THE HOWS AND WHYS OF INTERCEPTION: A STATE PERSPECTIVE

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I INTRODUCTION

There is increasing recognition in the developed world that there are substantial economic, demographic and social benefits to be gained from facilitating the orderly movement of people around the world. People are moving in increasing numbers for tourism, family reasons, education, business or employment. Migration reinforces links with the global economy and society, enhancing both productive and cultural diversity.

Drawing on the positive experiences of traditional overtly migration countries such as the United States, Canada, Australia and New Zealand, countries in Europe are exploring legal migration as the way to balance ageing populations and to fill labour market imbalances.

In addition to migration opportunities, a small number of countries make a contribution to refugee protection by offering third country resettlement to refugees in countries of first asylum.

The other, unfortunately much larger part of global people movement is made up of:

- forced migration of those who flee conflict, persecution or natural disasters; and
- illegal movement of those who seek to circumvent migration and border controls, often in order to improve their economic circumstances.

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Community support for immigration and resettlement, whether in traditional or emerging migration countries, is dependent on community confidence. The community expects that intakes do not exceed the community's capacity to integrate new arrivals, that migration and resettlement programmes are managed with fairness and integrity and that appropriate public health and security issues are being rigorously addressed.

It is no accident that communities that are diverse, tolerant and welcoming of migrants and resettled refugees are at the same time strongly supportive of measures to combat irregular migration and to fight people smuggling.

Many of those who are being smuggled or trafficked are migrants in search of a better life, hoping to find employment opportunities and economic prosperity abroad, while others are asylum-seekers and refugees.[1]

For many of those fleeing directly from a country of persecution, countries of asylum have clear obligations under the Refugees Convention not to *refoule.*[2] For those who have no need of protection, swift return to their country of origin is the most effective anti-smuggling approach.

But many of the people using people smugglers have mixed motives: they are refugees making secondary and even tertiary movements, from a country of first or subsequent asylum where they had or could have sought and been provided with effective protection, to a preferred country of protection where they seek improved living standards and/or a durable solution.

In all cases, criminal traffickers or smugglers make large illicit profit from offering their services.[3]

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1 UNHCR draft paper on 'Interception of Asylum-Seekers and Refugees: The International Framework and Recommendations' (EC/50/SC/CRP.17), 18th Meeting of the Standing Committee, 9 June 2000 at: http://www.unhcr.ch/refworld/refworld/unhcr/excom/standcom/2000/menu.htm.

2 Under Article 33(1), States undertake not to return or expel a refugee to the frontiers of a country where his or her life or freedom would be threatened on account of his or her race, religion, nationality, membership of a particular social group, or political opinion.

3 Ibid, p 1. The paper also points out the distinction made by the Vienna ad hoc Committee on the Elaboration of a Convention against Transnational Organised Crime (CTOC) (created by the UN General Assembly in its resolution 53/111 of 9 December 1998) between smuggled migrants and trafficked persons. As currently defined in the two protocols supplementing CTOC, trafficking concerns the recruitment and transportation of persons for a criminal purpose, such as prostitution or forced labour,

The costs of dealing with irregular migration are large and impact on the effectiveness and sustainability of the international protection system: In 2001 the IGC Inter-Governmental Consultations on Asylum, Refugee and Migration Policies in Europe, North America and Australia estimated that refugee status processing costs alone, exclusive of asylum-seeker accommodation and support, litigation or removal of rejected asylum-seekers cost IGC countries[4] in excess of US$10 billion.

Transparent links between a State's capacity and willingness to provide contributions to countries of first asylum and UNHCR and to resettlement are made in only a few countries. There is however clearly an impact where finite resources are used to deal with large numbers of asylum-seekers.[5]

In recent years, States have renewed efforts to prevent irregular migration and to combat the smuggling and trafficking of persons, in particular when undertaken by organised criminal groups.

This focus is reflected in the Convention against Transnational Organized Crime (CTOC) and its supplementary Protocols on trafficking and smuggling of migrants.[6] The General Assembly, in adopting the Convention and its Protocols, noted that it was:[7]

> Deeply concerned by the negative economic and social implications related to organized criminal activities, and convinced of the urgent need to strengthen

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and usually involves some level of coercion or deception. Smuggling, on the other hand, involves bringing a migrant illegally into another country.

4 IGC countries are: Australia, Austria, Belgium, Canada, Denmark, Finland, Germany, Ireland, The Netherlands, Norway, Spain, Sweden, Switzerland, United Kingdom and United States.

5 For example, Switzerland is a UNHCR resettlement country; however, it suspended its resettlement quota in early 1999, citing special circumstances related to the increase in asylum seekers and the need for increased in-country resources.

6 The United Nations Convention against Transnational Organized Crime (CTOC), the Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, and the Protocol against the Smuggling of Migrants by Land, Sea and Air, were adopted by the General Assembly in its Resolution 55/25 at its 62nd plenary meeting on 15 November 2000.

7 Resolution adopted by the General Assembly 55/25. United Nations Convention against Transnational Organized Crime, 15 November 2000.

cooperation to prevent and combat such activities more effectively at the national, regional and international levels.

Destination States have increasingly resorted to interception measures within the broader context of migratory control measures. Although interception frequently occurs in the context of large-scale smuggling or trafficking of persons, it is also applied to those who travel on their own, without the assistance of criminal smugglers and traffickers.

Because some intercepted persons may be asylum-seekers and refugees, but others may not, interception is a key example of the migration/asylum nexus. Interception is one of the processes within which State border control and entry laws and policies intersect with protection polices and obligations.

This paper examines the international legal and policy framework in which interception is used as one of the measures to combat irregular migration and people smuggling, and the impact of interception on asylum-seekers and refugees.

II MANAGEMENT OF PEOPLE MOVEMENT – THE WHY

Australia has consistently argued that irregular migration and people smuggling are best addressed using a comprehensive and integrated approach, drawing on international cooperation. The approach necessarily involves a solid commitment to the twin objectives of:

- continuing to meet protection obligations and working to ensure the viability of the international protection system;
- while at the same time, doing everything possible to fight irregular migration and people smuggling.[8]

Some argue that people smuggling is necessary to enable refugees to flee persecution in their country of origin to a place of safety.

While there is evidence to suggest that some refugees use people smugglers to reach an asylum country, in 2001 only 15% of those applying for asylum in IGC countries were adjudged to be refugees.[9] In addition, an analysis of decisions in 2001 demonstrates that in most cases asylum seekers would have had to transit

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8 'Principled Observance of Protection Obligations and Purposeful Action to Fight People Smuggling and Organised Crime – Australia's Commitment', September 2001 (A Paper distributed at UNHCR Global Consultations).

9 *Overview on First Instance Decision Data 2001* – IGC.

countries where they could have availed themselves of protection but instead chose to obtain both a protection and migration outcome at their final destination.

A The Comprehensive and Integrated Approach

Australia continues to vigorously promote and pursue a comprehensive and integrated approach to managing irregular migration. This approach is comprised of three main elements:

- addressing the so-called push factors through preventive strategies;
- disruption of the mechanism used to effect illegal entry – people smuggling and trafficking and the use of fraudulent documents; and
- addressing the attractiveness of the product sold by the smugglers – the so-called pull or demand factors – through adjustments to reception, return and readmission arrangements.

1 Prevention

Preventive strategies are relevant to both countries of origin and countries of first asylum. They seek to remove or ameliorate the factors that motivate people to leave through:

- support for the resolution of conflict and the development of human rights in countries of origin;
- aid and development assistance to developing countries to reduce poverty and address humanitarian and emergency relief situations;[10]

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10 General Assembly resolution 54/212 of 22 December 1999 urges 'Member States and the United Nations system to strengthen international cooperation in the area of international migration and development in order to address the root causes of migration, especially those related to poverty, and to maximize the benefits of international migration to those concerned, and encouraged, where relevant, interregional, regional and subregional mechanisms to continue to address the question of migration and development'. Incorporated in the Preamble to the Protocol against the Smuggling of Migrants by Land, Sea and Air. Also, Art 15 (3) of the Protocol against the Smuggling of Migrants states 'Each State Party shall promote or strengthen, as appropriate, development programmes and cooperation at the national, regional and international levels, taking into account the socio-economic realities of migration and paying special attention to economically and socially depressed areas, in order to combat the root socio-economic causes of the smuggling of migrants, such as poverty and underdevelopment'.

- resources to support countries of first asylum
  - in continued provision of effective protection while durable solutions are found; and
  - in provision of local integration as appropriate; and/or
- resources to support UNHCR in registration, refugee status determination and repatriation, and the referral of refugees in countries of first asylum for third-country resettlement.

Australia's capacity building and assistance measures are constantly reprioritised to take account of the needs of specific caseloads and situations. While Australia continues to fund and support States in the areas of migration management and border control, funding has also been directed to support rebuilding infrastructure and providing for people being returned or repatriated to assist with improving their standard of living. For example, since September 2001, the Australian Government has committed AU$40.3 million to assist with humanitarian aid and reconstruction of Afghanistan.

2 Disruption

The operations of people smugglers are generally highly profitable and low risk, encouraging the proliferation of this form of transnational organised crime. A key strategy is therefore to increase the risks and costs for the people smuggler.

Substantial work is being done by the Centre for International Crime Prevention (CICP)[11] and through regional bodies and initiatives to encourage States to criminalise people smuggling and ensure penalties are at a level commensurate with the gravity of the offence. States are urged to cooperate through exchange of information and joint law enforcement operations to identify, apprehend and successfully prosecute people smugglers and traffickers.

The Bali Regional Ministerial Conference on People Smuggling, Trafficking in Persons and Related Transnational Crime[12] generated considerable impetus and high level support for efforts to intensify regional cooperation including through

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11 The Centre for International Crime Prevention (CICP) is the United Nations office responsible for crime prevention, criminal justice and criminal law reform. It pays special attention to combating transnational organised crime, corruption and illicit trafficking in human beings. See at: http://www.undcp.org/odccp/crime_cicp.html

12 26-28 February, 2002 www.dfat.gov.au/illegal_immigration/cochair.html

information-sharing for law enforcement purposes and cooperation in verifying the identity and nationality of illegal migrants. Work is proceeding in the region on developing legislation to criminalise people smuggling and trafficking.[13]

Information campaigns that advise the lower level operatives, for example crews of boats, of the risks and penalties relating to involvement in people smuggling are important.[14]

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13 For example, new NZ legislation makes people smuggling an offence punishable by 20 years in jail or up to $500,000 in fines (previously the maximum penalty had been three months jail and a $5,000 fine). Fines for businesses that 'knowingly' hire illegal immigrants will jump from $5,000 to $50,000. The New Zealand Herald, 'Closing door on forlorn line of asylum-seekers', 28 May 2002, at http://www.nzherald.co.nz/storyprint.cfm?storyID=2043613

14 A Media Statement by Hon Phil Goff, Minister of Foreign Affairs, 'NZ sends stark warning to people-smugglers and boatpeople', Friday 28 June 2002 at www.refugee.org.nz/news.htm provides details of New Zealand's information campaign. 'The Minister has claimed that pamphlets warning of likely death or heavy penalties is hitting its mark with people-smugglers and potential illegal migrants. Three thousand pamphlets have been distributed in towns and ports in Indonesia directly to potential illegal migrants warning them of the perils of undertaking a journey to New Zealand. He claims that reports from Jakarta reveal that the pamphlet is making potential illegal immigrants doubtful about travelling to New Zealand as they see the journey as too dangerous and people-smugglers see the pamphlet campaign as an obstacle to attracting business. A further 25,000 pamphlets will be distributed in Indonesia and in other nations such as Iran, Pakistan, Sri Lanka, Thailand, Malaysia and Vietnam. The pamphlets also highlight the new laws passed recently which provide for severe penalties including fines of up to half a million dollars and twenty years imprisonment for those responsible for smuggling people.'

