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Interdiction at the Expense of Human Rights

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Introduction

Interdiction at the Expense of Human Rights: A Long-term Containment Strategy

Janet Dench and François Crépeau

Migratory pressure is heavy around the globe and the available data does not indicate any decrease in the foreseeable future. It has always been there: the highest number of immigrants to have come to Canada in one single year is still that of 1913, with more than 400,000. Today, globalization has only increased independent intercontinental migration. Fast and cheap transportation is available, as is international communication, through telephone and internet; knowledge about host countries is circulating through television and videos; large communities exist in host countries and are able to help friends, family, and compatriots.

The increase in global migrations also results from the fact that the differences in peace and prosperity have been sharpened between North and South in the past decades. Many societies in the South have become poorer and messier: some people need to escape increasing violence; others seek better survival opportunities for themselves and their children. The increase in these "push factors" is a negative dimension of globalization.

In most host countries, the protection and promotion of rights and freedoms have been reinforced. Constitutional, regional, and international standards are more sophisticated, and implementation mechanisms are more effective. We now know that the interaction of political struggle and legal jurisprudence is key to effectively protecting human rights: the European Court of Human Rights, the Inter-American Commission, the UN committees, the constitutional case law in, say, Canada, Germany, and South Africa testify that there is also a globalization phenomenon in the field of human rights. In host countries, this case law will often protect the foreigner and declare that she is equal to the citizen on most issues regarding fundamental rights.

But our States nowadays often feel dispossessed in a field that has been at the basis of their legitimacy for the past decades: redistribution of wealth and social justice. This goal is challenged by yet another aspect of globalization: essentially free-trade policies and the pressure that economic actors exercise to lower the cost of production. Our States have tried to regain political ground by insisting on their traditional mission since the Renaissance: security. In the past twenty years, a phenomenon of "securization" of the public sphere has emerged and resulted in the definition of new fields of government activity: food security, environmental security, bio-security, transport security, industrial security, internal security, migration security, to name only a few.

States have re-emphasized the role of the border as the traditional and tangible symbol of their power. This is not a new phenomenon. The border has always been used to distinguish between "us" and "them." For example, in the aftermath of World War I, the Canadian government responded to the arrival of impoverished and displaced Europeans by tightening the laws and stationing immigration officials at ports in Europe to prevent further "undesirables" from setting sail.

Following the sharp increase in asylum claims in the mid-1980s, States have launched a huge co-operative effort aimed at controlling migration flows, and in particular reducing irregular flows. This effort targeted especially asylum seekers, because, as these could count on human rights standards and mechanisms to argue against *refoulement*, host States knew there was a good chance that they would not be able to remove them from the territory.

This co-operation was particularly productive in Europe, as the abolition of the control of persons at internal borders of the common European territory created a com-

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plete restructuring of all government agencies that used to work at the border (police, customs, health, transport, immigration, etc.). The Schengen process emerged from this and, following the Amsterdam and Nice treaties, the European Commission is now in a position to take the lead on immigration and asylum issues.

The arsenal of measures devised by Northern States to prevent irregular migrants from setting foot on their territories is impressive. Their precise articulation is often confidential as the whole field pertains to national security. The intergovernmental framework in which this co-operation operates ensures that it is sealed from democratic scrutiny.

This co-operation includes the following measures: imposition of visas for all refugee-producing countries, carrier sanctions, "short stop operations," training of airport or border police personnel, lists of "safe third countries," lists of "safe countries of origin," readmission agreements with neighbouring countries forming a "buffer zone," regional migration agreements, economic co-operation agreements, common databases on individual files, immigration intelligence sharing, police co-operation and interventions, criminalization of migrant smuggling, reinforced border controls, systematic detention, armed interventions on the high seas, military intervention, etc.

All these measures are aimed at preventing, directly (by a physical barrier) or indirectly (through deterrence), irregular migrants from arriving at the border, by stopping them somewhere on the way. In doing so, potential host States believe they can (and, until now, have successfully been able to) avoid triggering the control mechanisms that we have established to protect our rights and freedoms: parliamentary debates, court challenges, media scrutiny, international shaming, etc. Very often, the actual stopping of the migrant will be carried out by a third party: an employee of a private company, a foreign civil servant, etc. Very often, it will be carried out in a country where migrants' rights issues do not call for intense scrutiny.

In the public discourse, our governments do little to give the asylum seeker or the refugee a good image. On the contrary, they emphasize the negative aspects of irregular migration and play into the racism that makes many in Northern societies eager for an excuse for shutting the door on newcomers of colour. In effect, governments have succeeded in changing public opinion towards the refugee. Irregular migrations are now considered part of international organized crime and asylum seekers are not really distinguished. The events of 11 September 2001 have provided the opportunity for besmirching their reputation even further. The refugee was a very sympathetic character in the years that followed the Indochinese exodus. She is now regarded with suspicion. Is she bogus? Is she a criminal or a terrorist? If we can't know for sure, we now think that we are better to protect ourselves at the expense of the refugee. The benefit of the doubt has suddenly become a dangerous concept.

Let's give one example of the "grey zone" in which States have been operating recently. Migrant smuggling has saved many lives throughout history. Thanks to smugglers, countless people escaped Nazi Germany, Franco's Spain, Vichy France, Central Europe during the Cold War, Vietnam in the 1970s, Guatemala in the 1980s, and many other abusive regimes. The repression of migrant smuggling as it is intended to function today would not have allowed them to find protection elsewhere. In Canada, in a most recent legislative change, the smuggling of ten persons or more, without harm to persons or property, can now carry a penalty of life imprisonment: it is more than rape at gunpoint (fourteen years maximum), it is the equivalent of a crime against humanity such as genocide. Such an absurd disproportion in the scale of penalties shows how deep the fear of the much fantasized barbaric invasion is embedded in our collective mind, despite the fact that, individually, we are ready to recognize that, if we were in the shoes of many refugees, we too would use migrant smuggling to escape and protect our children from violence. This state of affairs comes partly from the fact that governments have wilfully blurred the distinction between migrant smuggling and trafficking in persons, but also results from the fact that most of the fight against migrant smuggling takes place abroad, far from the centres of interest of the majority of the population.

Legally or not, migrations will increase, because inequities are not being reduced on our planet. How much violence will we allow our States to exercise against asylum seekers in order to protect the part of collective wealth that we have appropriated for ourselves and thanks to which we have forged such instruments as democracy, human rights, and the Rule of Law? Without advocating in favour of the suppression of borders and the abolition of territorial sovereignty, can we imagine ways to regulate migration flows – perhaps through meaningful development policies – that go beyond blind repression and recognize individual human dignity? How can we combine answering migration needs and protecting human rights?

Refugees, by definition, are orphans in a system based on the States' responsibility to protect the rights of those on their territory: their own State is unable or unwilling to take up that responsibility. They need to seek the protection of another State, but while in transit seeking that protection, they fall into a gaping crack in the human rights system. States have creatively (abusively) exploited this crack through their interception measures, as we see in the fol-

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lowing papers, which go a long way towards explaining how badly our societies are coping with irregular migration flows. The challenge is immense and the principle of human rights for all everywhere seems to be the only conceptual framework that would make sense in order to "guard the guardian."

Andrew Brouwer and Judith Kumin give us a very clear picture of how interdiction mechanisms are deployed, starting with four case studies to which we might feel drawn back constantly in order to test our assumptions. They note how international law standards and principles (extraterritoriality, maritime law, responsibility, non-discrimination, *non-refoulement*, right to seek asylum, mobility rights, rights of the child and of the family, etc.) could be used to limit blind State repression of irregular migration flows. They then analyze the most recent UNHCR Executive Committee Conclusion no. 97 (LIV) 2003 on Protection Safeguards in Interception Measures and suggest how the future UNHCR guidelines on interception could expand on the *acquis* of the conclusion.

Areti Sianni exposes the complex web of measures and institutions that are being developed at the level of the European Union and notes the imbalance between deterrence and protection, the former prevailing largely over the latter. She indicates that there is some interest in creating a common set of "protected entry procedures," but deplores that the EU directive on carrier sanctions included only the "weakest of safeguards," although some airline companies have tried to fight back in courts. The externalization of immigration controls through the EU network of Member States' immigration liaison officers is also challenged in at least one national court. The international co-operation on migration issues is very active, either with many countries that form part of the buffer zone around Europe (including Albania, Morocco, Turkey, Ukraine, Yugoslavia), or countries of origin (including China, Russia, Iran), or even with regional institutions (such as Mercosur or the Andean Community).

As could be expected, considering the notoriety of the *Tampa* incident and of its consequences, several articles are dedicated, at least in part, to Australian immigration policies. Richard Wazana (to be published, for reasons of space, in the next issue of *Refuge*) offers an analysis that situates the treatment of refugees in contemporary Australia in direct line with the former "White Australia policy." He draws upon Lévi-Strauss's distinction between the *bricoleur* and the engineer to place the asylum seeker in the first category, alongside the Aboriginals and the Asian migrants of yesterday. He develops the four tropes that are "operating in Australia's media, political parties and popular culture, around refugees, border protection, generosity and Australian culture": the belief that White and Anglo-Saxon Australian culture is under a constant and growing threat; the belief that Australia, as a nation under attack, has the right to control its borders; the belief that those seeking asylum in Australia are not refugees but are people seeking a better life, and that even if they are refugees, they are queue jumpers; the belief that Australia is generous as a recipient of refugees, thus justifying its actions of deterring the smuggling of refugees.

Jessica Howard gives us a very precise account of the *Tampa* incident and the policy implications of the "Pacific Solution." In line with the "whole of government approach," the sequence of the boarding and return of a "Suspected Illegal Entry Vessel" (SIEV) is detailed. The role of the Australian military and police and of IOM, chosen as lead agency over UNHCR, in the regional co-operation model with Indonesia are underlined. The Australian policy of "disruption" of people smuggling in Indonesia is analyzed and Howard delineates its consequences, including, possibly, the drowning of 353 asylum seekers (mostly women and children) with the sinking of the SIEV X (for which Australia has refused to acknowledge any responsibility). In conclusion, it is hoped that Australian policies will not prove too attractive a model for Europe or North America and that one will not witness the emergence of an "Atlantic Solution" or a "European Solution."

Jessica C. Morris compares the policies of the two countries that have successfully practiced interdiction policies on the high seas on a large scale: Australia and the U.S. She notes that interdiction is in stark contrast to the "deterritorialization" that the universal human rights doctrine had operated and emphasizes the "the lacuna between the physical spaces in which states exercise jurisdictional control and the spaces in which they will assume juridical responsibility." She underlines that "implicit to this 'teleology of restriction' is the assumption that many asylum seekers' claims are not well founded" and that, in line with a "self-diagnosed territorial vulnerability," "the goal of reasserting sovereignty clearly supersedes international responsibilities in this regard." This renewed emphasis placed on the distinction between the inside and the outside is only limited by internal factors, and especially constitutional provisions protecting human rights: the lack of a Bill of Rights in Australia and the role of executive orders in the U.S. have allowed these countries to shield their policies from judicial scrutiny. She warns against any underestimation of the forces behind restrictionist immigration controls (the doctrine of plenary power at the borders is not yet a "constitutional fossil") and asserts that the dominant interpretation by receiving States of their obligation to refugees is the "'*ex gratia*' approach, implying whatever

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protection is provided results purely from humanitarian goodwill."

Wendy Young and Bill Frelick offer diametrically opposed views on one potential response to U.S. interdiction of Haitians. Young argues in favour of an in-country or a regional-processing approach, with co-operation between the NGO community and American authorities. Frelick argues against such an approach, underlining that past experience has shown that in-country processing is used as a fig leaf for interdiction practices that violate the *non-refoulement* principle. He draws attention to the impossibly dangerous predicament facing those invited to ask for asylum while still in the country where they are persecuted.

Unfortunately, the sum total of these articles does not leave the reader with much hope of a replacement solution for interdiction in the short term. Until such time as human rights clearly prevail over any action taken by governments or in their name by private actors, inside or outside of their territory, for security purposes or otherwise, we are going to witness interdiction policies and practices that put refugees at risk, in the name of the protection of the comfort and well-being of the citizens of the North. We must debate them and, where possible, contest them.

The developments in containment policies highlight a challenge for NGOs who, at least in the case of refugee organizations, tend to be territorially based, paying most attention to refugees who reach their territory. Where governments have engaged in formal collaboration, NGOs have followed suit and developed strong cross-border ties, for example, the European NGOs responding to policy developments in the EU, or Canadian and U.S. NGOs in response to the "safe third country agreement" of 2002. However, where the collaboration is informal between governments, the NGOs have not been so effective. In the case of interdicted refugees, it is not clear that NGOs have organized themselves to make the connections.

This failure does not go unnoticed by the governments and this is surely part of the attractiveness of interdiction as the central measure to deal with refugee flows. As long as the refugees are offshore, *i.e.* nameless, faceless, and voiceless, there is little chance of refugees asserting legal rights or winning advocates among the local population. And when a refugee is effectively sent back to persecution, NGOs have not been good at ensuring a follow-up and publicizing their stories.

Unless a human face is given to these returnees,' their plight doesn't seem real and urgent, not even to the refugee advocates, let alone the general public. NGOs and other advocates have options open to them for providing this human face or for influencing authorities in adopting mitigating policies. All come at a cost and choices will have to be made, but strategies can be developed for effective action targeting public opinion and political elites, domestic institutions, and international organizations.

Some have been presented at a special meeting of the Canadian Council for Refugees in May 2003: direct action; presence at airports; developing research agendas; reinforcing inter-NGO co-operation, as well as co-operation between governments and NGOs; strategic and co-operative use of legal challenges; public education regarding security and refugee protection; making use of journalism and media (sharing stories of human rights abuses and interdiction stories); tracing the lives of refugees who have been interdicted.[1]

Some policy options may also be explored with governments (one of them is discussed in the present issue): protected visas; increased access to regular migration; increased access to refugee protection in country of origin; debating the role of privatization (carriers and detention centres).

No political gain has ever been obtained without a struggle. In the end, it is left to our imagination and energies to make sure that these strategies are explored and made to bear fruit.

Note

1. See online: <http://www.web.ca/~ccr/interdictionproceedings.PDF>.

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Interception and Asylum: When Migration Control and Human Rights Collide

Andrew Brouwer and Judith Kumin

Abstract:
Preoccupied with sovereign control of access to their territories, states are devoting increasing energy and resources to intercepting and turning back migrants before they arrive at their borders. Interception measures, however, rarely include adequate procedures to distinguish those who need protection from those who do not. As a result, desperate people are left with no option but to resort to ever more dangerous and disruptive methods of migration. This article surveys the main types of interception measures and their effects, and examines the international refugee and human rights law issues raised by these practices. It then reviews recent developments at the level of UNHCR's Executive Committee with regard to interception and concludes with some suggestions for building compliance with principles of refugee protection in the context of interception measures.

Résumé
Soucieux de pouvoir contrôler complètement l'accès à leur territoire, les états consacrent de plus en plus de ressources et d'efforts à intercepter et à renvoyer les migrants avant même que ces derniers n'atteignent leurs frontières. Dans la réalité, cependant, il est très rare que les mesures d'interception comportent des procédures adéquates pour départager ceux qui ont un besoin réel de protection des autres. Il en résulte que les gens désespérés n'ont d'autre choix que d'avoir recours à des méthodes de migration qui sont de plus en plus dangereuses et disruptives. Cet article examine les principales mesures d'interception et leur efficacité, et se penche sur les problèmes soulevés par ces pratiques au niveau du droit humain international et du droit d'asile. Il examine ensuite les derniers développements intervenus au Comité exécutif de la HCR sur la question de l'interception, et conclut avec des suggestions visant à encourager la mise en conformité des mesures d'interception avec les principes de la protection des réfugiés.

Introduction

> *Many States which have the ability to do so find that intercepting migrants before they reach their territories is one of the most effective measures to enforce their domestic migration laws and policies.*
>
> International Organization for Migration, 2001[1]

The blandness of this observation masks the seriousness of the assault on the institution of asylum posed by interception practices. Concerned about sovereign control of access to their territories in an age of preoccupation with national security, "irregular" migration, and the so-called asylum-migration nexus, states are devoting more and more energy and resources to turning back migrants before they arrive at their borders. States regard these programs as defences against the subversion of orderly immigration and refugee resettlement programs by "bogus" refugees and "queue-jumpers." However, in practice these interception measures leave desperate people with no option but to resort

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to ever more dangerous and disruptive methods of migration and ultimately erode the institution of asylum.

Existing interception measures rarely include adequate procedures to distinguish those who need protection from those who do not. Unless current practices are either abandoned by states – which is unlikely – or are reformed to conform to human rights law and refugee protection norms, access to asylum will progressively be choked off. Some refugees may reach asylum in a country neighbouring their own or within their region of origin, but those opportunities may also dwindle, as countries of first asylum see the industrialized states actively erecting barriers to prevent asylum seekers from reaching their territories.

This article will look at the main types of interception measures and their effects, and will examine the international refugee and human rights law issues raised by these practices.[2] It will then review recent developments at the level of the Executive Committee of the United Nations High Commissioner on Refugees (UNHCR) with regard to interception and conclude with some suggestions for building compliance with principles of refugee protection in the context of interception measures.

Definition of Interception

There is no generally accepted definition of interception.[3] A provisional definition was proposed by UNHCR in a June 2000 report:

> [I]nterception is defined as 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.[4]

This definition applies equally to actions taken on land or at sea. For the purposes of this paper, it will not be considered to extend to passive measures such as visa requirements, which are the most common form of migration control, or the carrier sanctions which buttress visa requirements, but rather will be limited to active intervention by states to impede the movement of persons.

Indeed, UNHCR's Executive Committee has recently construed interception in this narrower, active sense, as:

> …one of the measures employed by States to:
>
> (i) prevent embarkation of persons on an international journey;
>
> (ii) prevent further onward international travel by persons who have commenced their journey; or
>
> (iii) assert control of vessels where there are reasonable grounds to believe the vessel is transporting persons contrary to international or national maritime law;
>
> where, in relation to the above, the person or persons do not have the required documentation or valid permission to enter…[5]

The following case studies illustrate the types of issues involved in interception:

Case Study No. 1

Mr. K., an Iranian writer, used false documents to flee Iran hoping to reach Canada, where his brother is a citizen.[6] He travelled by air, via Moscow and Havana. At the airport in Havana, while transferring to the final leg of his journey, his fraudulent documents were discovered and he was refused permission to board his flight to Canada. Cuba is not a party to the 1951 Convention relating to the Status of Refugees (1951 Refugee Convention)[7] and did not give Mr. K. an opportunity to claim asylum there, but put him on a plane back to Moscow.

Before being sent back to Moscow Mr. K. was able to telephone his brother in Canada, who alerted UNHCR in Ottawa to his plight. UNHCR contacted their colleagues in Moscow, to make sure that Mr. K. was not *refouled* to Iran and was able to seek asylum in Russia, which is a party to the 1951 Refugee Convention (albeit with significant shortcomings). Despite numerous requests, however, UNHCR staff were denied access to Mr. K., who was detained at Moscow's International Airport. UNHCR's office in Moscow engaged a lawyer for Mr. K., who presented an asylum application to the Russian authorities on his behalf. Nevertheless, Mr. K. was *refouled* to Tehran where, according to his brother, he was detained on arrival.

Case Study No. 2

On August 26, 2001, the Tampa, a Norwegian freighter, rescued 430 people from a sinking Indonesian ferry.[8] The passengers, mostly Afghans, asked to be taken to Christmas Island, Australia, to seek asylum. When the Tampa sought permission to dock at Christmas Island, it was refused by the Government of Australia, which insisted that Norway or Indonesia should take responsibility for the asylum seekers. Neither of those governments, however, accepted responsibility. When the Tampa entered Australian waters, Australia deployed troops to prevent the ship from reaching land, forcing it back outside of Australia's territorial sea.[9] The master of the Tampa requested help, as some of the migrants were in need of medical care. Yet the Australian government would not allow the asylum seekers to enter its territory. There was a stalemate.

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On September 1, Australia announced that it had found a "solution": Australia would pay the government of Nauru, a tiny Pacific island and former Australian dependent territory, an initial sum of US$10 million in aid in exchange for Nauru's agreement to house the asylum seekers while their claims were being processed. UNHCR would assess the claims of the asylum seekers on Nauru. Australia's "Pacific Solution" was born.

Case Study No. 3

S., an Iraqi widow, was smuggled out of Iraq in the autumn of 2002 together with R., her nine-year-old daughter.[10] The pair were brought to Iran through the marshlands of southern Iraq. They remained in Iran for two months, while a smuggler arranged forged passports of a European country for them. In late 2002, the smuggler took them to Tehran's Mehrabad Airport and flew with them to Dubai. At Dubai airport, they were to board a flight to Canada, where S. was to be met by a man she had married by proxy. Before they reached the passport control area at Dubai airport, S. was told by the smuggler to pose as his wife. R., the child, was instructed to walk ahead of the pair and not to look back or call out to them. She passed through the exit control, but S. and the smuggler were stopped. They were held at Dubai airport for two days, where they were questioned separately by the authorities. The United Arab Emirates are not Party to the 1951 Refugee Convention. S. admitted that she was attempting to reach Canada with the help of a smuggler and a false passport, and was sent back to Iran. There, she was detained at the airport for five days, before being bailed out by someone whose assistance had been arranged by the man in Canada whom S. had married by proxy. The Iranian authorities gave her ninety days to leave Iran.

Meanwhile, the child, R., reached Canada, applied for asylum, and was recognized as a refugee by Canada's Immigration and Refugee Board. Mother and daughter remain separated, while UNHCR and Canadian government officials grapple with the case.

Case Study No. 4

The United States actively intercepts vessels in the Caribbean if there is suspicion of illegal migration.[11] It has entered into more than twenty bilateral agreements granting the right to board foreign flagged vessels for this purpose. The nationalities most often intercepted are Cubans, Haitians, Dominicans, Ecuadorians, and Chinese. Different standards of screening apply to the different groups. Cubans, for example, are normally given a screening on board the migrant vessel or on board a U.S. Coast Guard vessel to determine whether they have a "credible fear" of persecution, though even those found to be refugees are not ultimately permitted entry to the U.S., but are "resettled" in other countries in the region. Chinese are given a written statement (in Mandarin Chinese), which explains certain rights and a form to fill in. Haitians reportedly need to meet the "shout test;" that is, they must insist verbally that they wish to seek asylum. This differential treatment raises serious questions about access to protection and durable solutions for intercepted refugees.

State Practice

A defining prerogative of the nation-state is its right to determine who may or may not enter and remain in its territory.[12] States employ various tools in their exercise of this basic jurisdiction. First among these are visa policies, which, for the purposes of this article, are not considered interception measures *per se*, but which clearly limit the ability of individuals to exercise the right to seek asylum. As John Morrison and Beth Crosland have observed: "The imposition of visa restrictions on all countries that generate refugees is the most explicit blocking mechanism for asylum flows and it denies most refugees the opportunity for legal migration."[13] Some background on visa policies is included below, as visa regimes are the main reason why asylum seekers and other migrants resort to the services of people smugglers, use false documents, and otherwise find themselves in situations where they may be intercepted.

Visa Requirements

The right to enter the territory of a state is generally reserved to nationals of that state.[14] Non-nationals are often required to obtain a visa to enter a foreign country. Visa policies allow a state individually to assess each person seeking entry, and permit wide discretion in admitting or refusing applicants.

Visa requirements rarely apply uniformly to all foreign nationals,[15] but instead reflect a state's political, economic, or historical ties. Industrialized countries frequently impose visa requirements on countries that produce large numbers of refugees, asylum seekers, or irregular migrants. The introduction by Canada in December 2001 of visa requirements for citizens of Hungary and Zimbabwe, for example, was in direct response to the large number of asylum seekers from those two countries.[16]

Visa requirements clearly have significant implications for asylum seekers. In order to obtain a visa, an applicant must present a valid passport, but a person who fears persecution at the hands of his or her government is unlikely to take the risk of approaching the authorities for a travel document. As observed by a joint Council of Europe/UNHCR Experts Roundtable, "Often it is impossible, or too dangerous, for a refugee to obtain the necessary travel documents from the authorities."[17] In other cases, where government institutions have collapsed due to civil

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war (*e.g.* Somalia), there is simply no agency to issue passports. Even when asylum seekers do have passports, they may be unable to travel to an embassy to apply for a visa. Moreover, as observed above, embassies and consulates are unlikely provide a visa to an individual for the purpose of seeking asylum.

Visa policy is increasingly being harmonized regionally.[18] As a result, not only individual countries but also entire regions are becoming inaccessible to asylum seekers. As noted by Human Rights Watch and other NGOs: "Desperate people will resort to desperate measures. With all other options closed, migrants and asylum seekers have been forced to make use of illegal and dangerous means of entry via sophisticated trafficking and smuggling rings."[19]

Responses to Smuggling and Trafficking in Persons

Smuggling and trafficking in persons are of growing concern to the international community. Smuggling in persons has been defined in the 2000 Protocol against the Smuggling of Migrants by Land, Sea and Air as "the procurement, in order to obtain, directly or indirectly, a financial or other material benefit, of the illegal entry of a person into a State Party of which the person is not a national or a permanent resident."[20] Among those being smuggled are persons who are on the move for a variety of reasons, including: individual or group persecution; generalized violence; other human rights violations; external aggression, occupation or foreign domination; natural or economic disasters; extreme poverty; striving for betterment; or a mixture of these motives.[21]

People smuggling is a business, and in principle involves willing parties – the smuggler who seeks to make money, and the person being smuggled who wants or needs transit. The demand for the services of people smugglers is driven by a combination of shrinking legal migration opportunities, especially for asylum seekers and poorer migrants from the South, and expanding migration control activities, such as interception.

Trafficking, on the other hand, has been defined in a companion protocol, the 2000 Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children:

> "Trafficking in persons" shall mean the recruitment, transportation, transfer, harbouring or receipt of persons, by means of the threat or use of force or other forms of coercion, of abduction, of fraud, of deception, of the abuse of power or of a position of vulnerability or of the giving or receiving of payments or benefits to achieve the consent of a person having control over another person, for the purpose of exploitation. Exploitation shall include, at a minimum, the exploitation of the prostitution of others or other forms of sexual exploitation, forced labour or services, slavery or practices similar to slavery, servitude or the removal of organs...[22]

Though often lumped together for discussion purposes, it is important to recognize some of the significant differences between smuggling and trafficking in persons. Trafficking in persons is inherently coercive and exploitative. As the Protocol definition emphasizes, trafficking involves the threat or use of force and the abuse of power over vulnerable persons, and may even involve abduction. People are trafficked for the purposes of sexual or work exploitation. Yet among those who are trafficked may well be some who need international protection, whose vulnerability to traffickers may originally have been a result of insecurity in their place of origin. Some of those who end up being trafficked may have begun their journeys intending to simply avail themselves of the assistance of smugglers. Furthermore, having come under the control of traffickers, trafficked persons should be recognized as presumptively in need of protection from further exploitation.[23]

Smugglers and traffickers in persons frequently employ the same means to transport people, such as fraudulent travel documents or clandestine attempts to reach a state's territory by sea. States' concerns about smuggling and trafficking are motivated by a mixture of factors including national security, sovereignty, and the "integrity" of immigration programs, as well as concern about the safety and human rights of those being smuggled and trafficked. However, as noted, most enforcement measures designed to prevent illegal or unauthorized migration, such as the visa controls described above, or the carrier sanctions and immigration control activities discussed below, have the unintended effect of encouraging the expansion of smuggling and trafficking networks.

Carrier Sanctions

Visa requirements may discourage irregular migration but they do not necessarily prevent persons without visas from arriving at a port of entry and seeking admission. The prohibition on *refoulement* of refugees[24] contained in the 1951 Refugee Convention means in practice that a person who arrives at the frontier of a state party and makes a refugee claim must have the merits of that claim considered before being removed, regardless of whether the individual holds a valid visa. It should be noted that the *non-refoulement* principle is not limited to states party to the 1951 Refugee Convention; *non-refoulement* has also evolved into a norm of customary international law.[25]

In order to enforce visa requirements, many states impose financial penalties on carriers that bring improperly documented persons into their territory.[26] Article 27 of the

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1990 Schengen Implementation Agreement, for example, obliges all members of the EU to implement carrier sanctions.[27] This was followed in 2001 by a European Council Directive[28] to harmonize penalties against carriers transporting undocumented passengers. Canadian legislation imposes steep penalties on transport companies that bring improperly documented persons to Canada, including for the costs of detention, return, and, in some cases, medical care.[29]

Carriers, seeking to avoid such sanctions, are thus put into the position of having to check travellers' documents before allowing them to board. Airline representatives and, in some cases, private security companies hired by airlines are trained to identify false or improper documentation and to prevent the embarkation of persons without adequate travel documents and visas.[30] Governments and the International Air Transport Association (IATA), which represents the global airline industry, have provided training to carrier personnel on detection of fraudulent documents. As well, pursuant to the 1944 Chicago Convention,[31] many airlines have negotiated memoranda of understanding with states, which waive sanctions where airlines can demonstrate strict good-faith adherence to document control procedures. In some cases sanctions may also be waived where the improperly documented passenger is subsequently found to be a refugee.[32]

The transport industry is not necessarily happy about having to undertake immigration control activities. IATA indicates that its members see immigration control as a matter that ought be left in the hands of states, which have the expertise and jurisdiction to examine the credibility of asylum claims and the obligation to protect refugees.[33]

With respect to activities at sea, the actions taken to avoid fines have had even more dramatic results, for example, when undocumented stowaways are discovered on board. As Morrison and Crosland observe:

> Unfortunately, in the case of commercial sea vessels such proactive action by ship's crews to avoid carrier fines is known to sometimes have fatal consequences. International Maritime Organisation guidelines given to ships crew on the detection of stowaways make no reference to the right to asylum or the dangers of *refoulement*.[34]

Immigration Control Officers, Airline Liaison Officers, and Migration Integrity Officers

In order to assist carriers in complying with carrier sanctions legislation, some states deploy immigration control officers (ICOs) to foreign transit hubs used by "improperly documented" persons en route to their territory. As a rule, these officers provide training and expertise to carriers and officials of other countries in the identification of fraudulent documents. Canadian government officials are careful to emphasize that immigration control officers do not have extraterritorial powers and act solely in an advisory capacity.[35] However, like airline personnel themselves, they do not appear to have any mandate to examine the intercepted person's motivation for migration or to address any need for international protection.

In a document tabled in the House of Commons in November 2002, Citizenship and Immigration Canada (CIC) described the role of Canada's ICOs as: "monitoring airlines for MOU compliance and providing training, expert guidance and support to airline staff and local authorities abroad in order to reduce irregular migration to Canada."[36] The document goes on to emphasize the ICO intelligence-gathering role, which it says is "essential to efforts toward the development of a more proactive 'intelligence-led' approach to combating global irregular migration."[37] Regarding the relationship between immigration control officers and airlines, CIC asserts: "The focus of ICO airport activities has been and should continue to be the transfer of skills and information. The primary responsibility for passenger screening remains with the airlines."[38]

Canada currently has a large global network of such officers,[39] now called "Migration Integrity Officers", who work under the newly created Intelligence Branch of CIC. Between 1996 and late 2002, Canada's immigration control personnel are reported to have interdicted "more than 40,000 people abroad attempting to travel to Canada with improper documents."[40]

Canada is not alone in its use of immigration control officers. Australia, Denmark, Germany, the Netherlands, the UK, and the United States all post officials at their consulates and embassies abroad to advise airlines and other governments on fraudulent documents. The UK expanded its airline liaison officer presence fourfold in 1999, putting officers in twenty international airports.[41]

The impact of airport interceptions on refugee protection is difficult to quantify. As noted, immigration control officers and airline liaison officers are not mandated to examine the reasons for an intercepted person's attempt to enter the country of prospective destination. A senior Canadian official has indicated that Canadian practice is to refer intercepted asylum seekers to the local UNHCR office, in those cases where the interception has taken place in a state that is not party to the 1951 Refugee Convention.[42] However, there is no data available to corroborate this assertion. There is no information, for example, about how many of the 40,000 "improperly documented" travellers reportedly intercepted by or with the assistance of Canadian immigration control officers were given an opportu-

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nity to indicate their need for asylum, if any, or what procedures were followed. There is no information on how many were referred to UNHCR, how many were referred to local asylum authorities, how many were simply turned back, or what happened to them.

As the Council of Europe/UNHCR Experts Roundtable observed in relation to EU interception practices:

> It is impossible to be precise about the number of refugees who are denied escape due to stringent checks by transport companies. The number is considered to be on the rise, however, not least since transport companies have been assisted by Governmental liaison officers in verifying travel documents.[43]

Interception to Avoid "Asylum Overload"

The deployment of airline liaison officers or immigration control officers to advise carriers on detecting fraudulent documents is not the only focus of interception measures employed by states at foreign airports. In mid-2001, the UK began to intercept individuals abroad because of the expectation that they would apply for asylum in the UK, even though they possessed valid documentation for entry. Such actions go beyond UNHCR's suggested definition of interception, which is limited to stopping the movement of persons "without the required documentation."

