12129.

unique ability to enforce CIL through advocacy and investigating. These networks of NGOs work with one another to endorse a consistent message to the Thai government and the international community. It is almost a form of 'shaming' the Royal Thai Government into complying with customary international law.

The final pattern of the Thai government following the basic rules of non-refoulement through the work of NGOs is after the elections in Myanmar on November 7th. Skirmishes along the border caused 10,000-30,000 Karens to cross into Thailand.[236] This led to a flow of Karens moving back and forth from Thailand to Myanmar.[237] Thai officials were accused of sending back Karen refugees into another armed conflict. As David Mathieson of the Human Rights Watch observed, "while Thai authorities have been good at letting refugees flee into Thailand to escape fighting and receive assistance, they need to allow these people to stay until the refugees themselves feel it is safe to return home."[238] There was some confusion over whether the Thai officials intentionally returned Karen people or if they voluntarily moved back into Burma.

In effect, NGO's rallied together in December of 2010 to send an open letter to the Royal Thai Government reaffirming Thailand's customary international law obligation to non-refoulement.[239] The International Federation for Human Rights, the Union of Civil Liberty, and the Alternative ASEAN Network sent an open letter to the Prime Minister on December 30th.[240] The letter recounted Thailand's alleged refoulement of 166 Karen refugees and declared,

[236] "Report from the Thailand-Burma Border," *New Mandala*, November 10, 2010, http://asiapacific.anu.edu.au/newmandala/2010/11/10/report-from-the-thai-burma-border/.
[237] Ibid,.
[238] "Myanmar: Thai Officials 'Force Refugees into Harms Way in Karen State'," *Mizzina*, December 10, 2010, http://reliefweb.int/report/myanmar/myanmar-thai-officials-force-refugees-harms-way-karen-state.
[239] "Thailand Must Respect Principle of Non-refoulement and Protect the Rights of Refugees - ALTSEAN Burma," accessed May 26, 2013, http://www.altsean.org/Press%20Releases/2010/30Dec10.htm.
[240] Ibid,.

> "These actions are in clear violation of the principle of non-refoulement under international customary law, which prohibits the forced repatriation of refugees to places where their life or freedom would likely be threatened."[241]

Furthermore, an NGO newspaper called Prachatai published a scathing article on January 7th about the Thai government's refoulement of the same 166 Karen refugees where they argued,

> "The fact that Thailand has not ratified the UN Refugee Convention makes no difference: like the prohibition against torture, non-refoulement is customary international law, meaning that it applies to all states regardless of their treaty obligations. Once again, Thailand has committed a clear and direct violation of international refugee law."[242]

These bold statements and direct confrontations to Thailand's integrity in the international community garnered a response by the Thai government in reaction the to Prachtai article. On January 10th, the Department of Public Relations issued a statement reasserting Thailand's extensive "humanitarian assistance to displaced persons fleeing fighting in Myanmar."[243] A Foreign Affairs Director denied any violation of international law and repeated Thailand's work with NGOs to provide assistance and protection for over 100,000 displaced persons.[244] The Thai Official also corroborated their actions to facilitate in voluntary returns with NGOs.[245]

The truth probably lies somewhere in between. These final events illustrate the diverse role of NGOs in working with the Thai government to ensure non-refoulement, while actively advocating for Thailand to comply with customary international law. General reports by NGOs, like the Human Rights Watch call for further action by the Royal Thai Government to ratify the 1951 Refugee Convention and create domestic policies, but the events in 2010 demonstrate the multifaceted impact of NGOs on customary international law. Thailand does not have a formal response to refugees through traditional notions of regional

[241] "Thailand Must Respect Principle of Non-refoulement and Protect the Rights of Refugees - ALTSEAN Burma,"
[242] Benjamin Zawacki, "Thailand Again Sullies Its Human Rights Record," *Prachatai*, January 7, 2011, http://www.prachatai.com/english/node/2234.
[243] "Thailand's Policy on Humanitarian Assistance for Persons Fleeing Fighting in Myanmar," *The Government Public Relations Department*, January 10, 2011, http://thailand.prd.go.th/view_news.php?id=5452&a=2.
[244] Ibid.
[245] Ibid,.

agreements or domestic legislation. Rather, the localization of non-refoulement with the support of NGOs on the ground and the international advocacy of non-refoulement creates this epistemic community that connects with one another in addition to the Thai Government. As the evidence shows, the role of customary international law and non-refoulement is still a long road that takes decades to develop. New international actors, such as NGOs, on local, regional, and international planes have the ability to influence states in a multitude of ways. It is fundamental to keep in mind that the growth of the epistemic community and the transnational legal model is a process- a process that NGOs are using to push states into granting greater rights for refugees.