The Australian Government is collaborating with the International Organisation for Migration (IOM) on the development of an international information campaign to combat people smuggling from the Middle East and South-West Asia. As the international people smuggling rackets feed on rumour and misinformation, a key preventative strategy is to improve the level of information available to potential users about smugglers and outcomes. Australia's international information campaigns have been conducted in source, first asylum and transit countries. The campaigns concentrated on disseminating messages about the penalties for people smuggling and the dangers of illegal travel to Australia. For example, an Indonesian-language scrapbook of newspaper stories about Indonesian fishermen gaoled in Australia was compiled and distributed in those parts of Indonesia where people smuggling is active. Information about legal avenues of migration to Australia was also included in the campaigns.

Another way of increasing the costs of smugglers' operations is through concerted efforts to disrupt the flow of people. Interception, wherever possible, as early as possible along the route, is the key disruption strategy and is widely used by States.[15]

Australia's approach involves criminalisation of people smuggling with minimum sentencing to underline the gravity of the offence,[16] investment in the apprehension, prosecution and where necessary and possible the extradition of smugglers,[17] enhanced surveillance and detection capacity[18] and board, search and vessel seizure and destruction powers.[19]

3 Reception, readmission and return

Most irregular migrants seek permanent residence status, usually by applying for asylum. However, even if that quest were unsuccessful, extended stay, achieved through long processing times and/or delays in removal, of itself provides benefit. Time in the country of destination provides an opportunity to

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15 At a meeting organised in May 2001 by UNHCR as part of the Global Consultations process, involving 21 participants (including representatives of the Government of Canada and the United States, NGOs, academics and others) it was 'recognised that interception is here to stay, as States consider it an effective means of controlling irregular migration and combating smuggling or trafficking of persons'; 'Global Consultations Update' in Prima Facie, the Newsletter of UNHCR's Department of International Protection, August 2001, p 4. An overview of the meeting's conclusions and recommendations on incorporating refugee protection safeguards into interception measures can be found in the document: 'Regional Workshops in Ottawa, Ontario (Canada) and Macau', Global Consultations on International Protection, 2nd Meeting, EC/GC/01/13, 31 May 2001.

16 DIMIA Fact Sheet 70, Border Control, 19 November 2001. Australian courts must now sentence those convicted of people smuggling action which have occurred since 26 September 2001 (including crews of boats) to a minimum of 5 years in prison, with a maximum sentence of 20 years in prison possible for a first conviction, and at least 8 years and up to 20 years for a second conviction for bringing people to Australia illegally where both offences occurred after the 26 September 2001.

17 DIMIA Fact Sheet 70, Border Control, 19 November 2001.

18 DIMIA Fact Sheet 73, People Smuggling. Measures include improved Coastwatch, Customs and Navy capabilities to detect, pursue, intercept and search boats carrying unauthorised arrivals.

19 DIMIA Fact Sheet 70, Border Control, 19 November 2001.

work (whether permitted or not), which can generate funds sufficient to at the least defray the costs of smuggled entry and for remittances.

Thus the key to reduction in value of what is sold by the smuggler is to process quickly, remove as soon as practicable and return to the country of origin, or to the country of first asylum providing effective protection if the person is a refugee.

In the absence of readmission, reduction of the benefits achieved though smuggling down to the level of core entitlements (for example through removal of immediate access to local integration) can encourage refugees to stay in the country of first asylum in order to access the full benefits of the orderly delivery of durable solutions.

These strategies, while they no doubt impact on the choices made by smugglers and the users of smugglers as to which destination country to target, are not enough in and of themselves to prevent people smuggling. It is only through truly global cooperation and investment in preventive strategies and cooperation on return and readmission – the comprehensive and integrated approach – that true inroads in reducing the incidence of people smuggling will be made.

4 Comprehensive approach by other destination countries

Policies in other countries reflect this comprehensive approach.

An example of a comprehensive approach is provided by the country-specific action plans of the European Union's High Level Working Group on Asylum and Migration (HLWG). These plans address the phenomenon of composite flows and comprise a number of elements relating to the root causes of migratory and refugee movements. They also contain control measures to combat irregular migration, such as increasing the number and effectiveness of airline liaison officers and immigration officials posted abroad.[20]

The European Union (EU) has recently proposed a number of measures to combat illegal migration, including measures to prevent illegal migrants reaching EU borders. The Commission of the European Communities in a communication to the European Council and the European Parliament stated that:[21]

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20 UNHCR Standing Committee paper on interception, op cit, p 2.

21 Communication from the Commission to the Council and the European Parliament on a Common Policy on Illegal Immigration, COM (2001), Brussels, 15.11.2001, at http://www.ue2002.es/principal.asp?idioma=ingles

> The prevention of and fight against illegal immigration are essential parts of the common and comprehensive asylum and immigration policy of the European Union.

The problem of illegal immigration within the broader context of the common policy on asylum and immigration was considered recently by the European Council in Seville. The Council concluded (Conclusion 28) that:[22]

> Measures taken in the short and medium term for joint management of migration flows must strike a fair balance between, on the one hand, an integration policy for lawfully resident immigrants and an asylum policy complying with international conventions, principally the 1951 Geneva Convention, and, on the other, resolute action to combat illegal immigration and trafficking in human beings.

The Council endorsed the EU plan to fight illegal immigration and called on the Council and the European Commission to attach top priority to certain measures contained in the plan.[23] The European Council considered that combating illegal migration required a greater effort by the EU and a targeted approach to the problem with the use of all appropriate instruments in the context of the EU's external relations.[24] The Council considered it necessary to carry out a systematic assessment of relations with third countries which did not cooperate in combating illegal immigration. Inadequate cooperation by a country could

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22 Seville European Council, Presidency Conclusions at http://.ue2002.es/principal.asp?idioma=ingles

23 Seville European Council, op cit, Conclusion 30 – in particular 'review, before the end of the year, the list of third countries whose nationals require visas or are exempt from that requirement; introduce… a common identification system for visa data [as soon as possible]; speeding up of the conclusion of readmission agreements currently being negotiated and approval of new briefs for the negotiation of readmission agreements with countries already identified by the Council...'.

24 Seville European Council, ibid, Conclusion 33 – the Council concluded that an integrated, comprehensive and balanced approach to tackle the root causes of illegal immigration must remain the European Union's constant long-term objective. The Council urged that any future cooperation, association or equivalent agreement which the European Union or the European Community concludes with any country should include a clause on joint management of migration flows and on compulsory readmission in the event of illegal migration. The Council highlighted the importance of ensuring the cooperation of countries of origin and transit in joint management and border control as well as on readmission.

hamper the establishment of closer relations between that country and the Union.[25]

EU members are faced with uneven and unreliable cooperation of source countries with respect to facilitating return of nationals. As a result, EU States are increasingly adopting an approach of expecting readmission to the point of embarkation to Europe, thus increasing the incentive for these transit countries to intercept and in turn return to prior transit countries or the country of origin.

The United States has Integrated Border Enforcement Teams (IBET) in place. These are multi-agency groups of law enforcement officials dedicated to securing the integrity of the border. In December 2001 the United States and Canada began working together at key international locations to enhance interception capacity.[26]

On 8 October 2001, the President of the United States George W Bush announced the creation of the Department of Homeland Security in order to secure borders and transportation systems which straddle 350 official ports of entry.[27]

The issue of combating smuggling and trafficking of persons has also featured prominently on the agenda of several international organisations, including the Council of Europe; the Organisation for Security and Cooperation in Europe (OSCE); the International Organisation for Migration (IOM); the Inter-

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25 Seville European Council, ibid, Conclusion 35.

26 www.sgc.gc.ca/Releases/e20011203_2.htm

27 www.whitehouse.gov/deptofhomeland/sect3.html. It is planned that the Department will work towards the creation of a state-of-the-art visa system, which will include biometric information gathered during the visa application process. It would ensure that information is shared between databases of border management, law enforcement, and intelligence community agencies so that individuals who pose a threat to America are denied entry to the United States. It would also lead efforts to deploy an automated entry-exit system that would verify compliance with entry conditions, student status such as work limitations and duration of stay, for all categories of visas. The Department will incorporate the United States Customs Service (currently part of the Department of Treasury), the Immigration and Naturalization Service and Border Patrol (Department of Justice), the Animal and Plant Health Inspection Service (Department of Agriculture), and the Transportation Security Administration (Department of Transportation).

Parliamentary Union; and several United Nations agencies, such as the International Labour Organisation (ILO).[28]

III INTERNATIONAL TRAVEL AND INTERNATIONAL LAW

A Do States have a Sovereign Right to Control their Borders?

States have a legitimate interest in controlling irregular migration and have the sovereign right to control their borders and to determine who will enter their territory. As the High Court of Australia said in the case of *Lim*:[29]

> The power to exclude or expel even a friendly alien is recognised by international law as an incident of sovereignty over territory. As Lord Atkinson, speaking for a Judicial Committee of the Privy Council, said in *Attorney-General for Canada v Cain* ([1906] AC 542 at p 546): 'One of the rights possessed by the supreme power in every State is the right to refuse to permit an alien to enter the State, to annex what conditions it pleases to the permission to enter it, and to expel or deport from the State, at pleasure, even a friendly alien, especially if it considers his presence in the State opposed to its peace, order, and good government, or to its social or material interests'.

B What is the Impact of the Refugees Convention?

The Refugees Convention contains no explicit or implicit prohibition on interception. A State's primary obligation under the Refugees Convention is not to *refoule* or return a person, either directly or indirectly to a country where the person's life or freedom would be threatened on account of a Convention ground. The prohibition on *refoulement* in Article 33 of the Refugees Convention may qualify, but does not remove the prerogative of States to intercept,[30] exclude,[31]

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28 UNHCR Standing Committee paper on interception, ibid, p 2.

29 Brennan, Deane and Dawson JJ, in *Lim v MILGEA* (1992) 176 CLR 1 FC 92/051 at 27. More recently, in *Ruddock v Vadarlis* [2001] FCA 1329 at 193, http:/www.austlii.edu.au, French J (in the majority), stated: 'The power to determine who may come into Australia is so central to its sovereignty that it is not to be supposed that the Government of the nation would lack under the power conferred upon it directly by the Constitution, the ability to prevent people not part of the Australian community, from entering'.

30 Qualified interception on the high seas has been incorporated into the UN 'Protocol against the Smuggling of Migrants by Land, Sea and Air, supplementing the UN Convention against Transnational Organised Crime', United Nations, 2000, see

expel or deport illegal entrants, even if they are refugees.[32] In the context of interception measures, it is accepted that there need to be effective safeguards put in place to ensure that *refoulement* does not take place in the transit country of interception or the countries of disembarkation.

This *non-refoulement* obligation does not require entry to the territory of the intended State of destination, nor to its refugee status determination procedure.[33]

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especially Articles 8 ('Measures against the smuggling of migrants by sea') and 9 ('Safeguard clauses').

31 In considering the case of the MV *Tampa*, Beaumont J of the Full Federal Court in *Ruddock v Vadarlis* [2001] FCA 1329 at 125-126, http:/www.austlii.edu.au said: '[T]here is nothing in any of the authorities to contradict the principle that an alien has no common law right to enter Australia. This aspect is beyond argument … [W]hilst customary international law imposes an obligation upon a coastal state to provide humanitarian assistance to vessels in distress, international law imposes no obligation upon the coastal state to resettle those rescued in the coastal state's territory. This accords with the principles of the Refugee Convention. By Article 33, a person who has established refugee status may not be expelled to a territory where his life or freedom would be threatened for a Convention reason. Again, there is no obligation on the coastal state to resettle in its own territory'. The case involved the Australian Government's ability to prevent the entry into Australia's migration zone, and arranging for their departure from Australian territorial waters, of unauthorised arrivals rescued from a sinking vessel by a Norwegian ship, the MV *Tampa*, on 26 August 2001. The unauthorised arrivals were removed to Nauru, where a refugee status determination procedure was implemented.