The action in question concerns measures implemented by the UK at Prague airport, in which Czech citizens of Roma origin who were intending to travel to London were intercepted prior to boarding. By 2000, the UK government had grown increasingly concerned about the number of Czech Roma asylum seekers arriving in the UK. Although authoritative statistics are not available, according to UK Home Office information, the majority of these applications were unfounded – notwithstanding the fact that the Home Office recognized that discrimination, harassment, and even persecution of Roma citizens did occur in the Czech Republic.[44]

The UK therefore proceeded to conclude an arrangement with the Czech authorities allowing the UK to set up a pre-entry clearance procedure at the Prague airport. As Czech citizens were not required to obtain a UK visa for travel to the UK, the travellers were stopped on alleged grounds that they were not genuinely seeking entry for the limited period allowed for visitors and business travellers. Although the UK has maintained that the pre-clearance was not discriminatory, it appears that most of those stopped were Roma. According to testimony before the UK High Court by the European Roma Rights Centre, during the period July 2001 through April 2002, "of 6170 passengers who were Czech nationals but not Roma, only 14 [or fewer than 1 per cent] were refused entry, while of 78 who were apparently Roma, 68 [or 90 per cent] were refused."[45]

The UK actions in Prague raise questions not only about the discriminatory effect of the pre-clearance practice, but also about the restriction of the individual right to seek asylum. A legal challenge of the UK's pre-screening practice was unsuccessful at first instance and in the Court of Appeal, where the UNHCR filed an *amicus curiae* brief[46] arguing that the UK practice was not compatible with the principle of good faith in the implementation of international law. The case has been further appealed to the House of Lords by the NGO Liberty.

Maritime Interception

The most widely publicized and most visible type of interception is that conducted at sea (often also referred to as "interdiction"). The best-known actions are those of the U.S. Coast Guard in the Caribbean and of the Australian navy in waters separating Australia from Indonesia. But other countries, including Greece, Italy, Malaysia, Spain, Turkey, and Yemen, also intercept vessels suspected of carrying improperly documented migrants or asylum seekers, whether in the territorial sea, in contiguous waters,[47] or on the high seas, in international waters. While Canada does not engage directly in maritime interception on its own, it has been involved in joint interception activities with other states.[48]

Analogous to the interception of improperly documented travellers at foreign airports, countries generally try to intercept boats while they are still in international waters, to prevent them from entering territorial waters or reaching shore. Interception is sometimes done in the context of anti-trafficking and anti-smuggling operations.[49]

In most instances, the aim after interception is the return without delay of all migrants to their country of origin. Passengers are rarely disembarked on the territory of the intercepting state. When they are not returned directly to the country of embarkation, whether this is their country of origin or one through which they transited, they may be taken to a third country which agrees to their disembarkation.[50]

An area of considerable complexity is rescue at sea. States have an obligation under international maritime law to rescue those on unseaworthy vessels.[51] But when such vessels are carrying irregular migrants and the seaworthiness of the vessel is open to judgment, activities that are characterized as "rescue" may in fact be designed primarily to intercept and prevent entry into territorial waters. Even where an act is clearly one of rescue, required by international maritime law, the question of how states treat rescued asylum seekers remains.[52]

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In terms of numbers, the U.S. would appear to be the leader in maritime interception. From 1982 through 2002, the U.S. Coast Guard intercepted 185,801 people at sea.[53] Most were from Haiti, the Dominican Republic, or Cuba, though Ecuadorians, Chinese, and others have also been intercepted.[54]

The US Committee for Refugees reports that: "Interdicted migrants were not entitled to any asylum screening, regardless of whether they were interdicted in international waters or US territorial waters. The INS does, however, provide a minimal level of asylum screening to interdicted persons on an *ad hoc* basis and slightly more screening to Chinese and Cubans" than to others.[55] Any Haitians or other migrants who manage to evade the Coast Guard and arrive on U.S. territory by sea are subjected to "expedited removal" proceedings. These proceedings include mandatory, indefinite detention, without possibility of bail, and little opportunity to make an asylum claim.[56] (Cuban nationals, however, are exempted from the expedited removal procedure.)

Australia also engages in maritime interception. Since the *Tampa* incident, highlighted in Case Study No. 2, Australia has instituted a number of measures. One of the first was "excision" of certain of its territory from its "migration zone." This legal fiction was designed to remove the protection of Australia's immigration and asylum laws from unauthorized arrivals to those territories which were most easily and frequently accessed by migrant ships (*e.g.* Christmas Island and Ashmore Reef).[57]

The next was to build on the Nauru experience and start negotiating similar arrangements with other states in the region. In October 2001, Australia announced that Papua New Guinea would build a refugee-processing centre for intercepted Australia-bound asylum seekers, in exchange for an initial aid package of US$500,000. Nauru and Papua New Guinea became part of Australia's "Pacific Solution" to "irregular migration."

Under the policy, Australia intercepts ships on the high seas believed to be headed toward their territory and diverts the passengers who claim asylum to one of the third states with which Australia has entered into a contract for the reception of asylum seekers. Such states need not themselves be parties to the 1951 Refugee Convention – and to date none has been. With the exception of the passengers on the *Tampa*, whose claims the UNHCR agreed to assess, examination of asylum claims is done by Australian authorities. Asylum seekers who somehow do manage to enter Australian territory and claim asylum there, including children, are mandatorily detained, often in remote locations and under difficult conditions.[58]

Many of the refugee protection and human rights issues raised by maritime interception are the same as those raised by interception at airports: namely, the right to seek and enjoy asylum, and *non-refoulement*. In addition, there are important questions that need to be considered regarding the safety of those who are intercepted and the widespread use of lengthy detention in poor conditions.

Regional Agreements

There is a growing trend towards regional and international harmonization and co-operation on migration control, including not just visa and carrier liability policy, but also interception and enforcement programs.

The G8's *ad hoc* Migration Experts working group, for example, finalized in October 2002 a set of "Best Practices for Document and Passenger Screening and Related Work at Airports."[59] The Inter-governmental Consultations on Asylum, Refugees and Migration Policies in Europe, North America and Australia (IGC) held a workshop on interception for its members in late 2002.[60] Co-operative strategies for interception have likewise been under intense discussion at the Regional Conference on Migration (the Puebla Process), of which Canada and the U.S., as well as Mexico and the Central American states, are members; in the Budapest Process of European states; and at the wider Bali Conference of thirty-three states, which is focused specifically on enforcing migration control. There are numerous other such regional groupings: for instance, the Manila Process; the Asia-Pacific Consultation; and the "5+5" Group of Western Mediterranean states, to cite just a few.

These fora are all state-driven and conduct their meetings largely behind closed doors. Civil society groups are generally not represented. Although the intergovernmental organizations mandated to oversee the protection of refugees and human rights are at times invited – as in the Puebla group – they generally participate only as observers.

Summary of Refugee Protection Concerns

The preceding discussion has highlighted a number of areas where migration control and refugee protection imperatives come into conflict. For instance:

- Visa policies rarely accommodate the special situation of asylum seekers and thus either prevent escape or leave persons little choice but to resort to the services of people smugglers and traffickers;
- Carrier sanctions serve to enforce visa regimes, but put the task of screening passengers' documents into the hands of private agents who are neither mandated nor trained to identify asylum seekers and refugees;
- Immigration control officers assist carriers in complying with carrier liability legislation, helping to distinguish be-

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tween genuine and fraudulent documents; they do not have a refugee protection mandate;
- Interception measures may restrict the right to seek and enjoy asylum from persecution;
- Maritime interception, like interception at airports, frequently lacks any mechanism to distinguish refugees from non-refugees, resulting in summary returns of those intercepted; moreover, where persons intercepted at sea are provided with an opportunity to claim asylum, this is often *ad hoc* and inconsistent;
- Interception frequently results in arbitrary detention, sometimes under conditions below minimum standards;
- Interception measures by individual states lack transparency; moreover, there is growing state co-operation on migration control without adequate involvement of civil society organizations or of the UNHCR.

At heart, all of these concerns flow from the basic observation that interception measures as currently implemented, whether at sea or on land, consistently fail to distinguish between persons who need international protection and those who do not, and thus do not provide refugees with the protection to which they are entitled under international law. One of the reasons for this failure is the premise of many states that they are not constrained by their domestic laws or even by international law, so long as the interception activities are conducted beyond their own borders. Similarly, when interception is conducted by private agents, such as carriers, states sometimes argue that they are not responsible.

International Law

What are the international legal obligations of states in the context of interception? That states have a sovereign right to control access to their territory is evident. But are there any limits on how they do so? One obvious restriction arises from international refugee law, namely, the principle of *non-refoulement*. States parties to the 1951 Refugee Convention are prohibited, under Article 33.1, from returning individuals to persecution. That this applies to refugees and asylum seekers at ports of entry, as well as those who claim asylum from within the territory of a state party, is not generally disputed. But what application does this principle have to activities undertaken by states *beyond* their own territory? And what is the relevance of other international human rights and refugee law norms, in relation to extraterritorial interception?

Extraterritoriality

It is sometimes argued that interception, which by definition takes place outside the territory of the intercepting state, does not engage the international human rights and refugee law responsibilities of intercepting states, including the prohibition on *refoulement*.[61] Further, some states seem to take the position that as long as the interception is done by a third party, whether a transport company staff person or the crew of a privately owned ship that has been instructed to rescue passengers on a ship in distress, states are not responsible.[62] However, neither the general law of state responsibility nor international refugee and human rights law supports these arguments.

The International Law Commission's Articles on Responsibility of States for Internationally Wrongful Acts,[63] adopted with consensus on "virtually all points"[64] in 2001, were developed over the course of some thirty years of research, drafting, and debate by the world's leading international jurists. The Articles do not attempt to propose new law but rather to codify existing norms. As such, they represent the highest authority for attributing responsibility to states.

Article 1 provides that: "Every internationally wrongful act of a State entails the international responsibility of that State." Article 2 proceeds to lay out the conditions for such a wrongful act, namely, "when conduct consisting of an act or omission (a) is attributable to the State under international law; and (b) constitutes a breach of an international obligation of the State."

With respect to attribution of conduct to a state, three articles are relevant to the interception context:

> Article 4(1): The conduct of any State organ shall be considered an act of that State under international law, whether the organ exercises legislative, executive, judicial or any other functions, whatever the position it holds in the organization of the State, and whatever its character as an organ of the central government or of a territorial unit of the State.
>
> Article 5: The conduct of a person or entity which is not an organ of the State under article 4 but which is empowered by the law of that State to exercise elements of the governmental authority shall be considered an act of the State under international law, provided the person or entity is acting in that capacity in the particular instance.
>
> Article 8: The conduct of a person or group of persons shall be considered an act of a State under international law if the person or group of persons is in fact acting on the instructions of, or under the direction or control of, that State in carrying out the conduct.

With regard to extraterritorial application of international law, the Articles clearly provide that state responsibility attaches to *any* internationally wrongful act that is

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properly attributable to the state. The place where such an act occurs is simply not a relevant consideration. As Sir Elihu Lauterpacht and Daniel Bethlehem observe with respect to the extraterritorial application of the 1951 Refugee Convention:

> The responsibility of the Contracting State for its own conduct and that of those acting under its umbrella is not limited to conduct occurring within its territory. Such responsibility will ultimately hinge on whether the relevant conduct can be attributed to that State and not whether it occurs within the territory of the State or outside it.[65]

In support of this proposition the authors cite a range of human rights treaties and case law from the European Court of Human Rights and the UN Human Rights Committee.[66]

The fact that it is airline staff who are checking documents and denying passage does not absolve states of responsibility, as the airline is simply acting on the basis of carrier liability legislation imposed by the state, or even, in some cases, direct advice from an Immigration Liaison Officer. Nor can a state deny responsibility for persons who have been brought aboard a private ship if the master of that ship was acting on instructions from the state in question.[67] The Articles on State Responsibility do not allow for such distinctions between a state organ and a person, group, or entity acting for, or under the direction or control of, the state. Indeed, in the Commentary on Article 5, UN special rapporteur James Crawford explicitly includes in the ambit of the article the situation where "Private or state-owned airlines may have delegated to them certain powers in relation to immigration control or quarantine."[68]

Lauterpacht and Bethlehem make a similar point specifically with regard to the principle of *non-refoulement*:

> [P]ersons will come within the jurisdiction of a State in circumstances in which they can be said to be under the effective control of that State or are affected by those acting on behalf of the State more generally, wherever this occurs. It follows that the principle of *non-refoulement* will apply to the conduct of State officials or those acting on behalf of the State wherever this occurs, whether beyond the national territory of the State in question, at border posts or other points of entry, *in international zones, at transit points*, etc. [emphasis added][69]

In summary, at international law, no distinction is made for actions taken outside of state territory, nor for actions taken by those acting for or under the direction or control of the state when it comes to attribution of responsibility. While the law is clear on this point, it is worth observing that, from a human rights perspective, to hold otherwise would be to render the international refugee protection regime ineffective. States would be able to avoid their international obligations, creating a human rights vacuum for intercepted refugees and asylum seekers.

International Maritime Law

State responsibility and sovereignty issues are even more complicated in the maritime context, where in addition to general international law norms of state responsibility there is a well-established Law of the Sea. States have the right under international maritime law to assert jurisdiction in relation to migration not just in their territorial seas but also in the "contiguous zone" between the territorial sea and the high seas.[70] While interception on the high seas without authorization of the flag state would appear to be a *prima facie* violation of the principle of free navigation of international waters under the Law of the Sea,[71] there is a countervailing emerging obligation to intercept in order to combat certain types of crime, including smuggling and trafficking in persons.[72] Similarly, as noted above, states are obliged to go to the aid of ships in distress regardless of where they are.[73]

Both the anti-smuggling and anti-trafficking provisions and the general obligation of rescue are tightly bound up with maritime interception practices. Often those who are travelling "irregularly" by sea are victims of smugglers and traffickers, and their vessels are frequently unseaworthy. Even where smugglers or traffickers are not involved, unseaworthy vessels appear to be the norm. At the same time, however, "rescue" is easily used by an intercepting state as a way around the normal obligation to seek the permission of a flag state before intercepting and boarding a vessel on the high seas or even in another state's territorial sea or contiguous zone.

From the perspective of refugee protection, the key question in maritime interception is, what happens to intercepted asylum seekers? Whatever the legality of the initial interception and boarding of a vessel, the act of so doing is a *de facto* exercise of jurisdiction over those on board the ship. This exercise of jurisdiction, whether motivated by rescue, anti-trafficking, or anti-smuggling criminal law enforcement, or migration control, brings with it the range of responsibilities all states have at international law. It is clearly within the scope of Articles 4 or 5 on State Responsibility and so triggers international refugee and human rights law obligations for the state. Whether on land or at sea, the extension of state enforcement mechanisms beyond state territory carries with it an obligation to ensure international protection for those who require it,[74] and must be exercised within the parameters of international law.

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The Right to Seek and Enjoy Asylum

Everyone has the right to leave any country, including his own. This basic human right was recognized by the General Assembly of the United Nations in Article 13 (2) of the 1948 Universal Declaration of Human Rights (UDHR) and is included in a number of human rights treaties, notably the 1966 International Covenant on Civil and Political Rights (ICCPR).[75]

The right of every person to seek and enjoy asylum likewise is enshrined in the 1948 UDHR, in Article 14(1). Both the 1948 American Declaration of the Rights and Duties of Man and the 1969 American Convention on Human Rights include the right to asylum as well.[76] The UN General Assembly reaffirmed its commitment to this right in a resolution in 2000, and "[called] upon all States to refrain from taking measures that jeopardize the institution of asylum."[77] Interception measures that preclude exercise of the right to seek and enjoy asylum by preventing travel to a state party to the 1951 Refugee Convention would appear to be in violation of these key provisions.

Notwithstanding the clear language of these instruments, however, the 1951 Refugee Convention itself does not include a right to asylum but focuses instead on the *non-refoulement* obligation that attaches to states. States parties to the 1951 Refugee Convention have a good-faith obligation to refrain from actions that run contrary to the principles and objectives of this instrument.[78] This would include actions that directly or indirectly undermine the very institution of asylum.

UNHCR, in its intervention before the UK Court of Appeal in the case of *European Roma Rights Centre and Others v. The Immigration Officer at Prague Airport*, argued that the UK's pre-entry clearance procedure was not compatible with the UK's general obligation to implement its international obligations in good faith – and specifically, its obligations as a state party to the 1951 Refugee Convention.[79]

Moreover, as Andrew Shacknove has argued,

> Although no right to receive asylum yet exists in international, regional or municipal law … a willingness to provide asylum is the litmus test for the commitment by affluent states to human rights. Affluent states cannot expect other, more vulnerable nations to execute demanding reforms or improve human rights conditions and at the same time claim that it is beyond their own substantial means to sustain a commitment to asylum."[80]

Non-refoulement

Underpinning the right to seek and enjoy asylum from persecution is the fundamental state obligation of *non-refoulement*. This principle prohibits states and their agents from returning, directly or indirectly, any person "in any manner whatsoever" to a territory where they may be subjected to persecution or torture.[81] The prohibition applies irrespective of whether such persons have been formally recognized as refugees.[82] It is explicitly included in the 1951 Refugee Convention,[83] the 1984 Convention Against Torture (CAT),[84] and several regional treaties.[85] The UN Human Rights Committee has found that the principle of *non-refoulement* is also a component of Article 7 of the 1966 ICCPR.[86] Unlike the right to asylum, the *non-refoulement* obligation is binding on parties to these treaties at international law. *Non-refoulement* is also recognized as a principle of customary international law[87] and is progressively evolving into a peremptory norm of international law.[88]

The principle of *non-refoulement* does not include any explicit geographical limitation,[89] nor is it limited in application to the actions of official state representatives. And while Article 33.2 of the 1951 Refugee Convention provides an exception to the *non-refoulement* principle where there are serious security or criminality issues and the individual poses a danger to security or to the community, Article 3 of the 1984 CAT allows no such derogation where there is a substantial risk of torture on return.

The direct removal of a refugee or an asylum seeker to a country where he or she fears persecution is not the only manifestation of *refoulement*. The removal of a refugee or asylum seeker from one country to another that will subsequently send the refugee onward to the place of feared persecution constitutes indirect *refoulement*, for which several countries may bear joint responsibility.[90]

In the context of interception, the principle of *non-refoulement* comes into play as soon as a state intercepts (and thereby assumes some degree of jurisdiction over) a person or group of persons. In order to comply with the *non-refoulement* obligation, prior to removing the person to his or her country of origin, the state must satisfy itself that the intercepted person will not face persecution on a ground enumerated in the 1951 Refugee Convention, or torture, upon return.[91] To deny an asylum seeker access to fair and effective procedures for the determination of his or her refugee claim could result in *refoulement*,[92] in violation of international law.

Despite the absence of any explicit territorial limitation in the 1951 Refugee Convention, it has been argued that the *non-refoulement* principle in the 1951 Refugee Convention does not have extraterritorial effect. In *Sale v. Haitian Centers Council, Inc.*[93] the U.S. government argued, and the majority of the U.S. Supreme Court accepted, that the term *refoulement* only applies to expulsion from a state's territory, and does not cover the situation where a person is

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seized outside of the territory and returned to his or her country of origin.

The U.S. Supreme Court decision in *Sale v. Haitian Centers Council, Inc.* has been subjected to widespread criticism from the human rights and refugee law community for upholding an incorrect interpretation of Article 33. Guy Goodwin-Gill has argued vigorously that the Court incorrectly narrowed the true scope of the provision, asserting that the provision unambiguously does have extraterritorial effect.[94] UNHCR itself, whose mandate it is to supervise the application of the provisions of the 1951 Refugee Convention,[95] took the same position in its *amicus curiae* brief submitted to the U.S. Supreme Court.[96] Considering the same issues and facts, the Inter-American Commission on Human Rights found that Article 33 had no geographical limitations and accordingly applied on the high seas.[97]

The application of the provision to the interception context was also directly asserted by participants in an experts' roundtable on the principle of *non-refoulement*, organized in 2001 in the context of UNHCR's Global Consultations on International Protection:

> The principle of *non-refoulement* embodied in Article 33 encompasses any measure attributable to the State which could have the effect of returning an asylum-seeker or refugee to the frontiers of territories where his or her life or freedom would be threatened, or where he or she is at risk of persecution, including interception, rejection at the frontier or indirect *refoulement*.[98]

Finally, it is worth noting that both the 2000 Protocol against the Smuggling of Migrants, and the 2000 Protocol to Prevent, Suppress and Punish Trafficking in Persons, though not yet in force, include a "saving clause" which explicitly requires that measures taken pursuant to the protocols conform with the principle of *non-refoulement* under Article 33 of the 1951 Refugee Convention.[99]

In practical terms, then, the principle of *non-refoulement* implies a positive obligation on states that intercept "irregular migrants" to provide them with an opportunity to claim asylum and to assess their claim fairly and effectively prior to returning them.[100] Those who establish that they are refugees in the sense of the 1951 Refugee Convention or who would face torture if they were returned must be protected from return. While the intercepting state, by virtue of having exercised jurisdiction over the refugee, has primary responsibility for the protection of the intercepted refugee, it need not necessarily be the one to provide long-term asylum; the 1951 Refugee Convention contemplates the possibility of inter-state responsibility sharing.[101]

Non-discrimination

The principle of non-discrimination is well established at international human rights and refugee law. It is guaranteed in Article 2 of the 1948 UDHR,[102] Article 2(1) of the 1966 ICCPR,[103] and Article 2(2) of the 1966 International Covenant on Economic, Social and Cultural Rights (ICESCR).[104] It is also, of course, the motivating principle of the 1969 Convention on the Elimination of All Forms of Racial Discrimination (CERD).[105]

The principle of non-discrimination is included in the 1951 Refugee Convention itself. Article 3 provides: "The Contracting States shall apply the provisions of this Convention to refugees without discrimination as to race, religion or country of origin."

The common saving clauses of the 2000 Smuggling and Trafficking Protocols apply these principles of international law directly to the interception context:

> The measures set forth in this Protocol shall be interpreted and applied in a way that is not discriminatory to persons on the ground that they are victims of trafficking in persons. The interpretation and application of those measures shall be consistent with internationally recognized principles of non-discrimination.[106]

Whatever the provisions of the domestic laws of intercepting states, it is clear that at international law, interception measures may not target particular groups or individuals on the basis of race, religion, sex, ethnicity, political opinion, nationality, country of origin or physical incapacity.[107] *Prima facie*, the maritime interception practices of the U.S. and the airport interceptions of the UK violate this fundamental principle.

Mobility rights

The right to leave a country is guaranteed by Article 13(2) of the Universal Declaration of Human Rights. Article 12 of the 1966 ICCPR likewise guarantees the freedom to leave any country,[108] and emphasizes the importance of this right by expressly limiting the circumstances in which this right can be restricted, namely, only where the restrictions "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." Article 22(2) of the American Convention on Human Rights makes similar provision.

The UN Human Rights Committee had occasion to discuss the application of this right in the context of interception in its Concluding Observations on Austria. There the Committee expressed concern that Austria's regime of

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carrier sanctions and other "pre-frontier arrangements" may violate Article 12(2).[109] Likewise during its consideration of France, the Committee observed:

> The Committee is furthermore concerned at the reported instances of asylum seekers not being allowed to disembark from ships at French ports, without being given an opportunity to assert their individual claims; such practices raise issues of compatibility with article 12, paragraph 2, of the Covenant.[110]

Absent compelling reasons of national security or other applicable grounds cited in Article 12(3), interception measures that result in the return of the person to their country of origin appear to be inconsistent with the Article 12(2) obligations of states parties to the ICCPR. This applies not solely with respect to asylum seekers and refugees, but rather to all persons.

Further, in General Comment 27, the Human Rights Committee asserted that the freedom to leave the territory of a state includes the right to choose the state of destination. This freedom also applies to "an alien being legally expelled from the country…(subject to the agreement of the state)."[111] While the General Comment does not directly contemplate the circumstances of interception, there is a clear analogy where it is established that the state is exerting jurisdiction over the intercepted person's movement. In such circumstances, while Article 12(2) does not explicitly require the intercepting state to allow entry to its own territory, it does require that the intercepted person be allowed to choose her or his state of destination. Especially where important rights such as life or freedom from torture are concerned, individuals must be allowed to choose an alternate state of destination where the rights will be respected.[112] To the extent that intercepted persons are denied an opportunity to choose an alternate destination, interception thus violates the right to leave one's country.

Family Unity and Children's Rights

Another area of international law that is directly relevant to interception is that of child protection and protection of the family. The 1989 Convention on the Rights of the Child requires that, "In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interest of the child shall be a primary consideration." States parties must: "ensure the child such protection and care as is necessary for his or her well-being, taking into account the rights and duties of his or her parents, legal guardians, or other individuals legally responsible for him or her," and, to this end, must "take all appropriate legislative and administrative measures."[113]

In addition, Article 16(3) of the 1948 UDHR sets out the entitlement of the family to protection "by society and the state." Similarly, Article 10(1) of the 1966 ICESCR provides: "The widest possible protection and assistance should be accorded to the family ... particularly for its establishment and while it is responsible for the care and education of dependent children." Article 23 of the 1966 ICCPR reiterates: "The family is the natural and fundamental group unit of society and is entitled to protection by society and the State."

In the context of interception, these provisions would require that, before making a final decision regarding admission or return, the best interest of any child involved be given due consideration. This would apply not only where an unaccompanied child is intercepted, but also when a parent is intercepted en route to be reunited with her or his child or children. Current interception practices appear to fail to address children's interests to any degree.

Building Compliance

As noted, states have a legitimate interest in controlling irregular migration. In addition, there is an emerging obligation to intercept persons in order to combat certain types of crime, including smuggling and trafficking in persons.[114] However, the extension of state enforcement mechanisms beyond state territory carries with it an obligation to ensure international protection for those who require it.[115]

Yet existing migration control tools, including visa requirements, carrier sanctions, and interception measures, rarely incorporate safeguards for the protection of asylum seekers and refugees. UNHCR's Agenda for Protection, adopted by its Executive Committee in 2002, recognizes this shortcoming and calls for "[b]etter identification of and proper response to the needs of asylum seekers and refugees, including access to protection within the broader context of migration management."[116]

If interception measures fail to distinguish between those intercepted persons who require international protection and those who do not, the ability of persons in need of protection to reach safety and to have access to fair and effective asylum procedures is jeopardized and intercepted persons are at risk of *refoulement*.[117] States have both a legal and moral obligation to ensure that refugees and asylum seekers may enjoy their human rights, including access to protection.[118] While interception practices present some serious challenges to this basic objective, these challenges are not insurmountable.

The 2003 UNHCR Executive Committee Conclusion

Although interception is not a new phenomenon, it has only recently been taken up *qua interception* by UNHCR's Execu-

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tive Committee. In earlier years, the Committee had dealt extensively with the matter of rescue at sea.[119] In 2000, UNHCR put the topic on the agenda of its Standing Committee for the first time, and tabled a working paper entitled "Interception of Asylum-Seekers and Refugees: The International Framework and Recommendations for a Comprehensive Approach."[120] In May 2001, UNHCR organized a regional workshop in Ottawa on "Incorporating Refugee Protection Safeguards into Interception Measures,"[121] the conclusions of which were presented to a meeting of the Global Consultations on International Protection in June of that year.[122] In March 2002 UNHCR convened an Expert Roundtable on Rescue at Sea,[123] which addressed issues of state responsibility and the international legal framework. Finally, in October 2003, UNHCR's Executive Committee adopted a "Conclusion on Protection Safeguards in Interception Measures."[124]

The Executive Committee Conclusion, though it has significant gaps and weaknesses, is nevertheless an important milestone. It recognizes that states have an interest in controlling irregular migration and that interception activities will therefore continue, but that this must not prevent asylum seekers and refugees from gaining access to safety and obtaining international protection. The Conclusion recommends that interception measures be guided by eight considerations to ensure "adequate treatment" of asylum seekers and refugees among those intercepted. These considerations can be summarized as follows:

1. allocation of state responsibility: primary responsibility for addressing the protection needs of intercepted persons lies with the state where interception occurs;
2. humane treatment of intercepted persons in accordance with their human rights;
3. the need to take into account the fundamental difference between asylum seekers and refugees, and other migrants;
4. *non-refoulement* and access to international protection and durable solutions for those who need it;
5. the particular needs of women, children, and vulnerable persons;
6. intercepted asylum seekers and refugees should not be liable to criminal prosecution for the fact of having been smuggled, nor punished for illegal entry or presence (subject to Article 31 of the 1951 Refugee Convention);
7. persons not in need of international protection should be swiftly returned to their countries of origin;
8. state authorities and agents acting on behalf of the state in implementing interception measures should receive specialized training in human rights and refugee protection.

The adoption of this Conclusion paves the way for UNHCR to issue Guidelines on Refugee Protection Safeguards in Interception Measures. Such Guidelines have been contemplated by UNHCR for some time, but a number of states insisted that the Executive Committee first adopt a Conclusion on the subject. The objective of Guidelines would presumably be to encourage states to maintain access to asylum for those who need it, while allowing states to control access to territory within the boundaries of international law. By proposing specific safeguards for refugee protection in the context of interception, UNHCR Guidelines would contribute toward building consensus on what is acceptable in the context of interception, and what is not.

Future UNHCR Guidelines on Interception

Any future UNHCR Guidelines on interception will naturally have to balance what is desirable against what is achievable. However, as a framework for UNHCR Guidelines, UNHCR Executive Committee Conclusion 97 (LIV) 2003 is not entirely satisfactory. In particular, it lacks reference to the well-established international human rights principle of non-discrimination, which would prohibit interception measures from targeting particular groups or individuals on the basis of race, religion, sex, ethnicity, political opinion, nationality, country of origin, or physical incapacity.[125]

The Guidelines will also need to resolve the apparent ambiguity in the Conclusion text, not to mention in the practices of some states, with respect to state responsibility. As discussed above, international law of state responsibility does not allow states to absolve themselves of their international legal obligations by undertaking interception measures extraterritorially. States must act within their legal obligations regardless of where their actions take place. To hold otherwise would be to eviscerate international human rights and refugee law, as states would be able to set aside their freely adopted legal obligations whenever it is convenient to do so, simply by taking their actions outside of their own territory.

The first "consideration" set out in UNHCR Executive Committee Conclusion 97 (LIV) 2003, however, seems to veer away from this fundamental principle. This provision assigns primary responsibility for the protection of intercepted persons not to the active, intercepting state, but rather to the passive state within whose territory or territorial waters the interception takes place. However, it is important to interpret this provision in the light of the rest of the Conclusion and, more broadly, in the light of international law. Two clauses are of particular relevance. One is

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the explicit acknowledgement in the Conclusion itself that the text as a whole must be taken "without prejudice to international law, particularly international human rights and refugee law." Though this acknowledgement is not strictly necessary, since the Conclusion is itself "soft law" and thus cannot derogate from treaty and customary law obligations, it is nonetheless important in that it signals that the states that negotiated the text recognized that interception measures are indeed constrained by existing international human rights and refugee law.

Also relevant to the question of state responsibility is the second proposed "consideration", which provides that "[s]tate authorities and agents acting on behalf of the intercepting state should take, *consistent with their obligations under international law*, all appropriate steps in the implementation of interception measures to preserve and protect the right to life…" (emphasis added). This is a further acknowledgement that, notwithstanding the first enumerated consideration, intercepting states themselves, as well as agents acting on their behalf, are constrained by international law in their implementation of interception measures.

Thus the assertion that "primary responsibility" lies with the state within whose territory or territorial waters the interception takes place cannot be used to absolve intercepting states *entirely* of their international obligations. In order to comply with international human rights and refugee law, intercepting states, particularly if they are party to the 1951 Refugee Convention or the 1967 Protocol, must ensure as a starting point that their interception activities do not result in *refoulement*. Intercepted asylum seekers and refugees must have access to a fair and effective refugee status determination process, and if found to be in need of protection they must receive it.

While the intercepting state is not *necessarily* obliged to be the one that provides effective protection or a durable solution, it cannot discharge its international obligations without ensuring that those who are intercepted will receive fair treatment and adequate protection at the hands of the territorial state. The allocation of "primary" responsibility to the territorial state via the UNHCR Executive Committee Conclusion will thus relieve the intercepting state of its protection obligations only if the territorial state will meet the protection and durable solution needs of the intercepted person. Where this condition is not met, the intercepting state retains an underlying obligation to protect those it intercepts.

UNHCR's Guidelines will have to address this key issue forcefully in order to put to rest any state's lingering hopes that the Conclusion would absolve them of any responsibility for refugees and asylum seekers they intercept, or those intercepted at their behest. The Guidelines should clearly indicate that the proposed allocation of responsibility to the state where interception occurs will only be legally valid and permissible if certain conditions are met, including respect for and compliance with a number of fundamental safeguards, not all of which are explicitly outlined in the Executive Committee Conclusion 97 (LIV) 2003.

Ultimately, however, it will be possible to build refugee protection safeguards into interception measures only if states are willing to be transparent about their interception activities. Pursuant to Article 35 (2)[126] of the 1951 Refugee Convention, states and other entities involved in interception activities should provide information to UNHCR with respect to their interception practices in order to enable UNHCR to fulfill its obligation to supervise the application of the Convention. UNHCR's work on the development of Interception Guidelines may help to draw this practice out of the shadows.