Conclusion:

In sum, the lives of the Vietnamese and Karen refugees exposes the complex relationships between states, the international community, the UNHCR, and non-governmental organizations in the process and maintenance of customary international law. Forming the more nuanced approach to state practice and *opinio juris* compliments the role of NGOs in Southeast Asia working adamantly to ensure protection for all refugees. Also, conceptualizing non-refoulement as a transnational legal process underscores the role of NGOs in pushing states to deeper integration of non-refoulement into their legal system and preventing states from retreating back into less humanitarian approaches to non-refoulement. From the mass pushbacks of Vietnamese refugees in the 1970's to a wide range of non-governmental, regional, and international organizations, Thailand has made immense progress in following non-refoulement as customary international law through the insistence and advocacy of NGOs.

One of the most important findings was the importance of creating an epistemic community that forms networks within itself in order to gain validity with the Royal Thai Government. This importance could be a product of the localization process in Southeast Asia. NGOs are vital to the formation of these epistemic communities, but networks with the refugee population create a more distinct voice. Even though NGOs have made progress in the last five years assisting the RTG with the maintenance of non-refoulement, more work still needs to be done.

Another at-risk minority group from Myanmar are the Rohingya refugees. According to the 2013 Human Rights Report, there are approximately 750,000 Rohingya in the Northern Rakhine State, 28,000 registered in Bangladesh, 90,000 in Malaysia, around 15,000 in

Thailand, and thousands more are undocumented or not registered.[246] They are practicing Muslim, stateless people who are not recognized by any government.[247] Although the paper could not analyze the Rohingya refugees, comparing the lukewarm reception of Rohingya to the Vietnamese and the Karen refugees would show the current role of NGOs without the deeper community roots in Thailand that the Karen's exhibit.

In a broader context, the influx of refugees into Thailand and the lack of domestic and regional legislation demonstrates the difficulty of reconciling developing state's interests with the humanitarian concerns of the developed world. There is no question that the future mission of NGOs in Southeast Asia is to encourage states to adopt more holistic views of refugees, but there should be an awareness of how different cultures adapt these western-centric international ideas. NGOs should continue to advocate for the ratification of the 1951 Refugee Convention, adopting a binding regional agreement through ASEAN, and institutionalizing domestic laws that give rights to refugees, but there should be an effort to shapes these ideas around Southeast Asian culture. Longstanding NGOs in Southeast Asia like the Thai Burma Border Consortium can guide lawmakers and policy advocates to formulate proposals based on religious freedom, ethnic communities, and resettlement solutions.

In the future, it would be interesting to focus on field research to observe how laws function in Southeast Asia. I do not have the answer for the most precise legal mechanisms to integrate non-refoulement into their domestic legal systems for the Thai government, and Southeast Asia, but collaborating with NGOs and ASEAN to systemize a regional solution would be one avenue to research further. More research on the development of ASEAN's response will become more important as the organization becomes a more formidable actor in world politics. NGOs can push for regional developments in ASEAN to move Southeast Asia

[246] Smith, *"All You Can Do Is Pray" Crimes Against Humanity and Ethnic Cleansing of Rohingya Muslims in Burma's Arakan State*.
[247] Ibid,.

into interpreting non-refoulement. This will probably be done before there is any consideration by the Southeast Asian government to internalize non-refoulement through a domestic legal process.[248] Similarly, exploring the differences between Southeast Asia's informal response to refugees and Africa's formal response through progressive regional agreements could give insight into crafting regional agreements.

Finally, researching the impact of different types of NGO's in international law could show the most useful ways to impact states, especially within the human rights and environmental law. With the bonds of state sovereignty being broken, the role of non-state actors such as non-governmental organizations binds information, values, and law together into a message of hope for refugees in all parts of the world.

[248] It should be noted that Cambodia has ratified the 1951 Refugee Convention.

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