32 For a more detailed discussion of these issues see the paper prepared by DIMIA for the UNHCR Series of Roundtables on Article 31 of the Refugees Convention. In 'Interpreting the Refugees Convention - an Australian contribution', 2002, pp123-173 at www.immi.gov.au

33 The Convention is silent on what procedure might be appropriate to determine refugee status, where it might take place, and who might undertake it. These are matters which the Convention's drafters left to each State to determine. As noted in UNHCR's 'Handbook on Procedures and Criteria for Determining Refugee Status', Geneva 1979, para 189: '[T]he determination of refugee status, although mentioned in the 1951 Convention (cf Article 9), is not specifically regulated. In particular, the Convention does not indicate what type of procedure is to be adopted for the determination of refugee status. It is therefore left to each Contracting State to establish the procedure that it considers most appropriate, having regard to its particular constitutional and administrative structure'. For a more detailed discussion of these issues see the paper prepared by DIMIA for the UNHCR Series of Roundtables on Article 31 of the Refugees Convention. In 'Interpreting the Refugees Convention - an Australian contribution', 2002, pp123-173 at www.immi.gov.au

It may be met anywhere in the world by other States which permit entry and which honour the *non-refoulement* obligation and other core human rights obligations.

Asylum is for States to provide rather than a right of the individual. The right to 'seek and enjoy asylum' in the Universal Declaration of Human Rights (UDHR) must be understood as purely permissive. As noted by Gummow J of the High Court in *Ibrahim*:[34]

> [The] right 'to seek' asylum [in the UDHR] was not accompanied by any assurance that the quest would be successful. A deliberate choice was made not to make a significant innovation in international law which would have amounted to a limitation upon the absolute right of member States to regulate immigration by conferring privileges upon individuals … Nor was the matter taken any further by the International Covenant on Civil and Political Rights … Article 12 of the ICCPR stipulates freedom to leave any country and forbids arbitrary deprivation of the right to enter one's own country; but the ICCPR does not provide for any right of entry to seek asylum and the omission was deliberate'.

The return of illegal entrants to a safe country of first asylum in the case of those making secondary movement, or transfer to another safe country where any protection claims may be considered by UNHCR, officials of the receiving State, or officials of the intercepting State are both valid actions under international law.

Interception of refugees beyond the territorial boundaries of the intercepting or destination State does not engage the protection obligations of either State under the Refugees Convention. While there is some support for the view that the *non-refoulement* obligation has assumed the status of customary international

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34 *MIMA v Ibrahim* [2000] HCA 55 at 137-138. He adds, '[I]t has long been recognised that, according to customary international law, the right of asylum is a right of States, not of the individual; no individual, including those seeking asylum, may assert a right to enter the territory of a State of which that individual is not a national … Over the last 50 years, other provisions of the Declaration have [citing Brownlie] come to "constitute general principles of law or [to] represent elementary considerations of humanity" and have been invoked by the European Court of Human Rights and the International Court of Justice. But it is not suggested that Art 14 goes beyond its calculated limitation'. See also comments by Gummow J et al in *Applicant A & Anor v MIEA & Anor* (1997) 190 CLR 225.

law,[35] there is no obligation on the intended State of destination to admit to its territory a refugee seeking to enter illegally.

It has been suggested by UNHCR,[36] that the physical act of interception by a State engages that State's protection obligations in respect of those intercepted, irrespective of the location of that interception.

However, an examination of the *travaux preparatoires* provides firm ground for the conclusion that Article 33(1) of the Refugees Convention was not intended by the original drafters to apply extraterritorially. In particular the President of the Conference ruled that to avoid ambiguity the interpretation given by the Netherlands be placed on the record. That interpretation reflected a consensus among a number of major receiving States that Article 33 was limited in its application to those who had already been admitted or were already within the territory.[37] In agreement with Robinson, Grahl-Madsen notes that Article 33 'may

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35 There is no settled view on whether the obligation applies extra-territorially, though some commentators take the view that it does. According to Goodwin-Gill, *The Refugee in International Law* (Clarendon Press, Oxford, 1996) 143, 'The principle of *non-refoulement* has crystallised into a rule of customary international law, the core element of which is the prohibition of return in any manner whatsoever of refugees to countries where they may face persecution. The scope and application of the rule are determined by this essential purpose, thus regulating State action wherever it takes place, whether internally, at the border or through its agents outside territorial jurisdiction'. See also 'The Scope and Content of the Principle of *Non-Refoulement'*, by Sir Elihu Lauterpacht and Daniel Bethlehem, UNHCR, 20 June 2001 (a background paper prepared for the Expert Roundtable series organised by UNHCR as part of the Global Consultations process for the 50th anniversary of the Convention).

The proposition that the principle of *non-refoulement* – but not necessarily agreement on its scope as proposed by Goodwin-Gill – is now embedded in customary international law was acknowledged in the Declaration adopted by Contracting States to the Convention on 12-13 December 2001 in Geneva.

36 In the UNHCR Standing Committee paper, 'Interception of Asylum Seekers and Refugees: The International Framework and Recommendations for a Comprehensive Approach', EC/50/SC/CRP.17, 9 June 2000, p 4, UNHCR adopts a purposive approach to give effect to the objective of international protection. It is argued that to restrict the Convention's application to the territories of the Contracting States would render the Convention ineffective. It is also argued that international human rights law recognises an obligation of *non-refoulement* in certain circumstances and has extra-territorial effect where a person is 'subject to the jurisdiction' of the State.

37 Weis P, *The Refugee Convention, 1951 The Travaux Preparatoires Analysed with a Commentary*, (Cambridge University Press, UK, 1995) 334-335.

only be invoked in respect of persons who are already present – lawfully or unlawfully – in the territory of a Contracting State.[38]

An act of interception outside the territory does not create an Article 33 obligation on the part of a destination country or the flag state of a rescuing ship, whoever does it, or wherever it is done, if the asylum-seeker is not within the State's territorial boundary. This general principle is not changed in the context of interception on the high seas or in rescue at sea.[39]

C Obligations of Carriers

Carriers have a responsibility to abide by the immigration laws and regulations of States. These obligations are set out in the Chicago Convention for international air carriers,[40] but as a matter of domestic law, this responsibility applies in any event to air carriers, as it does to shipping, rail and road carriers.

Australia's migration legislation imposes a liability on carriers to ensure that non-citizens brought to Australia are properly documented. The master of a vessel [which includes an aircraft][41] which brings an unauthorised passenger or inadequately documented passenger to Australia is deemed guilty of an offence[42] and may be liable to pay any costs of detention, removal and deportation.[43]

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38 Grahl-Madsen, *The Status of Refugees in International Law*, (Vol 2, AW Sijthoff-Leyden) 94.

39 For further discussion of this point, see section 5.3 of this paper.

40 For example Article 13 of the 1944 Convention on International Civil Aviation [known as the Chicago Convention] states: 'The laws and regulations of a contracting State as to the admission to or departure from its territory of passengers, crew or cargo of aircraft, such as regulations relating to entry, clearance, immigration, passports, customs, and quarantine shall be complied with by or on behalf of such passengers, crew or cargo upon entrance into or departure from, or while within the territory of that State.'

41 Section 5(1) of the Migration Act.

42 Section 232(1) of the Migration Act states:

Where:

(a) a non-citizen:

(i) enters Australia on a vessel; and

(ii) because he or she is not the holder of a visa that is in effect or because of section 173, becomes upon entry an unlawful non-citizen; and

(iii) is a person to whom subsection 42(1) applies; or

(b) a removee or deportee who has been placed on board a vessel for removal or deportation leaves the vessel in Australia otherwise than in immigration detention under this Act;

the master, owner, agent and charterer of the vessel shall each be deemed to be guilty of an offence against this Act punishable by a fine not exceeding 100 penalty units.

Section 229 of the Migration Act states *inter alia*:

The master, owner, agent, charterer and operator of a vessel of which a non-citizen, is brought in to Australia on or after 1 November 1979 are each guilty of an offence against this section unless the non-citizen, when entering Australia:

is in the possession of evidence of a visa that is in effect and that permits him or her to travel to and enter Australia; or

holds a special purpose visa; or

is non-citizen who is eligible for a special category visa; or

holds an enforcement visa; or

is a non-citizen who is covered by subsection 42(2) or (2A) or by regulations made under subsection 42(3)

A person who is guilty of an offence against this section is liable, upon conviction, to a fine not exceeding $10,000.

An offence against subsection (1) is an offence of absolute liability.

43 Section 213(1) of the Migration Act:

If a non-citizen who enters Australia:

(a) is required to comply with section 166 (immigration clearance); and

(b) either:

(i) does not comply; or

(ii) on complying, is detained under section 189 as an unlawful non-citizen;

then, as soon as practicable after the Secretary becomes aware that paragraphs (a) and (b) apply to the non-citizen, the Secretary may give a carrier of the non-citizen a written notice requiring the carriers of the non-citizen to pay:

(c) if the non-citizen is detained - the costs of the non-citizen's detention; and

(d) if the non-citizen is removed or deported from Australia, the costs of the non-citizen's removal or deportation.

In the EU, carriers are responsible for returning aliens who are refused entry.[44] In addition, carriers are obliged to take all necessary measures to ensure that an alien is in possession of valid travel documents.[45]

In Canada, interception measures used include obliging carriers to screen passengers for proper documents.[46] In the United Kingdom, a £2000 civil penalty is imposed on the driver or operator of any UK-bound road vehicle concealing illegal immigrants (the penalty was later applied to rail freight).[47]

D Obligations of Passengers

Passengers are bound under relevant domestic law to abide by entry and stay conditions, including obtaining visas where required to enter lawfully. Attempted

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Section 217 states:

(1) If a person covered by subsection 193(1) is to be removed, the Secretary may give the controller of the vessel on which the person travelled to and entered Australia written notice requiring the controller to transport the person from Australia.

(2) Subject to section 219, the controller must comply with the notice within 72 hours of the giving of the notice or such further time as the Secretary allows.

Penalty: 100 penalty units.

(3) An offence against subsection (2) is an offence of strict liability.

Note: For strict liability, see section 6.1 of the Criminal Code.

See also sections 207-221.

44 Communication from the Commission to the Council and the European Parliament on a Common Policy on Illegal Immigration, op cit, para 4.7.5. Carriers are responsible for returning those clients who are refused entry on the basis of Article 26 of the Convention implementing the Schengen Agreement of 14 June 1985.

45 Ibid.

46 Summary Record of Workshop on Incorporating Refugee Protection Standards into Interception Measures, UNHCR Global Consultations on International Protection, Ottawa, May 14-15, 2001.

47 The UK government introduced the civil penalty in April 2000, and in the first year issued 852 notices in respect of 4798 clandestine entrants; the penalty was applied to rail freight in March 2001.

P&O Stena Line introduced routine lorry checks at Calais in December 2000, and in four months found nearly 1,700 potential illegal entrants: http://194.203.40.90/default.asp?PageId=1205.

entry without valid documentation may be subject to penalty, subject to the provisions of Article 31 of the Refugees Convention.[48]

IV WHAT IS INTERCEPTION?

A formally internationally accepted definition of interception does not exist. UNHCR have put forward a working definition, which defines interception as:[49]

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

Its dictionary meaning is to seize, catch or stop (a thing) going from one place to another, or to check or stop (motion etc).[50]

A Interception and International and Domestic Law

International law provides important parameters for States undertaking interception as a means to combat irregular migration and people smuggling. Reference to these parameters is to be found within a complex framework of existing and emerging international legal principles deriving from international maritime law, criminal law, the emerging legal regime for combating transnational crime, the law of State responsibility[51] and human rights and refugee law.

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48 For a more detailed discussion of these issues see the paper prepared by DIMIA for the UNHCR Series of Roundtables on Article 31 of the Refugees Convention. In 'Interpreting the Refugees Convention - an Australian contribution', 2002, p123 at www.immi.gov.au. For further information on legislative provision see Press release of *Legislative Provisions Restore Integrity to Refugees Convention* MPS 117/2001 (13 August 2001) <http://www.minister.immi.gov.au/media_releases/media01/r01117.htm>

49 UNHCR paper on interception, op cit, p 2.

50 *Australian Concise Oxford Dictionary* (Oxford University Press, Melbourne, 1995) 588.