Notes

1. United Nations High Commissioner for Refugees (UNHCR), *Refugee Protection and Migration Control: Perspectives from UNHCR and IOM*, UN Doc. EC/GC/01/11 (31 May 2001) at 14.
2. This paper does not address the matter of the rights of non-refugee migrants, including migrant workers and their families.
3. Nor indeed is there even consensus that "interception" is the word best used to refer to the practices explored in this paper. Some governments refer to their practices as "interdiction." However, UNHCR and the IOM use the word "interception," which is more neutral in tone.
4. UNHCR, *Interception of Asylum-seekers and Refugees: The International Framework and Recommendations for a Comprehensive Approach*, UN Doc. EC/50/SC/CRP.17 (9 June 2000) at 10.
5. UNHCR Executive Committee, Conclusion No. 97 (LIV) 2003.
6. Case on file at UNHCR Ottawa.
7. 28 July 1951, 189 U.N.T.S. 150, CTS 1969/6 (entered into force 22 April 1954) [1951 *Refugee Convention*].
8. US Committee for Refugees (USCR), *World Refugee Survey 2002*, online: USCR Homepage <http://www.refugees.org/downloads/wrs02/easia1.pdf> (accessed 8 November 2003).
9. The territorial sea extends to a maximum of twelve nautical miles from shore (*United Nations Convention on the Law of the Sea*, 10 December 1982, 1833 U.N.T.S. 3, CN 236.1984, CN 202.1985, CN 17.1986, CN 166.1993, 1904 U.N.T.S. 320 (entered into force 16 November 1994) [*UNCLOS*] art. 3).
10. Case on file at UNHCR Ottawa.
11. European Union Presidency Report on the Seminar on Sea Border Control, 28 October – 1 November 2002 [unpublished]; Bill Frelick, "The United States: Maritime Interdic-

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tion" (Presentation at the Canadian Council for Refugees International Workshop, Ottawa, Ontario, May 29, 2003) [unpublished].

12. International Organization for Migration (IOM), "Managing Migration at the Regional Level: Strategies for Regional Consultation" (Geneva: IOM, 27 May 2002) at 48; H. Kindred *et al.*, "Admission of Immigrants and Refugees" in *International Law Chiefly as Interpreted and Applied in Canada*, 6th ed. (Toronto: Emond Montgomery, 2000) at 559.
13. J. Morrison and B. Crosland, *The trafficking and smuggling of refugees: The end game in European asylum policy?* UNHCR Working Paper No. 39 (Geneva: UNHCR, April 2001) at 28 [Morrison and Crosland].
14. Art. 13(2) of the *Universal Declaration of Human Rights*, GA Res. 217 (III), UN GAOR, 3d Sess., Supp. No. 13, UN Doc. A/810 (1948) [*UDHR*], states: "Everyone has the right to leave any country, including his own, and to return to his country."
15. Australia, which has a universal visa requirement, is a notable exception.
16. The move was effective. The number of asylum seekers from Hungary fell from 4,163 in 2001 to near zero in 2002; the number of asylum seekers from Zimbabwe fell from 2,743 in 2001 to 113 in 2002. (Source: Statistics provided by Citizenship and Immigration Canada.)
17. Council of Europe and UNHCR, *Proceedings: "Round Table Process" on carriers' liability-Second expert meeting on carriers' liability, Topic B: Respect of the humanitarian dimension*, Brussels, 24 June 2002, at 3.
18. The December 2001 Canada-U.S. Smart Border Declaration calls for "enhanced co-operation" on visa policy and appears to commit the two countries to gradual harmonization. See: "The Canada-U.S. Smart Border Declaration: Action Plan for Creating a Secure and Smart Border The Secure Flow of People," online: Department of Foreign Affairs and International Trade Homepage <http://www.dfait-maeci.gc.ca/anti-terrorism/actionplan-en.asp> (date accessed: 9 December 2001); Office of the Press Secretary to the White House, "U.S. – Canada Smart Border/30 Point Action Plan Update," Media Release: December 6, 2002, online: White House Homepage <http://www.whitehouse.gov/news/releases/2002/12/20021 206-1.htm l> (date accessed: 9 December 2002.

    The European Union's commitment to visa regime harmonization was signalled in the 1999 Tampere Conclusions: "A common active policy on visas and false documents should be further developed, including closer co-operation between EU consulates in third countries and, the establishment of common EU visa issuing officers." (*Presidency Conclusions of the Tampere European Council*, Finland, 15 and 16 October 1999, at 22.]
19. Human Rights Watch, the International Catholic Migration Committee, and the World Council of Churches, *NGO Background Paper on the Refugee and Migration Interface*, UNHCR Global Consultations on International Protection, Geneva, 28–29 June 2001, at 8. See also Morrison and Crosland, *supra* n. 13 at 1.
20. *Protocol against the Smuggling of Migrants by Land, Sea and Air*, supplementing the *United Nations Convention against Transnational Organized Crime*, UNGA Res. 55/25, 15 November 2000, [*Smuggling Protocol*], art. 3a.
21. UNHCR, *Composite flows and the relationship to refugee outflows, including return of persons not in need of international protection, as well as facilitation of return in its global dimension*, UN Doc. EC/48/SC/CRP.29 (25 May 1998) at 4.
22. *Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children*, supplementing the *United Nations Convention against Transnational Organized Crime*, UNGA Res. 55/25, 15 November 2000 (not yet in force) [Trafficking Protocol], art. 3(a). Note that this definition has been criticized from a variety of perspectives. For more information see online: the Canadian Council for Refugees' "Trafficking in Women and Girls" project webpage <http://www.web.net/~ccr/trafficking.html>.
23. See arts. 6 and 7 of the *Trafficking Protocol.*
24. Art. 33(1) of the 1951 *Refugee Convention* reads: "No Contracting State shall expel or return ("*refouler*") a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion."
25. See *Non-refoulement* section, below.
26. E. Feller, "Carrier Sanctions and International Law" (1989) 1 IJRL 1 at 50. See also: R.I.R. Abeyratne, "Air Carrier Liability and State Responsibility for the Carriage of Inadmissible Persons and Refugees" 10 IJRL 1 at 675*ff.*
27. *Convention of 19 June 1990 applying the Schengen Agreement of 14 June 1985 between the Governments of the states of the Benelux Economic Union, the Federal Republic of Germany and the French Republic, on the Gradual Abolition of Checks at their Common Borders* [*Schengen Convention*], Title II, Ch 6, art. 27.
28. EC, *Council Directive of 18 June 2001* (2991/51/EC).
29. *Immigration and Refugee Protection Act,* SOC 2001, c. 27, s. 148. For further detail on carrier liabilities in Canada, see Citizenship and Immigration Canada (CIC), *Immigration Manual, Chapter ENF 15: Obligations of Transporters,*" online: CIC Homepage <http://www.cic.gc.ca/manuals-guides/english/enf/enf15e.pdf>.
30. *Supra* n. 4 at 13.
31. *Convention on International Civil Aviation*, 7 December 1944, 15 U.N.T.S. 295, TIAS 1591, CTS1944/36, (entered into force 4 April 1947), [*Chicago Convention*], art. 9, Standard 3.41.
32. *Schengen Convention,* art. 26.
33. Telephone conversation with Robert Davidson, Assistant Director, International Air Transport Association (IATA) Facilitation Services, October 21, 2002.
34. *Supra* n. 13 at 31.
35. In Canada's intervention at UNHCR's 18th Standing Committee session in 2001, the Canadian representative, Gerry van Kessel, said: "[Canada's] immigration control officers do not have extraterritorial power to enforce our Immigration Act. They act solely as advisers and liaison officers with airlines and

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local authorities. Canada has very strong views against the *refoulement* of refugees and our officers do not engage in *refoulement* or support such activities."

36. Canada, *Government Response to the Report of the Standing Committee on Citizenship and Immigration: Competing for Immigrants,* November 2002, online: CIC Homepage <http://www.cic.gc.ca/english/pub/competing.html> (date accessed: 15 December 2002), Response to Recommendation 21.
37. *Ibid.*
38. *Ibid.*
39. Hon. D. Coderre, "Notes for an Address by the Hon. Denis Coderre, Minister of Citizenship and Immigration, Appearance before the Standing Committee on Citizenship and Immigration," 20 March 2003.
40. CIC, "Fact Sheet: September 11, 2001, A Year Later," online: CIC Homepage <http://www.cic.gc.ca/english/pub/sept11.html> (date accessed:).
41. Morrison and Crosland, *supra* n. 13 at 33.
42. During a Canadian Council for Refugees (CCR) panel discussion on interception held in Calgary, Alberta, on November 22, 2002, Claudette Deschenes, Director General of CIC Intelligence Branch, indicated that of this total, 87 per cent were intercepted in countries which were signatories to the 1951 *Refugee Convention*. She implied that the remaining 13 per cent intercepted in countries not party to the 1951 *Refugee Convention* were referred to the local UNHCR office. UNHCR is not able to confirm this. No attempt is made by CIC to assess the degree of compliance with international refugee/human rights norms of the "signatory" states, nor is any tracking done of the fate of intercepted persons.
43. *Supra* n. 17 at 3. Participants at the Roundtable expressed concern about the absence of refugee protection considerations in carrier sanctions regimes, and listed their concerns as follows: "(i) persons in need of international protection may be denied access to safety; (ii) codifying carriers' liability may be at odds with States' obligations under international refugee and human rights law, including the principle of *non-refoulement*; (iii) the inclusion of a humanitarian clause in carriers liability legislation has proven problematic to implement; (iv) carriers should not be tasked to verify the validity of travel documents which is the duty of immigration officers; (v) a privatisation of State obligations is to be avoided; (vi) the imposition of carrier sanctions is likely to have contributed to the rise in migrant smuggling and human trafficking…"
44. *European Roma Rights Centre & Others v. Immigration Officer at Prague Airport and Secretary of State for the Home Department,* [2002] EWHC 1989, at 20 – 21.
45. *Ibid.,* at 27.
46. Brief *amicus curiae* of the Office of the United Nations High Commissioner for Refugees in support of the European Roma Rights Centre and Others, C2002/2183, January 30, 2003, in the England and Wales Court of Appeal.
47. The contiguous zone is defined as that portion of the high seas that extends up to twelve miles beyond the line of the territorial sea (*i.e.* up to a total of twenty-four miles out from the shoreline). (*UNCLOS*, art. 33.1(a)).
48. For example, in 1998 Canadian and U.S. officials, in collaboration with the IOM, arranged for the interception by the Senegalese navy of a boat carrying 192 Tamils from Sri Lanka. Prof. Sharryn Aiken has documented the case in "Of Gods and Monsters: National Security and Canadian Refugee Policy" (2003) 14.2 *Revue québecoise de droit international.* It has also been documented in two Amnesty International Bulletins: AI Index, ASA 37/19/98; ASA 37/21/98; as well as in the video documentary "In Search of the African Queen: A People Smuggling Operation," Wild Heart Productions, 2000.
49. Interception on the high seas is contemplated in the *Smuggling Protocol*.
50. The role of the U.S. in arranging for disembarkation in Central American countries of persons intercepted at sea was discussed at the Sixth Regional Conference on Migration ("Puebla Group") held in San José, Costa Rica, on 22–23 March 2001. The conference discussed, but did not adopt, a U.S. proposal for co-operation for the return on "extra-regional" migrants.
51. *UNCLOS*, art. 98. For a thorough discussion of the obligations of states towards asylum seekers at sea, see: M. Pallis, "Obligations of States towards Asylum Seekers at Sea: Interactions and Conflicts between Legal Regimes" (2002)14 *IJRL* 329–64.
52. See: UNHCR, *Background Note on the Protection of Asylum-Seekers and Refugees Rescued at Sea* (Geneva: UNHCR, March 18, 2002), online: UNHCR Homepage <http://www.unhcr.ch>.
53. U.S. Coast Guard (USCG), "Coast Guard Migrant Interdictions At Sea, Calendar Year 1982 – 2002 (As of 12/03/2002 08:51 AM)," online: USCG Homepage <http://www.uscg.mil/hq/g-o/g-opl/mle/amiostats1.htm#cy> (date accessed: 3 December 2002).
54. USCG, "Migrant Interdiction Statistics: Fiscal Year 2003 (As of 10/07/2003 11:11 AM)," online: USCG Homepage <http://www.uscg.mil/hq/g-o/g-opl/mle/amiostats03.htm> (accessed 7 October 2003). In fiscal year 2003, the U.S. Coast Guard intercepted a total of 6,068 persons at sea, including 2,013 Haitians, 1,748 Dominicans, 1,555 Cubans, 15 Chinese, 703 Ecuadoreans, and 34 "others." It is worth noting that several thousand other persons were intercepted at sea by other U.S. law enforcement agencies, including 1,596 Dominicans, 961 Cubans, and 450 Haitians.
55. USCR, *Worldwide Refugee Information. Country Report: USA*, online: USCR Homepage <http://www.uscr.org/world/countryrpt/amer_carib/us.htm> (date accessed: 15 October 2003).
56. U.S. Department of Justice, "Fact Sheet: *Illegal Immigration Reform and Immigrant Responsibility Act of 1996*: Summary" (03/24/97), online: <http://www.immigration.gov/graphics/publicaffairs/factsheets/948.htm> (date accessed: 15 October 2003); Immigration and Naturalization Service (INS), "Notice Designating Aliens Subject to Expedited Removal Under Section 235(b)(1)(A)(iii) of the Immigration and Nationality Act," INS Order No. 2243-02, (12 November 2002), online: http://www.immigration.gov/graphics/lawsregs/fr111302.pdf (accessed 15 October 2003); Office of the Attorney General of the

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USA, *In Re D-J-*, 23 I&N Dec. 572 (A.G. 2003), (17 April 2003), online: <http://www.usdoj.gov/ eoir/efoia/bia/Decisions/Revdec/pdfDEC/3488.pdf> (accessed 15 October 2003).

57. USCR, *Sea Change: Australia's New Approach to Asylum-Seekers* (February 2002) at 35.
58. *Ibid.* at 21.
59. Note the recommendation of G-8 Foreign Ministers at their June 12–13, 2002, meeting in Whistler, B.C.: "We commit ourselves and urge all other States to…[t]ake strong measures, including relevant legislative measures if necessary, in cooperation with other countries, to prevent terrorist acts and the international movement of terrorists by strengthening, *inter alia*, border, immigration, and travel document control and information sharing." *G8 Recommendations On Counter-Terrorism,* June 12–13, 2002, online: DFAIT Homepage <http://www.dfait-maeci.gc.ca/g8fmm-g8rmae/counter-terrorism-en.asp>, Section 8: International Cooperation, Rec. 4. See also their recommendations regarding transportation safety, in Section 6 of the same document.
60. Conversation with Gerry van Kessel, Coordinator of the IGC, in Geneva, July 2002.
61. This was the position taken, for example, by the U.S. government in *Sale v. Haitian Centers Council, Inc.,* 113 S. Ct. 2549, 125 L., 509 U.S. 155 (1993).
62. This (mis)interpretation of state responsibility appears to be the motivation behind Canadian officials' consistent efforts to point out that their Immigration Liaison Officers (or Migration Integrity Officers) do not directly intercept migrants, but merely provide advice to carriers that do interception.
63. J. Crawford, *The International Law Commission's Articles on State Responsibility* (Cambridge: Cambridge University Press, 2002).
64. *Ibid.* at 60.
65. E. Lauterpacht and D. Bethlehem, "The Scope and Content of the Principle of Non-Refoulement" in E. Feller, V. Turk, and F. Nicholson, eds., *Refugee Protection in International Law: UNHCR's Global Consultations on International Protection* (Cambridge: Cambridge University Press, 2003) [Lauterpacht and Bethlehem] at 110, para. 62.
66. *Ibid.* at 110–11, paras. 63–66, citing *International Covenant on Civil and Political Rights*, 16 December 1966, 999 U.N.T.S. 171, CTS1976/47 (entered into force 23 March 1976) [*ICCPR*], art. 2(1); *Optional Protocol* to ICCPR, UNGA res. 2200A (XXI), 21 UN GAOR Supp. (No. 16) at 59, UN Doc. A/6316 (1966), 999 U.N.T.S. 302, (entered into force March 23, 1976), art. 1; *European Convention for the Protection of Human Rights and Fundamental Freedoms,* 4 November 1950, ETS No. 5, 213 U.N.T.S. 221 (entered into force 3 September 1953), art. 1; *American Convention on Human Rights,* OAS TS no. 35, 1144 U.N.T.S. 123, art. 1(1), as well as *Lopez Burgos v. Uruguay*, Communication No. 52/1979, UN Doc. CCPR/C/13/D/52/1979 (29 July 1981), at 12.1–12.3; and *Loizidou v. Turkey (Preliminary Objections)* (1995), ECHR, Series A, No. 310, (23 February 1995), 103 ILR 622, at paras. 62–63.
67. Separate questions of state responsibility are raised with regard to situations where a private ship, acting on its own, rescues persons at sea. Maritime law provides for allocation of state responsibility for the saved persons in such circumstances, and requires that the guiding consideration be their own safety. The states that potentially might be involved include the flag state, the country of embarkation, the country of the nearest port or of the next intended port of call. While these are matters far beyond the scope of this paper, it is submitted that the safety principle must be understood to include safety from persecution, and that the principle of non-refoulement (including possible chain-*refoulement*) must be a deciding factor where asylum seekers are involved. The preference should be to land such persons on the territory of the nearest state party to the 1951 *Refugee Convention*, or another nearer state that can guarantee access to asylum and safety.
68. *Supra* n. 63 at 100.
69. *Supra* n. 65 at 111, para. 67.
70. *UNCLOS*, art. 33.1(a).
71. *UNCLOS*, art. 87 (freedom of the seas); art. 92.1 (exclusive jurisdiction of the flag state).
72. See the 2000 *Smuggling Protocol*.
73. UNCLOS, art. 98.1.
74. UNHCR, *Summary Record of Workshop on Incorporating Refugee Protection Standards into Interception Measures*, Global Consultations on International Protection, Ottawa, May 14–15, 2001, at 8.9.
75. *ICCPR*, art.12 (2); see also *International Convention on the Elimination of All Forms of Racial Discrimination,* 21 December 1965, 660 U.N.T.S 195, CTS1970/28 (entered into force 4 Jan. 1969), [*CERD*] art. 5; *Convention on the Rights of the Child*, 20 November 1989, CTS 1992/3 (entered into force 2 September 1990) [*CRC*] art. 10(2); *African Charter of Human and Peoples' Rights,* 27 June 27 1981, OAU Doc. CAB/LEG/67/3 rev. 5, 21 ILM 58 (1982), (entered into force 21 October, 1986) [*African Charter*], art. 12(2); *Arab Charter on Human Rights*, 15 September 1994 (not yet in force) <http://www1.umn.edu/humanrts/instree/arabhrcharter.html> (date accessed: 7 November 2003) [*Arab Charter*] art. 21.
76. American Declaration of the Rights and Duties of Man, 1948, O.A.S. Res. XXX, adopted by the Ninth International Conference of American States (1948), in OEA/Ser.L.V/II.82 doc.6 rev.1 at 17 (1992), [*American Declaration*], art. XXVII; ACHR, art. 22.
77. UNGA Res. 55/74, 4 Dec. 2000, para. 6.
78. rt. 26 of the *Vienna Convention on the Law of Treaties*, 22 May 1969, 1155 331, CTS1980/37 (entered into force 27 January 1980) [*VCLT*], sets out the well-established international law norm of *pacta sunt servanda*: "Every treaty in force is binding upon the parties to it and must be performed by them in good faith." Nor may a state seek to avoid its treaty obligation by adopting a more convenient interpretation of the relevant provision: Art. 31(1) provides, "A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be

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given to the terms of the treaty in their context *and in the light of its object and purpose*" (emphasis added).

79. *Supra* n. 46.
80. A. Shacknove, "Asylum seekers in affluent states" (Paper presented to the UNHCR conference "People of Concern," Geneva, November 1996), quoted in UNHCR, *The State of the World's Refugees* (Oxford: Oxford University Press, 1997).
81. 1951 *Refugee Convention*, art. 33(1); *Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, 10 December 1984, CTS 1987/36 (entered into force 26 June 1987) [*CAT*], art. 3(1). In addition, in some jurisdictions, protection against *refoulement* is extended to persons who would face a risk of cruel and unusual treatment or punishment upon return. This is the case in States party to the *European Convention on Human Rights and Fundamental Freedoms*. Canada's *Immigration and Refugee Protection Act* extends protection, under certain circumstances, to persons facing a risk to life or a risk of cruel and unusual treatment or punishment upon return, as well as to those who face a risk of persecution or torture.
82. See Lauterpacht and Bethlehem, *supra* note 65, at 87–99; UNHCR, *Handbook on Procedures and Criteria for Determining Refugee Status*, Geneva, January 1992 [*UNHCR Handbook*] at 28; UNHCR Executive Committee, Conclusion No. 6 (XXVIII) 1977 at c, 79 (XLVII) 1996, and 81 (XLVIII 1997; UNGA Res. 52/103 of 9 Feb 1998; "Summary Conclusions: the principle of *non-refoulement*," in E. Feller, V. Turk, and F. Nicholson, eds., *Refugee Protection in International Law: UNHCR's Global Consultations on International Protection* (Cambridge: Cambridge University Press, 2003) [*Cambridge Roundtable*] at 179, para. 3.
83. 1951 *Refugee Convention*, art. 33(1).
84. 1987 *CAT*, art. 3(1).
85. *Organization of African Unity (OAU) Convention Governing the Specific Aspects of Refugee Problems in Africa*, 10 September 1969, 1001 U.N.T.S. 45 (entered into force 20 June 1974), art. II; 1969 ACHR, art. 22(8). UNHCR's Executive Committee has repeatedly emphasized the fundamental importance of *non-refoulement*; see *e.g.* UNHCR Executive Committee, Conclusion No. 82 (XLVIII) 1997 at d(i) and 6 (XXVIII) 1977.
86. UN Human Rights Committee, General Comment 20 (1992), HRI/HEN/1/Rev.1 (28 July 1994).
87. Lauterpacht and Bethlehem, *supra* n. 65; *Cambridge Roundtable, supra* note 82, at 1.
88. UNHCR, *supra* n. 4, at 21; UNHCR Executive Committee, Conclusion No. 25 (XXXIII) 1982.
89. Some states argue, however, that there is an implicit territorial limitation. See *infra*.
90. UNHCR, *supra* note 4, at 22.
91. *Smuggling Protocol*, art. 19(1); UNHCR Executive Committee, Conclusion No. 89 (LI) 2000.
92. UNHCR, *Note on International Protection*, UN Doc. A/AC.96/898, (3 July 1998), at 16.
93. *Supra* n. 61.
94. Guy Goodwin-Gill, "The Haitian *Refoulement* Case: A Comment" (1994) 6 IJRL.
95. 1951 *Refugee Convention*, art. 35.
96. Brief *Amicus Curiae* of the Office of the United Nations High Commissioner for Refugees in Support of Respondents, *Sale v. Haitian Centers Council, Inc., supra* n. 61.
97. *The Haitian Center for Human Rights et al. v. United States* (1997), Inter-Am. Comm. H.R., No. 51/96, *Annual Report of the Inter-American Commission on Human Rights: 1997*, OEA/Ser.L/V/II.95 Doc. 7 rev. at 550.
98. *Cambridge Roundtable*, *supra* n. 82, at 178, para. 3.
99. *Trafficking Protocol*, art. 14(1); *Smuggling Protocol*, art. 19(1).
100. Established international standards for refugee status determination can be found in the *UNHCR Handbook, supra* n. 82.
101. 1951 *Refugee Convention*, *Preamble*.
102. "Everyone is entitled to all the rights and freedoms set forth in this Declaration, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status." (*UDHR*, art. 2.)
103. "Each State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status." (*ICCPR*, art. 2.1.)
104. "The States Parties to the present Covenant undertake to guarantee that the rights enunciated in the present Covenant will be exercised without discrimination of any kind as to race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status." (*International Covenant on Economic, Social and Cultural Rights*, 16 December 1966, 993 U.N.T.S. 3, CTS1976/46 (entered into force January 3, 1976) [*ICESCR*], art. 2(2).)
105. "States Parties condemn racial discrimination and undertake to pursue by all appropriate means and without delay a policy of eliminating racial discrimination in all its forms and promoting understanding among all races, and, to this end: (a) Each State Party undertakes to engage in no act or practice of racial discrimination against persons, groups of persons or institutions and to en sure that all public authorities and public institutions, national and local, shall act in conformity with this obligation." (*CERD*, art. 2(1).)

    "In compliance with the fundamental obligations laid down in article 2 of this Convention, States Parties undertake to prohibit and to eliminate racial discrimination in all its forms and to guarantee the right of everyone, without distinction as to race, colour, or national or ethnic origin, to equality before the law…" (*CERD*, art. 5.)
106. *Trafficking Protocol*, art. 14(2); *Smuggling Protocol*, art. 19(2).
107. On this point see also UNHCR Executive Committee, Conclusion No. 22 (XXXII) 1981 at II.B.2.e.
108. *ICCPR*, art. 12(2).

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109. *Concluding Observations of the Human Rights Committee: Austria,* UN Doc. CCPR/C/79/Add.103 (19 November 1998).
110. *Concluding Observations of the Human Rights Committee: France,* UN Doc. CCPR/C/79/Add.80 (4 August 1997).
111. UN Human Rights Committee, General Comment 27, UN Doc. CCPR/C/21/Rev.1/Add.9 (2 November 1999).
112. See, on this point, *Suresh v. Canada (MCI)*, 2002 SCC 1.
113. CRC, art. 3 (1) and (2); see also art. 10.
114. See the *Smuggling Protocol.*
115. UNHCR, *supra* n. 74 at 8.9.
116. *Agenda for Protection*, Goal 2(1), UN Doc. A/AC.96/965/Add. 1 (26 June 2002).
117. *Note on International Protection*, UN Doc. A/AC.96/898 (3 July 1998), at 16.
118. *Supra* n. 4, at 17–19. This point is set out in several UNHCR Executive Committee Conclusions, including: Nos. 89 (LI) 2000; 85 (XLIX) 1998 at s; 85 (XLIX) 1998 at y.
119. See, for instance, UNHCR Executive Committee, Conclusions Nos. 14 and 15 (XXX) 1979, and No. 23 (XXXII) 1981.
120. *Supra* n. 4.
121. UN Doc. EC/GC/01/13 (13 May 2001).
122. UNHCR, *supra* n. 1.
123. *Supra* n. 52.
124. UNHCR Executive Committee, Conclusion No. 97 (LIV) 2003.
125. 1951 *Refugee Convention*, art. 3; 1965 *CERD*, art. 2.1; 1966 *ICCPR*, art. 2.1; *ICESCR*, art. 2.2; *Smuggling Protocol*, art. 19(2); UNHCR Executive Committee, Conclusion No. 22 (XXXII) 1981 at II.B.2.e.
126. "The Contracting States undertake to co-operate with the Office of the United Nations High Commissioner for Refugees, or any other agency of the United Nations which may succeed it, in the exercise of its functions, and shall in particular facilitate its duty of supervising the application of the provisions of this Convention."

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Interception Practices in Europe and Their Implications

Areti Sianni

Abstract

The dilemma of reconciling migration control functions and State obligations for refugee protection has underlined much of the immigration and asylum debate in the European Union. In recent years, numerous measures have been introduced to block access to refugee status determination. This paper focuses on EU policies of non-entrée as they relate to the interception of individuals en route to Europe. It argues that there is a fundamental imbalance in the Union's activities relating to asylum and migration management with recent measures having the effect of undermining the right to seek asylum and effectively blocking access to protection.

Résumé

Les débats au sein de l'Union européenne sur les questions de l'immigration et du droit d'asile ont été marqués par la problématique de comment réconcilier les fonctions de contrôle de l'immigration et les obligations de l'état en matière de protection des réfugiés. De nombreuses mesures ont été adoptées au cours des dernières années pour bloquer l'accès au processus de détermination du droit d'asile. Cet article examine les politiques de non entrée de l'Union Européenne, tout spécialement en relation avec la pratique d'interception d'individus en route pour l'Europe. L'article soutient que les activités de l'Union Européenne en matière de gestion de la question de l'immigration et du droit d'asile souffrent d'un déséquilibre fondamental, et que les mesures récentes ont eu pour conséquence d'affaiblir le droit d'asile et d'interdire l'accès à la protection.

I. Interception in Europe

The dilemma of reconciling migration control functions and State obligations for the protection of refugees has underlined much of the debate on immigration and asylum policy in the European Union. In recent years, numerous measures have been introduced to block access to refugee status determination. These have included mechanisms that operate as barriers, either preventing asylum seekers from access to the territory of a European country where they could seek and find protection, or, alternatively, for those who manage to reach the shores of potential asylum states, applying admissibility criteria which allow states to deport them without offering an effective possibility of having their asylum applications examined in substance. This paper will focus on the policies of *non-entrée* or non-arrival as they relate to the interception of individuals *en route* to Europe.

Interception has been defined by UNHCR as "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."[1] In the context of the European Union, interception practices need to be considered within the broader process of harmonization of asylum and immigration measures. In this process, the management of migration flows has been seen as "one of the three essential elements together with cooperation with countries of origin and the integration of legal immigrants for a comprehensive and therefore effective immigration policy."[2]

In October 1999, the European Council held a special meeting in Tampere, Finland, on the establishment of an area of freedom, security, and justice. There, EU heads of state committed the Union "to develop(ing) common poli-

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cies on asylum and immigration while taking into account the need for a consistent control of external borders to stop illegal immigration and to combat those who organise it and commit related international crimes." In fighting illegal immigration, the special meeting concluded that "common policies must be based on principles which are both clear to our own citizens and also offer guarantees to those who seek protection in or access to the European Union."[3] NGOs at the time welcomed the formulation of this paragraph as an affirmation of the Union's commitment to ensuring a balanced approach which allowed for full compliance with the absolute respect of the right to seek asylum when introducing immigration control measures.[4]

The importance of a balanced approach in the fight against illegal immigration was reiterated in the November 2001 Commission *Communication on a Common Policy on Illegal Immigration*[5] and the "Proposal for a Comprehensive Plan to Combat Illegal Immigration and Trafficking of Human Beings in the European Union," approved by the Justice and Home Affairs Council on 28 February 2002.[6] Both documents provide that "measures relating to the fight against illegal immigration have to balance the right to decide whether to accord or refuse admission to the territory to third country nationals and the obligation to protect those genuinely in need of international protection." In doing so, Member States were called upon to "explore possibilities of offering rapid access to protection so that refugees do not need to resort to illegal immigration or people smugglers."[7]

Notwithstanding these affirmations, an overview of EU policy debate and initiatives in recent years would highlight the absence of a real balance in the activities of the Union in relation to asylum and migration management. This is evident in the *Conclusions* of the European Council meeting in Laeken in December 2001, set up to assess the progress in the two years since Tampere.[8] It is also clear in the *Conclusions* of the Seville European Council meeting which, beyond a timetable for agreeing upon the asylum measures under discussion, mostly limited itself to reaching consensus on border control enforcement measures, the conclusion of readmission agreements, and the evaluation of agreements with host and transit countries to promote co-operation in the fight against illegal immigration.[9] With deterrence rather than protection being the key priority for most EU Member States, a range of measures has been put in place that has had the effect of undermining the right to seek asylum and effectively blocking access to Europe. The following sections will consider some of these measures in turn and will conclude by setting out some of their implications.

A. *Visa Policies*

On 15 March 2001, a Council Regulation was adopted listing third countries whose nationals must be in possession of visas when crossing the external borders and those whose nationals are exempt from that requirement.[10] The regulation includes a common list of 131 countries whose nationals must have a visa when entering the territory of the European Union, among them being a considerable number of refugee producing countries such as Afghanistan, Somalia, Sudan, and Iraq. A visa policy is a legitimate tool for controlling immigration. When, however, it is aimed at blocking access to protection of persons fleeing persecution and grave human rights violations, it is in flagrant contradiction of the institution of asylum and international human rights and refugee norms. At the time of the Seville meeting in May 2002, the European Council called for a review of the list of third countries whose nationals require visas or are exempt from that requirement.[11] In responding, NGOs asked for the introduction of exemptions from visa requirements for persons fleeing countries suffering civil wars or systematic abuses of human rights in order to enable them to gain access to Europe legally.[12] Although this was not taken up by Member States in the recent review of the regulation on visas in March 2003,[13] it is encouraging that some of the current debate is shifting towards the development of an EU system of "protected entry procedures." This term describes arrangements that would allow non-nationals "to approach the potential host state outside its territory with a claim for asylum or other forms of international protection and to be granted an entry permit in case of a positive response to that claim, be it preliminary or final."[14] Such arrangements already exist in some Member States on a formalized basis[15] while some other Member States allow access through informal measures on an exceptional basis.[16]

In this context, a recent European Commission publication, *Study on the Feasibility of Processing Asylum Claims outside the EU against the Background of the Common European Asylum System and the Goal of a Common Asylum Procedure*, has identified five proposals which Member States could consider when developing protected entry procedures in the future, ranging from a flexible use of the visa regime to the introduction of a sponsorship model, the development of an EU Regional Task Force and EU Regional Nodes, gradual harmonization through a Directive based on best practices, and the development of a Schengen Asylum Visa.[17] Out of these proposals, two have been singled out by the Commission for further exploration relating to the viability of setting up an EU regional presence "to provide expertise to local authorities where needed and operate a referral system, matching different needs with appropriate solutions" and the gradual harmonization

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through a Directive based upon best practices of protected entry procedures.[18] In light of the difficulties and hardship facing refugees seeking access to Europe, any proposals that aim at increasing the options for people to obtain legal access to protection are to be welcome. The focus, however, needs to remain on facilitating access to protection for those in need of international protection. Here, in the light of the emphasis placed by some EU Member States on the orderly and managed arrival of refugees, a risk exists that the availability of protected entry systems might be used as the justification for prejudicing the treatment of asylum claims of persons arriving spontaneously in Europe.[19]

B. Carrier Sanctions

Strict visa policies operate in conjunction with sanctions imposed on transport carriers for bringing into the territory of Member States passengers who are not in possession of travel documents and visas required by national or international regulations. An EU Directive on carrier sanctions was formally adopted on 28 June 2001, supplementing the provisions of Article 26 of the Schengen Convention.[20] This lays down the obligations of carriers transporting foreign nationals into the territory of EU Member States and provides for the harmonization of financial penalties in cases where carriers fail to comply with its provisions.[21] Beyond the obligations of the Schengen Convention, carriers are now expected to assume responsibility for returning third-country nationals in transit if they have been refused entry to the State of destination and have been sent back to the transit country, or if the carrier that was to take them to the country of destination refuses to allow them to board.[22] They are also responsible for immediately finding means of onward transportation in the cases where they are unable to effect the return of third-country nationals whose entry has been refused and for bearing any related costs including the cost of staying in the country until return can be effected.[23] Failure to engage in the exercise of immigration control functions risks penalties of 3000 euros minimum for each person carried.[24]

In UNHCR's opinion, carrier sanctions "should only be implemented in a manner consistent with refugee protection principles and should be accompanied by appropriate safeguards so as not to hinder access to status determination procedures by persons in need of protection." Sanctions should be enforced only in the event of negligence in checking documents; if the person is admitted to the asylum procedure, carriers should be exempted from liability.[25] The weakest of safeguards are included in the EU Directive on carrier sanctions. Despite affirming that its application is without prejudice to obligations resulting from the Refugee Convention, the Directive provides no safeguards to ensure protection from *refoulement* of persons for whom carriers are unable to effect return and for whom carriers are therefore obliged to arrange onward transportation. Nor does the Directive provide for any access to remedies for asylum seekers who have been refused permission to board a plane or are being forced to return or be transported to a country where they might face violations of their rights in the sense of Article 33 of the Refugee Convention or Article 3 of the European Convention on Human Rights. With regard to the provisions on financial penalties, although Article 4.2 sets out that these are "without prejudice to Member States' obligations in cases where a third country national seeks international protection," there is no express requirement for Member States to exempt airlines from paying penalties if "the third country national is admitted to the territory for asylum purposes."[26] This was a formulation that was included in the original proposal for a Council Directive on carriers sanctions in recognition of the reality of refugee flight to safety which at times involves the use of forged documents. It was subsequently upheld in the report on the proposal by the European Parliament's Committee on Citizens' Freedoms and Rights, Justice and Home Affairs. There, a call was made for an exception from penalties if "a third-country national seeks asylum immediately after arriving on the territory of the State of destination; the person is granted refugee status or leave to remain under a subsidiary form of protection (or) the person is admitted to the asylum determination procedure."[27] Regrettably, the original formulation was rejected on the basis of Germany's objections that it "could make penalties for carriers ineffective and increase asylum applications,"[28] a position reiterated by the Irish Minister for Justice during negotiations of carrier-sanctions-related provisions of the Irish Immigration Bill in early 2003.

Faced with increased obligations and the threat of substantial financial penalties and associated costs, carriers have introduced extensive checking facilities at airports as well as major ports of entry to the European Union, the result being the privatization of government immigration control functions. Rather than trained government officials exercising their functions under effective judicial control and in line with their government's obligations under international law, the responsibility of screening refugees has been delegated to transport companies and their personnel who are untrained in refugee and human rights law and ill-positioned to undertake any asylum determination functions, but also unaccountable for their actions under international law. The carrier industry, concerned mostly about escalating costs, has sought to challenge the legal framework in certain cases. In Sweden, despite the deadline of 11 February 2003 for transposition of the Directive on

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carrier sanctions into national legislation, the government, expecting that it will not secure the necessary majority in Parliament, has yet to introduce amendments to the Swedish Aliens Act that would allow it to impose financial penalties on airlines. SAS, the Swedish national carrier, commenting on the Ministry for Foreign Affairs' memorandum on carriers' responsibility in the Aliens Act, has expressed strong opposition against airlines engaging in assessing which passengers have valid reasons to seek asylum, arguing that "this assessment requires a considerable amount of time for the concerned authorities and results in a careful investigation. The flight company on the other hand, has about a minute during check in to make a similar judgement for each individual person."[29] The company further objected to laying down general guidelines for airport staff in order to block certain types of "suspect" passengers on the basis that this might seem discriminatory.

In Austria, a November 2002 ruling by a court of appeal of the Land of Lower Austria has overturned a decision reached in the first instance to fine an airline a total of 36,000 euros for transporting twelve insufficiently documented passengers to Austria. The judgment considered that carriers could not be expected to detect forged travel documents, as they were often difficult to distinguish from genuine ones.[30] This follows a landmark decision by the Austrian Constitutional Court in October 2001 which declared relevant provisions of the 1997 Austrian Aliens Act null and void on the basis that they did not specify exactly what kind of obligations carriers are obliged to fulfill when transporting passengers to Austria nor whether, or how, in fulfilling their obligations carriers needed to take into consideration Austrian commitments under the Refugee Convention.[31]

In Britain, a High Court judge ruled in December 2001 that holding lorry drivers responsible for transporting stowaways is "unworkable in practice and unfair in law" and the fine of £2,000 per stowaway is "ruinous for many persons of ordinary means" and could amount to violations of the European Convention on Human Rights (Article 6 on the right to a fair trial and Article 1, Protocol No. 1, on the protection of property) since a driver risks having his vehicle confiscated if he cannot pay the fine immediately.[32] This ruling was partially upheld at a Court of Appeal decision in February 2002 which led to changes in legislation on carriers' liability.[33] Under the new law authorities are required to take into account efforts made by lorry drivers to prevent their vehicles from being misused by irregular migrants when determining fines for abuse.

C. *Externalization of Immigration Controls*

Complementing the objectives of carrier sanctions provisions, there has been an increase in recent years in the use of other measures aimed at externalizing immigration controls. These have taken the form of posting immigration officers at diplomatic missions in countries from which EU Member States want to reduce population movements towards their borders. They have also involved the placement of immigration and airline liaison officers at major international airports and seaports in countries of origin and transit, with the task of assisting carriers and national authorities to prevent the embarkation of undocumented and improperly documented travellers. This is not a new phenomenon. Some EU Member States have operated for some years a system of stationing immigration officers in third countries whose airports are considered to be starting or transfer points for illegal immigration. The Netherlands for example, operates a network of Immigration Liaison Officers (ILOs) which in 2001 consisted of nine officers in nine countries.[34] During the same year, the UK had similar arrangements in twenty locations for a total cost of £100,000. A key question in relation to these arrangements has concerned the treatment by officials responsible for externalized immigration controls of persons fleeing persecution who might not be in a position to comply with immigration formalities. Here, the risk is that access to protection could be denied by Member States acting in co-operation with the actual country from which international protection is being sought.

In addition to the stationing of liaison officers who operate in an advisory capacity, since 1999, the UK has introduced legislative provisions that allow for immigration rules to be operated extraterritorially and not only at British ports of entry. On 18 July 2001, the UK in agreement with the Czech Republic started a scheme at Prague Airport of pre-entry clearance immigration controls. This aimed principally at putting an end to the arrival of asylum seekers from the Czech Republic, the vast majority of whom were of Romani ethnic origin (Roma). The scheme has been proven effective as a migration control tool.[35] Its compliance with the UK's obligations under refugee and human rights law, however, has been questioned. In a submission on behalf of UNHCR to a British Court of Appeal dealing with a case brought against the Home Secretary by the European Roma Rights Centre and six Romani nationals, the scheme was described as having "frustrate(d) the object and purpose of the 1951 Convention contrary to the international legal principle of good faith…(and) rendered the 1951 Convention nugatory (as) it prevents provisions such as Article 31 or 33 ever being engaged."[36] The scheme's compliance with anti-discrimination provisions has also been questioned, given its focus on persons of Romani

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origin.[37] Beyond the Prague practice, under a specific agreement between France and the UK, British immigration officers now have the power to also exercise full immigration controls on passengers on Eurostar trains and those embarking in French ports. In accordance with the 2002 National Immigration and Asylum Act, this power has been extended to any port in the European Economic Area.[38]

At Community level, following the Seville *Presidency Conclusions*, which call for implementation before the end of 2002, a process has been underway for the development of an EU network of Member States' Immigration Liaison Officers (ILOs).[39] This will be based upon experiences of previous joint projects run by individual Member States such as the UK and Italy joint initiative on southeastern Europe (in operation since 2001)[40] and the Belgian-led western Balkans ILO network (since December 2002). Under this scheme, still under negotiation, it is proposed that representatives of Member States will be posted at national consular authorities of Member States in third countries, relevant authorities of other Member States or competent authorities of third countries, with a view to contributing to the prevention and combating of illegal immigration, the return of illegal immigrants, and the management of legal migration. Member States' officers will be expected to maintain direct contacts with the competent authorities in the host country and any appropriate organization within the host country. They will also be expected to constitute local and regional co-operation networks for the purpose, *inter alia*, of exchanging information, coordinating positions to be adopted with commercial carriers, and adopting common approaches to the methods of collecting and reporting strategically relevant information, including risk analyses.[41] A report of their activities as well as the situation in the host country will be submitted to the Council and the Commission by the Member State holding the presidency or serving as acting presidency by the end of each semester.[42]

The inclusion of a provision for an activities' report of the proposed ILO network might be an important step towards ensuring transparency and overcoming the secrecy characterizing the operations of national ILO arrangements to date. What is needed, moreover, is the adoption of a common approach among Member States' immigration or airline liaison officers as to the procedure for dealing with cases that might come under the scope of the Refugee Convention or other relevant human rights instruments. Such an approach should tacitly acknowledge the realities of refugee flight which frequently involve reliance upon forged documents and be in full compliance with Article 31 of the Refugee Convention.

D. *Interception in the Context of EU's External Relations*

An area that has been a focus of intensified activity by the European Union and Member States relates to co-operation with third countries in the management of migration flows. In late 1998, in an attempt to integrate asylum and immigration concerns into all areas of EU external policy, the High Level Working Group on Migration and Asylum (HLWG) was established with the task of preparing cross-pillar action plans for the countries of origin and transit of asylum seekers and migrants. The task of this Group until 2002 was to design EU Action Plans and develop practical and operational proposals to increase co-operation with countries of origin and transit that enhanced the capacity of the EU to manage migration flows. Six regions or countries were identified, including Afghanistan and the neighbouring region, Morocco, Somalia, Sri Lanka, Iraq, and Albania and the neighbouring region. Action Plans on these countries/regions were submitted to the European Council in Tampere which agreed on the continuation of the HLWG's mandate and called for a "comprehensive approach to migration addressing political, human rights and development issues in countries and regions of origin and transit."[43]

The first phase of the implementation of the HLWG Action Plans was characterized by an "impression of imbalance," a rather euphemistic term for describing an exclusive focus on migration controls.[44] A report evaluating the work of the Group, prepared for the Nice European Council meeting in December 2000, underlined that "countries in which the plans are directed feel that they are the target of unilateral policy by the Union focusing on repressive action."[45] It stated that "the actual implementation of the plans respects the balance originally sought between the various areas (foreign policy, development, asylum and migration)," arguing that "it would be detrimental to the credibility of this new European Union policy to allow one aspect to predominate owing to difficulties in implementation."[46]

A new momentum in the integration of immigration policy into the European Union's relations with third countries can be found since the meeting of EU Heads of State in Seville on 21–22 June 2002.[47] The Seville European Council urged that "any future cooperation, association or equivalent agreement which the European Union concludes with any country should include a clause on joint management of migration flows and on compulsory readmission in the event of illegal immigration." The Council further reaffirmed the necessity of carrying out a systematic assessment of relations with third countries which do not co-operate in combating illegal immigration, concluding that "inadequate cooperation by a country could hamper the establishment of closer relations between that country and the European Union."

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Following Seville, a set of criteria has been developed to identify countries of origin and transit of particular interest.[48] So far, nine countries have been selected for the purpose of intensified co-operation including: Albania, China, Morocco, Russia, Ukraine, Tunisia, Federal Republic of Yugoslavia, Libya, and Turkey.[49] Co-operation with them is seen as not only desirable but also essential given that they represent key source and transit countries for irregular migration. Further, plans are underway to include a clause on joint management of migration flows and compulsory readmission in future Community agreements with, for example, Syria, Iran, Mercosur, and the Andean Community.[50]

What can be made of the plethora of initiatives on co-operation in the management of migration flows with third countries and their impact on the right to seek and enjoy asylum? The establishment of the High Level Working Group was originally seen as "a potentially important step towards a more comprehensive, EU cross-pillar approach to migration and asylum policy."[51] Warning against the Group's work solely focusing on illegal immigration to the European Union, measures were called for co-operation to address the root causes of forced and voluntary migration, including poverty reduction, protection of human rights, and promotion of democratic institutions. Nevertheless, an overview of the activities of the High Level Working Group and the Union's initiatives following the Seville Conclusions highlights a clear emphasis on measures to fight illegal immigration which compares poorly with the level of attention paid to the root causes of refugee flight and to measures to improve refugee protection. The November 2002 General Affairs Council Conclusions illustrate this point. They identify a set of parameters for "all existing or future comprehensive dialogues pursued… (which) should where relevant, include subjects such as return, readmission and documentation, implementation of agreements on management of migration flows, preventive policies and technical assistance geared towards institutional capacity building".[52] No reference is made here to strengthening the rule of law or building institutional capacity to safeguard human rights and provide for effective refugee protection. This is also the case in the Commission's *Communication on Integrating Migration Issues in the European Union's Relations with Third Countries*.[53] Commenting on the limited focus of the document's conclusions on return policies and border controls, a number of NGOs expressed concern about the potential risk of the fight against irregular migration extending "beyond overshadowing the international protection regime to also taking hostage of the development sector."[54]

Examples of actions approved in relation to some of the countries selected for intensified co-operation show a clear focus on control measures. In the case of Morocco, a program to combat illegal immigration by supporting improvements to the management of border checks has been adopted for the period 2002–04 with a budget of 40 million euros. The money will be used to improve surveillance measures on Moroccan sea and land borders and to set up an information centre to advise potential candidates of illegal immigration on how to seek entry into the EU by legal means. Likewise, negotiations are currently underway upon the request of the Italian government for the EU to ease restrictions on the purchase of military equipment by Libya so that it can increase its coast guard capacity to prevent the clandestine departure of vessels carrying irregular migrants to Europe. Further, within the framework of plans to create a "friendly neighbourhood with whom the EU enjoys close, peaceful and co-operative relations" the EU intends, *inter alia*, to assist neighbouring countries in reinforcing their efforts to combat illegal migration and to establish mechanisms for returns, especially in relation to illegal transit migration.[55]

Against a backdrop of control-oriented measures, the absence of a concrete commitment for Community action to address the human rights abuses, organized violence, and conflict that are the main causes for involuntary migration becomes apparent. So is the absence of any measures that engage the Union and its Member States in meaningful responsibility sharing with first countries of asylum in regions of origin where the majority of refugees are located.[56] Rather, responsibility shifting seems to be the name of the game. Faced with no options of protection, many individual refugees take risks in the hands of smugglers and traffickers: the result is a rise in human suffering at the borders of Europe.

II. Europe's Reality: The Implications of Interception Measures for Refugee Protection

What has been the cumulative effect on refugee protection of visa policies, sanctions, and pressure on countries of transit to co-operate in the fight against illegal immigration? In a few words, the *de facto* criminalization of the act of seeking asylum. Without any other option, people in need of international protection are forced to rely on smugglers and traffickers who can often provide the only viable means of entry into Europe. The absence of hard data on trafficking and smuggling makes it difficult to quantify the extent of the problem across the European Union.[57] Some *ad hoc* statistics are, however, illustrative. In 2002, for example, 16,504 boat migrants were apprehended for trying to reach Spain illegally by sea, an average of forty-six people per day. During the same period, thirty-five bodies were discovered at sea; this figure concerns the number of bodies found in Spanish

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territorial waters and not those who drowned while attempting to reach Spain by sea. Similarly, 3,766 stowaways were found in lorries and containers crossing to the UK from Belgian ports, an increase of 40 per cent from figures in 1999. As the costs in terms of human suffering increase, the physical barriers to entry to Europe have become higher and methods of interception more sophisticated. During, for example, the last six months of 2002, seventeen joint operations, pilot projects, and *ad hoc* centres of illegal migration were approved under intriguing names such as Ulysses,[58] Triton,[59] Orca,[60] RIO IV,[61] and Project Deniz.[62]

More recently, in February 2003, the UK government proposed the establishment of protected zones in third countries to which those arriving in EU Member States and claiming asylum could be transferred to have their claims processed. Such centres might be on transit routes into the EU and might "also receive illegal migrants intercepted en route to the EU before they had lodged an asylum claim but where they had a clear intention of doing so."[63] The UK proposals have been strongly opposed by British and international NGOs as "unlawful, unworkable and unprincipled" and as an attempt to undermine the rights-based global refugee protection regime.[64] They have also been seen as an attempt to shift responsibility for hosting refugees to poorer countries, despite the reality that many countries close to regions of origin of refugee populations host far greater numbers of refugees and asylum seekers than do EU Member States.[65]

Although the British government has recently claimed to have moved away from the idea of transit processing centres on the edge of Europe, they plan to move ahead with their plans of regional protection zones.[66] In doing so, they might work in co-operation with what they have termed "the coalition of the willing," countries such as The Netherlands and Denmark who are interested in exploring ways of providing protection in regions of origin. At the EU level, the Thessaloniki European Council, held in June 2003, has asked that the Commission "explore(s) all parameters in order to ensure more orderly and managed entry in the EU of persons in need of international protection, and to examine ways and means to enhance the protection capacity of regions of origin." A comprehensive report on these issues is expected to be presented before June 2004 suggesting measures including legal implications. Further, the Council's Conclusions acknowledge the importance of developing an evaluation mechanism to monitor relations with third countries which do not co-operate with the EU in combating illegal immigration. Among the topics which are identified to be of primary importance are the efforts of third countries in "border control and interception of illegal immigrants, combating of trafficking in human beings… cooperation on visa policy and possible adaptation of visa systems."[67] The European Commission will be expected to report annually on the results of monitoring co-operation with third countries.

In 1997, EU Member States agreed to the Amsterdam Treaty, thereby committing themselves to the creation of an "area of freedom, security and justice." In undertaking this task, they agreed upon the development of common standards for asylum based on the principles of solidarity and responsibility sharing. Since the Treaty came into force in May 1999, a process has been underway to develop a Common European Asylum System. The development of such a system has been seen as a question of fundamental justice if not of absolute necessity. In this context, the various measures under discussion during the last few years have been considered to have the potential to represent an important step away from the "protection lottery" currently in place in Europe.

There is no doubt that some progress has been made towards the development of common asylum standards. Notwithstanding this, an overview of the range of measures to fight illegal immigration, as compared with progress made in the area of common asylum standards, would indicate the presence of a fundamentally imbalanced approach in the Union's work towards the creation of an area of "freedom, security and justice." Member States have consistently been prepared to agree upon control-related measures while opposing the introduction of any standards which might result in substantial changes in their national asylum systems. Although some potentially positive proposals are under discussion, in particular with regard to the development of an EU resettlement scheme and a harmonized approach on protected entry procedures, the reality on the ground is of persons in need of protection being denied the possibility of legal exit from their countries or regions of origin. In the fight against illegal immigration, the risk remains that EU Member States might find themselves acting in co-operation with the very countries from which refugees might be fleeing. In the search for order and a managed approach, the danger is also one of irrevocably compromising the fundamental right to seek and enjoy asylum in the territory of the European Union.

Notes

1. Working definition of interception as contained in the UNHCR Note, *Interception of Asylum Seekers and Refugees: The International Framework and Recommendations for a Comprehensive Approach* (Geneva, EC/50/SC/CRP.17).
2. European Commission, *Communication from the Commission to the European Parliament and the Council in view of the European Council of Thessaloniki on the development of a com-*

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mon policy on illegal immigration, smuggling and trafficking of human beings, external borders and the return of illegal residents (Brussels: COM/2003/0323 final), Introduction.
3. European Council, *Presidency Conclusions* (Tampere: European Council, 15–16 October 1999), para. 3.
4. European Council on Refugees and Exiles (ECRE), *Observations on the Presidency Conclusions of the Tampere European Council, 15–16 October 1999* (London: ECRE, 1999), para. 7.
5. European Commission, *Communication on a Common Policy on Illegal Immigration* (Brussels: COM (2001) 672 final, 15.11.2001), para. 3.2.
6. European Commission, "Proposal for a Comprehensive Plan to Combat Illegal Immigration and Trafficking of Human Beings in the European Union," *Official Journal of the European Communities*, C142/23, (14.6.2002).
7. *Ibid*. para. 11.
8. European Council, *Presidency Conclusions* (Laeken: European Council, 14–15 December 2001). Para. 39 of the Conclusions, for example, makes a reference to a common policy on asylum and immigration that "maintain(s) the necessary balance between protection of refugees…the legitimate aspiration to a better life and the reception capacities of the Union and its Member States." Notwithstanding, para. 40 makes no reference to integrating refugee protection and human rights concerns into the EU's policy on migratory flows. Instead, the emphasis here is on migration control measures. See further, ECRE, *Observations on the Presidency Conclusions of the European Council Meeting in Laeken* (London: December 2001).
9. European Council, *Presidency Conclusions* (Seville: European Council, 21–22 June 2002), para. 37.
10. Council Regulation (EC) No 539/2001 of 15 March 2001 listing the third countries whose nationals must be in possession of visas when crossing the external borders and those whose nationals are exempt from that requirement, *Official Journal of the European Communities*, L 81/1, (21.3.2001).
11. *Supra* note 9, para. 30.
12. ECRE, *Observations on the Presidency Conclusions of the Seville European Council Meeting, 21 and 22 June 2002* (London: ECRE, 2002).
13. Council Regulation (EC), No. 453/2003 of 6 March 2003 amending Regulation (EC) No. 539/2001 listing the third countries whose nationals must be in possession of visas when crossing the external borders and those whose nationals are exempt from that requirement, *Official Journal of the European Union*, L69 Vol. 46, (13.3.2003).
14. G. Noll, J. Fagerlund, and F. Liebaut, *Study on the Feasibility of Processing Asylum Claims outside the EU against the Background of the Common European Asylum System and the Goal of a Common Asylum Procedure,* (Copenhagen: The Danish Centre for Human Rights, January 2002), 20.
15. Austria, France, The Netherlands, Spain, and the UK. See further, *ibid*., Chapters 6.1.1, 6.1.2, 6.1.3, 6.1.5, 6.1.6.
16. Belgium, Germany, Ireland, Italy, Luxembourg, and Portugal.
17. *Supra* note 14, 222–250.
18. European Commission, *Communication towards more accessible, equitable and managed asylum systems* (Brussels, COM (2003) 315 final, 3.6.2003), para. 6.1.2.3.
19. European Council on Refugees and Exiles and U.S. Committee on Refugees (USCR), *Responding to the Asylum and Access Challenge: An Agenda for Comprehensive Engagement in Protracted Refugee Situations* (London: ECRE & USCR, August 2003), section 4.4.2 on embassy procedures and humanitarian visas.
20. Convention implementing the Schengen Agreement of 14 June 1985 between the Governments of the States of the Benelux Economic Union, the Federal Republic of Germany, and the French Republic on the gradual abolition of checks at their common borders.
21. Council Directive 2001/51/EC of 28 June 2001 supplementing the provisions of Article 26 of the Convention implementing the Schengen Agreement of 14 June 1985, *Official Journal of the European Communities,* L 187/45, (10.7.2001), Preamble.
22. *Ibid*., Article 2.
23. Article 3.
24. Article 4, 1(b).
25. UNHCR, *Asylum Applications and the Entry into Force of the Schengen Implementation Agreement: Some Observations of UNHCR* (Geneva: UNHCR, March 1995).
26. Council of the European Union, *Draft Council Directive concerning the harmonisation of financial penalties imposed on carriers transporting into the territory of the Member States third-country nationals lacking the documents necessary for admission*, 14074/00, Front 67, Comix 868 (Brussels: 29 November 2000), Article 4,3.
27. European Parliament, *Report on the initiative of the French Republic for adoption of a Council Directive concerning the harmonisation of penalties imposed on carriers transporting into the territory of the Member States third country nationals lacking the documents necessary for admission* (Kirkhope Report), Final A5-0069/2001 (Brussels: European Parliament, 27 February 2001).
28. German Delegation, *Comments on the initiative of the French Republic with a view to the adoption of a Council Directive concerning the harmonisation of financial penalties imposed on carriers transporting into the territory of the Member States third country nationals not in possession of the documents necessary for admission,* 12361/00, FRONT 53 COMIX 730, (Brussels: 16 October 2000) Part 4.
29. Scandinavian Airlines System, *Comments to the Ministry of Foreign Affairs, Department for Migration and Asylum Policies Regarding Department Memorandum on Carriers' Responsibility in the Aliens Act*, Legal Department (2001) 74.
30. *Migration News Sheet*, No. 239/2003-02, (February 2003).
31. Austrian Constitutional Court, G224/01 of 1 October 2001. See also, Caritas Europe, *The Case against Carriers' Liabilities* (Brussels: Round Table on Carriers' Liability Related to Illegal Immigration, 30 November 2001).
32. High Court of Justice, *International Transport Roth GMBH & others v. the Home Office* (5 December 2001).

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33. Court of Appeal Civil Division, *Secretary of State for the Home Department vs. International Transport Roth GmbH and others* (22 February 2002).
34. E. Beugels, *Keynote Presentation* (Brussels: Round Table on Carriers' Liability Related to Illegal Immigration, 30 November 2001).
35. The checks are periodic and can last for a number of days. In the three weeks before the start of the operation in May 2001, there were over 200 asylum claims (including dependants) at UK ports from the Czech Republic. Only some twenty such claims were made in the first three weeks following its introduction; over 110 intending travellers from Prague were refused leave to enter the UK during that period. In May 2002, checks resulted in denials of the right to board flights to the UK for forty-seven people.
36. G. Goodwin-Gill, *Submission on behalf of UNHCR to the Court of Appeal considering the case of the European Roma Rights Centre and Others v. the Immigration Officer at Prague Airport and the Secretary of State for the Home Department*, Case No: C1/2002/2183/QBACF, paras. 14, 29. The case was dismissed at first instance (8 October 2002) and at appeal level (June 2003).
37. *Ibid*.
38. Refugee Council, *Response to the Home Office Consultation on Juxtaposed Controls Implementation, Dover-Calais* (London: November 2002).
39. *Supra* note 9, para. 32.
40. This aimed at sending immigration officers to countries of origin and transit to train local officials and gather intelligence on trafficking and smuggling networks. See also UK Delegation, *Paper on Illegal Immigration via the Western Balkan Route*, 5496/01, CIREFI 3, (19 January 2001).
41. Council of the European Union, *Initiative of the Hellenic Republic with a view to adopting a Council Regulation on the creation of an immigration liaison officers' network*, CIREFI 26 FRONT 81 COMIX 394 (Brussels: 18 June 2003).
42. *Ibid*, Article 7.
43. *Supra* note 3, para. 11.
44. High Level Working Group on Asylum and Migration, *Report to the European Council in Nice*, 13993/00 JAI 152, AG 76 (Brussels: 29 November 2000), para. 53.
45. *Ibid.*
46. *Ibid*., para. 54.
47. Prior to that meeting, the terms of reference of the High Level Working Group were revised to include the development of "a strategic approach and a coherent and integrated policy of the European Union for the most important countries and regions of origin and transit of asylum seekers and refugees without geographical limitation." See Permanent Representatives Committee, *Modification of the terms of reference of the High Level Working Group on Asylum and Migration*, 9433/02, JAI 109, AG 20, ASIM 18 (Brussels: 2002).
48. General Affairs Council Meeting, *Conclusions* (Brussels: 2,463rd Council meeting, 18 November 2002). These include "the nature and size of migratory flows towards the EU; geographical position in relation to the EU; need for capacity building concerning migration management; existing framework for cooperation; and attitude towards cooperation on migration issues."
49. Justice and Home Affairs Council Meeting, *Conclusions* (Brussels: 2,469th Council meeting, 28–29 November 2002), Chapter on Integration of Immigration Policy into the Union's Relations with Third Countries.
50. Council of the European Union, *Road Map for the Follow-up to the Conclusions of the European Council in Seville*, 6023/4/03 (Brussels: 5 May 2003).
51. ECRE, *Observations on the Work of the High Level Working Group on Asylum and Migration* (London: 1 June 1999). See also Amnesty International, *Comments on the Implementation of the Action Plans adopted by the High Level Working Group on Asylum and Migration* (Brussels: September 1999).
52. General Affairs Council, *Conclusions* (Brussels: 2,463rd Council meeting, 18 November 2002), paras. 3, 7, on external relations and justice and home affairs.
53. European Commission, *Communication on Integrating Migration Issues in the European Union's Relations with Third Countries* (Brussels: (COM 2002), 703 Final, 3.12.2002).
54. *Preliminary Observations by NGOs active in the migration, refugee protection and development field on the European Commission's Communication on "Integrating Migration Issues in the European Union's Relations with Third Countries,* COM (2002) 703 final of 3 December 2002 (Brussels: March 2003).
55. European Commission, *Communication on Wider Europe – Neighbourhood: A New Framework for Relations with Our Eastern and Southern Neighbours*, COM (2003) 104 final (Brussels: 11.3. 2003).
56. On the question of responsibility sharing, the Council has invited the European Commission to develop concrete proposals before the end of 2004 on the "refugee burden issue." See Council of the European Union, *Draft Council Conclusions on migration and development*, DEVGN 15, RELEX 47, JAI 34, ASIM 8 (Brussels: 7 February 2003).
57. See also J. Morrison & B. Crossland, "The Trafficking and Smuggling of Refugees: The End Game in European Asylum Policy," Working Paper No. 39, *New Issues in Refugee Research* (Geneva: UNHCR, April 2001).
58. Operation led by Spain in co-operation with France, Italy, Portugal, and the United Kingdom with the aim of enforcing sea border controls off the coasts of the northern Mediterranean and Canary islands.
59. Project led by Greece in co-operation with France, Italy, and Spain. It took place in March 2003 involving joint sea border controls in the southeastern Mediterranean.
60. Project led by Norway with Finland, Germany, Netherlands, Sweden, Estonia, and Poland as observers. The operation's objective is the prevention of illegal immigration/transborder crime and illegal use of visas and documents issued to seamen by improving co-operation between border control authorities.

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61. Led by Spain, the aim of the operation is to improve border control systems and practices in designated ports in EU candidate countries.
62. This involves the secondment of experts to Turkey to combat trafficking of illegal immigrants by sea.
63. *New International Approaches to Asylum Processing and Protection*, paper submitted by PM Tony Blair to PM Simitis in advance of the Brussels European Council (10 March 2003).
64. Human Rights Watch, *An Unjust Vision for Europe's Refugees: Commentary on the U.K 'New Vision' Proposals for the Establishment of Refugee Processing Centres Abroad* (17 June 2003); G. Noll, *Visions of the Exceptional: Legal and Theoretical Issues Raised by Transit Processing Centres and Protection Zones*, (May 2003) [unpublished paper]; Amnesty International, *Unlawful and Unworkable – Extra Territorial Processing of Asylum Claims* (18 June 2003); Refugee Council, *Unsafe havens, unworkable solutions – UK proposals for transit processing centres for refugees and regional management of asylum* (May 2003); R. Marx, *International protection and reception in the region: The specific European understanding of the principle of international co-operation* (4 August 2003).
65. The proposals do not enjoy the support of the majority of EU Member States with the exception of The Netherlands, Denmark, and Austria.
66. Response by Beverly Hughes, Minister of State for the Home Office, to UK NGO letter regarding the proposals on zones of protection (August 2003).
67. European Council, *Presidency Conclusions* (Thessaloniki: 19–20 June 2003).

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To Deter and Deny: Australia and the Interdiction of Asylum Seekers

Jessica Howard

Abstract
The paper provides an overview of the development and implementation of Australia's comprehensive 'border protection' policy, including the Pacific Solution and Operation Relex – the interdiction of asylum seekers. The intention of the paper is to demonstrate the lengths to which a developed state will go in addressing the interrelated problems of secondary movement, people smuggling and mixed flows. It also highlights the 'export value' of the policy and its wider implications.

Résumé
Cet article propose un survol du développement et de la mise en vigueur de la politique intégrée australienne de « défense des frontières », y compris la Solution du Pacifique et Relex – l'interdiction des demandeurs d'asile. L'article vise à montrer jusqu'où un état avancé est disposé à aller pour confronter les problèmes connexes de mouvement secondaire, de la traite des gens et des flots mixtes. Il met aussi en exergue la valeur « à l'export » de cette politique et ses applications possibles dans d'autres domaines.

I. Introduction

Australia is not normally considered to be a country facing a refugee or asylum seeker "problem." Certainly, by European or African standards, the number of asylum seekers and refugees arriving on Australian shores in any year is minuscule. However, the high profile rescue by the MV *Tampa* of over 400 people attempting to reach Australia and claim asylum catapulted the Australian treatment of asylum seekers onto the world stage. The MV *Tampa* saga provided the impetus for the introduction by the Australian government of a new policy approach to "unauthorized arrivals." The catchphrase for this new policy was the "Pacific Solution" and entailed the use of neighbouring Pacific states as refugee holding pens and a concerted naval interdiction campaign. Unlike the MV *Tampa* incident, which has been the subject of considerable academic discussion,[1] Australia's naval interdiction campaign (known as "Operation Relex") has received scant consideration, despite having potentially significant ramifications for the treatment of asylum seekers by other Western states.