51 It should be noted that Australia does not accept the view put forward by some international bodies that the law of state responsibility imposes an obligation on intercepting countries, when a government official is involved in interception, to provide access to their territory and to provide fair and effective asylum procedures within that territory. No question of an international wrongful act arises when the interception has taken place outside the borders of the intercepting state. Consequently

The right to leave a country, including one's own,[52] is not explicitly dependent on whether the person has the right to enter another country. However, the right to leave a country is subject to such restrictions as are provided by law and are 'necessary to protect national security, public order (*ordre public*), public health or morals or the rights and freedoms of others'.[53] It is recognised, for example, that States have a limited right to prevent persons accused of a crime from leaving their territory.[54]

It was proposed by the British delegation participating in the drafting of the ICCPR that States might be permitted to control emigration in order to assist neighbouring States to control illegal immigration.[55]

The French term '*ordre public*' was inserted together with the English 'public order' to indicate that the full sense of the term was meant to cover not only the absence of public disorder, but also:[56]

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the doctrine of state responsibility has no bearing on the issue. Access to fair and effective procedures may be met by return to a safe country of first asylum and/or transfer to another safe country for processing by UNHCR, by officials of the intercepting state or receiving state.

52 Article 13.2 of the Universal Declaration of Human Rights (UDHR) states 'Everyone has the right to leave any country, including his own, and to return to his country' and Art 12.2 of the ICCPR states 'Everyone shall be free to leave any country, including his own'.

53 Article 12 of the International Covenant on Civil and Political Rights (ICCPR) provides that: '1. Everyone lawfully within the territory of a State shall, within that territory, have the right to liberty of movement and freedom to choose his residence. 2. Everyone shall be free to leave any country, including his own. 3. The above-mentioned rights shall not be subject to any restrictions except those which are provided by law, are necessary to protect national security, public order (*ordre public*), public health or morals or the rights and freedoms of others, and are consistent with the other rights recognized in the present Covenant. 4. No one shall be arbitrarily deprived of the right to enter his own country.'

54 Nowak, M, 1993, UN Covenant on Civil and Political Rights: ICCPR Commentary (NP Engel, Kehl) 213.

55 Ibid, p 214.

56 Ibid, p 212.

> …in addition to public safety and the prevention of crime, all those "universally accepted fundamental principles, consistent with respect for human rights, on which a democratic society is based" [footnotes removed].

Presence in a country of those engaged in people smuggling and trafficking imports a substantive threat to public safety and the State's capacity to prevent crime. There is clear evidence that corruption of local officials and subversion of law enforcement are necessary for people smuggling to operate, thus threatening the core of the State's governance. People smuggling is often associated with other forms of smuggling and breaches of customs and quarantine regulations.

Restrictions on the right to leave in order to combat people smuggling and trafficking can thus clearly be seen to be in accordance with Article 12(3) of the International Convention on Civil and Political Rights (ICCPR).

Of further relevance, interception is clearly envisaged in the Chicago Convention[57] and in the People Smuggling and Trafficking Protocols of the Convention against Transnational Organized Crime.[58] The general individual right expressed in Article 12(2) of ICCPR must be read in the light of these specific provisions.

In any event, interception by transit countries, whether or not it is done in cooperation with destination countries, can be viewed in the context of breach of their own domestic immigration and other laws, thereby falling within the provisions of Article 12(3).

Nor is interception – the prevention of exit to a country where there is no right of entry – a blanket prevention of exit. The person would still be able to leave to a country of origin or other country into which the person had permission to enter, or indeed to the proposed country of destination should entry subsequently be authorised.

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57 Article 13 obliges international air carriers to ensure that passengers are properly documented for entry to the destination State. So carriers in a practical sense, by preventing boarding by undocumented passengers, undertake interception.

58 Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, Supplementing The United Nations Convention Against Transnational Organized Crime (Article 15) and Protocol against the Smuggling of Migrants by Land, Sea and Air, Supplementing The United Nations Convention Against Transnational Organized Crime (Article 8).

States are not able to intercept within the territory of another State, without their express agreement.[59]

Interception measures must not breach domestic laws, for example criminal laws with respect to destruction or damage of property or crimes against the person such as assault.

There was general agreement at the regional workshop organised in May 2001 by UNHCR as part of the Global Consultations process which considered ways of incorporating refugee protection safeguards into interception measures, that intercepted persons, including asylum seekers and refugees, are entitled to be treated in a safe and humane manner.[60]

V INTERCEPTION MEASURES – THE HOW

In the context of managed people flows, the prevention of unauthorised movement takes place whenever there is refusal of a visa or permission to enter.

It appears that all countries operate some form of visa regime, some with visas considered at the border, some with visa-free entry for nationals of low risk countries.[61]

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59 Article 4 of the United Nations Convention Against Transnational Organised Crime states "1. States Parties shall carry out their obligations under this Convention in a manner consistent with the principles of sovereign equality and territorial integrity of States and that of non-intervention in the domestic affairs of other States.

2. Nothing in this Convention entitles a State Party to undertake in the territory of another State the exercise of jurisdiction and performance of functions that are reserved exclusively for the authorities of that other State by its domestic law".

60 'Regional Workshops in Ottawa, Ontario (Canada) and Macau', Global Consultations on International Protection, 2nd meeting, EC/GC/01/13, 31 May 2001. The workshop concluded that international law standards, in particular the UN Convention against Transnational Organised Crime and its relevant Protocols as well as international refugee and human rights law, provide a useful framework for elaborating applicable standards and procedures of treatment.

61 It was pointed out at the Workshop on Incorporating Refugee Protection Standards into Interception Measures, (UNHCR Global Consultations on International Protection), Ottawa, in 2001 that the INS continues to rely on visa requirements as the primary method for screening and intercepting persons not entitled to travel to the US. Australia has a universal visa system delivered through overseas posts at diplomatic missions, travel agents and e:visas, to encourage travellers to obtain authority before departing to

When a person who has not applied for a visa or who has been refused a visa nevertheless attempts to circumvent the orderly lawful entry system, with or without the use of a people smuggler, purposeful interception by State authorities is an important part of its border management system.

Interception takes place:

- in countries of departure at immigration control points where exit permits are required and at boarding points by international air, land and sea carriers;
- in transit countries, where the person is illegal, or is attempting to depart to a destination where they have no right to enter;
- at sea; and
- at the borders of transit or destination countries in the process of attempting illegal entry.

A Interception in Countries of Departure at Immigration Control Points and at Boarding Points for International Air, Land and Sea Carriers

Interception at the point of embarkation can be particularly effective as it:

- increases the likelihood of identification of recruiters and people smugglers and therefore also interruption of other planned smuggling attempts;
- minimises the risk, both financial and physical, to the users of smugglers; and
- sends a strong deterrence message to those with a potential to pay a smuggler in the future.

Interception of smuggled migrants at boarding points by international carriers is clearly envisaged by the Protocol against the Smuggling of Migrants,[62] as is the

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Australia. See Fact Sheet 53, Australia's Entry System for Visitors at http://www.immi.gov.au/facts/53entry_system.htm

62 Article 11 of the Protocol against the Smuggling of Migrants states: '… 2. Each State Party shall adopt legislative or other appropriate measures to prevent to the extent possible, means of transport operated by commercial carriers from being used in [smuggling migrants]… 3. Where appropriate, and without prejudice to applicable international conventions, such measures shall include establishing the obligation of

imposition of sanctions against carriers who violate their obligations to ensure that passengers have the necessary authority to enter the destination State.[63]

The IATA/Control Authorities Working Group (IATA/CAWG) brings together airlines and immigration control authorities from nineteen countries[64] to 'develop and pursue a cooperative programme for the facilitation and processing of a growing number of passengers, while ensuring effective action against illegitimate traffic…'.[65]

To this end, Immigration Liaison Officers (ILOs) are placed with airlines to assist with the identification of fraudulent documents and to provide airlines with training and advice on entry requirements and so assist them to comply with Chicago Convention obligations and avoid carrier sanctions.[66]

In accordance with the IATA/CAWG Code of Conduct, Liaison Officers are to refer inadmissible passengers who raise refugee issues to seek assistance from the relevant diplomatic mission or the UNHCR.

Many countries utilise these administrative measures with the aim of intercepting inadmissible passengers. At key locations abroad, such as the main

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commercial carriers… to ascertain that all passengers are in possession of the travel documents required for entry into the receiving State'.

63 Article 11 (4) of the Protocol against the Smuggling of Migrants.

64 Australia, Austria, Belgium, Canada, Denmark, Finland, France, Germany, Italy, Japan, Netherlands, Norway, Portugal, South Africa, Spain, Sweden, Switzerland, United Kingdom, United States of America.

65 The IATA/CAWG Vision Statement at http://www.iata.org/oi/committees/pfwg/_files/InadpaxRemovalsGuidelines.pdf.

66 Among the main tasks for ILOs, '…5.3 training airline staff in the general principles of passport and visa requirement, passenger profiling and awareness of fraud and forgery; 5.4 advising airline staff on whether passengers have the right travel documents and visas for their proposed journey; 5.5 assisting in establishing the bona fides of individual passengers who are properly documented, but about whose documents airline staff have doubts; 5.6 advising airline staff on whether travel documents and visas are genuine, forged or fraudulently obtained; 5.7 assisting the local immigration and police authorities in identifying criminals involved in the illegal movement of inadequately documented passengers…' IATA CAWG *A Code of Conduct for Immigration Liaison Officers* Oct 1998. IATA CAWG has indicated that where ALOs are not able to refer to UNHCR or to the relevant diplomatic mission, they are expected to have other procedures in place to manage asylum claims.

transit hubs for global migratory movements, States[67] have deployed extraterritorially their own immigration control officers in order to advise and assist the local authorities in identifying fraudulent documents. In addition, airline liaison officers, including from private companies, have been posted at major international airports both in countries of departure and in transit countries, to prevent the embarkation of improperly documented persons.

Australia has selected, trained and placed at key overseas posts additional compliance and liaison officers for the purpose of investigating people smuggling, liaising with authorities in the host country, exchanging information, and providing training to assist in combating irregular migration. One facet of these outposted personnel are the Airport Liaison Officers (ALOs).[68] In accordance with the IATA/CAWG code of conduct for Immigration Liaison Officers, the primary role of Australian ALOs is to provide advice to airlines about the travel documentation held by passengers and whether such documentation meets the entry and clearance requirements to Australia.

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67 Within IATA/CAWG, the following countries have ALOs (or their equivalents): Australia, Canada, United Kingdom, Netherlands, Germany, United States, Norway, Switzerland. Several other States, such as Finland and Sweden, will on occasion, organise short term visits by their officers to problem airports under bilateral agreements.

68 Australia's Airline Liaison Officer (ALO) programmme commenced in 1990 in Singapore and Bangkok. Over the last decade, the programmme has been expanded and currently there are 9 ALOs stationed at 6 key airports. ALOs have played a vital role in protecting Australia's border at overseas airports by preventing the travel to Australia of inadequately documented passengers. Australian ALOs do not consider the bona fides of a passenger's travel intentions to Australia nor the fulfilment of any associated visa conditions. ALOs provide information on irregular movements and emerging trends in the use of fraudulent documents. To the extent possible, ALOs also provide information on people smuggling activities, although this is more a role for the dedicated Compliance officer covering the region. The ALOs are part of Australia's Overseas Compliance Network which includes 26 specialist compliance officers who are strategically located at various posts where people smuggling activities may impact on Australia's border protection. Awareness of refugee policy is a prerequisite for successful ALO placement. During 2000-01, 231 Australia bound passengers were intercepted by ALOs.