The purpose of this paper is to provide an overview of the development and implementation of Australia's "border protection" policy, including the Pacific Solution and Operation Relex. Whilst the policy raises significant questions about Australia's compliance with international obligations owed to asylum seekers and refugees and the legality of certain activities at sea, it is not the purpose of this paper to canvass these in any detail. Rather, the intention is to demonstrate the lengths to which a developed state will go in addressing the interrelated problems of secondary movement, people smuggling, and mixed flows. In the case of Australia, ensuring the sanctity of its borders in a climate of heightened security fears took primacy over its obligation to abide by the spirit, if not the letter, of the *Refugee Convention*.[2] The "export value" of Australia's new policy means that the 'Pacific Solution' may have an impact on the nature of asylum regimes around the world.[3]

II. Australian Government Responses to Unauthorized Arrivals

As a relatively young country, Australia has relied heavily on immigration to achieve population and economic growth. More than six million people have come to Australia as migrants since 1945.[4] Australia has a well-developed and

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strictly controlled immigration system, which includes a universal visa system for all non-citizens coming to Australia. The Department of Immigration and Multicultural and Indigenous Affairs (DIMIA)[5] is responsible for the administration of Australia's official migration program, including the humanitarian and refugee intake.

Australia is a signatory to both the *Refugee Convention* and the *1967 Protocol*,[6] which together shall be referred to as the *Refugee Convention*. Historically, Australia has resettled large numbers of refugees and other persons of humanitarian concern from overseas camps; it remains one of only a handful of active "resettlement" countries.[7] Unlike many other countries, however, Australia has not faced mass influxes of refugees or large numbers of asylum seekers arriving in its territory. This has enabled Australia to tightly control all aspects of its immigration program, including refugee numbers. The arrival of increasing numbers of asylum seekers on Australia's shores presented a real challenge to this "culture of control."[8]

The Australian government's policy and legislation on unauthorized arrivals has historically displayed an acute bias towards boat arrivals, rather than those arriving "illegally" by air. This is so, in spite of the fact that, until the late 1990s, unauthorized air arrivals outstripped unauthorized boat arrivals to Australia. The fear of immigrants from Australia's populous northern neighbours flooding through porous and unprotected coastal borders looms large in Australian mythology.

The first significant Australian government action to combat increasing unauthorized arrivals was in response to the arrival of Indochinese refugees in the early 1990s. The Australian government amended the *Migration Act 1958* (Cth) to provide for the mandatory detention of the Indochinese "boat people" in 1992.[9] Boat arrivals throughout the 1990s remained very low; however, there was a sharp increase in 1998–99. One explanation for this change was the increase in people smuggling activities in the region, largely moving Afghan, Iranian, and Iraqi refugees and asylum seekers. Despite being cast as undeserving "queue jumpers," the vast majority (90 per cent of arrivals from 1998 to 2001)[10] of unauthorized boat arrivals demonstrate that they are refugees in need of protection and have been successful in their claim for asylum in Australia.

Since 1999, increasingly restrictive practices in relation to unauthorized arrivals in general, and people smuggling in particular, have been introduced by the Australian government. These practices culminated in the implementation of a comprehensive border protection (read "refugee control") strategy in September 2001 – the so-called "Pacific Solution." As of 6 November 2003, there had been only three unauthorized boat arrivals in Australia (two from Vietnam with fewer than one hundred people in total and one carrying fourteen Turkish Kurds), since 16 December 2001.

A. *The Development of the Border Protection Strategy*

In 1999, two vessels carrying unauthorized arrivals landed, undetected, on the east coast of mainland Australia. Boat arrivals had previously only landed in Australia's remote northern reaches and offshore territories. Australia has a number of island territories to its north, including Christmas Island, Ashmore Reef, and Cocos Island, all of which are proximate to Indonesia, a major transit country for people smuggling to Australia. In response to these arrivals, the Australian government created the Coastal Surveillance Task Force (CSTF) to make recommendations on the strengthening of Australia's coastal surveillance procedures and systems. This was the first step towards the creation and implementation of the Pacific Solution.

The CSTF recommended a four-year, A$124 million program to "strengthen Australia's capacity to detect and deter illegal arrivals,"[11] which was accepted by the government. One of the specific recommendations was the need for a coordinated administrative approach to unauthorized arrivals. This led to the creation of a second task force in late 1999 – the Unauthorized Arrivals in Australia Task Force (UATF) – which was to report on:

> issues of international cooperation to combat irregular migration and people smuggling; measures to bolster the international protection framework; and steps to improve coordination and efficiency among Australian Government agencies.[12]

The UATF report resulted in the adoption of a "comprehensive and integrated unauthorized arrivals strategy."[13] There are three key elements to this strategy: prevention of irregular migration; disruption of people smugglers and their clients en route; and the development of "appropriate reception arrangements." Much of the unauthorized arrivals strategy developed by the UATF remains in place today; however, it has been modified and extended over time, particularly in late 2001.

The prevention of irregular migration involved:

- the use of targeted aid funding to help eliminate "push factors" in key source countries (Afghanistan and Pakistan in particular);
- the implementation of domestic and international information campaigns;

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- increased technical co-operation, capacity building, and information exchange with key source countries (focusing on the Middle East), and
- efforts to increase international co-operation on irregular migration and people smuggling.

Strategies aimed at disrupting people smugglers included the posting of additional compliance and airline liaison officers in overseas locations; technical co-operation and capacity building with key transit countries in the region;[14] improved intelligence gathering and exchange; and increased efforts to obtain regional co-operation on the interception of irregular migrants. The most comprehensive regional co-operation model implemented to date is with Indonesia – the key transit country for unauthorized boat arrivals to Australia.

The final aspect of the strategy was coordinated reception arrangements in Australia. This comprised a continued commitment to the use of mandatory detention (including the establishment of the remote detention centres in the desert regions of Australia), improved processing times, negotiations with countries of origin and first asylum for the return of failed asylum seekers, and a raft of legislative amendments "to reduce the incentives of using Australian refugee law to achieve a migration outcome."[15]

III. Refugee Controls and Border Protection

The unauthorized arrival strategy saw no immediate reduction in the number of boat arrivals. It appears to have been effective in easing the general upwards trend in unauthorized air arrivals, which comprised about a third of all unauthorized arrivals in the 1999–2000 financial year. However, the number of boat arrivals in 1999–2000 and 2000–01 remained relatively steady, at around 4,000 annually. Despite the unauthorized arrivals strategy having been in place for two years, there was a strong feeling amongst senior government representatives that people smugglers saw Australia as a "soft touch."

A. *The MV Tampa and the Pacific Solution*

The sense that the unauthorized arrivals strategy was not achieving its aim was strengthened by the arrival of 1,212 people in six boats in the first three weeks of August 2001.[16] The boats arrived at the Australian offshore territories of Ashmore Reef and Christmas Island. In accordance with the established policy (and authorized by the *Migration Act 1958* (Cth)) all of these boats were detained and the people on board were taken to detention centres on mainland Australia for immigration processing.[17] However, this policy was to soon change.

On 26 August 2001, the Norwegian flagged freighter MV *Tampa* rescued in excess of 400 people from a twenty-metre wooden fishing vessel that was sinking about 140 kilometres north of Christmas Island. The rescue had occurred at the request of Australian authorities, who believed there were approximately eighty people on board the sinking vessel. The "rescuees," as they became known, were mostly from Afghanistan, having departed Indonesia by boat to seek asylum in Australia.[18]

The captain of the MV *Tampa*, Captain Arne Rinnan, intended to return the rescuees to Indonesia; however, several of the asylum seekers made threats to harm themselves if they were not taken to Australia. Captain Rinnan decided to change course for Christmas Island. Upon reaching Christmas Island, the MV *Tampa* was denied entry to Australian territorial waters.[19] A standoff ensued and the MV *Tampa* sat just outside Australian territorial waters for three days.

During that time, the rescuees were housed on the deck of the ship, with only empty cargo containers for shelter. Many were suffering dehydration, some quite severely. Captain Rinnan informed the Australian government that if the medical situation on board was not addressed immediately, people would die shortly. The Australian government did not respond to requests for medical assistance, food, and the removal of the sickest people.[20]

At about 11.30 a.m. on Thursday, 29 August, Captain Rinnan decided to enter Australian waters and stopped about four nautical miles off the coast of Christmas Island. He determined not to leave until the humanitarian situation was addressed and the "rescuees" allowed to disembark. The Australian government response was swift and decisive. In around one hour, it ordered forty-five armed SAS (Special Air Services) troops to board the MV *Tampa* and closed the port at Christmas Island to incoming and outgoing traffic.

Soon after the boarding by SAS personnel, Prime Minister John Howard announced that not one of the "rescuees" on board the MV *Tampa* would set foot on Australian soil.[21] The government decision was the subject of legal proceedings in the Federal Court of Australia, which initially determined that the "rescuees" were being unlawfully detained by the government.[22] This decision was overturned, by majority, on appeal.[23]

While the court proceedings were being heard, the government obtained the agreement of the impoverished Pacific island nation of Nauru to house the MV *Tampa* "rescuees," in exchange for significant aid contributions and debt write-offs.[24] In addition, New Zealand agreed to

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accept 150 rescuees – primarily women, children, and family groups – for processing.[25]

The "rescuees" were removed from the MV *Tampa* and transported to Nauru on board HMAS *Manoora*, an Australian warship. Upon arrival in Nauru, they were detained in compounds managed by the International Organization for Migration (IOM).[26] The UNHCR accepted a request from Nauru for assistance in the processing of asylum claims of those rescued from the MV *Tampa*.[27] All costs associated with the housing, detention, and processing of the rescuees on Nauru, including those incurred by the UNHCR, were to be met by the Australian government.[28]

The government's response to the MV *Tampa* situation was coordinated through the creation of a high-level, interdepartmental committee to be known as the People Smuggling Taskforce (PSTF) on 27 September 2001. The PSTF was created partly in response to the MV *Tampa*, and partly due to intelligence suggesting there were a range of boats planning to come to Australia from Indonesia in the near future. These two issues required there be a "concerted focus" on what was happening and the possible government responses.[29]

Despite being an *ad hoc* response to the MV *Tampa* incident, the establishment of the PSTF signalled a change to a "whole of government" approach to the question of unauthorized arrivals and people smuggling. Prior to this time, intelligence exchange and liaison about potential boat arrivals had occurred at the working level between DIMIA, the Australian Federal Police (AFP) and Coastwatch (a branch of the Australian Customs Service). It was also to signal the start of a new government policy on boat arrivals and people smuggling.

The arrival of further boatloads of asylum seekers saw the Australian government extend its so-called "Pacific Solution" to a second compound on Nauru and a third compound on Manus Island in Papua New Guinea.[30] These too were managed by IOM. However, the UNHCR refused to process any of these further arrivals. Instead, the Australian government established a new offshore processing regime using DIMIA officials. The Nauru facilities were used primarily for Afghan asylum seekers and Manus Island for Iraqis. The Australian government once again met all costs associated with these "offshore processing centres." On the question of costs, the Select Committee concluded that:

> Although substantial information is available on the costs associated with the operation of the offshore processing centres in Nauru and Papua New Guinea, the Committee has not been able to collate an accurate picture of the full cost of the Pacific Solution. The substantive difficulty arises from the inability to fully identify the cost of the activities of the Australian Defence Force in support of the arrangements.[31]

The Committee does quantify the non-Defence related costs of the Pacific Solution, which total in excess of A$250 million.[32] These expenses relate to the reception and processing of 1,515 asylum seekers in Nauru and Papua New Guinea. According to DIMIA, the estimated average cost for each unauthorized arrival that is processed in Australia is $29,000.[33] This means that if all the asylum seekers taken to Nauru and Papua New Guinea had been processed in Australia, the average total cost would have been around A$44 million.

The Select Committee noted that:

> [I]t is apparent that the cost of the Pacific Solution processing arrangements on Nauru and Manus to date, including additional aid funding, have been significantly more expensive than onshore processing of the same number of people. This is true even without a full accounting of the cost of the supporting services provided by the Defence Force.[34]

B. *To Deter and Deny – Operation Relex*

The MV *Tampa* incident marked the introduction of a new comprehensive border protection regime, of which the "Pacific Solution" formed a part. Central to this regime was "Operation Relex," an Australian Defence Force (ADF) mission with the aim of deterring and denying boats suspected of carrying asylum seekers from entering Australian territorial waters.

On 28 August 2001,[35] the Chief of Defence Forces issued a warning order initiating Operation Relex. It specified that the ADF mission was to "deter unauthorized boat arrivals from entering Australian territorial waters off the north west coast and offshore territories" by providing:

> a maritime patrol and response option to detect, intercept and warn vessels carrying unauthorized arrivals for the purpose of deterring suspected illegal entry vessels from entering Australian territorial waters.[36]

Operation Relex formed part of the "whole of government" approach to the issue of unauthorized arrivals and people smuggling. As such, ADF operations were only a part of the overall strategy, which comprised a continuum of operations:

- intelligence gathering and analysis in preparation for possible boat departures from Indonesia, usually by non-ADF personnel;

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- surveillance of the areas in which approaches to Australia would be likely;
- naval interception of any suspected illegal entry vessels (SIEVs) once close to Australia's contiguous zone;
- the provision of warnings to the crew not to enter Australian waters;
- if the SIEV proceeded into the Australian contiguous zone, the insertion of a boarding party, with the aim of removing the boat to the high seas;
- the eventual detention of any SIEV that persisted in its attempts to enter Australian territorial waters; and
- the transfer of detained SIEVs to a designated holding area, pending a government determination on transfer and/or transportation.

This policy was later amended to include the forcible return of vessels to Indonesia.

1. Surveillance and interception of SIEVs

Prior to the MV *Tampa* incident, surveillance of Australia's northern approaches was the responsibility of Coastwatch, a branch of the Australian Customs Service. However, under Operation Relex, the lead responsibility for surveillance within the area of operations was held by Defence.

The surveillance conducted by Defence consisted of air surveillance from the Australian mainland to within thirty miles of the Indonesian archipelago, coupled with the positioning of naval vessels closer to Australian territory.[37]

> We [Defence] had a standard operating procedure, which we developed for this operation. That involved ships intercepting an illegal vessel, either primarily by the ship itself or after having been detected by the aircraft that were in surveillance.[38]

Coastwatch was responsible for the "residual national surveillance program … and the provision of support for Defence in the Operation Relex areas in the Timor and Arafura Sea approaches."[39]

SIEVs would be intercepted on the high seas, generally in the vicinity of Christmas Island or Ashmore Reef. Defence personnel only had authority to board the vessels once they entered Australia's contiguous zone, which commences twenty-four nautical miles from land. Interceptions could occur much further out than twenty-four nautical miles; however, naval vessels would then have to shadow the SIEV until it entered the contiguous zone before any action could be taken. For this reason, and in order to militate against the risk of another SIEV slipping through, naval vessels were not positioned too far "up threat."[40]

Naval frigates were not directly involved in the interception and boarding of SIEVs. Rather, rigid hull inflatable boats (RHIBs) were sent forward to meet the SIEV with the frigate remaining positioned downstream, just over the horizon. This approach was designed to minimize the risk of a safety-of-life-at-sea situation being generated. There was a fear that the sight of a large vessel capable of rescuing all persons on board the SIEV would be the catalyst for attempts to sabotage the SIEV, thereby creating a rescue situation.[41]

2. Warning issued to crew

Upon interception of an SIEV, the personnel on board the RHIB would issue a warning to the master of the vessel, if one was identified, or otherwise to the crew.[42] The warning advised that the master and/or crew would be breaching Australian law if they proceeded into Australian territory and that they would be subject to severe penalties under that law.[43] The text of the warning was provided in both English and Bahasa (Indonesian), given that the crews were invariably Indonesian nationals. The warning advised that people smuggling was a criminal offence in Australia subject to mandatory jail terms and large fines. It recommended the crew turn the boat around and return to Indonesia.

Whether or not the warning was comprehended by the crew or the asylum seekers on board the SIEVs is unknown; however, it was assumed by Australian officials that the warning was read and understood.[44] It appears that in every instance the warnings were ineffective in stopping the boats from continuing towards Australian waters.[45] No specific warning was issued to the asylum seekers on board the vessels about their likely treatment upon arrival in Australia.

3. Boarding of SIEVs

The naval vessel would then shadow the SIEV as it proceeded towards the Australian contiguous zone. Warnings would continue to be given to the vessel, in preparation for boarding. The boarding of the SIEV could be either compliant or non-compliant. Where the boarding was compliant the SIEV was often broken down and in need of assistance, or else responded to a request to heave to, allowing the insertion of the boarding party. In the case of a non-compliant boarding, requests to heave to were usually ignored, requiring more forceful measures to be used to embark the boarding party. In at least one instance, machine gun warning shots were fired into the water ahead of the SIEV and a searchlight was used to illuminate both the weapon firer and the area in the water ahead of the vessel where the rounds were to land.[46] Other tactics included manoeuvring the naval vessel close to the SIEV to create a distraction, allowing "an assault type non-compliant boarding, using the RHIB, to be effected whilst the vessel was still under way."[47]

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Once embarked, the boarding party commandeered the ship and prevented any further damage being occasioned to the vessel.[48] Initially, the boarding party comprised naval personnel only. As Operation Relex progressed, it was decided that an armed presence in the boarding party was required in order to ensure control of the vessel.[49] This armed presence was known as the Transit Security Element (TSE) and included members of the Australian Army.

Members of the boarding party were armed with a holstered pistol and a baton.[50] The Rules of Engagement (ROE) for Operation Relex stipulated the level of force which the boarding parties were authorized to use.[51] Whilst the weapons carried by the boarding party were visible, personnel were not authorized to use lethal force except in self-defence. The members of the boarding party were advised that the use of force should always be consistent with the situation they found themselves in and should be kept to a minimum.[52]

A range of options for controlling people on board the vessels was employed. The naval personnel were trained in the used of batons. The army personnel also carried and were trained to use capsicum spray and electricians' cable ties to temporarily restrain people. Both of these methods of controlling the situation were used in the course of Operation Relex.[53]

The boarding party would include at least one engineer who would inspect the engine and other members of the boarding party would assess the hull and other parts of the vessel.[54] The boarding party would then assess the mechanical engineering, navigational equipment, and general seaworthiness of the SIEV, and any minor repairs necessary to ensure continued seaworthiness would also be made.[55] The boarding party would also provide basic medical assistance and estimate the number of passengers on board.

Once a boarding had been effected, the established policy was to

> reinforce the warning and turn the vessel around and either steam it out of our contiguous zone ourselves under its own power or – as had happened on a number of occasions – if the engine had been sabotaged in our process of boarding, we would then tow the vessel outside our contiguous zone into international waters.[56]

The boarding party would remain on the SIEV until it reached the outer limit of the Australian contiguous zone, at which point it would return to the naval vessel. The naval vessel would closely escort the SIEV, if it was not under tow, until the Indonesian twenty-four nautical mile limit, at which point it would instruct the vessel to continue back towards Indonesia. The naval vessel would then withdraw over the horizon, outside the nominal visual range and would monitor the SIEV using an electro-optical tracking system. The SIEVs "invariably just turned around and came back again."[57]

According to Rear Admiral Smith, the "initial policy was to do that up to three times and, after having done it the third time, to seek further advice from government"[58] about what to do with the vessel. The decision about what was to happen with the SIEV was one made by government, again through the PSTF process.

4. Containment of SIEVs and transportation

Initially, any SIEV which persisted in its attempts to enter Australia, or which foundered whilst attempting to enter Australia, was contained by the ADF until a decision was made as to where the boat and/or passengers were to be taken. The circumstances of containment varied for each SIEV and are outlined in Appendix 1. The common element, however, was the requirement that no persons from any SIEV were to land on Australian territory. Many persons were contained on vessels within Australian territorial waters, but none were allowed to land, even when land was very close by.[59]

As discussed above, the Pacific Solution saw the establishment of two processing camps on Nauru – one for the MV *Tampa* asylum seekers, the other for subsequent arrivals – and one camp on Manus Island. The people on board each SIEV that was not returned to Indonesia were taken to either Nauru or Manus Island for processing. There is one exception to this, and that is SIEV 8, which had thirty-one people on board, and had departed from Vietnam, not Indonesia. After being detained at Christmas Island for a short period of time, these people were taken to the Australian territory of Cocos Island for processing. The reason for the different processing locations is something that can only be speculated about, but is probably due to the fact these asylum seekers were not "secondary" movers and had not engaged the services of a people smuggler to get to Australia.

DIMIA developed written scripts to inform the asylum seekers about where they were being transported to, what to expect upon arrival, and their future options. The notable exception is the script used for SIEV 4 – the first group to be sent to Manus Island – in which the destination does not seem to have been revealed. Unlike the people taken to Nauru, this group was not transported by navy vessel; rather, they were flown to Papua New Guinea.

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5. Forcible return to Indonesia

In early October, a request was conveyed to the PSTF to prepare a report on the feasibility of returning SIEVs to Indonesia once intercepted. The PSTF discussed the matter on 11 October 2001 and provided the draft report to the Secretaries Committee on National Security (SCONS) on 12 October 2001.[60]

The PSTF report advised that, subject to a number of limitations particularly relating to the seaworthiness of the vessel, it was possible to return SIEVs to Indonesia. The report acknowledged that not every vessel could be returned. The overriding considerations would be safety-of-life-at-sea issues and Australia's international obligations to assist those in distress. Whether or not a vessel was seaworthy enough to make it back to Indonesia safely would remain a matter of judgment for the relevant naval commander.[61] Interestingly, the caveats on return did not include any consideration of people's claims to be refugees.

The SCONS drafted a minute to be transmitted to Prime Minister Howard, suggesting that the policy of tow-backs to Indonesia be instituted, and the Prime Minister agreed to this policy change on or around 12 October 2001. The first boat to be subject to the policy was SIEV 5, which was intercepted on 12 October and held off Ashmore Reef until 17 October, at which time it was escorted back to Indonesia.

The "tow-back" policy essentially constituted the interception of SIEVs and forcible return of the vessels under Navy escort to within close proximity of Indonesian territorial waters. Vice Admiral Shackleton, Chief of Navy, stated that when the Navy takes a ship back to Indonesia, "we essentially navigate on its behalf, and we leave it within sight of the Indonesian coast."[62] Australian vessels involved in tow-backs apparently did not at any stage enter Indonesian territorial waters; rather, they escorted the SIEVs to the edge of the Indonesian contiguous zone, from which point the SIEVs continued under their own steam back into Indonesian territorial waters.[63]

The Indonesian government was apparently notified of the return of each of the four SIEVs subject to the "tow-back policy."[64] The official Australian position is that the place to which each of the boats actually returned is unknown. However, it is known that one (SIEV 12) ran aground on Roti Island, just off the coast of West Timor. The Navy returned the three other SIEVs to the Indonesian waters in the West Timor area – one near Kupang (SIEV 5) and the other two near the town of Pepela, Roti (SEIV 7 and 11).[65] It is estimated that in total there were over 500 people on board these four SIEVs.

Given the level of intelligence gathering by Australian authorities in Indonesia, it is implausible that Australia has no knowledge of where these boats returned to or what happened to the people on board. It is also a gross abdication of the international obligation owed to asylum seekers to ensure that they are not subjected to *refoulement* by Indonesia.[66] According to Mr Killesteyn, Deputy Secretary of DIMIA, Australia's involvement ceased once the Indonesian government was informed that the boats were returned to Indonesian territorial waters and "[w]hat then happened in terms of reception arrangements is really a matter for the Indonesian government."[67] As is apparent from the discussion below of the Regional Cooperation Model in place between Australia and Indonesia, it is in fact inconsistent with the structure and purpose of those arrangements that Australia had no further information on, or involvement in, the interception, detention, and processing of those returned to Indonesia.

IV. Regional Cooperation Model with Indonesia

The anti-people smuggling arrangements in place between Australia and Indonesia are the longest standing and most developed in the region.[68] In early 2000, Australia proposed a Regional Cooperation Model (RCM) with Indonesia, including the co-operation of the International Organisation for Migration (IOM) and UNHCR. According to DIMIA, the RCM provides for the interception and detention of asylum seekers, assessment of protection claims, and arrangements for removal of failed asylum seekers or resettlement of recognized refugees. Under the arrangements in place, Australia and Indonesia have agreed

> to cooperate to disrupt [the flow of unauthorized arrivals] by taking concerted action to intercept people who are breaching Indonesia's immigration laws and to take an active approach to putting an end to the operations of people smugglers who are based in Indonesia.[69]

A. Implementation of the Regional Cooperation Model

In order to ensure that its *non-refoulement* obligations under the *Refugee Convention* were not breached, Australia needed to ensure that the RCM provided asylum seekers with an opportunity to have their claims for protection assessed. UNHCR did not agree to take a leading role in the implementation of the model, and initially it refused to endorse, or even participate in, the RCM.[70] The function of "lead agency" was taken on by IOM.

Despite UNHCR's initial reluctance to be involved, it has a statutory responsibility to interview anyone who expresses a wish to request asylum.[71] Whilst UNHCR did not agree to assist the Australian government by actively seeking out asylum seekers in Indonesia, it had no choice but to

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agree to assess any claims lodged with its (small) Jakarta office.[72] IOM undertook to inform intercepted asylum seekers of this option.

Under the RCM, the interception of illegal third-country nationals in Indonesia is the responsibility of local Indonesian authorities, primarily the Indonesian National Police service (INP). Whilst Australia has federal police officers on the ground in Indonesia, they have no law enforcement jurisdiction outside Australia. Thus, the stated Australian policy of disruption and interception required co-operation from local police in order to be effective. This co-operation is ensured through a protocol concluded in 2000 and renegotiated in 2002 between the two police services, and is discussed in detail below.

The interception of unauthorized migrants by the INP predominantly results from Australian intelligence about the locations and movements of people or from information provided by human sources, such as hotel staff or other informants, to the Indonesian authorities. Any person who is intercepted by the INP and found to be undocumented, in possession of fake documentation, or without a valid Indonesian visa is usually arrested. Once arrested, the persons are transferred to the custody of Indonesian immigration authorities. IOM, the Australian embassy in Jakarta, and UNHCR are subsequently advised of the arrests. It seems that Australia has a tacit agreement with Indonesian authorities that they will not *réfoule* people who may be asylum seekers, despite the fact that Indonesia is not a party to the *Refugee Convention*. Australia has not declared Indonesia to be a "safe third country" under the *Migration Act 1958*, and has no formal readmission agreement with Indonesia. This is particularly concerning as it leaves returned and intercepted asylum seekers at risk of "chain *refoulement*."

Those persons who are intercepted and arrested are then detained in a variety of places in Indonesia, ranging from immigration detention facilities to hotels. IOM staff members attend the locations where the unauthorized migrants are being held and arrange for longer-term accommodation. The Australian government meets the costs of IOM in providing accommodation, food, and medical assistance to those detained. IOM also arranges longer-term accommodation if it is required, (for example, while refugee status determination is conducted by UNHCR).

Regardless of where unauthorized migrants are located, they remain the responsibility of IOM and are strictly in "detention" until they leave Indonesia.[73] In reality, the detention arrangements are not particularly secure, leading to a number of persons leaving the accommodation. It is not known whether those persons have remained in or left Indonesia, and, if they have left, whether they travelled to Australia or to some other location.

IOM also has the responsibility of advising those arrested of their options for the future. These include voluntary return to their country of origin, return to another country which recognizes their right of entry, or contacting UNHCR to make an application for refugee status. According to the Deputy Secretary of DIMIA, the co-operation with UNHCR

> was specifically designed to give these people, who were enjoying protection in Indonesia at the time, an opportunity to have their claims assessed and for resettlement processes to start.[74]

One problem with this approach is that it has lead to a burden shift from Australia's onshore processing system, which is very well-resourced, to the UNHCR's Jakarta office, which is chronically under-resourced. Traditionally a small office, it has not been equipped to process the increasing number of claims lodged in Indonesia for which it is responsible. This has led to problems of delay in processing claims. The problems of delay have been compounded by an unwillingness on the part of states parties to the *Refugee Convention* to then resettle designated refugees located in Indonesia.

People found to have protection needs remain the responsibility of UNHCR, which then seeks a durable solution for each refugee, usually in the form of resettlement in a third country. As Indonesia is not a signatory to the *Refugee Convention*, no durable solutions are available for refugees in Indonesia. Those indicating a desire to leave Indonesia are assisted by IOM to do so and Australia meets the costs incurred in organizing the voluntary removal of unauthorized migrants. Approximately 10 per cent of persons intercepted decide to voluntarily return to their country of origin.[75] If a person is found by UNHCR as not having protection needs, IOM arranges to remove from Indonesia those wanting to return home, with the costs again met by the Australian government.

B. Co-operation between Australian Federal Police and Indonesian National Police

Despite its formal title, the RCM is not a high-level arrangement between governments. Rather, it is a primarily a co-operative arrangement between the law enforcement agencies of Australia and Indonesia – the Australian Federal Police (AFP) and the Indonesian National Police (INP).

The AFP is the law enforcement agency for the federal government in Australia, and enforces Commonwealth (as

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opposed to State) laws, including the *Migration Act 1958* (Cth). In the area of people smuggling, the AFP

> engages in targeting facilitators of people-smuggling ventures. These are the people who arrange for the marketing of opportunities for potential passengers, organise their travel to embarkation points, coordinate and provide vessels and employ crews.[76]

The AFP is also partly responsible for the investigation and prosecution of the crews of SIEVs for people smuggling offences under the *Migration Act 1958* (Cth).[77]

The co-operative regime between the AFP and the INP in relation to people smuggling is given effect through a specific protocol concluded in 2000. On 27 October 1995, the AFP entered into a Memorandum of Understanding (MOU) with the Indonesian National Police to co-operate in the investigation of transnational crime. The MOU was renewed on 5 August 1997. On 15 September 2000, the AFP entered into a specific protocol under the MOU "to target people smuggling syndicates operating out of Indonesia."[78] Two weeks later, on 27 September 2000, a ministerial direction was issued to the AFP, directing the AFP to "give special emphasis to countering and otherwise investigating organised people smuggling."[79]

According to the Commissioner of the AFP, Mr. M. Keelty,

> Under the provisions of the Protocol, the AFP did fund INP units to take part in anti-people smuggling operations … The Protocol laid out the level of accountability that would have to be met by the various INP units …
>
> The Protocol allowed for the AFP and INP to provide advice regarding target selection, technical and management support of operations, informant management, information facilitation and assistance in financial reporting.[80]

Action was taken under the Protocol almost immediately, including the training of five INP Special Intelligence Units in October, the provision of equipment to those units in November and the allocation of funds to coordinate operations (including the INP Interpol office) and pay the INP informant network.[81]

Under the Protocol, however, the AFP "cannot direct the INP … [w]e can seek their cooperation." The INP Special Intelligence Units have been involved in gathering information, making arrests and prosecuting Indonesian-based people smugglers.[82] The Special Intelligence Units were also central to the Australian policy of disruption in Indonesia.

On or around 12 September 2001, the Indonesian government set aside the Protocol. Apparently, it is unclear why this occurred. The AFP have stated that the only reason they were given was that the Indonesian government desired a more formal, government-to-government agreement, rather than the "agency-to-agency" arrangement in place at the time. It was acknowledged, however, that "to a degree the concern went to the disruption operation."[83] The operation of the Protocol remained suspended until the conclusion of a new MOU and Protocol on 13 June 2002. Despite the suspension of the Protocol, the AFP maintains that they continued to receive co-operation from the INP "on a case by case basis."[84]

The Australian policy of disruption in Indonesia has been labelled "the untold story of people-smuggling."[85] The Senate Select Committee pursued this story in some detail, in response to a submission raising questions about the sinking of a SIEV en route to Australia. This incident lead to the drowning of 353 asylum seekers – mostly women and children – and has become known as 'SIEV X'.[86] In pursuing some of the issues raised by the SIEV X incident, the extent of disruption activities in Indonesia became apparent.

The primary objective for disruption activities is "to prevent the departure of the vessel in the first instance, to deter or dissuade passengers from actually boarding a vessel."[87] A distinction was drawn between dismantling and disruption efforts.

> Dismantling is more focused on targeting the critical players, the facilitators, within the syndicate. So you are actually taking away a fulcrum for activity … whereas disruption can extend far beyond the syndicate itself and … target potential passengers on the vessel to disrupt their getting on board.[88]

Disruption activities included the interception and diversion of potential asylum seekers in Indonesia.

> By disruption, we mean the use of the Indonesian national police to divert potential passengers to the International Organisation for Migration or the interception by the Indonesian national police of passengers prior to boarding vessels. What would happen … is that potential passengers are gathered sometimes in a number of locations and at the last moment they are provided with details or transport to an embarkation point and they are placed on the vessels at the embarkation point. Often a disruption activity would be to prevent the passengers from getting to the point of embarkation or if we knew who the people smuggler was, to have the Indonesian national police arrest the organiser, or in other ways to disrupt the gathering of the people prior to the vessel departing.[89]

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Other efforts that may fall within the general description of disruption activities include the distribution of information leaflets discouraging people in Indonesia from using a people smuggler to get to Australia,[90] information campaigns directed at Indonesian fishermen who are usually recruited by people smugglers as "crew"[91] and "soft" enforcement measures.

It was the role of the Special Intelligence Units of the INP, trained by the AFP, to conduct the disruption activities. On a number of occasions the AFP has emphasized the fact that Australia does not have the power to direct or command the INP; "we can seek their cooperation."[92] The INP invariably co-operates. However, the absence of a line of command raises serious accountability questions. As the AFP itself has stated, "[w]e don't know what they are up to but we know what we have requested of them."[93] The absence of accountability is particularly alarming in light of the fact that there appear to be no clear limits placed on disruption activities.