The New Zealand Government will use the APP system to identify and screen passengers bound for New Zealand, prior to their boarding an aircraft. The New Zealand Government has announced that:[69]

> APP will be an invaluable tool in our ability to scrutinise people before they get on the plane, which means we can prevent people who are attempting to circumvent our immigration laws from arriving in New Zealand.

The EU has liaison officials deployed at key locations abroad. As part of a Global Plan to fight Illegal Immigration and Trafficking in Human Beings approved by the Union in February 2002, measures include creation of common consular offices in third countries and strengthening the coordination of liaison officials in countries of origin.[70]

Canada has used interception since 1989 to prevent improperly documented persons from coming to Canada. Measures include the establishment of a network of Immigration Control Officers (ICOs) stationed overseas. The ICOs are responsible for assisting and training host country officials and carrier (mostly airline) personnel in fraudulent document detection and Canadian entry requirements. Canada has two cooperation agreements on interception, with the UK and the Netherlands.[71]

The US Immigration and Naturalisation Service (INS) carries out operations at foreign airports. Similar to the Canadian ICO programmes, these involve training and cooperation with airlines and local authorities to identify false documents and to break up smuggling operations.[72]

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69 www.beehive.govt.nz/ViewDocument.cfm?DocumentID=14066

70 Details of the plan can be found at: http://www.ue2002.es/principal.asp?idioma=ingles

71 Presentation by Citizenship and Immigration Canada (CIC) to Workshop on Incorporating Refugee Protection Standards into Interception Measures, UNHCR Global Consultations on International Protection, Ottawa, 14-15 May 2001. During their initial training, ICOs are sensitized to Canadian refugee policy. Where persons seeking protection are intercepted in countries which have ratified the Refugees Convention, Canada expects that country to provide protection against refoulement. ICOs are governed by the IATA/CAWG Code of Conduct, which directs them to refer asylum seekers to UNHCR or the appropriate diplomatic mission. During 2000, 6,238 persons were intercepted seeking to come to Canada without proper documentation (85% were intercepted in countries which have ratified the 1951 Convention).

72 Presentation by INS to Workshop on Incorporating Refugee Protection Standards into Interception Measures, UNHCR Global Consultations on International Protection,

Tough security and interception measures have also been introduced to deal with the large numbers seeking to move irregularly from France to England.[73]

B Interception in Transit Countries

A number of transit countries have received financial and other assistance from prospective destination countries in order to enable them to detect, detain and remove persons suspected of having the intention to enter the country of destination in an irregular manner.[74]

Transit countries in SE Asia,[75] supported by Australia and with the involvement as appropriate of UNHCR and IOM,[76] disrupt the flow of people to

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Ottawa, 14-15 May 2001. INS also carries out 'pre-flight inspections' by INS inspectors stationed in Canada, the Caribbean and Ireland.

73 Cherbourg, France's second biggest port is reported to be the new target for asylum seekers heading for the UK following the introduction of tough new security measures at Calais and the Eurotunnel entrance, the common route for people trying to come to Britain.

"Wave of migrants descends on France's 'new Sangatte'", The Telegraph (U.K.), August 25, 2002 at: http:www.telegraph.co.uk/news/main.jhtml?xml=%2Fnews%2F2002%2F08%2F25%2Fwasy25.xml. Asylum seekers have managed to smuggle themselves on to lorries entering ferries despite measures to stem the tide such as carrier sanctions and increased border patrol police. The number of asylum seekers caught at the port attempting to smuggle themselves across the channel has risen from a couple every night to more than 40. According to the mayor of Cherbourg, the situation had worsened markedly in his town since July, when Britain and France announced a joint agreement to close the Sangatte camp near Calais by April 2003. A spokeswoman for Brittany Ferries, said the company risked being fined £2,000 by the British Government for every stowaway, as well as having to pay the cost of lodging and repatriation. The company is now employing a private security firm with sniffer dogs and carbon dioxide monitors to check every lorry entering its ferries. France's interior minister, Nicolas Sarkozy, promised new laws to crack down on illegal immigration and announced round-the-clock checks at Cherbourg and increased numbers of border patrol police at the port. He also promised to deploy a group of paramilitary police and about 15 extra interpreters and border officials in Cherbourg.

74 UNHCR Standing Committee draft paper on interception, op cit, p 3.

75 Indonesia, Cambodia and East Timor Australia has recently also signed an agreement with the South African Government, to discourage illegal migrants from using South Africa as a transit to Australia. Under the agreement, illegal migrants who travel to Australia via South Africa will be sent back to South Africa, whose officials will process any claim for asylum. Officials from both countries will work together to reduce the number of people smugglers and illegal entrants, MPS 073/2002 'Agreement

their country and onwards to Australia by taking concerted action to intercept those who are breaching their immigration laws.[77]

These cooperative arrangements are proving to be an effective and important initiative to address the issue of irregular migration and people smuggling. As a result, there are signs that some smugglers are seeking to move their operations elsewhere.

The arrangements bring transit countries, destination countries and international organisations together in partnership to combat irregular people movement. Importantly they contain mechanisms to ensure that any protection needs are identified and met.

C Interception at Sea

The phenomenon of people using smuggled passage over the seas in search of safety, refuge, or simply better economic conditions is not new. The mass exodus

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with South Africa on People Smuggling', 2 August 2002 at: http://www.minister.immi.gov.au/media_releases/media02/r02073.

76 IOM advise the detainees of their options, particularly voluntary return, and refers to UNHCR any person who signals an intention to claim asylum. UNHCR then assesses any protection claims and seeks durable solutions for those people determined to be refugees. Australia assists the transit country by supporting IOM in meeting the reasonable costs for the upkeep of those third country nationals who have been detained and the costs for the voluntary removal of those who wish to depart the transit country. Australia also assists UNHCR with administrative and processing costs associated with refugee status determination procedures and reasonable cost of readmission to countries of prior protection or first asylum of those assessed as needing protection.

As at 15 September 2002, IOM advised that 3 826 illegal immigrants had come under its program. Some 741 illegal immigrants were currently in IOM care and advice from immigration officials in the Australian Embassy in Jakarta suggests that there are a further 500 to 600 illegal immigrants in Indonesia.

According to UNHCR figures, at 31 August 2002 the intercepted caseload awaiting resettlement stood at 535 refugees (276 cases) of whom 197 (104 cases) had been provisionally approved for resettlement by various countries. Another 135 people (85 cases) were waiting to be referred to a country for resettlement. In addition, there were 666 asylum seekers, most of whom had been found not to be refugees in a preliminary assessment by UNHCR and were in the review process.

77 In mid 2001 these cooperative arrangements helped to bring about the joint interdiction of a vessel bound for Australia carrying third country nationals who did not have permission to enter Australia.

of Vietnamese boat people throughout the 1970s and 1980s was followed in the 1990s by large-scale departures from places such as Cambodia, Albania, Cuba, Haiti,[78] and from North Africa.[79]

While smuggling along land routes involves danger,[80] the transport of illegal migrants by sea presents grave risks.[81]

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78 Illegal Haitian immigrants intercepted trying to enter the Bahamas so far this year (August 2002) was more than 3,000. Haitians often take the sea route through the Bahamas towards Florida, or end up in the Bahamas. From January to July this year, the Bahamas immigration department had repatriated 3,044 Haitians and 444 people of other nationalities (Reuters, August 20, 2002).

79 Every year thousands of illegal immigrants from Morocco and other African states, as well as Asian countries including Pakistan try to cross the Gibraltar Strait in unsafe boats and many die in the attempt. Spanish immigration officials say nearly 45,000 people were stopped while trying to enter Spain illegally in 2001, an increase of about 10,000 from the previous year. About 18,000 immigrants were intercepted trying to illegally enter the country by sea and 44,800 were deported or refused entry (Reuters, August 25, 2002).

80 Spanish police recently arrested a Moroccan truck driver for homicide a day after the discovery of the bodies of four Moroccans, suspected of being illegal immigrants, in the back of his sealed container (Reuters, August 22, 2002). In June 2000, 58 Chinese migrants found in Dover, UK lost their lives when they suffocated in the container of the truck they were being transported in.

81 It has been reported that Spanish civil guards have rescued 730 people from the sea in the Strait of Gibraltar since 2000 and humanitarian organisations say several thousand people are likely to have drowned in this way. Thirteen bodies washed up on the shore near Tarifa on August 1 after traffickers forced their passengers to jump into the water some distance from the beach. (Reuters, August 14, 2002) An Italian fishing boat had rescued 151 illegal immigrants crowded on a 12-metre boat that was shipping water about 50 miles off the coast of Sicily. The Italian coastguard helped tow the boat towards the nearest port as some immigrants threatened to jump in the water unless they were rescued (Deutsche Presse – Agentur, August 19, 2002). The rescue of 433 persons from a sinking Indonesian fishing boat by the MV Tampa highlights the risks associated with attempting to enter Australia in dangerous, unsafe and often overcrowded vessels. On 19 October 2001, 353 suspected illegal migrants, including 150 women and children drowned in international waters south of Java on its way to Christmas Island. Only 44 survived. US Coast Guard Statement on Interdiction (ibid). For example in December 2001 CG brought to Florida 185 Haitians floundering on a dangerously overcrowded boat, due to safety concerns [Miami Herald, 4 December 2001]. In May 2002 at leat 14 Haitian migrants drowned and 73 were rescued when their overcrowded boat sank off the Bahamas [Miami Herald, 5 July 2002, at http://www.miami.com/mld/miamiherald/3602634.htm].

Many States have pointed out that smuggling often endangers the lives of persons, in particular those travelling in unseaworthy boats. Their interception directly reduces the need for rescue of persons in distress at sea and can help save lives.[82]

Interception can occur in the form of physical interception (or as it is sometimes called interdiction) of vessels suspected of carrying irregular migrants or asylum-seekers, either:

- within the territorial sea[83] or contiguous zone[84] of the country of embarkation or transit;
- on the high seas;[85] or
- within the territorial sea or contiguous zone of the country of destination.

Different legal regimes apply to interception, depending where on the sea it takes place and on the flag status of the vessel.

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82 Interdiction is seen as serving both humanitarian and national security functions for the US. A significant number of cases handled by the US Coast Guard begin as search and rescue and the Coast Guard considers its duty under international law is to first render assistance, given the extremely unsafe conditions under which illegal migrants travel. Issues of status and disposition are left to be resolved once immediate safety concerns are addressed.

83 The 1982 United Nations Convention on the Law of the Sea (UNCLOS) allows a state to claim a territorial sea of up to twelve nautical miles from baselines [Article 3] and most states, including Australia by proclamation in 1990, claim the full twelve mile zone. In Blay, Piotrowicz and Tsamenyi, *Public International Law in Australia* (Oxford University Press, Melbourne, 1997) 333.

84 The 1982 UNCLOS grants the coastal state jurisdiction over the waters that lie immediately beyond the limits of the territorial sea up to 24 miles from the baselines [Article 33(2)]. Australia claimed a contiguous zone up to 24 miles in the Maritime Legislation Amendment Act 1994. Blay, Piotrowicz & Tsamenyi, op cit, p 334.

85 The high seas is the area that is not included in the internal waters, territorial sea, Exclusive Economic Zone (from the outer edge of the territorial sea to 200 miles from baselines – Articles 55 and 57 of UNCLOS), or archipelagic waters of a state (Article 86 of UNCLOS).

1 Interception within the territorial sea or contiguous zone of the country of embarkation or transit

Ships of all States are permitted to enjoy the right of innocent passage through the territorial seas,[86] including in transit through the territorial sea for the purposes of navigating an international strait,[87] provided it is continuous and expeditious, with stopping and anchoring only if incidental to ordinary navigation or rendered necessary by *force majeure*, distress or for the purposes of rendering assistance to persons, ships or aircraft in danger or distress.[88] Passage is considered innocent so long as it is not prejudicial to the peace, good order or security of the coastal State and takes place in conformity with the United Nations Convention on the Law of the Sea (UNCLOS) and with other rules of international law.[89] A coastal State may adopt laws and regulations relating to innocent passage in respect of *inter alia*:[90]

> the prevention of infringement of the customs, fiscal, immigration…laws and regulations of the coastal State.

A foreign ship whose passage is not innocent may be excluded from the territorial sea by the coastal state.[91]

A coastal State is allowed to exercise the control necessary in the contiguous zone to prevent the infringement of its customs, fiscal, immigration or sanitary laws and regulations within its territory or territorial seas, and to punish infringement of these laws and regulations committed within its territory or territorial sea.[92]

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86 Article 17 of the United Nations Convention on the Law of the Sea (UNCLOS).

87 Blay, Piotrowicz & Tsamenyi, op cit, p 345.

88 Article 18 of UNCLOS.

89 Article 19(1) of UNCLOS. Passage of a foreign ship shall be considered to be prejudicial to the peace, good order or security of the coastal state if in the territorial sea it engages in 'the loading or unloading of any commodity, currency or person contrary to the customs, fiscal, immigration or sanitary laws and regulations of the coastal State' (Article 19.2. (g) of UNCLOS).

90 Article 21(h) of UNCLOS.

91 Article 25 of UNCLOS.

92 Article 33 of UNCLOS. Australia amended in 1999 the Migration Act to give effect to its jurisdiction in the contiguous zone with respect to immigration.

2 Interception within the territorial sea or contiguous zone of the country of destination

A vessel carrying inadmissible passengers, seeking to effect unauthorised entry is clearly not engaged in innocent passage and the destination state thus has the power to exclude and expel the vessel.[93]

However, the restriction on *non-refoulement* of any refugees on board clearly applies to an asylum-seeker within the territorial coverage of Refugee Convention obligations. Therefore a State interception in the territorial sea involving exclusion from entry needs a mechanism to ensure there is no subsequent *refoulement*.

3 Interception on the high seas

The international law of the high seas is dealt with in UNCLOS.[94] Article 87 sets out the general position that the high seas are open to all States, whether coastal or landlocked. Freedom of the high seas is to be exercised in accordance with UNCLOS and other rules of international law, and it includes the freedoms of navigation and overflight, the right to lay submarine cables and pipelines, freedom of fishing, freedom to construct artificial islands and other installations and the freedom of scientific research.[95]

There are some limitations on these freedoms, but they are circumscribed. Vessels can be seized on the high seas when they have engaged in piracy.[96] States may exercise jurisdiction to arrest persons and vessels engaged in unauthorised broadcasting from the high seas, and seize the broadcasting apparatus.[97]

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93 Section 5.3.1 above refers.

94 Australia ratified UNCLOS on 5.10.94 and it entered into force for Australia on 16.11.94.

95 Article 87.1 of UNCLOS. Article 87.2 provides that these freedoms shall be exercised by all States with due regard for the interests of other States in their exercise of the freedom of the high seas, and also with due regard for the rights under this Convention with respect to activities in the Area.

96 Article 105 of UNCLOS.

97 Article 109 of UNCLOS.

There is a limited jurisdiction to board vessels on the high seas that is contained in Article 110 of UNCLOS, entitled *Right of Visit*. Under this Article, personnel from a government vessel may board another vessel where there are reasonable grounds for suspecting that the vessel concerned is engaged in piracy, the slave trade or unauthorised broadcasting. The other circumstances in which there is a right to visit is where a vessel is without nationality, or it is flying a flag other than a flag it is entitled to fly. Article 110 does however contemplate that States may enter into treaties conferring more extensive powers of intervention against vessels on the high seas than the minimalist ones set out in UNCLOS.

Article 111 of UNCLOS entitled *Right of hot pursuit* permits the hot pursuit of a foreign ship to be undertaken when the competent authorities of a coastal state have good reason to believe that the ship has violated the laws and regulations of that State. Such pursuit must be commenced when:[98]

> 1 …the foreign ship or one of its boats is within the internal waters, the archipelagic waters, the territorial sea or the contiguous zone of the pursuing State, and may only be continued outside the territorial sea or contiguous zone if the pursuit has not been interrupted. It is not necessary that, at the time when the foreign ship within the territorial sea or the contiguous zone receives the order to stop, the ship giving the order should likewise be within the territorial sea or the contiguous zone…
>
> 3 The right of hot pursuit ceases as soon as the ship pursued enters the territorial sea of its own State or of a third State.

Interception on the high seas can take place only within the limits of authorisation given by the flag State.[99] This interception must be undertaken by

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98 http://www.unorg/Depts/los/convention_agreements/texts/unclos/closind.htm.

99 Article 8 of the Protocol against the Smuggling of Migrants states '1. A State Party that has reasonable grounds to suspect that a vessel … is engaged in the smuggling of migrants by sea may ... request authorization from the flag State to take appropriate measures with regard to that vessel. The flag State may authorize the requesting State, inter alia: (a) To board the vessel; (b) To search the vessel; and (c) If evidence is found that the vessel is engaged in the smuggling of migrants by sea, to take appropriate measures with respect to the vessel and persons and cargo on board, as authorized by the flag State'.

Under Article 110.1.(d) of UNCLOS, except where acts of interference derive from powers conferred by treaty, a warship is justified in boarding a foreign ship on the high seas if there is reasonable ground for suspecting that the ship is without nationality.

vessels clearly identified as being on government service,[100] and shall be done in such a way that the safety and security of the passengers and the vessel and its cargo are ensured.[101]

The protection obligations of the flag State are not engaged on the high seas by a request for asylum. The principle of freedom of the high seas means that the high seas are common to all states and no state may purport to subject any part of them to its territorial sovereignty.[102] The legal order on the high seas is based primarily on the rule of international law, which requires every vessel sailing the high seas to possess nationality and to fly the flag of one State.[103] Consequently a ship on the high seas is subject to the almost exclusive jurisdiction of the flag state; however, this does not make it part of the territory of the flag State.[104] There is a legal distinction between an exercise of flag State jurisdiction on board a vessel on the high seas and the concept of territorial sovereignty. Thus while a vessel may carry the nationality of a party to the Refugees Convention, the Convention will travel with the vessel only within its territorial boundaries. In other words, a request for asylum made on board a vessel on the high seas does not itself engage the legal obligations of the flag State under the Convention unless it is made inside the flag state's territorial waters.

Similarly, Convention obligations cannot arise when a request for asylum from persons on board a vessel of one flag State is addressed to a person on board another vessel on the high seas from a different flag State.

4 State practice of interception at sea

The Migration Act 1958 (the Act) was amended by the Border Protection Act 1999 which inserted Division 12A into Part 2 of the Act. Division 12A contains provisions that relate to boarding of ships in the territorial sea, the contiguous

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100 Article 9(4) of the Protocol against the Smuggling of Migrants.

101 Article 9(1) of the Protocol against the Smuggling of Migrants states: 'Where a State party takes measures against a vessel in accordance with article 8 of this Protocol, it shall: (a) Ensure the safety and humane treatment of the persons on board; (b) Take due account of the need not to endanger the security of the vessel or its cargo…'.

102 Jenning, R and Watts, A, *Oppenheim's International Law* (9th ed, Longman, UK, 1993) 726.

103 Ibid, p 731.

104 Ibid.

zone and on the high seas. Section 245G for example provides for the boarding of certain ships on the high seas, and the exercise of particular powers by officers.[105] The power to chase foreign ships on the high seas for boarding is contained in Section 245C of the Act. Division 12A was structured to authorise Australian officials under Australian law to exercise to the maximum extent permitted by UNCLOS powers to enforce Australia's immigration laws. This included enabling Australia to enter into agreements with other countries to enable Australian authorities to exercise powers over their vessels, and to empower the making of regulations to give effect to such agreements. Australia has not yet entered into any agreements with foreign countries to enable the exercise of Australian jurisdiction over foreign flagged ships.

The Australian Government introduced new legislation,[106] passed by the Australian Parliament on 26 September 2001, which contains the following interception type measures:[107]

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105 Subsection 245B(7) is about requests to board ships without nationality that are on the high seas. Section 245G allows those ships to be boarded, even though the master of the ship has not complied with the request to board. Under subsection 245G(6) if an officer confirms that a ship is a foreign ship without nationality, the officer may search the ship.

106 The Migration Amendment (Excision from Migration Zone) Act 2001, The Migration Amendment (Excision from Migration Zone)(Consequential Provisions) Act 2001, and the Border Protection (Validation and Enforcement Powers) Act 2001.

107 The Border Protection (Validation and Enforcement Powers Act) enhances the border protection powers found in the Customs Act and the Migration Act, including the provision of powers to move vessels carrying unauthorised arrivals and those on board. The Migration Amendment (Excision from Migration Zone) Act has defined some Australian territories (Ashmore and Cartier Islands in the Timor Sea, Christmas and Cocos (Keeling) Islands in the Indian Ocean and offshore installations) as 'excised offshore places'. This has the effect of prohibiting those who arrive at these places without lawful authority from making a valid visa application while they are unlawfully in Australia (unless the Minister intervenes in the public interest).

The Migration Amendment (Excision from Migration Zone) (Consequential Provisions) Act provides powers to take persons who arrive unlawfully at one of the excised offshore places to another country where their claims, if any, for refugee status may be dealt with, provided that country meets requirements concerning *non-refoulement* and basic human rights standards. The Republic of Nauru and Papua New Guinea have been declared countries for this purpose.

- clarifies powers to detain, search and move people and ships in certain circumstances in Australian and international waters if suspected of being involved in a contravention of immigration laws. The new legislative powers enhance existing border protection powers in the Customs Act and the Migration Act, and exercised in line with Australia's international maritime obligations to ensure the safety of those concerned. Other initiatives to combat people smuggling and irregular migration include improving Coastwatch, Customs and Navy capabilities to detect, pursue, intercept and search boats carrying unauthorised arrivals;
- provides powers to take persons to another place, including a 'declared' country; and
- excises some territories from the coverage of Australia's Migration Act in respect of people who arrive there without authority.

In short the position with respect to vessels carrying prospective illegal immigrants to Australia is that they must engage in conduct that enlivens the provisions of Division 12A of Part 2 of the Act (other than the provisions relating to vessels flagged to a country with which Australia has an agreement or arrangement) or they must actually arrive in Australian territorial or contiguous waters before action can be taken against them.

Australia's approach in relation to interception under the new legislation is consistent with its international protection obligations. Unauthorised vessels detected approaching Australian territorial waters are warned that they cannot enter these waters without proper authorisation. When considering this approach, due regard is given to Australia's geographic position and the circumstances concerning the particular vessels. In recent years unauthorised vessels detected approaching Australian territorial waters are almost universally Indonesian flag ships, crewed by Indonesians, and are most likely to have left from an Indonesian port.[108]

Any action to intercept before arrival in Australia is discretionary and may take into account the seaworthiness of the vessel, the weather conditions and the country of origin of the persons being smuggled. Should a situation arise that

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108 Principled Observance of Protection Obligations paper, op cit. Passengers are almost never Indonesian nationals. In recent years almost all were from the Middle East and South West Asia.

suggests *refoulement* may occur or the safety of passengers may be jeopardised if a vessel were to be intercepted, Australia has the capacity to act differently to ensure protection obligations continue to be met and passengers' safety is assured.[109]

Legislation introduced by Australia to provide power to intercept and exclude and to take people to alternative processing sites in 'declared countries' sets out clear requirements to ensure *non-refoulement* and arrangements, reflected in Memoranda of Understanding, have been put in place to support care and welfare and processing of any refugee claims.[110]

The New Zealand Government has introduced measures increasing police and Immigration Service powers to deal with illegal immigrants.[111] The Transnational Organised Crime Bill also includes changes to the police's search and seizure powers so that they can board boats once they enter New Zealand's contiguous zone.[112]

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109 Principled Observance of Protection Obligations paper, op cit.