The Leader of the Opposition in the Senate, Senator Faulkner, has stated

> It is not clear whether disruption extends to physical interference with vessels. It is not clear what, if any, consideration is given in the planning and implementation of disruption to questions of maritime safety, to the safety of lives at sea.[94]

These comments were made in response to allegations aired on a local television program that an informant in Indonesia had represented himself as a people smuggler.[95] It was claimed that the informant – with the knowledge of either the AFP or the INP, or both – took money from asylum seekers in Indonesia on the basis that he would smuggle them to Australia. He claimed to be an Australian police officer who knew the movements of Australian Navy ships and so could get them to Australia. After taking money from the asylum seekers (around $1,000 per person) he would then hand them over to the authorities in Indonesia. This informant also claims that Indonesian locals were paid on several occasions to sabotage people-smuggling boats with passengers on them.

Senator Ellison, Minister for Justice and Customs, has refuted any suggestion of an *Australian* official engaging in, or requesting the conducting of, this kind of activity.

> Upstream disturbance has been a key strategy of the Howard government in dealing with people-smuggling … Disruption and deterrence do not equate to sabotage. The Australian Federal Police has not been involved in sabotaging vessels but it has been involved in upstream disturbance – that is, disturbing and disrupting the activities of ruthless people-smugglers.[96]

Whilst the AFP maintains that it has not requested that the INP do anything illegal in relation to the disruption of people smuggling, it acknowledges that it has no way of knowing exactly what is being done in its name.

> We are not privy to what network the INP necessarily used so I can't say whether they employed people to do this work on their behalf … We knew when they arrested people or detained people, but we are not aware of how they did the other things they did.[97]

In relation to the overall policy of disruption of people smuggling in Indonesia, the majority[98] of the Senate Select Committee concluded as follows

> The Committee notes that it has not been able to gather more detailed information on the exact nature of the disruption measures employed in Indonesia. Further, it is concerned about the general lack of transparency surrounding elements of the strategy itself. In particular, the inability of the AFP to provide clear and precise information about the factors behind the Indonesian Government suspending the protocol governing the disruption effort compounds the sense of concern that a key diplomatic partner had cause to abrogate an element of the bilateral relationship. The Committee finds it perplexing that neither the AFP nor any other Australian agency took action to get to the bottom of this matter. The Committee considers that this matter warrants further investigation and reporting back to the Parliament.[99]

The Committee recommended that a full independent inquiry be conducted into

> the disruption activity that occurred prior to the departure from Indonesia of refugee vessels … with particular attention to the activity that Australia initiated or was instrumental in setting in motion through both its partners in the Indonesian government and its own network of informants.[100]

At the date of writing, no steps had been taken towards the implementation of this recommendation.

V. Assessing the Impact of the Australian Policy

Australia's comprehensive border protection measures seem to have been effective in that there have been no boat arrivals from Indonesia since 16 December 2001. Whilst the

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information campaigns, interception, and diversion activities in Indonesia have undoubtedly deterred asylum seekers from voyaging to Australia many of those people simply remain in Indonesia. The estimated number of people prevented from reaching Australia under the disruption program varies; however, in excess of 3,000 people appears to be a reasonable estimate.[101]

Whilst it is not possible to solely attribute the reduced flow of asylum seekers over the past twelve months to Australia's comprehensive border protection efforts, the introduction of the policy has coincided with a complete halt in the arrival of boats. As the Senate Select Committee noted:

> The number of unauthorized boats attempting to reach Australia has declined dramatically, although the effect of the offshore processing arrangements and the new legislative regime in halting the flow of illegal boat arrivals is difficult to isolate from the influence of other factors, including disruption activities, regional anti-smuggling initiatives, the SIEV X disaster, and global developments such as increased border security in the aftermath of September 11, 2001.[102]

Through the introduction of a comprehensive border protection regime involving disruption, interdiction, redirection, and mandatory detention, Australia has managed to completely insulate itself from unauthorized boat arrivals of asylum seekers and refugees. For this reason, many other developed countries have shown particular interest in the Australian approach.

Most well known is the recent UK proposal for the introduction of regional protection areas[103] – safe areas where UNHCR will be responsible for providing protection and humanitarian support to refugees, funded by the states redirecting asylum seekers to the area. Asylum seekers arriving in the EU would be identity screened at the external borders of the EU and removed to a regional protection area, based on their country of origin. Thus, it is proposed that there be an offshore (or outside EU) processing centre in Turkey for Iraqis, Somalia for Africans, and Morocco for Algerians and other Africans. It is made quite clear in the UK proposal that if UNHCR was not willing to participate in the scheme, the seemingly more compliant IOM would be approached. The UK proposal was strongly condemned by Human Rights Watch and other human rights organization.[104] The proposal was not adopted by the European Council earlier this year. It is possible that the UK will look to partners outside the EU to implement the scheme, including Australia.[105]

The parallels between the UK proposal and Australia's Pacific Solution are quite striking, particularly the burden shift onto less developed countries and the UNHCR. According to Human Rights Watch, the UK acknowledges that "Australia's refugee policy is its source of inspiration."[106] One obvious point of distinction between the UK proposal and Australia's comprehensive border protection policy is that the UK policy would require the complete co-operation of all EU member states in order for it to be anywhere nearly as effective as Australia's has been. Australia's geography makes it unique in the developed world; people cannot simply walk or drive across Australia's borders. Slow-moving boats that are overflowing with people are readily detectable by a well-resourced and vigilant defence force. And they are certainly no match for naval warships.

VI. Conclusion

Australia's border protection policy has generated much criticism, both domestically and internationally, especially from UN bodies and non-governmental organizations. The criticisms have, without exception, been ignored, largely because the Australian government does not believe it is in breach of any international obligations. Whilst this position may prove to be correct, the policy may be viewed as exploiting the greyer areas of refugee law, international human rights law, and the law of the sea. The policy certainly undermines Australia's long-standing reputation as a good international citizen and Australia's record as a human rights defender has been seriously tarnished. At best, the Australian policy pushes the limits of acceptable international practice. At worst, Australia has set a new "low water mark" for the treatment of asylum seekers and refugees.

The interception, return, and redirection of thousands of people – many of whom were subsequently recognized as refugees in need of international protection – and the shameless "burden shift" engaged in by Australia highlights the lengths to which a wealthy state can and will go to ensure the meeting of a domestic policy objective. That Australia's refugee "problem" is tiny by global standards is an even greater cause for alarm. It sends a dangerous message to all states that it is acceptable to "deflect" asylum seekers away from your territory when you feel that you have carried enough of the asylum burden. There are many states that would be far more justified in reaching this conclusion than Australia. If those states shut their borders to refugees and asylum seekers, the international refugee protection regime would be seriously jeopardized. Given the costs involved in hosting large numbers of refugees and asylum seekers, many host states will see the Australian policy as a tantalizing prospect. It is hoped that they resist the temptation to expand the Pacific Solution into a "European Solution" or an "Atlantic Solution."

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Appendix 1
Summary of SIEV Incidents 2001

SIEV	**Date (2001)**	*Where*	*Australian vessel*	*Action*	*Outcome*
Palapa	27/8-3/9	In vicinity of (IVO) Christmas Island	**Norwegian** freighter *MV Tampa*	Held in Australian territorial waters by SAS Transferred to HMAS *Manoora*	Transported to Nauru (UNHCR processing)
1	7-8/9	IVO Ashmore Reef	Warramunga	Transferred to HMAS *Manoora*	Transported to Nauru
2	10-22/9	Aground Ashmore Reef	Newcastle, Gawler	Vessel foundered – held off Ashmore on board SEIV 1. Transferred to HMAS *Tobruk*	Transported to Nauru
3	12-22/9	IVO Ashmore Reef	Warramunga, Geelong	Held off Ashmore Reef. Transferred to *Tobruk* Reef	
4	6-10/10	IVO Christmas Island	Adelaide	Taken under tow; SIEV foundered, rescued	Disembarked at Christmas Island. Taken to Papua New Guinea (Manus)
5	12-19/10	IVO Ashmore Reef	Warramunga Whyalla Townsville	Escorted to AI lagoon Removed to Indonesian territorial waters	Indonesia – Kupang, West Timor
6	19-30/10	IVO Christmas Island	Arunta Warramunga	Held in custody by AFP & AQIS Attempted escort to Indonesian territorial waters	Vessel foundered, returned to Christmas Island. Taken to Nauru
7	22-29/10	IVO Ashmore Reef	Bunbury, Arunta, Bendigo	Held at Ashmore Escorted to Indonesian territorial waters	Indonesia – Pepela, Roti Island
8	29/10-10/11	North-west Bathurst Island	Wollongong	Escorted to Ashmore and held there Transferred to HMAS *Tobruk*	Transported to & disembarked at Christmas Island SIEV 9 passengers then taken to Cocos Is, most of SIEV 8 & 10 to Nauru. Some held at Christmas Island until 26 Jan 02 then transferred to Nauru
9	31/10-10/11	IVO Ashmore Reef	Arunta, Bunbury, Gladstone	Towed to Ashmore Reef and held there Transferred to HMAS *Tobruk*	
10	8/11	IVO Ashmore Reef	Wollongong	Vessel caught fire and sank. 2 deaths Transferred to HMAS *Tobruk*	
11	11-13/12	IVO Ashmore Reef	Leeuwin	Escorted to Indonesian territorial waters	Indonesia – Roti?
12	16-20/12	IVO Ashmore Reef	Leeuwin	Escorted to Indonesian terr>torial waters	Indonesia – Roti?
X	19-22/10		Departed Sumatra (Indonesia)	Vessel sank en route to CI, either in international waters south of Java or in IDTS (Sunda Straits)	421 passengers & crew including 70 children. 24 disembarked en route. 352 drowned. 44 survivors (3 kids)

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Notes

1. See, *e.g.,* "Symposium–Australia's *Tampa* Incident: The Convergence of International and Domestic Refugee and Maritime Law in the Pacific Rim" (2003) 12 *Pacific Rim Law and Policy Journal*.
2. *Convention Relating to the Status of Refugees*, 28 July 1951, 189 U.N.T.S. 137 (entered into force 22 April 1954) [*Refugee Convention*].
3. For a discussion of the possible impact of Australia's border protection regime internationally, see Guy S. Goodwin-Gill, "Refugees and Responsibility in the Twenty-First Century: More Lessons Learned from the South Pacific" (2003) 12 *Pacific Rim Law and Policy Journal* 23 at 45–47.
4. Australian National Audit Office, *Report No. 57: Management Framework for Preventing Unlawful Entry into Australian Territory* (2001–02) at 9.
5. Until 11 November 2001 (the date of the most recent Australian federal election), DIMIA was known as the Department of Immigration and Multicultural Affairs (DIMA). This paper uses the name current at the relevant time, so both names are used.
6. *Protocol Relating to the Status of Refugees*, 31 January 1967, 606 U.N.T.S. 267 (entered into force 4 October 1967).
7. According to the UNHCR, the participating resettlement countries are Australia, Brazil, Burkina Faso, Canada, Chile, Denmark, Finland, Iceland, Ireland, The Netherlands, New Zealand, Norway, Sweden, and United States of America. See UNHCR Department of Protection, *Easy Guide to Resettlement Programs* (June 2002).
8. Don McMaster, *Asylum Seekers: Australia's Response to Refugees* (Melbourne; Melbourne University Press, 2002) at 60.
9. For a discussion of Australia's mandatory detention regime and its extension to desert and remote detention, see Kristie Dunn & Jessica Howard, "Reaching behind Iron Bars: Challenges to the Detention of Asylum Seekers in Australia" (2003) 4 *The Drawing Board* 45.
10. Mary Crock & Ben Saul, *Future Seekers: Refugees and the Law in Australia* (Sydney: Federation Press, 2002) at 33.
11. Prime Minister's Coastal Surveillance Task Force, *Report* (June 1999) para. 7, online: Department of Prime Minister and Cabinet Homepage <http://www.dpmc.gov.au> (date accessed: 6 November 2003).
12. Minister Philip Ruddock, *Background Paper on Unauthorized Arrivals Strategy* (2001), online: Minister for Immigration Homepage <http://www.minister.immi.gov.au> (date accessed: 6 November 2003).
13. *Ibid*.
14. These efforts have included agreement on joint co-operative activities in relation to border management with Papua New Guinea, document fraud training in Indonesia, Cambodia, and Vietnam and a Joint Ministerial Statement with Thailand on enhancing co-operation to combat irregular migration and people smuggling. See *Background Paper on Unauthorized Arrivals Strategy*, *supra* note.
15. *Ibid*.
16. DIMIA, *Fact Sheet No 74: Unauthorized Arrivals by Air and Sea* (2002), online: DIMIA Homepage <http://www.dimia.gov.au> (date accessed: 6 November 2003).
17. DIMIA refers to these centres as "Immigration Reception and Processing Centres." The detention of asylum seekers in Australia has been the subject of much international criticism: see, *e.g.*, Justice P. N. Bhagwati, Regional Advisor for Asia and the Pacific of the United Nations High Commissioner for Human Rights, *Report on Mission to Australia: Human Rights and Immigration Detention in Australia* (24 May to 2 June 2002); UN Commission on Human Rights, *Report of the Working Group on Arbitrary Detention: Visit to Australia*, UN Doc.E/CN.4/2003/8/Add.2 (24 October 2002).
18. The Afghan "rescuees" sent a letter to the Australian government while on board the MV *Tampa* saying, in part:

    > you know well about the long time war and its tragic human consequences and you know about the genocide and massacres going on in our country and thousands of us innocent men, women and children were put in public graveyards, and we hope that you understand that keeping view of above mentioned reasons we have no way but to run out of our dear homeland and to seek a peaceful asylum.

    The letter was tendered in evidence during the hearing of proceedings brought on behalf of the "rescuees" See *Victorian Council for Civil Liberties v. Minister for Immigration & Multicultural Affairs,* [2001] F.C.A. 1297 (11 September 2001, North J).
19. In an interview on 28 August 2001, Prime Minister Howard stated: "[W]e've taken the view, after taking a lot of advice, that it is not appropriate to allow that vessel to enter Australian waters, that it will not be given permission to land either at Christmas Island or somewhere else in Australia." Fran Kelly, Interview with John Howard, *7.30 Report,* ABC TV (28 August 2001), online: ABC Homepage <http://www.abc.net.au> (date accessed: 6 November 2003).
20. Answers to Questions on Notice: "Timeline for *Tampa* Incident," Senate Select Committee on a Certain Maritime Incident, Parliament of Australia, Canberra, 5 July 2002 (Australian Maritime Safety Authority (AMSA) at 10 (copy on file with author).
21. Prime Minister John Howard, *Doorstop Interview*, Melbourne (31 August 2001), online: Prime Minister's Homepage <http://www.pm.gov.au> (date accessed: 17 December 2002).
22. *Victorian Council for Civil Liberties v, Minister for Immigration & Multicultural Affairs*, [2001] F.C.A. 1297 (North J).
23. *Ruddock v. Vadarlis*, [2001] F.C.A. 1329 (French and Beaumont JJ, Black CJ dissenting).
24. The First Administrative Arrangement between the Republic of Nauru and the Commonwealth of Australia "for joint co-operation in the humanitarian endeavours relating to asylum seekers" was signed on 10 September 2001 (copy on file with author). The two countries entered into a Memorandum of

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Understanding on 11 December 2001 (copy on file with author). Under the two agreements, Nauru agreed to accept a maximum of 1,200 asylum seekers at any one time on behalf of Australia on the understanding that all persons would be removed from Nauru once processed and that Australia would fully finance the costs of Nauru in hosting the asylum seekers. Australia further agreed to an assistance package for Nauru totalling over A$18 million, including A$4.5 million for health related items, A$3.45 million in education assistance, A$3.8 million in fuel, A$4.2 million in power generation, A$1 million in rehabilitation support and A$1.2 million in miscellaneous items.

25. Prime Minister Helen Clark, Press Release, "New Zealand Offers to Admit Asylum Seekers" (1 September 2001), New Zealand Labour Party (copy on file with author).
26. On 12 September 2001, the Australian government formalized a verbal request made on 3 September 2001 that IOM "provide a range of services to the Australian Government in respect of unlawful asylum seekers transferred to offshore designated processing centres". An initial amount of A$5 million was advanced to IOM with all further costs to be reimbursed by the Australian government. Letter from Mr. W. Farmer, Secretary, DIMIA to Mr Denis Nihill, Chief of Mission – Regional Office, *IOM*, 12 September 2001 (copy on file with author). The letter was formally responded to by IOM on 17 September 2001 (copy on file with author).
27. *Note verbale* between UNHCR and the Government of Nauru, 20 September 2001 (copy on file with author).
28. In relation to IOM's costs, see Letter from DIMIA to IOM, *supra* note 26. In relation to UNHCR's cost, the Australian Government wrote to UNHCR on 5 October 2001, undertaking to "fully reimburse UNHCR for all staff and related costs incurred in assessing asylum claims in Nauru."
29. Evidence to Senate Select Committee on a Certain Maritime Incident, Parliament of Australia, Canberra, 16 April 2002, at 859 (Mr. William Farmer, Secretary, DIMIA).
30. On 11 October 2001, Australia and Papua New Guinea signed a Memorandum of Understanding which provided the "guiding principles for joint cooperation in relation to the operation of the immigration processing centre, including but not limited to, determining the identity and protection needs of persons and combating illegal migration and people smuggling" (copy on file with author). Under the MOU, Australia agreed to bear "all reasonable costs incurred" and to "support the Government of Papua New Guinea in its management of nationals from third countries who are illegally entering Papua New Guinea."
31. Senate Select Committee, Parliament of Australia, *Report on a Certain Maritime Incident* (2002), at 327 [11.60], online: Senate Committees Homepage <http://www.aph.gov.au/Senate/committee> (date accessed: 6 November 2003).
32. These costs include both actual and budgeted costs, as follows: $114.5 million budgeted (2001–02) for the establishment and operational costs of the offshore processing centres in Nauru and PNG; $129.3 million budgeted (2002–03) for the costs of offshore reception and processing in offshore countries, on the basis of 4,500 new arrivals per annum; $26.5 million in payments to Nauru pursuant to the MOU, in addition to the regular aid program; $2.1 million for DFAT to cover the costs of a diplomatic presence on Nauru in support of the MOU for 2002–03; $660,000 absorbed by DFAT in 2001–02 for cost of negotiations leading up to the Pacific Solution and the placement of a Temporary Consul on Nauru during 2001–02. An additional $195 million (2001 to 2003) has been budgeted for the construction of a purpose-built Immigration Reception and Processing Centre on Christmas Island to house future arrivals.
33. *Answers to Questions on Notice: Question 14*, provided to the Senate Select Committee on a Certain Maritime Incident, Parliament of Australia, Canberra, 12 June 2002 (DIMIA) (copy on file with author). DIMIA noted that some cases cost in excess of $50,000.
34. *Report on a Certain Maritime Incident*, *supra* note at 333 [11.91–2].
35. Chief of Defence Forces, *Warning Order 007/01 dated 28 August 2001* (declassified), released to Senate Select Committee on a Certain Maritime Incident, Parliament of Australia, Canberra, 20 September 2002 (copy on file with author).
36. *Ibid*.
37. Evidence to Senate Select Committee on a Certain Maritime Incident, Parliament of Australia, Canberra, 5 April 2002, at 488 (Rear Admiral Smith).
38. *Ibid*. at 502.
39. Evidence to Senate Select Committee on a Certain Maritime Incident, Parliament of Australia, Canberra, 22 May 2002, at 1629 (Rear Admiral Bonser, Director General Coastwatch, Australian Customs Service).
40. Evidence to Senate Select Committee on a Certain Maritime Incident, Parliament of Australia, Canberra, 4 April 2002, at 462 (Rear Admiral Smith).
41. See discussion of standard operating procedure, Evidence to Senate Select Committee on a Certain Maritime Incident, Parliament of Australia, Canberra, 5 April 2002, at 502 (Rear Admiral Smith).
42. *Ibid*.
43. *Ibid*. at 503.
44. *Ibid*. at 504.
45. *Ibid*.
46. The vessel in question was SIEV 4: Evidence to Senate Select Committee on a Certain Maritime Incident, Parliament of Australia, Canberra, 25 March 2002, at 159 (Commander Norman Banks, Royal Australian Navy).
47. *Ibid*. at 159.
48. Evidence to Senate Select Committee on a Certain Maritime Incident, Parliament of Australia, Canberra, 25 March 2002, at 136 (Vice Admiral David Shackleton, Chief of Navy).
49. Evidence to Senate Select Committee on a Certain Maritime Incident, Parliament of Australia, Canberra, 4 April 2002, at 453 (Rear Admiral Geoffrey Smith, Maritime Commander).

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50. Evidence to Senate Select Committee on a Certain Maritime Incident, Parliament of Australia, Canberra, 5 April 2002, at 526 (Rear Admiral Geoffrey Smith, Maritime Commander).
51. Any rules of engagement require ministerial approval before they can be implemented: see, *e.g.*, Evidence to Senate Select Committee on a Certain Maritime Incident, Parliament of Australia, Canberra, 16 April 2002, at 946 (Jane Halton, Former Chair People Smuggling Task Force).
52. Evidence to Senate Select Committee on a Certain Maritime Incident, Parliament of Australia, Canberra, 11 April 2002, at 660 (Rear Admiral Geoffrey Smith, Maritime Commander).
53. *Ibid*.
54. Evidence to Senate Select Committee on a Certain Maritime Incident, Parliament of Australia, Canberra, 25 March 2002, at 137 (Vice Admiral David Shackleton, Chief of Navy).
55. *Ibid*. at 136.
56. Evidence to Senate Select Committee on a Certain Maritime Incident, Parliament of Australia, Canberra, 5 April 2002, at 504 (Rear Admiral Geoffrey Smith, Maritime Commander).
57. Evidence to Senate Select Committee on a Certain Maritime Incident, Parliament of Australia, Canberra, 4 April 2002, at 462 (Rear Admiral Geoffrey Smith, Maritime Commander).
58. Evidence to Senate Select Committee on a Certain Maritime Incident, Parliament of Australia, Canberra, 5 April 2002, at 504 (Rear Admiral Smith).
59. Human Rights Watch, "*By Invitation Only:" Australia's Asylum Policy* (December 2002), at 43, online: Human Rights Watch Homepage <http://www.hrw.org> (date accessed: 6 November 2003).
60. Evidence to Senate Select Committee on a Certain Maritime Incident, Parliament of Australia, Canberra, 16 April 2002, at 917 (Jane Halton, Former Chair, People Smuggling Task Force).
61. Evidence to Senate Select Committee on a Certain Maritime Incident, Parliament of Australia, Canberra, 11 April 2002, at 662 (Rear Admiral Geoffrey Smith, Maritime Commander).
62. Evidence to Senate Select Committee on a Certain Maritime Incident, Parliament of Australia, Canberra, 25 March 2002, at 136 (Vice Admiral David Shackleton, Chief of Navy).
63. Evidence to Senate Select Committee on a Certain Maritime Incident, Parliament of Australia, Canberra, 1 May 2002, at 1452–3 (Dr. Geoff Raby, First Assistant Secretary, International Organisations and Legal Division, Department of Foreign Affairs and Trade).
64. Evidence to Senate Select Committee on a Certain Maritime Incident, Parliament of Australia, Canberra, 16 April 2002, at 823 (Edward Killesteyn, Deputy Secretary, DIMIA).
65. *SIEV Event Summary*, tabled as part of Evidence to Senate Select Committee on a Certain Maritime Incident, Parliament of Australia, Canberra, 5 April 2002 (Rear Admiral Smith) ("the Smith Report") (copy on file with author). This document can also be found as Appendix 3 to the Government Members Report, *Report on a Certain Maritime Incident*, *supra* note, enclosure 8.
66. Article 33, *Refugee Convention*. The Australian government maintains that no one has been *refouled* from Indonesia, but appears not to have actively monitored any of the returnees.
67. Evidence to Senate Select Committee on a Certain Maritime Incident, Parliament of Australia, Canberra, 16 April 2002, at 823 (Edward Killesteyn, Deputy Secretary, DIMIA).
68. The information for this section is drawn from three main documents: Jana Mason, "Paying the Price: Australia, Indonesia Join Forces to Stop 'Irregular Migration' of Asylum Seekers" (2001) 22 *Refugee Reports*; DIMIA, *People Smuggling – Australia's experience and policy response* (2002); and *Background Paper on Unauthorized Arrivals Strategy*, *supra* note .
69. *Background Paper on Unauthorized Arrivals Strategy*, *supra* note , Attachment B.
70. See Mason, *supra* note 68.
71. See *Statute of the Office of the United Nations High Commissioner for Refugees*, adopted by GA Res 428, UN GAOR, 5th sess, UN Doc. A/Res/428 (1950).
72. Mason, *supra* note 68, citing the Australian government's understanding of UNHCR's reluctance to take the lead role in the RCM.
73. Mason, *supra* note 68.
74. Evidence to Senate Select Committee on a Certain Maritime Incident, Parliament of Australia, Canberra, 16 April 2002, at 823 (Edward Killesteyn, Deputy Secretary, DIMIA).
75. Mason *supra* note 68.
76. Evidence to Senate Select Committee on a Certain Maritime Incident, Parliament of Australia, Canberra, 11 July 2002, at 1923 (Commissioner Michael Keelty, Australian Federal Police).
77. As at 31 March 2002, 481 people had been charged with people smuggling offences since the introduction of the crimes on 22 July 1999. In the financial year 2001–2002 to that date, 91 prosecutions had been finalized. See DIMIA Response to Questions on Notice, 13, Question 43, provided to the Senate Select Committee on a Certain Maritime Incident, Parliament of Australia, Canberra, 14 June 2002 (copy on file with author).
78. Evidence to Senate Select Committee (Keelty), *supra* note 76, at 1924.
79. *Ministerial Direction (Supplementary)*, issued by Minister for Justice and Customs on 27 September 2000, pursuant to section 37(2) *Australian Federal Police Act 1979* (Cth).
80. Commissioner Keelty, *Statement of Clarification to the Senate Select Committee on a Certain Maritime Incident*, 30 July 2002, at 1 (copy on file with author).
81. *Ibid*. at 2.
82. *Ibid*.
83. Evidence to Senate Select Committee (Keelty), *supra* note 76 at 1939.
84. *Ibid*.
85. Commonwealth, *Parliamentary Debates*, Senate, 23 September 2002, at 4690 (John Faulkner, Leader of the Opposition in the Senate).

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86. Many allegations have been raised about who is responsible for these deaths as the boat apparently sank in Indonesian territorial waters, but within the area in which Australia was conducting aerial surveillance at the time. Questions have also been raised about the extent of intelligence about SIEV X that was known to the Australian government and the PSTF at the time. None of the allegations about Australian knowledge or culpability have been substantiated. Information on SIEV X has been collated on the following website: <http://www.sievx.com>.
87. Evidence to Senate Select Committee on a Certain Maritime Incident, Parliament of Australia, Canberra, 11 July 2002, at 1934 (Federal Agent Brendon McDevitt, General Manager National, AFP).
88. *Ibid*. at 1933.
89. Evidence to Senate Select Committee (Keelty), *supra* note 76 at 1930.
90. See, for example, the "public awareness brochure" provided to the Senate Select Committee by DIMIA, Questions on Notice, (copy on file with author), the text of which provided (in Arabic and Indonesian):

    STOP! GOING TO AUSTRALIA ILLEGALLY?
    New Australian Laws ensure that those attempting to enter Australia illegally by boat will never live in Australia. Illegal boat arrivals will have no right to apply for asylum under the Australian system. The people smugglers are happy to take your money but they cannot deliver – they cannot get you to Australia. All recent arrivals at Ashmore Reef and Christmas Island have been transferred to places outside Australian jurisdiction including to Nauru and Papua New Guinea. Several boats have been returned to Indonesia (with all passengers) at the request of crews. Nobody has got access to Australia or its asylum system. If you get on a boat in Indonesia you will expose yourself and your family to great danger; lose your money; fail in your objective to get to Australia. The boats used by people smugglers are overcrowded and dangerous. Too many people have died trying to enter Australia by boat. Stop. Go back. Don't get further into the trap.
91. Evidence to Senate Select Committee on a Certain Maritime Incident, Parliament of Australia, Canberra, 11 July 2002, at 1999 (Ms Nelly Seigmund, Assistant Secretary, DIMIA).
92. Evidence to Senate Select Committee (Keelty), *supra* note 76 at 1938.
93. *Ibid*.
94. Commonwealth, *Parliamentary Debates*, Senate, 23 September 2002, at 4691 (John Faulkner, Leader of the Opposition in the Senate).
95. "The Federal Police and People Smugglers," *Sunday*, Nine Television, 1 September 2002, online: Sunday Homepage <http://sunday.ninemsn.com.au> (date accessed: 6 November 2003).
96. Commonwealth, *Parliamentary Debates*, Senate, 26 September 2002, at 4735.
97. Evidence to Senate Select Committee (Keelty), *supra* note 76 at 1978.
98. The Committee report was not unanimous, with the government senators writing a dissenting report.
99. *Report on a Certain Maritime Incident*, *supra* note at 2.
100. *Ibid*., Recommendation 1.
101. Australian Federal Police, *Annual Report 2000–2001*, (2001) at 33.
102. *Report on a Certain Maritime Incident*, *supra* note at 334–35 para. 11.99.
103. UK Government, *A New Vision for Refugees* (2003) (copy on file with author).
104. Human Rights Watch, *An Unjust "Vision" for Europe's Refugees: Human Rights Watch Commentary on the UK's "New Vision" Proposal for the Establishment of Refugee Processing Centers Abroad* (17 June 2003), online: Human Rights Watch Homepage <http://www.hrw.org> (date accessed: 6 November 2003).
105. The UK proposal states that this collaboration "may include other Western States such as Australia who are looking for new solutions to asylum and have to some extent piloted this approach … Australia have been making noises that indicate that they may be willing partners": *supra* note 103 at 27.
106. Human Rights Watch, *supra* note at 2.

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The Spaces In Between: American and Australian Interdiction Policies and Their Implications for the Refugee Protection Regime

Jessica C. Morris

Abstract

Interdiction policies by countries such as the U.S. and Australia are embedded in these states' perception of their obligations to asylum seekers as strictly territorially bound. With the aim of limiting asylum seekers access to protection mechanisms, these policies are carried out in an arena firmly within the reach of executive-driven actions yet beyond the purview of constitutional or judicial safeguards. In the case of the U.S., the long-standing Haitian interdiction policy illustrates the manipulation of this protection gap, and, in Australia, the administration's reaction to the Tampa incident in 2001 and the subsequent policy developments provide further illustration. The autonomy with which states carry out such policies poses a significant threat to the refugee protection regime, especially the international norm of non-refoulement.

Résumé

Les politiques d'interdiction poursuivies par certains pays, tel les États-Unis et l'Australie, reposent sur leur conviction profonde que leurs devoirs envers les demandeurs d'asile sont strictement limités à leur territoire. Dans le but de limiter l'accès des demandeurs d'asile aux mécanismes de protection déjà en place, ces politiques sont appliquées dans des lieux fermement sous le contrôle des forces de l'ordre, tout en ne bénéficiant d'aucune garantie constitutionnelle ou judiciaire. Aux États-Unis, la politique d'interdiction déjà ancienne envers les Haïtiens illustre bien la manipulation de ces interstices dans la protection, tout comme les politiques australiennes qui ont suivi l'incident du Tampa en 2001. La grande liberté dont disposent les États pour appliquer de telles politiques constitue une menace pour le système de protection des réfugiés, en particulier pour le respect du principe cardinal de non-refoulement.

I. Introduction

Interdiction policies highlight tensions in the current relationship between the liberal democratic asylee-receiving state, the international human rights regime, and the realities facing the asylum seeker. Embodying the discourse of the human rights regime in the context of globalization, Soysal holds that "individual rights, expansively redefined as human rights on a universalistic basis and legitimized at the transnational level, undercut the import of national citizenship by disrupting the territorial close of nations."[1] In a similar vein, Jacobson notes a process of "deterritorialization" whereby the "nation" is becoming delinked from the territorial state.[2] The realities of interdiction, however, present a stark contrast to this vision. The draconian measure of forcing a ship from a country's territorial waters in order to avoid legal obligations exhibits, not deference to a transnational rights bearing regime, but a reassertion of the primacy of territoriality and boundedness of the duty of protection. Even a ruling in an international tribunal stating that such protection duties are attached to states operating outside their physical boundaries does not have the leverage of directly impacting state policy or jurisprudence.[3] Through their interdiction campaigns, the U.S. and Australia have demonstrated the lacuna between the physical spaces in which states exercise jurisdictional control and the spaces in which they will assume juridical responsibility. The

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existence of such policies and the relative impunity with which states enact them expose deficiencies in both the institutional and legal mechanisms of the refugee protection regime. The right to seek asylum, although provided for by international human rights doctrines, remains a territorially bounded claim.