110 Since the Australian Government refused entry to those rescued by the MV Tampa in August 2001, 600 people on 4 boats have been intercepted at sea and escorted back on their boats to Indonesia, and 1834 have been transferred to offshore processing centres in Christmas Island and to the declared countries of Nauru and Papua New Guinea. There have been only two persons illegally crossing Australia's maritime border since August 2001, Fact Sheet No 76 Offshore Processing Arrangements. 5 July 2002 http://www.immi.gov.au/facts/index.htm.

111 The recent New Zealand budget also provided money to fingerprint all asylum-seekers who come forward to claim refugee status, including those who claim immediately at the border, and for an advance passenger processing system already used in Australia.

112 The New Zealand Herald, 'Boatpeople in open waters bound for New Zealand', 11 June 2002, at http://www.nzherald.co.nz/storyprint.cfm?storyID=2046020. The NZ Parliament has recently passed the Transnational Organised Crime Bill, enabling New Zealand to ratify the UN Convention on Transnational Crime and its two protocols on people smuggling and trafficking. The NZ Minister of Foreign Affairs, Hon Phil Goff, says that passing the legislation is a critical step towards ensuring that New Zealand can protect its borders against illegal migration and that the legislation and continuing efforts by New Zealand working regionally and in Indonesia were necessary to deter people smugglers and prevent human tragedies. Other powers in the new legislation enable New Zealand authorities to seize and detain craft in New Zealand's territorial waters, facilitate confiscation of ships used for smuggling and extradite people smugglers. [Media Statement by Hon Phil Goff, 'Government passes tough new anti people-smuggling legislation', 12 June 2002, at http://www.refugee.org.nz/news.htm].

The New Zealand Government has signalled its intentions to be involved in the interception of boats carrying illegal entrants on the high seas. The New Zealand Minister of Foreign Affairs is reported as saying that:[113]

> New Zealand is working with Indonesian authorities to ensure that any ships carrying boatpeople do not leave Indonesia seeking refuge in New Zealand…there were two reports of boats coming to New Zealand…New Zealand was working with Indonesia, Australia and the regional countries so that if any such ship passes through their waters, that ship would be intercepted and turned around.

The US Coast Guard enforces US immigration law principally by interdicting at sea illegal migrants/undocumented aliens, and the vessels carrying them, before they reach US shores and suspending their entry with the aim of eliminating most of the potential flow of undocumented migrants entering the US via maritime routes.[114] Most interdicted illegal migrants are returned to the country from which they originally departed.[115] PRC illegal migrants have been increasingly smuggled since 1998 to Guam as a gateway to continental US. Some of these have been interdicted and transported to tent cities in the Tinian and the Commonwealth of Northern Mariana Islands (CNMI), for processing.[116] People intercepted at sea in the Carribean by the US are sent to Guantanamo Bay.

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113 Helen Tunnah, 'Authorities link up to stop boatpeople' NZ Herald, 18 June 2002, at http://www.refugee.org.nz/news.htm.

114 US Coast Guard, Statement of Captain Anthony S Tangeman on Coast Guard Interdiction Operations before the Subcommittee on Immigration and Claims Committee on the Judiciary, US House of Representatives, 18 May 1999. Interdiction is done under authority of Presidential Executive Order of 1992. The Coast Guard along with other Federal law enforcement agencies also cooperate in suppression of alien smuggling, which includes interdicting illegal migrants at sea and responding to new illegal migration threats (this occurs by presidential Decision Directive 9 of 18 June 1993). A Presidential Directive of 11 March 1998 established the USA's strategy to combat the trafficking of persons around the world, and involves prevention, protection of victims, and prosecution and enforcement against traffickers. The US views trafficking as a global problem that must be addressed through country-specific, anti-trafficking initiatives as well as by regional cooperation.

115 Up to 5 July 2002, Bahamian authorities have intercepted more than 1400 Haitians at sea trying either to come to the US or enter the Bahamas. The Coast Guard has repatriated 427 Haitians in the same period [The Miami Herald, 5 July 2002, at http://www.miami.com/mld/miamiherald/3602634.htm].

116 US Coast Guard Statement on Coast Guard Interdiction, ibid.

At various times since 1981, the United States has intercepted more than 60,000 Haitian irregular migrants. Prior to 1991, more than 25,000 were returned in line with an accord signed between the Haitian and US Governments. Following a military coup in 1991, more than 38,000 Haitians were intercepted on route to the US. More than 20,000 Haitians were allowed to pursue asylum claims. The screening process took place at Guantanamo Bay, Cuba. The policy framework is similar to the Pacific Strategy undertaken by Australia.

According to a US State Department official, such a temporary refuge programme served an important purpose:[117]

> ...you accept all comers, you do not question their motives, you feed and protect them, but don't let them come to the U.S. In other words, you create a mechanism in which the boat people themselves are encouraged to decide whether the need for protection or the desire to immigrate is the primary motivation.

Most Haitians processed at Guantanamo Bay were repatriated or returned to Haiti by early 1996.

European States with borders to the Mediterranean Sea have increased their capacity to detect and intercept illegal migrants coming from North Africa and the Middle East. In 2001 Spanish Immigration officials estimate that 45,000 people were stopped from entering Spain. This is an increase of 10,000 in numbers on 2000. Spain has also increased its capacity to detect illegal migrants arriving by sea as it has recently installed a system of radars and night vision cameras to detect boats crossing into its territory.[118] The Italian Government has recently introduced a number of measures to combat illegal migration including increasing the Italian Navy's capacity to search for illegal migrants.[119]

In Greece the Parliament has passed a new aliens law, effective May 2001, which includes carrier sanctions and stiff penalties, such as fines and prison terms, for individuals who either employ or facilitate the entry of undocumented foreigners. The law also mandates that smugglers who knowingly transport undocumented aliens in unsafe conditions receive prison sentences of one year for

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117 www.soros.org/fmp2/html/carri_iii.html.

118 Morocco arrests 70 illegal immigrants, Reuters, August 22, 2002).

119 Italy's lower house of parliament approves immigration bill, Alessandra Rizzo The Associated Press, June 3, 2002.

each illegal alien transported. Greece strongly supported counter-immigration measures announced at a summit of EU leaders in Seville, Spain.

5 Rescue at sea

In any of the maritime zones, interception may occur in the context of a rescue at sea, bringing into play complex interrelationships between international maritime law, border protection legislation and refugee and human rights law.

Aiding those in peril at sea is one of the oldest maritime traditions. Its importance is attested by numerous references in the codified system of international maritime law as set out in several conventions.[120] These Conventions explicitly contain the obligation on ship masters to come to the assistance of persons in distress at sea.[121] The obligation is unaffected by the status of the persons in question, their mode of travel, or the numbers involved. The undertaking to rescue at sea is an obligation of ship's masters.[122] Where a ship is in distress, preservation of human life is the paramount consideration.[123]

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120 The United Nations Convention on the Law of the Sea of 1982 (UNCLOS), the International Convention for the Safety of Life at Sea of 1974, as amended (SOLAS), the International Convention on Maritime Search and Rescue of 1979, as amended (SAR), the 1958 Convention on the High Seas (to the extent that it has not been superseded by UNCLOS).

121 Indicative of the nature of the responsibility assumed by the master is the fact that he or she may be criminally liable under national law for failing to uphold the duty to render assistance whilst commanding a vessel under the flag of certain States, for example the UK and Germany (UNHCR, Background Note on the Protection of Asylum – Seekers and Refugees Rescued at Sea, 18 March 2002, Final Version as discussed at the expert roundtable *Rescue-at-Sea: Specific Aspects Relating to the Protection of Asylum-Seekers and Refugees,* held in Lisbon, Portugal on 25-26 March 2002.

122 Article 98 of UNCLOS provides that:

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

123 In those circumstances international law confers a right of entry - see Article 18 of UNCLOS. Under circumstances where a ship is not in distress, maritime law would entitle a coastal state to require a vessel carrying illegal immigrants to leave its territorial sea - see Article 25 of UNCLOS.

The duty of the master begins with the actual rescue and ends when the rescue is completed by delivery to a place of safety.[124] Although the master's duty to render assistance is clear, the Convention does not create an obligation on any State to disembark those rescued.

Professor Eric Roseag of the Scandinavian Institute of Maritime Law in his article *Refugees as Rescuees – the Tampa Problem*[125] makes an analysis of customary international law and treaty law, and demonstrates that there is no duty on coastal states to allow disembarkation of rescuees. Professor Roseag states the view that there is no State practice of permitting disembarkation of rescuees, and that the position in Norway is that Norwegian immigration laws and regulations must be complied with. Professor Roseag also indicates that the SAR Convention confirms that the question of whether rescuees are received or not is within the discretion of the coastal State, and that a duty for a port State to allow disembarkation of rescuees cannot be deduced from the SOLAS Convention.

Coastal States do have a responsibility in accordance with UNCLOS to develop adequate search and rescue services.[126] The Executive Committee of UNHCR has formulated a number of Conclusions in relation to rescue-at-sea emphasising the question of disembarkation and admission from the perspective of asylum-seekers and refugees.[127] These Conclusions are a response to mass

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124 International maritime law does not elaborate on any continuing responsibility of the master once a rescue has been effected (UNHCR Background Note, op cit, para 6).

125 SIMPLY, the Scandinavian Institute of Maritime Law Yearbook (in press).

126 Article 98.2 of UNCLOS requires every coastal State to '…promote the establishment, operation and maintenance of an adequate and effective search and rescue service regarding safety on and over the sea and, where circumstances so require, by way of mutual regional arrangements cooperate with neighbouring States for this purpose.'

127 ExCom Conclusion No 14 (1979), para c, notes as a matter of concern: '…that refugees had been rejected at the frontier…in disregard of the principle of *non-refoulement* and that refugees, arriving by sea had been refused even temporary asylum with resulting danger to their lives…'.

ExCom Conclusion No 15 (1979), para c, states: 'It is the humanitarian obligation of all coastal states to allow vessels in distress to seek haven in their waters and to grant asylum, or at least temporary refuge, to persons on board wishing to seek asylum'.

ExCom Conclusion No 23 (1981), para 3 states: 'In accordance with international practice, supported by the relevant international instruments, persons rescued at sea should normally be disembarked at the next port of call. This practice should also be applied to asylum seekers rescued at sea. In cases of large-scale influx, asylum-seekers

outflows of Vietnamese during the 1970s, and the serious concerns at the time that refusals to permit disembarkation, especially if only permitted on a temporary basis, would have the effect of discouraging rescue-at-sea and undermining other international obligations.[128] According to UNHCR, the Executive Committee pronouncements, taken in conjunction with the obligations on ship masters under international maritime law to ensure delivery to a place of safety, call upon coastal states to allow disembarkation of rescued asylum seekers at the next port of call.[129] From a safety and humanitarian perspective, UNHCR considers ensuring the safety and dignity of those rescued and of the crew, must be the overriding consideration in determining the point of disembarkation.[130] This is by no means internationally agreed.

An Expert Roundtable co-convened by UNHCR and the Migration Policy Institute in Lisbon in March 2002 addressed the question of rescue-at-sea and

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rescued at sea should always be admitted, at least on a temporary basis. States should assist in facilitating their disembarkation by acting in accordance with the principles of international solidarity and burden-sharing in granting resettlement opportunities'.

128 UNHCR, Background Note on the Protection of Asylum-Seekers and Refugees Rescued At Sea, 18 March 2002.

129 Ibid, para 29. UNHCR acknowledges that the term 'next port of call' in connection with disembarkation or landing of rescued persons is unknown as such to maritime law but rather results from ExCom Conclusions. UNHCR puts forward a number of possibilities:

In many instances, especially when large numbers of rescued persons are involved, it will in effect be the nearest port in terms of geographical proximity given the overriding safety concerns;

Under certain circumstances the port of embarkation, arising from the responsibility of the country of embarkation to prevent un-seaworthy vessels from leaving its territory;

The next scheduled port of call in cases where the number of people rescued is small and the safety of the vessel and those on board is not endangered nor likely to necessitate a deviation from its intended course;

There may be instances where the next port of call may not be the closest one, but rather the one best equipped for the purposes of receiving traumatised and injured victims and subsequently processing any asylum applications;

In other situations involving State vessels intercepting illegal migrants, the nearest port of the State could be regarded as the most appropriate port for disembarkation purposes.