While U.S. President Ronald Reagan's codification of interdiction policy in 1981 represented a formalization of the use of interdiction as a form of immigration control, the United States had been guilty before of turning vessels from its shores at the cost of human life. Denying the U.S. *St. Louis*, a passenger ship from Hamburg, Germany, permission to dock after being turned back from its original port of call, Havana, had drastic humanitarian repercussions. The year was 1939 – over nine hundred of the passengers on board were Jews escaping Nazism. In the next few years, perhaps after viewing Miami from the deck, hundreds of the ship's passengers perished in concentration camps.[4]

In the past decade, however, the encounter at sea between the asylum seekers and repelling state has become a hallmark of the desperation on both sides in the prevailing restrictionist climate. Apart from the long-standing American policy, until recently there has been no equal in terms of a codified policy of interdiction. In August 2001, Australia resorted to interdiction in the midst of a highly publicized standoff with the captain of the *Tampa*, a Norwegian container ship seeking to off-load over four hundred rescued asylum seekers onto Australian territory. In the wake of this incident, Australia has formalized the use of interdiction through new legislation relating to "off-shore arrivals." Australia is not alone in the use of such strategies: in the Mediterranean, Italy, France, and Spain have begun to interdict vessels carrying North Africans and Albanians struggling to reach their shores. The harmonization of borders, and thus immigration policy, in the EU has made it increasingly difficult for asylum seekers to reach their shores, making sea arrivals, often organized by smugglers, increasingly prevalent.

Interdiction policies are the most extreme example of a trend of restrictionist, non-entrée policies implemented by liberal democratic receiving countries to reduce illegal immigration. This set of policies includes carrier sanctions, visa controls, and safe third country determinations. To the detriment of refugee protection, the sweeping exclusiveness of these policies does not discriminate between economic immigrants and asylum seekers with legitimate protection claims. Implicit to this "teleology of restriction" is the assumption that many asylum seekers' claims are not well-founded and that refugee status is being used as a "revolving door" for otherwise inadmissible entrants.[5] This skepticism is reflected by a set of "deterrence" policies enacted to complement the non-entrée regime. Governments seek to dissuade potential asylum seekers, referred to as "queue jumpers," from making the journey through harsh detention policies upon arrival, expedited removal processes, and a rollback in access to judicial review.

The combination of non-entrée policies with deterrence measures by Australia and the U.S. undermines the ability of genuine asylum seekers to avail themselves of protection. The Australian government has gone so far as to sponsor public information campaigns warning prospective immigrants about the crocodile-infested waters lining their borders.[6] Dangerous generalizations regarding the nature of asylum flows are driving this policy framework. While refugee status is conceived as a highly individualized condition, the labeling of thousands of people as "economic migrants," as has been the tradition with Haitians in the U.S., prejudices the entire determination system against fair, individual-based determinations. In Australia there have been instances in which important officials within the executive and Parliament have publicly undermined the foundedness of claims by particular groups of asylum seekers.[7] Interdiction policies represent the most tangible manifestation of this exclusionary trend.

The present paper seeks to illustrate how non-entrée policies, specifically interdiction, signify an assertion of state sovereignty and confirm the predominance of territorially based claims to protection by asylum seekers. While the protection claims of asylum seekers have firm footing once they are physically within a state's territory, when they find themselves in the spaces in between territorial boundaries, prospects for protection are as tenuous as the unseaworthy vessels that are so often a hallmark of their grave circumstances. The first section introduces the cases, U.S. and Australian interdiction policies, and establishes a rationale for the comparison. The following section will explore the remaking of the condition of being "outside" in the language of immigration, considering the plenary power doctrine and the implications of extraterritoriality. The final section contains commentary on the state of refugee protection with respect to interdiction.

II. Interdiction in the U.S. and Australia: A Framework for Comparison

While Australian and U.S. interdiction policies are essentially homegrown, products of the countries' respective domestic political environments and regional conditions, compelling parallels exist between the two. Essentially, they are both concerned with the diversion of asylum seekers from their shores. The overriding concern manifest in these projects is the states' discomfort with a self-diagnosed territorial vulnerability. This perceived weakness has been com-

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batted with drastic measures to regain control over entry. In both cases, the policies were introduced only after a series of other deterrence measures had appeared to fail. The lead role of the executive in initiating the interdiction measures in Australia and the U.S. demonstrates the extent to which immigration control measures were equated with questions of national security. The importance of keeping potential entrants physically outside a demarcated zone in both instances reflects the power of protection mechanisms once the line has been crossed. The role of an activist judiciary in developing these protection mechanisms and in challenging the development of restrictionist norms has been significant in both cases. While governmental discourse surrounding the policies has acknowledged international law and obligations regarding asylum seekers, the goal of reasserting sovereignty clearly supersedes international responsibilities in this regard.

Acknowledging the parallels between the interdiction policies of these two countries leads to an inquiry regarding the possibility of some kind of causal link. Given the American reputation for unsavoury exports and the fact that Haitian interdiction preceded Australia's formal policy by twenty years, the possibility that the U.S. policy served as a precedent looms large. One of the many criticisms levied by human rights advocates over the course of Haitian intervention was that America was setting a negative example for other countries and that refugee protection could suffer exponentially as a consequence. Of special importance to the legal community was the legitimizing of the treatment of Haitians through the resounding victory of the state in Supreme Court case *Sale v. Haitian Centers Council (1993)*. The late Arthur C. Helton, a lawyer at the helm of the movement to challenge interdiction, called the *Sale* case "a dangerous precedent at the international level," with the likelihood of being interpreted by some states "as an invitation to use brutal forms of refugee control."[8]

While America's long-standing interdiction policy certainly aids the Australians in their ability to deny extraterritorial responsibility, interdiction arose as a policy option primarily as a result of domestic and regional developments. For this reason, the initial inquiry must lie, not in the realm of precedent setting, which emphasizes the agency of the state in responding to conditions, but in the conditions themselves. There have been several attempts to explain similarities across immigration policies in liberal democratic countries along these lines. In a comparative study of nine countries, Cornelius et al. defend a "convergence hypothesis" which finds a "growing similarity" in the policy instruments used in immigration control along with the results of these policies and their reception by the public.[9] Acknowledging the importance of changes in the international system, the authors hold that it is *endogenous* factors that are the key determinants in immigration control.[10] In a smaller-scale study focusing specifically on the state of asylum, Joppke also emphasizes the importance of a state-based framework in which "there is a convergence on the erection of doubly restrictive asylum regimes."[11] Brief overviews of the interdiction policies of the two countries illuminate key points and will set the stage for further inquiry.

U.S. Interdiction Policy: From Reagan to Clinton

When President Reagan proclaimed on September 29, 1981, that illegal immigration had reached the level of a "serious national problem detrimental to the interest of the United States," an interdiction policy explicitly directed at Haitians was set in place that would survive ideological shifts in the White House and the end of the Cold War.[12] This Presidential Proclamation along with Executive Order 12324 of the same day outlined the nature of the threat posed by an influx of illegal immigrants, thereby activating the constitutionality of presidential authority in such matters and granting the Coast Guard the responsibility of protecting America's shores from the onslaught. The Coast Guard was given authorization to stop and board ships on the high seas that appeared to have the intentions of entering territorial waters with human cargo in violation of immigration law. The presidential directive ordered the Secretary of State to enter into bilateral agreements with "appropriate foreign countries" to facilitate co-operation in deterring illegal immigration to the U.S. Haiti was the only state with which any such agreement was ever negotiated, stipulating the return of interdictees to their country of origin. In recognition of its responsibilities not to *refoule* refugees, there was a provision that "no person who is a refugee would be returned without his consent." Immigration and Naturalization Service (INS) officials were stationed on board the Coast Guard cutters to make the necessary determination as to the likelihood of *refoulement*. The adequacy of this screening process was soon to be challenged by the courts.

It would amount to a vast oversimplification to interpret the Haitian interdiction policy initiated by Reagan in 1981 simply as a symptom of anti-immigrant feelings leading to a newly aggressive restrictionism. If this were the case then Haitians, estimated to represent only 2 per cent of illegal immigrants at the time of the interdiction policy, would not have been a logical target.[13] Haitian policy must be viewed in light of attitudes and policies towards Cuban asylum seekers, beneficiaries since 1966 of the Cuban Adjustment Act, which voided individual status determination requirements and granted Cubans automatic entry into the United States. While the 1980 Refugee Act established a normative

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break in American law from the Cold War tradition of conceiving of refugees as ideological symbols, long-standing approaches towards Cubans would continue to hold sway over the legal conception of refugee status in American law. Haitians had the bad luck of arriving *en masse* on the shores of southern Florida alongside Cubans in the late seventies and early eighties. Indicative of the building pressure in southern Florida, the INS was busy developing plans in 1978 to expedite the removal of Haitians by way of mass expulsion hearings motivated by the perception that current backlogs and inefficiencies were attracting further flows.[14] The arrival of 125,000 Cubans and 25,000 Haitians on the shores of Florida over a five-month period in 1980 threw the asylum system into crisis. Although President Jimmy Carter granted "special entrant status" to both groups, such a humanitarian gesture was unsustainable in the face of such large flows. Due to the special legislation in place welcoming Cubans and Fidel Castro's outright refusal to take back any new arrivals, the only opportunity to assert control rested with the Haitians.[15]

The original interdiction policy introduced by Reagan remained in place for eleven years, suffering from continuous legal challenges regarding the nature of refugee determination procedures. A significant development in the interdiction program, with important legal ramifications for the question of asylum, was the use of the U.S. base in Cuba, Guantánamo Bay, as a holding pen for Haitians awaiting screening. Although these challenges resulted in small victories, including temporary bans on repatriation of Haitians, President George H.W. Bush's issuance of the Kennebunkport Order on May 23, 1992, rendered this progress irrelevant.[16] By including the following provision, "nor shall this order be construed to require any procedures to determine whether a person is a refugee," Bush assured that intercepted migrants would be summarily returned to their country of origin, overriding the previous commitment to avoid *refoulement*.

Flows had once again increased dramatically in the wake of September the 30, 1991, military coup overthrowing Haiti's first democratically elected president, Jean-Bertrand Aristide. In lieu of screening procedures before repatriation, the Bush administration sought to divert potential asylum seekers through the channels of in-country processing, a mechanism "historically conceived as an additional avenue of protection for refugees."[17]

Despite President Bill Clinton's defense of the principle of first asylum and his criticism of the current policy during the campaign, once in the White House, he continued the interdiction program in the same fashion. Clinton's attention to Haiti as a foreign policy priority acknowledged the reality that even the most draconian immigration control policies would not stop Haitians from making the journey. Economic sanctions were imposed and ultimately a military intervention carried out in attempt to stabilize the political situation. The most significant court case regarding interdiction was decided in the beginning of Clinton's first term. In *Sale v. Haitian Centers Council* (1993) the Supreme Court ruled 8 to 1 that Article 33 of the 1951 Convention relating to the Status of Refugees (the Refugee Convention), protecting asylum seekers from *refoulement,* did not have an extraterritorial effect. This ruling legitimized the direct return of Haitians interdicted on the high seas without any inquiry into their refugee status.

Clinton was ultimately forced to recognize the urgent protection needs despite this ruling, however. This resulted in the provision of safe havens at the Guantánamo base and in other countries around the Caribbean. The persuasion by the U.S. of countries in the Caribbean and Central America to provide safe havens for Haitians demonstrated a blatant shifting of the problem. As one critic said, with the creation of safe havens in Honduras and Venezuela, "the United States stood the principle of burden sharing on its head."[18]

Australia's Interdiction Policies: The War on Smuggling

Compared to the long historical trajectory of Haitian interdiction, Australia's policy is in its infancy. The legislation outlining the new policy of interdiction, the Border Protection (Validation and Enforcement) Act 2001, was introduced in September of that year to retroactively legitimize action taken in late August by the Australian government. Unlike the case of U.S. interdiction policy that developed behind closed doors over time and was not a reactive measure taken in response to one single event, Australia's policy was formed in the midst of a standoff at the edges of its territorial waters. In late August 2001 a Norwegian cargo ship, the *Tampa*, responded to a call of a ship in distress by the Australian Coast Watch, thereby starting a chain of events that would capture the attention of the world for days and lead to a complete overhaul in Australia's immigration policies. After taking aboard the 433 passengers, hailing from Afghanistan, Iraq, Sri Lanka, and Pakistan, the captain headed for Indonesia, the point of origin of his new passengers. Complicating the situation, some of the hopeful asylum seekers threatened to jump overboard if returned to Indonesia. Considering this development and the deteriorating health of many of the passengers, the captain decided to make way for Australia's Christmas Island, the nearest port. Australia denied permission to enter territorial waters and proceeded to establish a naval blockade to prevent entry into the port. The standoff ended with the interdiction of the ship by the Australian Special Services and the removal of

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the asylum seekers onto an Australian naval vessel and eventually to refugee processing points around the Pacific.[19] While refugee advocates in Australia attempted to force the government to bring the asylum seekers to the mainland in order to file their claims, the decision was ultimately in favour of the state. The court's message was clear: interdictees had no rights under Australian law.

While Australia has a harsh detention policy towards asylum seekers and makes use of other non-entrée policies, interdiction represented a break from past dealings with boat arrivals. Restrictionist policies have been the trend since the Australian asylum system was challenged by the arrival of Cambodian boat people in the late eighties.[20] Despite the smaller numbers, in relevant terms this influx compared with the arrival of thousands of Cubans and Haitian in south Florida in the early eighties and was portrayed in a sensationalist manner by the media and manipulated by politicians. Australia's restrictionist policies should be seen in light of their preoccupation with the asylum-smuggling nexus. In order to combat this phenomenon, Philip Ruddock, Immigration Minister during the John Howard administrations, has taken an active stance in initiating regional co-operation on this issue. The focus has been a program involving the processing of refugee claims in Indonesia with the co-operation of the Indonesian government, International Organization for Migration (IOM) and the United Nations High Commissioner for Refugees (UNHCR).[21] In the year leading up to the *Tampa* crisis, Australia did experience a significant increase in unauthorized arrivals by sea. Despite the increase, Australia still hosts extremely few refugees in comparison to a country such as Canada, which is similarly isolated.[22] The elevation of the *Tampa* standoff to the level of a national crisis was a result of campaign showmanship by the incumbent Prime Minister, John Howard, eager to prove he could take a tough stand on illegal immigration. Now that the elections have come and gone, Howard and his controversial Immigration Minister, Ruddock, have shown a continued commitment to keeping asylum seekers at bay.

III. The Remaking of the "Outside"

In the language of immigration, the condition of being "outside" contains multiple layers of meaning. The policy of interdiction is both a reaction to and an agent in the implementation of these various meanings on three levels. At the most physical level, "outside" refers to a potential entrant's physical location beyond the territorial domain of the state. On a more abstract plain, domestic immigration laws recognize that an individual can be physically present in a state and remain "outside" in legal terms. Finally, it is possible for an individual to be within the jurisdictional control of the state and remain "outside" the zone of juridical responsibility. The shifting emphasis of the condition of being "outside" is underscored by tensions between the various branches of the government exerting their authority over these meanings. These tensions are played out in increasing judicial activism regarding immigration matters and the subsequent challenge to the plenary power doctrine in the U.S. and the corresponding legal basis for executive control in Australia. As the importance of being legally "outside" (but physically within a state) has eroded in the context of domestic rights allocation, states have sought ways to reassert their sovereignty and, thus, their control over who remains physically "outside" the demarcated territorial boundaries.[23] Along with interdiction, Australia's excision of territory from their migration zone for the purpose of limiting the claims of "offshore entrants" emphasizes the capacity of the state to interpret the condition of being "outside" in accordance with domestic concerns.

Immigration Law: The Changing Significance of Positionality

A pillar of immigration law in liberal democratic countries has historically been the de-linking of territoriality with most rights-based claims. Citizenship, "an exclusive status that confers on individuals rights and privileges within national boundaries," exists to demarcate the insiders from the outsiders.[24] An embodiment of this distinction lies in the development of parallel sets of entitlements regarding procedural guarantees in immigration proceedings depending on an immigrant's legal standing: deportation proceedings apply to those legally *within* the country while exclusion procedures apply to those legally *outside*. In the U.S., the case history establishing the treatment of deportable and excludable aliens stretches back to the 1903 Supreme Court case, *Yamataya v. Fisher*.[25] Subsequent judicial rulings established that the right to due process, established by the Fifth and Fourteenth Amendments, is granted to every person in America: "even one whose presence in this country is unlawful, involuntary, or transitory is entitled to that constitutional protection."[26] These universalist interpretations of the Constitution hinge on the use of the word "person" in a portion of the Fourteenth Amendment, implying that the following rights are not related to immigrant status: "nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."[27]

Lacking a bill of rights and without provisions for national citizenship until 1949, Australia is much less developed in its system of rights allocation according to citizenship and migration status. In Australia, "it is difficult to differentiate clearly between the rights of citizens and

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non-citizens because the rights of citizens themselves are not always clearly and consistently defined."[28] Common law with regard to equal legal protection and due process has developed to the extent that certain basic rights are clearly established for all persons in Australia.[29] The Migration Act 1958 established the normative basis for the most controversial feature of Australia's immigration policies that seek to differentiate between legal and illegal non-citizens: mandatory detention policies.[30] While rights are granted at a diminishing rate as one considers the three categories of citizen, legal non-citizen, and illegal non-citizen, the important point remains that a certain level of rights, albeit unequal, is bestowed upon all persons who find themselves physically within Australian or American territory.

In both Australia and the U.S., the domestic legal boundaries delineating the inside from the outside have become blurred over time as the gap between citizen and non-citizen rights has diminished. This is consistent with a general trend across liberal democratic states.[31] The continuous evaluation and contestation of these boundaries by the judiciary has been key to their devolution. The 1982 U.S. Supreme Court decision, *Plyer v. Doe*, granting children of illegal aliens full access to public education, is the most commonly cited example of this trend. With regard to asylum-related concerns, courts have "brought to bear the communitarian impetus of immigration law on the new field of asylum," challenging the deprivation of rights on the basis of due process and equal protection provisions.[32]

In Australia, the courts have been consistently restricted with regard to their authority to contest immigration-related matters. While still limiting the judiciary in many respects, the passage of the Administrative Decisions (Judicial Review) Act 1977 greatly expanded the reach of the courts in immigration matters. As a result, the largest caseload in the Federal Court involving Migration Act decisions appeared in the mid-eighties. The caseload continued to swell by 161 per cent from 1995 to 2000.[33] The arrival of Cambodian boat people in the late nineties was also a focal point in the judiciary's role in both justifying and challenging the government's immigration policy.[34] Interdiction policies represent an explicit intention to control immigration beyond the scope of a judiciary that is weighted more towards principles of inclusion than exclusion.

The Re-emergence of Plenary Power: Operating "Outside" the Law

In wresting control from the judiciary and asserting the power of the executive and Congress (in the U.S.) and Parliament (in Australia) over entry, interdiction policies are grounded in the renewed application of the plenary power doctrine. Entailing "the power to regulate immigration without judicial constraint," this doctrine is grounded in notions of absolute state sovereignty.[35] Demonstrating the conventional use of the doctrine, legislation in the U.S. and Australia in recent years has asserted plenary power by denying judicial review of immigration-related decisions. In 1996 the U.S. passed legislation providing for expedited removal procedures that are not eligible for judicial review. Even more recently, the U.S.A. Patriot Act gives the Attorney General remarkable capabilities to detain non-citizens loosely suspected of terrorist connections. Since the events of September 11, 2001, national security discourse is the trump, giving a whole new life to the reaches of the plenary power doctrine on the domestic front.

Australia has also experienced perennial power struggles regarding authority on immigration matters. Legislation passed on September 21, 2001, redefines most immigration and asylum-related decisions as falling under a "privative clause," signifying that they shall not "be challenged, appealed against, reviewed, quashed, or called in question in any court."[36] Those that emphasize a new era of restricted sovereignty and consider the plenary power doctrine (and its Australian equivalent) to be a "constitutional fossil" underestimate the forces behind restrictionist immigration controls such as interdiction.[37]

Interdiction policies exercise the plenary power doctrine in two ways, exploiting the immunity inherent in the condition of being "outside" on different levels. The most traditional form of plenary power application refers to the ability of the executive and legislature to respond quickly and flexibly to situations that concern the safety and welfare of the nation. Since the process of judicial scrutiny often stands in the way of expediency, it is bypassed in favour of tools such as executive orders and emergency legislation. Thus, the state is operating *legally* "outside" the reach of its own courts. Interdiction also constitutes a twist on the old practice of "judge-proofing" by operating *physically* "outside" the territorial boundaries of the state. Measures taken to prevent entry into territorial waters have the effect of "skewing the inquiry into an immigrant's physical connection" to the state.[38]

In this regard, the controversial legal condition of extraterritoriality is of the utmost importance. In the American and Australian cases, interdiction policies evoke immunity on both levels: the domestic policy formation process and the extraterritorial application of the policy. Experiencing many twists and turns under the direction of three Presidents, the U.S. interdiction policy actually gained immunity over time thanks to the decision in the *Sale* case.

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Whether or not this will be the case in Australia is yet to be seen.

Reagan's interdiction policies "effectively restored much if not all of the immunity that the plenary power doctrine originally established."[39] Reagan's policy was enacted under Constitutional and statutory provisions that granted express authority "whenever the President finds that the entry of any aliens into the United Sates would be detrimental to the interests of the United States, he may, by proclamation, for such a period has he shall deem necessary suspend the entry of all aliens or any class of aliens."[40] Illustrating just how dramatic it was for the President to exercise this power, the Task Force on Immigration assumed that an amendment to current legislation would be necessary to legitimize such a policy in the form of an "Emergency Interdiction Act." Due to the political pressures emanating from the situation in Florida, the Reagan administration forged ahead with a drastic new form of immigration control making use of a statutory source of power that had not been exercised by any President since becoming law in 1952.[41] Unilaterally, Reagan declared, "The entry of undocumented aliens from the high seas is hereby suspended and shall be prevented by the interdiction of certain vessels carrying such aliens."[42]

Reactionary and politically motivated, the first act of interdiction in Australia occurred entirely at the behest of the executive before the official articulation of any policy related to the actions. When the *Tampa* with its cargo of 433 asylum seekers entered Australia's territorial waters after being denied permission, the government responded with the drastic measure of ordering the Special Armed Forces to intercept and take control of the *Tampa* in the appropriately named "Operation Reflex." By doing so, the Australian government proceeded to elevate the event into a national security crisis, thereby justifying the executive's overarching decision-making power. The government presented the Border Protection Bill 2001 to the Parliament the same day as troops boarded the *Tampa.* The main provisions included the retrospective granting of "absolute discretion" to officers in the use of "reasonable force" against any ship just inside the territorial sea to force it back out. Most importantly, the bill declared outright that interdictees had no rights under Australian law and would not be given an opportunity to seek refugee status.[43] Although this bill was voted down in the Senate (after passing in the House of Representative), a very similar piece of legislation, the Border Protection (Validation and Enforcement Powers) Bill 2001, was passed the following month.

The wording of Reagan's original Executive Order did not explicitly deny the possibility of the extraterritorial responsibilities to asylum seekers under America's new refugee regime. In fact, the active participation of the INS in the interdiction of migrants and the provision that "no person who is a refugee will be returned without his consent" show a willingness to comply with these obligations.[44] A year after the induction of the program, the U.S. Attorney General wrote a letter to the UNHCR Chief of Mission in Washington, D.C., confirming "the Administration is firmly committed to the full observance of our international obligations and traditions regarding refugees."[45]

The reality of the U.S. interdiction program, however, represents a sharp break from this well-intentioned rhetoric. Guidelines developed by the INS explained to staff their responsibility in assuring that the U.S. is "in compliance with its obligations regarding actions toward refugees, including the necessity of being keenly attuned during any interdiction program to any evidence that may reflect an individual's well-founded fear of persecution."[46] Due to the inherent instability of the situation, however, INS officials were only permitted to have contact with the interdictees at the discretion of the Coast Guard officer in charge. The fact that interdiction was scheduled to occur *only* outside the territorial waters of the United States implies strongly that, were the boarding of vessels to occur within the territorial waters, a different set of procedural norms would apply. This judge's speculation regarding the extent of due process allowed to interdictees represents this ambiguity: "Because of the nature of the screening process and the fact that it was to take place on the high seas, it could not have been the intention of the President to allow the interdictees to initiate judicial review of their cases in the district courts of the United States."[47] The half-hearted provisions to provide adequate screening blurred the implications of extraterritoriality.

Convincing evidence of procedural inadequacies lies in the numbers of interdicted Haitians that successfully availed themselves of protection. Ten years after Reagan's executive order, out of the 25,000 Haitians interdicted, only twenty-eight were paroled into the U.S. to pursue asylum claims.[48] With mounting evidence against the government pointing to irregularities in the system, Haitian advocates seemed on the verge of a crucial decision acknowledging the rights of interdictees to due process at least on a par with exclusion proceedings. In November of 1991, a federal court hearing *Haitian Refugee Center, Inc. v. Baker* granted an injunction, preventing the forced repatriation of Haitians from Guatánamo Bay. By successfully bringing the issue of extraterritorialty to a head, judicial activism forced the executive to clarify its true intentions with regard to interdiction.

With the issuance of the Kennebunkport Order in response to a surge of interdictions following the coup in

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Haiti, Bush unequivocally rejected the extraterritorial application of U.S. law relating to refugees. While Reagan's order had at least implied a responsibility to avoid *refoulement*, the new policy explicitly states that U.S. law concerning *non-refoulement* does "not extend to persons located outside the territory of the United States." The court's reasoning in *Sale v. Haitian Centers Council* legitimized this position. At the end of the day, it was the Court's reliance on the presumption that "Acts of Congress do not ordinarily apply outside our borders" that resounded the most loudly.[49] Regardless of the extraterritorial protections that would normally apply, the majority opinion holds that the plenary power doctrine supersedes such protections anyway. Accordingly, the President possesses "ample power to establish a naval blockade that would simply deny illegal Haitian migrants the ability to disembark on our shores."

The dissenting opinion of Justice Blackmun dismissed the majority's decision in *Sale* as based on a "tortured reading" of the Refugee Convention. His argument emphasizes the minimalist nature of the plaintiff's claim: "The refugees attempting to escape from Haiti do not claim a right of admission to this country. They do not even argue that the Government has no right to intercept their boats. They demand only that the United States…cease forcibly driving them back to detention, abuse and death."[50] One cannot help but wonder if the court was somehow influenced by the practical implications of a *Haitian Centers Council* victory. An obligation to prevent *refoulement* would go hand in hand with a refugee status determination procedure. If conducted in a just and fair manner, this could have led to the incorporation of tens of thousands of Haitian refugees. The extraterritorial application of Article 33 was not a precedent they were prepared to set.

While Justice Blackmun was the lone dissenter on the Supreme Court bench, his interpretation of the extraterritorial application of *non-refoulement* was backed up by the Inter-American Commission of Human Rights in 1996.[51] Despite the court's decision that the norm of *non-refoulement* should be extraterritorially applied, the non-binding nature of the court's decision and the second-tier status of international law in American jurisprudence prevented the development from directly affecting interdiction policy. In fact, American's reply to the commission's findings stated their position on the extra-territorial application of all international human rights law: "The right to security of the person does not create an obligation on states to provide admission to persons fleeing their country by sea or preclude their repatriation, even in the case of a *bona fide* refugee."[52]

Exraterritoriality: "Outside" in Every Sense?

In the Australian case, extraterritoriality functions in a unique sense not with regard to interdiction, a policy that mirrors the post-*Sale* position in the U.S., but in the exceptional act of "excision." The most interesting and controversial immigration legislation passed in September 2001 was undoubtedly the Migration Amendment (Excision from Migration Zone) Bill 2001. This legislation had the effect of legally removing the outlying territories of Christmas Island, Ashmore Reef, Cartier Islands, and Cocos Islands from Australia's "migration zone." This can be seen as a backup or complementary policy to interdiction: if in the case that Coast Watch does not successfully interdict asylum seekers, they will still be unable to access legal recourse on the dry land they are most likely to reach. This policy creates the immigration category of "offshore entry person" to refer to non-citizens who enter Australia illegally via these territories. Thus the Australian state is simultaneously expanding, in terms of its extraterritorial immigration control operations, and shrinking in terms of the territory for which it is legally responsible. While interdiction exploits the gap between jurisdiction and juridical responsibility on the high seas, Australia's excision policy has created such a gap on its own territory. By rewriting its own territorial obligations, Australia has invented yet another meaning of "outside," asserting its sovereign power to define its own national community.

IV. Interdiction and Refugee Protection: Protection versus Rights to Protection

The long-standing policy of Haitian interdiction and Australia's new commitment to intercept asylum seekers beyond their territorial waters exposes a significant gap between purported rights to protection and actual protection. Champions of refugee protection and experts in international law assert rights that conflict with the current restrictionist climate: "Not only does the right to protection against *refoulement* inhere before status determination, but it applies as soon as a refugee comes under the *de jure* or *de facto* jurisdiction of a state or party."[53] While many agree that this right *should* apply, according to a resoundingly conclusive decision by the U.S. Supreme Court, in reality it is not enjoyed. Another theoretical application relevant to interdiction claims: "there is no principled reason to release states which act extraterritorially from legal obligation that would otherwise circumscribe the scope of their authority."[54] To the detriment of refugee protection, such a legal obligation is consistently recognized only in international law, however, and not by the states that are responsible for upholding it. Joppke's assertion that "human rights internationalists

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have inflated the effectiveness of international norms and regimes" speaks to this imbalance.[55]

This gap exists because, despite the existence of a multifaceted international refugee regime, the locus of power rests with states. There exists no legal doctrine or institutional body that can effectively check the state (especially a state such as the U.S. or Australia) with regard to its acts and omissions in refugee protection. The primary international instruments of refugee protection, the Refugee Convention and its Protocol, are not self-executing. The protection mechanisms and guidelines enshrined in these documents gain strength only to the extent that they are incorporated into the domestic law of the signatory states. Significantly, individuals in need of protection possess no right to asylum; "Governments grant asylum; individuals 'enjoy' it."[56] As shown by the case of interdiction, even the complete incorporation of the tenets of the Refugee Convention into the canon of domestic law provides no guarantees. Even the judiciary has the leverage to interpret protection obligations with a slanted perspective that puts national concerns ahead of what would seem to be justice (as in the *Sale* case).

While the political and financial commitments of proactive policies such as refugee resettlement speak encouragingly to an overall commitment to the spirit of protection, states maintain the convenience of interpreting their obligation to refugees as "*ex gratia*," implying whatever protection is provided results purely from humanitarian goodwill.[57] Evoking the uncertain grounding of the rights of asylum seekers, an American refugee advocate laments, "We have become minimalist in our demands…because the violations committed by our government deny even minimum standards of refugee protection that we thought were no longer open to question."[58]

The assertion of state sovereignty embodied by interdiction policy highlights the relative weakness of UNHCR, the international institution mandated with refugee protection, to provide any recourse for asylum seekers in this situation. According to the Refugee Convention, the role of UNHCR is to supervise the administering of international refugee protection. Emphasizing their reliance of the signatory states in the fulfillment of their mandate, Article 35 states that the contracting parties must "undertake to cooperate... and shall in particular facilitate its duty of supervising the application of the provisions of this Convention." In its supervisory role, however, UNHCR has not found an effective way to assert itself when it finds states to be falling short of their responsibilities under the Refugee Convention. Particularly crippling in its supervisory relationship with countries such as the U.S. has been UNHCR's heavy reliance on major donors. The funding situations creates a "Catch 22" in certain protection-related quandaries: strong advocacy regarding protection claims contrary to the national interests of a major donor could result in fewer resources and a *de facto* reduction in protection capacity.

A shocking example of this institutional weakness occurred in High Commissioner Poul Hartling's visit to the U.S. in late 1981 after the interdiction program began. Responding to criticisms after the trip regarding his failure to confront the administration on its new policy, Hartling said he was satisfied that the screening procedures were "absolutely fair and fine."[59] While the UNHCR spoke out against Australia's handling of the *Tampa* incident, it was unable to take any positive actions on behalf of the asylum seekers at risk. The only concrete gesture they made was to refuse to process a group of asylum seekers taken to Nauru by Australia, claiming it was Australia's responsibility to carry out the status determination process for the population in question.

This combination of nearly untouchable states, possessing the power to act arbitrarily in pursuit of their own interests, with a UNHCR incapable of posing a credible challenge, represents the bleak realities of refugee protection in the current climate. Hope remains, however, when one acknowledges that refugee protection exists, in its strengths, not only its weaknesses, thanks to states. While restrictionism is endogenous to the state, so are the liberal democratic ideals that foster protection. If change occurs, it will come from within: "Not external, but internal, constraints have prevented liberal states from shielding themselves completely from global refugee movements."[60]

The judiciary has a powerful role to play in establishing the norms of protection offered to asylum seekers. "Insulated from the popular politics and empowered by developments in administrative and human rights law…the courts have been able to expand the responsibilities of states to foreigners, including asylum seekers."[61] Safeguarding asylum seekers from the blow to protection dealt by interdiction policies presents a unique challenge. The Refugee Convention is generally thorough in providing for the various issues faced by asylum seekers, but interdiction is not explicitly referred to. Because of this, "it is really only when refugees are located on the high seas that they may fall outside the purview of the existing refugee law regime."[62] The existing tool kit of protection must be used creatively from within states in order to render these policies impracticable.