130 Ibid, para 30.

specific aspects relating to the protection of asylum seekers and refugees.[131] In discussion, it was proposed that in order to ensure masters of vessels continue to rescue persons in distress at sea, their responsibility should be no more than undertaking the rescue and providing maintenance and care until those rescued can ultimately be disembarked.[132] It was recognised that there were difficulties associated with States agreeing to disembarkation of people rescued, and in particular legal gaps concerning where disembarkation should take place and which parties are responsible for follow-up action and effecting solutions.[133]

The Australian Government has recently released a protocol to clarify the responsibilities of Australian and international ships' masters rescuing people at sea (Protocol for Commercial Shipping Rescuing Persons at Sea in or Adjacent to the Australian Search and Rescue Region).[134] The protocol contains certain

131 The roundtable was attended by Government representatives (including Australia), IOM, NGOs, academics and representatives from the shipping industry and maritime organisations. It was openly recognised that the meeting had been convened to discuss issues raised by the Tampa incident.

132 UNHCR, Rescue-at-Sea Expert Roundtable. A Summary of Discussions was released by UNHCR after the meeting. According to Proposition 6 'The master has the right to expect the assistance of Coastal States with facilitation and completion of the rescue, which occurs only when the persons are landed somewhere or otherwise delivered to a safe place.

133 See UNHCR, Rescue-at-Sea Expert Roundtable, ibid, propositions 8-11.

134 The protocol can be accessed at: www.dotars.gov.au/latest.htm. The protocol does not make any distinction between persons who may or may not be suspected of being unauthorised arrivals. Nothing in the protocol is inconsistent with or will derogate from Australia's or the shipping industry's international obligations under relevant international conventions including the Refugees Convention.

principles that are relevant in the context of rescuing people who are attempting to enter Australia illegally by boat.[135]

An inter-agency[136] meeting was held on 2-3 July 2002 in Geneva in response to the International Maritime Organization (IMO) Secretary-General's concern over 'a number of incidents involving persons rescued at sea and/or asylum seekers, refugees and stowaways' and the expressed need for a coordinated and coherent approach to all relevant rescue at sea issues at an inter-agency level. The meeting sought to identify the gaps, inconsistencies or shortcomings of the relevant conventions, laws or regulations and inter-agency coordination in relation to rescue at sea issues.[137]

The Maritime Safety Committee (MSC) of the IMO at its 75th meeting in May 2002 agreed to an informal meeting to discuss the potential need for amendments

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135 Those principles are:

> Any decision to disembark rescued persons at a particular port of a State should not be made without the consent of that State;
>
> Australia has an obligation to give expeditious consideration to the identification of suitable options for the disembarkation of rescued persons and to not unreasonably withhold consent to use its port or ports for disembarkation;
>
> Disembarkation arrangements for survivors need to be consistent with any security or border protection arrangements developed nationally, internationally or regionally;
>
> There should be no encouragement or incentive for persons to be deliberately put at risk in pursuit of entry to Australia or for rescuees to use threat in an endeavour to dictate the place of disembarkation; and
>
> Australia has a sovereign right to determine who comes to Australia.

136 Representatives of the UN Office of Legal Affairs – Division for Ocean Affairs and the Law of the Sea, UNHCR, UN Office for Drug Control and Crime Prevention, UNCHR, IOM and the IMO.

137 In particular, the meeting focused on establishing the areas (geographical and legislative) of competence and/or co-competence of each of the participating agencies and programmes; agreeing on a general framework of responsibility that each should assume for follow-up action in emergency cases; establishing a coordinating mechanism to respond in a coherent and consistent manner to emergencies; and exchanging views on the meaning of the term 'place of safety'.

to relevant Conventions on maritime safety, search and rescue, having regard to the issues that arose out of the MV Tampa incident in 2001.[138]

The meeting, held in Norrkoping, Sweden on 2-5 September 2002, examined relevant Conventions and concluded that it may be desirable to clarify obligations on coastal states with respect to arrangements for the release of masters of vessels that have rescued people in distress at sea. The following proposed text for insertion in the relevant Conventions was developed and will be considered at MSC 76 in December 2002:

> Contracting governments shall coordinate and cooperate to ensure that masters of ships providing assistance by embarking on board persons in distress at sea are released from their obligations with minimum further deviation from the ship's intended voyage, provided that releasing the master of the ship does not further endanger the safety of life at sea. The Contracting Government responsible for the search and rescue region in which such assistance is rendered shall exercise primary responsibility for ensuring such coordination and cooperation occurs, so that survivors assisted are disembarked from the assisting ship and delivered to a place of safety taking into account the particular circumstances of the case. In these cases, the relevant contracting governments shall arrange for such disembarkation to be effected as soon as reasonably practicable.

This formulation imposes no obligations on coastal States to accept disembarkation of rescuees above and beyond that already provided for in international law, but accepts that contracting States must cooperate to remove the burden from masters expeditiously. The formulation also preserves the position that a place of safety could be the rescuing ship or another ship, and not only a place on dry land.

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138 The meeting discussed matters within the scope of IMO Resolution A.920(22) on Review of Safety Measures and Procedures for the Treatment of Persons Rescued at Sea which called for a review of international conventions and other IMO instruments for the purpose of identifying gaps so that "survivors of distress incidents are given assistance regardless of nationality or status or of the circumstances in which they are found; ships which have retrieved persons in distress at sea are able to deliver the survivors to a place of safety; and survivors, regardless of nationality or status, undocumented migrants, asylum seekers, refugees and stowaways, are treated while on board in the manner prescribed in the relevant IMO instruments and in accordance with relevant international agreements and long-standing maritime traditions" and on documents proposing amendments submitted to MSC75 by Norway, France and Germany, www.imo.org/newsroom/mainframe.aspq topic id=583@doc id=2069.

Other issues that are part of the proposal for consideration at MSC76 include:

- the humane treatment of rescuees while on board the rescuing vessel;
- non-interference by the owner, charterer or company operating the vessel with the professional judgment of the master in attempts to rescue persons in distress; and
- disregarding the status of persons in distress at sea during the process of search and rescue or providing assistance.

The final decision of disembarkation has never been one for the ship's master acting unilaterally and is ultimately a matter of national sovereignty and policy. International law recognises the rights of sovereign States to determine who may enter the territory and under what conditions, except in most exceptional circumstances relating to distress. The status of the person should never be a factor in the rendering of assistance to a person in distress at sea. However, the legal status of a rescued person and the circumstances surrounding their presence will necessarily be among the factors to be considered by the coastal State in making the decision on whether or not to accept disembarkation.

Providing ships' masters with the final decision of disembarkation places States' sovereignty and the system of international protection at risk of abuse. Where people who have been rescued deliberately engage in aggressive behaviour in an attempt to force or coerce the ship's master into taking them to a place of their own choosing, they are seeking to achieve an unlawful purpose.

D Interception in the Process of Attempting Illegal Entry at the Border of the Country of Destination

In line with a State's sovereign right to decide who may enter the State's territory, there is no obligation under international law to admit an individual, whether or not the individual is seeking asylum, even at the border.

There is, however, an obligation under the Refugees Convention not to *refoule* a refugee within the territorial coverage of the Convention. States have introduced a range of mechanisms at immigration control points at the border to ensure that their *non-refoulement* obligations are not breached, ranging from expedited procedures to readmission agreements to safe third countries.

Interception at the border is clearly envisaged by the Chicago Convention and by IATA/CAWG guidelines that set out the obligations of carriers to effect the return of non-documented passengers.

VI CONCLUDING COMMENTS

Interception is one of a series of initiatives taken to address problems associated with people smuggling, secondary movement and attempts to circumvent the orderly lawful system to enter a destination country. Interception is here to stay as it is an effective means of controlling irregular migration and combating people smuggling.

There are three key principles that should guide the use of interception:

- Interception should not be seen as a solution of itself, but rather as providing symptomatic relief while causes at source are addressed
- Interception must always be done within the parameters set by international obligations and domestic law
- States must ensure that the protection needs of any intercepted refugees are identified and met in ways that do not encourage further smuggling.

Interception will flourish unless and until collective action makes it unnecessary. It is one of the few measures that destination countries can take unilaterally in efforts to maintain control of their borders.

Solutions that address the need and demand for people to move irregularly can be delivered only through multilateral action and resolve.

The international legal regime governing interception has uneven coverage and application. Carrier obligations with respect to immigration issues are explicitly addressed for international air travel, and not at all for international sea or land travel. The Refugees Convention does not apply on the high seas and some would argue that international customary law is not yet developed sufficiently to impose *non-refoulement* obligations on non-signatory transit countries.

Some States have well-developed laws and protocols to ensure that intercepted refugees and asylum-seekers are dealt with appropriately, while others rely on the presence of UNHCR resources to deal with any asylum needs in transit countries where interception takes place.

A more developed international regime is needed which integrates the State's right to decide whether to accord or refuse admission to the territory of third country nationals and the obligation to protect those genuinely in need of international protection.

UNHCR has put forward a series of recommendations for a comprehensive approach in relation to interception of asylum seekers and refugees in the context of dealing with the problem of persons making secondary movements.[139] The participants at the UNHCR regional workshop on interception in Ottawa acknowledged the difficulty of finding durable solutions for intercepted persons who are determined to be in need of international protection.[140] The UN High Commissioner for Refugees, Ruud Lubbers, pointed out when opening the 53rd annual session of UNHCR's governing Executive Committee in Geneva recently that the Refugees Convention on its own did not suffice to meet new refugee protection challenges in a rapidly changing world.[141] According to Lubbers what is needed is a new approach which he called the 'Convention Plus' supplementing the Convention in areas that it does not adequately cover. He cited a number of areas that could be addressed by the Convention Plus approach, with countries in the North and South working together to find durable solutions for refugees:[142]

> It concerns comprehensive plans of action, in cases of massive outflows…it concerns agreements on secondary movements, defining the roles and responsibilities of countries of origin, transit, and potential destination, with regard to asylum seekers. It concerns better targeting of development assistance in regions of origin, helping refugee-hosting countries to facilitate local integration. It

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139 UNHCR Standing Committee paper on interception, op cit, recommendation (para 34 (g) states that 'In cases where refugees and asylum seekers have moved in an irregular manner from a country in which they had already found protection, Conclusion No.58 (XL) para 25) enhanced efforts should be undertaken for their readmission including, where appropriate, through the assistance of concerned international agencies. In this context, States and UNHCR should jointly analyze possible ways of strengthening the delivery of protection in countries of first asylum. There could also be more concerted efforts to raise awareness among refugees of the dangers linked to smuggling and irregular movements'.

140 UNHCR Regional Workshop Ottawa, op cit. The workshop adopted as a key conclusion/recommendation [K. Durable solutions, para 16] that…it was recognised that…burden sharing is important, as are initiatives to avoid a situation where only one durable solution is available. Efforts need to made in the concerned regions to build up effective asylum systems, and it is critically important to reduce 'push' factors by making protection in first countries of asylum effective and viable…'.

141 UNHCR News, 'Lubbers Opens Annual Executive Committee Meeting, 30 September 2002, at www.unhcr.ch

142 UNHCR News, op cit.

concerns post-conflict reintegration. And, last but not least, it concerns multilateral commitments for resettlement.

The key to achieving the High Commissioner's objectives is the recognition of the importance of his own word 'comprehensive'.

States have multiple obligations under international law and to their own people. Policies and laws must accommodate that multiplicity. It can never be a choice between fighting crime in the form of people smuggling or protecting refugees. Both must be done in ways that do not compromise each other or other obligations. Laws and practice regarding interception and rescue at sea are no exception.