The central quandary posed by interdiction, extraterritoriality, will be most effectively addressed, not through a groundbreaking ruling that will turn all of the courts previous decisions on their heads, but through a piecemeal process. Motomura presents two such ways of addressing

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interdiction as a "unique" case of extraterritoriality. The first relies on precedents wherein the state's "affirmative acts" with relation to an immigrant alter the legal obligations towards that immigrant. The other makes use of the legal concept of the "functional equivalent of the border" in order to provide interdictees protection from *refoulement*.[63] Establishing positive precedents in this regard is helpful, but the ability of the executive to evoke national security concerns as a trump could undermine such progress at any time. Despite this inherent weakness, the judiciary remains empowered. For example, in the U.S. it has been argued that the persistent attempts in the lower courts to establish exceptions to plenary power "will eventually lead the Supreme Court to 'wear way' the doctrine little by little without expressly overruling its precedent."[64]

V. Conclusion

Interdiction policies have the capacity to undermine refugee protection in indirect and diffuse ways. Through their implementation of interdiction, the U.S. and Australia have sacrificed a degree of moral authority that will potentially hinder regional co-operation arrangements and thwart their ability to act as advocates for refugees worldwide. The danger of hypocrisy was particularly real with reference to America's advocacy on behalf of Indochinese refugees in which the principle of first asylum was threatened by the pushing back of boats by Southeast Asian countries. In the wake of the Tampa standoff, Australia's reputation as an advocate for refugees has been similarly compromised. Reportedly, when demands were placed on President Musharraf of Pakistan by the international community to open Pakistan's borders to fleeing Afghans, he replied, "If a rich country like Australia could shut its doors to a few thousand asylum seekers, why should a poor country like Pakistan – which already hosts about 2 million refugees – take more?"[65] The disconnect between both of these countries' rhetoric concerning refugee protection and their own behaviour conveys a strong sense of the "not in my backyard" phenomenon.

The most troubling aspect of Australia's new policies is the "Pacific Solution," a self-proclaimed regional burden-sharing agreement conceived to help Australia avert the supposed impending national crisis. More realistically, the plan was conceived to help Howard achieve his campaign promise that not a single asylum seeker would reach Australia's shores if he were to be elected. Under this plan, interdictees have been taken to processing camps on islands in the Pacific. Governments of countries such as Nauru, Fiji, and New Zealand were baited into accepting the asylum seekers by millions of dollars in aid by the Australian government. Fitzpatrick describes the problematic nature of this arrangement: "Financial transfers may appear to be a questionable substitute for the core obligation to provide direct physical protection to refugees, especially where such transfers take place between highly developed and lesser-developed states and resemble 'burden shifting.'"[66] The accusation that Australia has created a "new international 'practice:' the export of a refugee problem from one area to another" is incorrect, however.[67] In taking interdicted Haitians to safe havens in developing countries around the Caribbean, the U.S. deserves credit for authoring this unsavoury "new international practice." This practice has opened up new frontiers in the debate on *non-refoulement*. Refugee advocates adopt a liberal interpretation, claiming that sending asylum seekers to countries such as Nauru that are not signatories to the Refugee Convention could constitute *refoulement*. While the risk of *refoulement* might exist, a more real threat is posed by the undermining of the principle of asylum.

In both cases, the need to implement such extensive regional co-operation programs emphasizes two important things about interdiction. The act of interdiction itself has the potential of creating a "refugee in orbit" type of situation, and although there is no recognition of specific protection obligations, the interdicting state must deal with the asylum seekers in one way or another. Even if states are not bound by statutory obligations, interdiction exacts high costs on states in the management of interdictees. That the states are willing to pay such a high price to avoid admitting asylum seekers onto their soil demonstrates the extreme measures politicians are willing to take in order to foster the appearance of control. Australian Treasurer Peter Costello has predicted yearly costs of the Pacific Solution to be in the vicinity of $450 million (in Australian dollars).[68] This exorbitant amount of money being spent to keep out asylum seekers far exceeds the resources it would take to receive them through the appropriate channels in Australia.

Located both above and beyond the reach of the law, interdiction policies exist in a unique realm exploited by states to exert an unprecedented level of immigration control. The unchecked power of the U.S. and Australia in this regard undermines notions that their sovereignty is being eroded by the human rights regime and is subject to a "de facto transnationalization of immigration policy."[69] These policies represent a powerful reassertion of sovereignty on behalf of the state. Contrary to the depiction of reality characterized by "the desacralization of territory and the fraying of national communal boundaries," interdiction policies emphasize the persistent centrality of territoriality with regard to refugee protection.[70] Australia's adoption of interdiction and the complete overhaul of its immigration laws twenty years after the inception of the Haitian Inter-

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diction Program suggests that the climate has, perhaps, become even more conducive to such muscle-flexing by states. As Brubaker writes, "Those who herald the emerging postnational age are too hasty in condemning the nation-state to the dustbin of history."[71]

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Preamble

The proposals drafted by Wendy Young and Bill Frelick and reproduced below were written as advocacy pieces, not for publication, the second being provoked by the first. They illustrate dynamically the challenge faced by refugee advocates in responding to interdiction measures: does an alternative to interdiction such as source country processing mitigate the damage done to the right to seek asylum, or does it further undermine the basic principles of refugee protection?

In response to the two contradictory positions, the Refugee Council USA convened a meeting which resulted in a decision to develop a third document that reflects common opposition to current U.S. policies on Haitian asylum seekers.

Resettlement and Processing of Haitian Refugees

Wendy Young

Abstract

Political violence and human rights abuses are escalating in Haiti, as the country's nascent democracy deteriorates. Already, the United States and countries in the Caribbean region are developing and implementing policies designed to deter and prevent the arrival of Haitian asylum seekers, despite the fact that the flow of asylum seekers has not yet significantly increased from past years.

This paper raises concerns about the failure of the United States to offer protection to Haitian refugees and proposes the implementation of a resettlement program as a partial solution to this systemic failure. The paper endorses the concept of in-country processing of Haitian refugees if done with significant safeguards to prevent further abuses against such applicants.

Résumé

Alors que la démocratie naissante périclite à Haïti, la violence politique et les abus des droits humains sont en nette croissance. Mais déjà, les États-Unis et d'autres pays de la région des Caraïbes érigent des politiques visant à dissuader et à empêcher l'arrivée de demandeurs d'asile haïtiens, et cela malgré le fait que le flot de réfugiés n'a pas augmenté de façon appréciable par rapport aux années précédentes.

Cet article exprime de fortes inquiétudes devant l'échec des États-Unis à offrir des protections aux réfugiés haïtiens et propose, comme solution partielle à cette défaillance systémique, la mise en œuvre d'un programme de réinstallation. L'article donne son aval à l'idée de traitement sur place des réfugiés haïtiens, à la condition expresse que des mesures solides soient mises en place pour garantir la sécurité de tels demandeurs et empêcher qu'ils ne soient victimes d'abus additionnels.

On April 11, 2003, representatives from the White House, Department of Homeland Security, Department of State, the National Coalition for Haitian Rights, the National Immigration Forum, the United States Conference of Catholic Bishops, and the Women's Commission for Refugee Women and Children convened to discuss the need for improved access to U.S. asylum and refugee systems for Haitian asylum seekers. It was requested that the NGO representatives further clarify their recommendations regarding resettlement processing within Haiti itself as well as in countries in the surrounding region, such as the Dominican Republic and the Bahamas.

Before offering a brief outline of the parameters of the proposed resettlement program, we must note that the NGOs providing these recommendations are united in their belief that the United States must comply with its obligations under both U.S. and international law to provide protection to refugees who have a well-founded fear of persecution. Such protection, which would normally be available through the U.S. asylum system, has been severely curtailed for Haitian asylum seekers through a series of measures, despite the deteriorating political and human rights conditions in that country. Such measures have included interdiction, third-country resettlement, detention, denial of parole and bonds, and fast-tracked asylum adjudications.

We therefore offer the following recommendations from the perspective that resettlement is only a partial solution to the barriers preventing Haitians from presenting their asylum claims.

The Benefits of a Haitian Resettlement System

In-Country Processing

In years past, the United States has experienced significant influxes of Haitian refugees when political and economic conditions in Haiti deteriorated. Currently, there is little evidence to justify a fear that we are again facing a Haitian refugee crisis. It is true, however, that human rights conditions in Haiti are worsening. This has resulted in an increase in the asylum grant rate for those Haitians who have been able to access the U.S. asylum system. It has also resulted in a slight increase in the number of Coast Guard interdictions and the numbers of Haitians seeking protection in neighbouring countries such as the Dominican Republic and the Bahamas.

Resettlement processing could serve as an appropriate partial response to this developing situation. It offers an opportunity to balance the fear of a mass outflow against the need to offer protection to Haitians who demonstrate a well-founded fear of persecution. It also would facilitate the ability of the United States to meet its target goal of 50,000 refugee admissions in FY 2003, a goal that is currently eluding the resettlement system in the face of security issues and other concerns in many other parts of the world.

Moreover, resettlement is an orderly process. Unlike asylum, the United States can control the number of refugees brought to the United States. Resettlement also requires thorough security clearances before a refugee is allowed to proceed to the United States. Finally, resettlement would offer an alternative to at least some Haitians who might otherwise attempt the risky boat voyage to the United States.

In-country processing was utilized in Haiti during the 1990s. It offered protection to approximately 1,500 refugees who decided to present themselves at U.S. processing sites. After recognition as refugees, they were allowed to proceed to the United States where they were able to integrate into the United States with the assistance of voluntary agencies with expertise in resettlement.

Regional Processing

Regional processing out of the Dominican Republic and the Bahamas—the two largest receiving countries for Haitian asylum seekers—would also offer a number of benefits. First, because of their small size and population, both countries have expressed grave concern about the number of Haitians arriving on their shores. Regional resettlement processing would therefore alleviate the pressure on the Dominican Republic and the Bahamas, and would possibly increase the tolerance of the Dominican and Bahamian authorities and public for hosting at least some Haitians.

Second, there is no meaningful refugee protection in either country. Haitians in both countries are vulnerable to detention and forced return. In the Dominican Republic, the Women's Commission has documented that Haitians are vulnerable to police harassment; children are typically deprived of an education; and families often end up homeless and living on the streets of Santo Domingo.

Lessons Learned from Past Resettlement Efforts in the Region

It must be noted, however, that in-country resettlement processing presents certain risks to would-be applicants. It requires Haitians to surface and present themselves to processing authorities, thus risking exposure to Haitian government authorities and others who might seek to further persecute such applicants. Such incidents were documented in the 1990s, especially in the early days of the program when the only processing site was located across the street from the national headquarters of the Haitian police, who closely monitored, and frequently harassed, individuals seeking access to the processing office.

Resettlement also runs the risk of being burdensome and time consuming. Past in-country processing efforts were hindered by the imposition of multiple in-person interviews that required the applicant to present himself or herself in Port-au-Prince. It also required the completion in writing of complex application forms, a requirement that rendered illiterate Haitians virtually ineligible for resettlement.

Finally, once a Haitian was identified as a refugee eligible for resettlement, there were often long delays before the person was actually transferred to the United States. Again, this rendered individuals vulnerable to further persecution while they waited to be moved to the United States.

Following are some measures that must be implemented in the context of any future resettlement program to ensure that such barriers to protection are addressed:

Involvement of U.S.-based and local NGOs with refugee and human rights expertise: The in-country resettlement program initiated in Haiti in the 1990s was significantly improved when U.S.-based resettlement agencies, known as Joint Voluntary Agencies (JVAs), were utilized to identify potential candidates for resettlement and to assist in their processing. In the 1990s, both the U.S. Conference of Catholic Bishops and World Relief acted as JVAs in Haiti. The International Organization for Migration facilitated processing in Port-au-Prince.

Such agencies performed several key functions. They conducted initial screenings and intakes. They assisted Haitians in preparing for their actual refugee interviews. They helped Haitians complete their asylum applications, known as I-589s. They arranged travel for those Haitians accepted for resettlement.

Since that time, several successful initiatives have been implemented to facilitate resettlement in other parts of the

world that also build upon the expertise of international and local NGOs. For example, in Pakistan, the International Rescue Committee has partnered with local NGOs in an effort to discreetly identify those Afghan refugees most in need of resettlement. In Nairobi, the Hebrew Immigrant Aid Society is working with the UNHCR, relief agencies, and others to identify refugees in the region for whom resettlement is appropriate. By working with local NGOs and others who know the refugee communities, such efforts alleviate the risk of overburdening the processing system with applicants that are clearly ineligible. Such efforts also have precedents in Haiti, as the JVAs frequently took referrals from local human rights organizations.

Location of processing sites: It is critical that processing sites be located not only in Port-au-Prince but in outlying regions as well. In the 1990s, processing sites were eventually set up by the JVAs in Cap Hatien and Les Cayes. This alleviated the need for applicants to make the arduous and often risky trip to the capital in order to access resettlement processing.

Design of processing sites: There are serious risks involved when a Haitian physically appears at a processing site. One potential way to address this concern is by locating processing sites in facilities where other activities are also taking place. Refugee applicants may therefore be less easily identified by anyone monitoring the building. An additional measure that JVAs used in the 1990s to some effect was to vary the interview sites for applicants. Finally, processing sites should never be located near Haitian government offices.

Community outreach: Individuals in need of resettlement could also be referred to the system without having to present themselves physically at an office. Pilots have been implemented in places such as Pakistan under which Afghan refugees are referred for resettlement through NGOs working at the community level. Again, this would address the potential risk run by the applicant when having to present themselves and at the same time could serve as a useful and effective way to identify those most at risk of persecution.

Streamlining of Interview Procedures: Efforts should be made to limit the number of times an individual is forced to appear in-person to apply for resettlement. In the 1990s, approximately four appearances were required before an applicant was accepted or rejected for resettlement. This was tremendously burdensome to applicants who had to travel each time to the processing site. It also exposed them to further persecution.

Outprocessing: It is also critical that those individuals who are identified as refugees and accepted for resettlement be quickly transferred to the United States. To facilitate this outprocessing, refugee security clearances must be prioritized and conducted quickly.

Regional Processing: Many of the recommendations presented above would also apply to resettlement initiatives in the region. An additional key component would be to facilitate the prompt and safe return to Haiti of those applicants who are found not to qualify for refugee status. This would help ensure that the resettlement program does not become a magnet that prompts more Haitians to attempt to enter the Dominican Republic or the Bahamas.

Prevention of Fraud: Concerns have been raised in past months regarding the vulnerability of refugee resettlement to fraud, as refugees sometimes seek to bring unrelated individuals with them to the United States. Significant groundwork has been laid to address this problem in Africa and other sites through the use biometric data. These efforts should be replicated in any Haitian program.

Minimal Protection for Interdicted Haitians: Even when resettlement is available, there will undoubtedly be some Haitians who choose to leave by boat. The identification of refugees who are interdicted should be facilitated through the assignment of Creole speaking officers on Coast Guard vessels that are patrolling the waters around Haiti. Such officers should at a minimum inquire as to whether an interdicted Haitian has concerns about returning to Haiti. They should also, whenever possible, interview each Haitian individually rather than in groups, so that a refugee can more comfortably raise concerns about returning home. Finally, interdicted Haitians should be informed about the availability of in-country processing if they are repatriated.

Conclusion

We look forward to discussing these proposals with you in greater detail. While refugee resettlement is only a partial solution toward ensuring adequate protection of Haitian refugees, we believe that it would send an important signal to the world community that the United States will provide protection to at least some Haitians who are victims of human rights abuses.

Cc: Kelly Ryan, Department of State
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In-Country Refugee Processing of Haitians: The Case Against

Bill Frelick

Abstract

Reviewing past experience with in-country processing in Haiti and its links to American interdiction policies, as well as the history of Cuban migration to the United States, this paper argues against in-country processing for Haitian refugees. The paper asserts that in-country processing in Haiti in the early 1990s was a failure, and arguably was used as a justification for returning to persecution far more people than it saved. The very existence of a small aperture through which relatively few selected individuals will be able to pass for legal admission to the United States is likely to erode the rights of many more Haitian asylum seekers seeking to leave spontaneously and, in particular, to serve to rationalize migration control measures that seriously compromise the fundamental principles of refugee law.

Résumé

Après avoir passé en revue l'expérience du passé de traitement sur place à Haïti et ses liens avec les politiques américaines d'interdiction, ainsi que les antécédents de l'immigration cubaine aux États-Unis, cet article s'oppose fortement à la politique de traitement sur place des réfugiés haïtiens. L'article soutient que le traitement sur place à Haïti au début des années 90 s'est soldé par un échec, et qu'il est permis de penser que, par la suite, cet échec a été utilisé comme justification pour renvoyer à la persécution beaucoup plus de personnes qu'il ne sauva. L'existence même d'une petite ouverture à travers laquelle un nombre relativement restreint d'individus sélectionnés pourra passer pour entrer légalement aux États-Unis, va très vraisemblablement éroder les droits d'un plus grand nombre de demandeurs d'asile haïtiens désireux de quitter le pays spontanément, et, en particulier, va servir à rationaliser des mesures de contrôle à l'immigration qui portent sérieusement atteinte à l'intégrité des principes fondamentaux du droit des réfugiés.

In the context of deteriorating human rights conditions in Haiti and continuing interdiction and summary return of Haitian boat people, U.S. government agencies are discussing the possibility of re-initiating refugee processing from within Haiti. Based on past experience with in-country processing in Haiti as well as on principles of refugee protection, this paper argues that the existence of an in-country processing program might well prevent asylum seekers who leave Haiti irregularly from having a fair hearing on their claims while also not providing a viable alternative for people who are compelled by imminent threats to flee the country.

On April 11, 2003, government officials met with four nongovernmental organizations to discuss a wide variety of concerns relating to the treatment of Haitian refugees, asylum seekers, and immigrants. Officials at that meeting requested a statement from those agencies specifically on resettlement and processing of Haitian refugees. They sent that memorandum on June 23, 2003.[1] While this paper respectfully differs with the recommendations in that document, the agencies endorsing both that statement and this share the critique of past and present U.S. government practices toward Haitian refugees and asylum seekers as violating their rights. The agencies endorsing this statement fully support the opening statement in the June 23, 2003, paper: "The NGOs providing these recommendations are united in their belief that the United States must comply with its obligations under both U.S. and international law

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to provide protection to refugees who have a well-founded fear of persecution." All concerned NGOs agree that. practices of the U.S. with respect to Haitian asylum seekers, thus far, have fallen considerably short of meeting its obligations under U.S. and international law.

The History of In-Country Processing in Haiti and Its Link to Interdiction

From its inception, the in-country processing program in Haiti has been linked to U.S. interdiction policies. On January 31, 1992, the Supreme Court lifted an injunction on the forced repatriation of interdicted Haitians, and on the following day, February 1, the first Bush administration resumed forcibly repatriating Haitians. In-country processing began that same month. That was no mere coincidence. This became clear several months later, on May 24, 1992, when President George H.W. Bush issued the Kennebunkport Order, under which all interdicted Haitians would be returned summarily to Haiti without interviews or processing to determine possible refugee status. At the time of the announcement, the White House advised would-be refugees to apply at the U.S. consulate in Port-au-Prince for in-country refugee processing.

The mere existence of an in-country processing program was used to justify the new policy of summarily returning all interdicted Haitians with no screening. Although it was touted as an alternative to boat departure, the reality at the time was that only a handful of people were able to avail themselves of that alternative. Of the 279 Haitians who had applied since the inception of the program in February 1992, nine had been admitted to the United States by the end of May, an average of two per month. This rate was occurring as the Cedras dictatorship was crushing all dissent and while U.S. Coast Guard cutters were returning all interdicted Haitian asylum seekers.

A June 11, 1992, House hearing examined in-country processing in Haiti, at which point twelve Haitians had been admitted to the United States (out of 1,582 applicants). Then-Representative Stephen J. Solarz said that the Bush administration's use of in-country processing to justify summary return of interdicted Haitians was a "ludicrous argument." He said, "In the Soviet Union, Cuba, Vietnam, and Romania in-country processing has been an alternative option for those with the inclination, courage, and gumption to use it. But it has never been the exclusive option, and it is clear that making it the exclusive option does not conform to international law."

At the same Congressional hearing, Professor Harold Koh testified that it would be "suicide" for persons in the situation of Haitian boat people to attempt instead the in-country processing option. "To pursue this option," he said, "the asylee [sic] would have to leave hiding, pass numerous security road blocks, enter the heavily militarized capital city of Port-au-Prince, travel to areas surrounding the U.S. Consulate and Embassy that are especially dangerous given the high concentration of security forces, present and identify himself to the Haitian security forces before entering, subject himself to their scrutiny, engage in highly adversarial proceedings with U.S. immigration officials, then repeat the entire process several times before receiving a final determination on his asylum request."

On January 14, 1993, shortly before he was sworn in as president, President-elect Bill Clinton announced that he would continue the Bush administration's interdiction policy, telling Haitians, "Those who do leave Haiti directly by boat will be stopped and directly returned by the United States Coast Guard." He told Haitians that they had an alternative. "You can apply from within Haiti, through the United States embassy in Port-au-Prince." Shortly after Clinton's announcement, the Coast Guard announced Operation Able Manner, surrounding Haiti with twenty-two U.S. Coast Guard cutters and navy ships, as well as deploying planes and helicopters for surveillance in order to ensure that no boats of Haitian asylum seekers eluded interdiction.

In fact, it had become even more difficult to pass through the eye of the in-country-processing needle than a few months earlier. Between the start of the program in February 1992 and the end of that year, 9,389 cases, representing 15,580, persons had applied for the in-country processing program in Haiti; 61 cases, 136 people, were admitted to the United States. The Coast Guard interdicted 37,618 Haitian boat people in Fiscal Year 1992, the overwhelming majority of whom were summarily repatriated.

1993 was a particularly bad year for Haitian would-be refugees. Human rights abuses were widespread, yet Haitians had nowhere to flee. In-country processing was not a viable option for people being hunted down, but the existence of what on paper appeared to be an alternative justified summary interdiction and return. The hopelessness of boat escape was demonstrated by the precipitous drop in Haitian interdictions from the nearly 37,618 in FY 1992 to 4,270 in FY 1993, almost all of whom were summarily returned. Although the number of persons admitted through in-country processing rose in FY 1993 to 1,307, relative to the growing number of applicants the number admitted was paltry and amounted to little more than false hope for most. Nevertheless, the State Department reported to Congress that year that "refugee questionnaires were placed on U.S. Coast Guard cutters engaged in interdiction operations so that repatriated boat people would be made aware of the

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U.S. program and those with strong refugee claims could be brought quickly into the refugee processing program."[2]

With the failure of the Governors Island Agreement in October 1993, human rights conditions inside Haiti plummeted further. With the possibility of finding asylum through boat departure cut off, up to 800 persons a day began applying for in-country processing. This mechanism, slow moving at best, became completely overwhelmed by the numbers.

By May 1994, in-country processing had proven to be a complete sham—a smokescreen for *refoulement*. At that point, 54,219 applications had been filed representing nearly 106,000 people; only 10,644 cases had been decided, of which 9,827 had been denied, an approval rate of 7.7 percent of cases decided. But most cases never got as far as an interview with the Immigration and Naturalization Service (INS). The procedure required at least four separate interviews for screening and refugee status determination followed by additional visits for medical clearances, sponsorship assurances, issuance of Haitian passports and U.S. travel documents, and other travel arrangements. All visits required the applicants to wait at locked gates and pass various security guards. The Port-au-Prince and Les Cayes processing offices were located in close proximity to large military and police facilities. Although accommodations were made to permit INS-approved Haitians to leave the country without being required to approach the Haitian authorities for a Haitian passport, many of the most vulnerable people never applied for the in-country procedure for fear that doing so would expose them to danger, especially since many thought they would be required to approach the very authorities they feared to get passports. A total of 3,766 Haitians were admitted as refugees in FY 1994, which included cases adjudicated during the previous two years, but whose exit was delayed by the cumbersome process.

Screening Standards Higher for Haitians

The in-country screening standard was significantly higher than the international refugee standard of a well-founded fear of persecution. Starting in May 1994, interviews were granted only to applicants who met one of five criteria: (1) senior and mid-level Aristide officials; (2) close Aristide associates; (3) journalists or educational activists who had experienced significant and persistent harassment; (4) high-profile members of political and social organizations who had experienced significant and persistent harassment; or (5) others of compelling concern to the United States and in immediate danger.[3]

The criteria essentially required membership in a segment of the Haitian elite as well as a showing of significant and persistent harassment. Poor people, who bore the brunt of the Cedras regime's repression and who overwhelmingly constituted the ranks of the boat people, had virtually no chance. A U.S. embassy official involved in in-country processing said in an April 1994 interview, "We decide who gets placed into line [for an INS interview] and how to move cases that are INS-approved. If you are in a neighborhood that has been victimized en masse, you will not have a chance under U.S. law. You need to show individual targeting." In effect, applicants from neighbourhoods being victimized en masse, such as Cité Soleil, where individualized targeting was, in fact, occurring were excluded from the program. The same month, an NGO caseworker who screened cases for the INS said, "The person would at least have to have been arrested once to get an INS interview."[4] This clearly indicates a standard not required to establish refugee status under international law, which is based on a well-founded fear of future persecution, not necessarily based on a showing of past persecution.

The bias against non-elites went beyond the standards for screening applicants and adjudicating claims. It was based on capacity to travel and on having a mailing address, a place of residence, and, implicitly, literacy in a country with a high illiteracy rate.

The in-country processing program also, most importantly, required—ironically and perversely—that the applicant's fear of persecution couldn't be so high that he or she would be afraid to be seen standing in line outside the processing locations or that he or she was unable wait for the prolonged process to conclude.

In-country processing couldn't provide safety for applicants during the slow and highly visible procedure. As human rights conditions in Haiti deteriorated this became more and more obvious. On July 27, 1994, when commercial flights out of Haiti were cancelled, 1,857 INS-approved refugees were left stranded. Subsequently, the nongovernmental agencies pre-screening cases for the INS in Les Cayes and Cap Haitien stopped interviewing new cases, saying that there was no way to evacuate persons approved as refugees for U.S. admission. On August 1, 1994, Haitian police and paramilitary forces attacked a line of applicants waiting for refugee processing where pre-screening was still occurring in Port-au-Prince, beating and arresting a number of the applicants.

Now and Then

There is no reason to believe that many of these same problems would not recur if in-country processing were re-established in Haiti today. Given conditions in Haiti and available resources for such a program, would truly vulnerable Haitians have any better access to in-country processing now than they did then? Under conditions of appalling

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economic misery, endemic corruption and mismanagement, and uncontrolled political violence, would applicants be able to gain access to the program or expose themselves to additional risk while their claims were pending? A recent report by the National Coalition for Haitian Rights suggests that dissidents are subject to attack not only at the hands of so-called popular organizations, but also a corrupt and politicized police force. The September 2003 report observes:

> Most notably, the numbers of attacks, acts of intimidation and outright assassinations against members of the opposition, human rights organizations and independent journalists have amplified in comparison to the late 1990s. Alarmingly, members of the national police force as well as so-called popular organizations (OPs) close to the government have been linked directly to many such violations that have contributed to the decline for respect for human right in general.[5]

An additional problem that in-country processing would face in 2003 that it did not confront in the 1992–94 period is the role of the home government. In 1992–94, the U.S. government did not recognize the Cedras regime, and proceeded with in-country processing without the cooperation of that government. However, in cases where the U.S. government does recognize the government of the home country, as it does in 2003 with the Aristide regime, it would be bound to seek the co-operation of that government in the in-country processing procedure, particularly in the issuance of passports or other travel documents. In this respect, in-country processing would be more problematic in 2003 than it was in 1994 with respect to fundamental refugee protection principles—*i.e.*, it would compel a person who fears persecution at the hands of his or her government to approach that same government for permission to seek asylum from it.

Most importantly, in the event of a renewed mass exodus of Haitian boat people, would the mere existence of an in-country processing program, no matter how flawed or limited it might be, be used as a rationale for returning Haitians back to the place of persecution?

Violation of Fundamental Principles of Refugee Law

Article 33 of the Refugee Convention forbids the return of a refugee to a place where his life or freedom would be threatened—the principle of *non-refoulement*. The U.S. asylum system within the territory of the United States is built on this foundation—on the mandatory bar preventing governments from returning refugees to persecution, and on the corollary principle that a person so protected generally ought to have a status (asylum) which can lead to permanent protection in the form of citizenship. Yet this principle is openly violated by U.S. interdiction practices and was more subtly undermined by in-country processing in Haiti.

The international law bar on *refoulement* is absolute; but U.S. interdiction practice makes it discretionary. President George H.W. Bush's Kennebunkport Order, which authorized the United States to stop and board vessels on the high seas and to return their passengers to their countries of origin, added that "the Attorney General, in his unreviewable *discretion*, *may* decide that a person who is a refugee will not be returned without his consent." (Emphasis added.) The President does not hold the Attorney General to the 1951 Refugee Convention's command not to "expel or return ('refouler') a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened."

Overseas refugee resettlement is not built on the foundation of *non-refoulement* at all. It is completely discretionary because resettlement is about admission, not removal. Because refugee admissions are completely discretionary, the U.S. government is under no legal obligation to admit any refugees from abroad, and it has wide latitude to determine which refugees are of "special humanitarian concern" to it sufficient to admit them as refugees.

Accordingly, U.S. officials in Haiti would not be required to admit every Haitian who approached its in-country processing centers with a well-founded fear of persecution. As it did in the early 1990s, U.S. officials could choose whom and how many it wished to take. It would be compelled to take not a single would-be refugee, no matter how strong his or her claim. As it did in the early 1990s, the U.S. government could create almost insurmountable vetting criteria that go well beyond the legal refugee definition and the regulations that govern asylum adjudication within the United States.

A discretionary refugee admissions program, therefore, does not come close to meeting international legal requirements to protect refugees. In-country programs are even more problematic. Since the applicant is already inside his or her home country, he cannot actually be a refugee at all at the time of applying for refugee status, and, logically, his denial cannot be called *refoulement* since he or she cannot be returned to a place where he or she is already present.

In-country processing linked to interdiction is the most dangerous combination of all. Haitian in-country processing in the 1990s—established to operate in conjunction with interdiction and summary return—was designed to create an exclusive track for Haitians seeking protection from persecution. This is particularly offensive to international refugee protection principles. Ordinarily, U.S. asy-

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lum adjudicators regard asylum seekers as having abandoned their claims if they opt for voluntary repatriation. The interdiction-and-return-to-in-country-processing scheme, however, is predicated on requiring repatriation in order to seek protection from that country. Where in-country processing programs are, in effect, designed as the only avenue for seeking protection, as they were for Haitians during key periods of the Cedras dictatorship, they are not just problematic, but manifestly harmful.

Cuban In-Country Processing and Migration Controls

The practical realities also make it clear that in-country processing has intrinsic limitations as a mechanism to protect people fleeing persecution at the hands of their own government. Long before in-country processing started for Haitians, Ricardo Inzunza, the deputy commissioner of the INS in the first Bush Administration, wrote in a 1990 law review article about the limitations of in-country processing in the Soviet Union, Cuba, and Vietnam. "Unfortunately, in most cases, those most in need of this remedy—those most vulnerable to abuses and with least access to any viable alternative—are least likely to be able to take advantage of it. Those in active flight are unlikely to get into the U.S. embassy, or even to it, without being noticed and/or arrested…. It is slow and many persons with a 'well-founded fear of persecution' simply cannot wait for such processing to be completed."[6]

Whatever the value of in-country processing in Russia, Vietnam, or Cuba as a mechanism for rescuing people threatened with persecution while still living in their home countries, it ought, at best, to be considered as complementary to the right to seek asylum outside the country by other means, and not as a substitute for the right to seek asylum as embodied in Article 14 of the Universal Declaration of Human Rights. The scope of this paper does not permit an exhaustive examination of in-country processing in Russia and Vietnam and an analysis of whether or not it compromised the right to seek asylum (certainly the intent in creating the Orderly Departure Program out of Vietnam was to create an alternative to boat departures, but the existence of the program does not appear to have been used as a justification for summarily returning Vietnamese boat people to Vietnam), but because of the geographical similarities of Cuba and Haiti as Caribbean island nations and their proximity to the United States as a country of first asylum, it is worth examining in some detail in-country processing in Cuba and its links to migration-control measures.

The history of Cuban migration to the United States demonstrates the unique standing of Cubans in U.S. immigration and refugee policy as exiles from the only Communist country in the Western Hemisphere. Spontaneous waves of refugees ebbed and flowed between the 1959 Cuban Revolution and 1965, but boat departures escalated sharply in October 1965 when President Lyndon Johnson gave a speech at the foot of the Statue of Liberty welcoming all Cubans "who seek freedom" to the United States. Cuban President Fidel Castro opened up Camarioca harbour, allowing a flotilla of boats to leave. The large and unmanaged migration flow prompted the United States to negotiate a migration agreement with Cuba in late 1965 that established criteria for determining which Cubans might board daily flights from Havana to Miami. The 1965 Memorandum of Understanding excluded all political prisoners and all draft-age men from the flights. Therefore, what became the largest "in-country processing" program in U.S. history—the Freedom Flights of the 1960s that brought more than 700,000 Cubans directly to the United States from 1965 until they were halted by Fidel Castro in 1973—was designed to exclude the most vulnerable people at highest risk of persecution. Testifying before a Congressional hearing in 1979 about those who arrived on the Freedom Flights of the 1960s, Virginia Dominguez said, "Many of those who came after 1965 were housewives and children, and were not actively political. They were not necessarily poor, or the victims of political persecution."

The cut-off of managed migration in 1973 again resulted in Cubans fleeing the island by raft and boat with the encouragement of the U.S. government, culminating in President Jimmy Carter's 1980 welcome of Cuban boat people "with an open heart and open arms" that resulted in a mass influx of more than 125,000 from the harbour of Mariel that summer. The presence of some criminals and mental patients among the other "Marielitos" and their sudden, massive, and disorganized arrival caused a sharper backlash than had occurred in 1965. On September 29, 1981, President Ronald Reagan issued Presidential Proclamation 4865, which authorized the high seas interdiction of boats carrying suspected undocumented migrants to the United States. Cuban migration slowed considerably during the Reagan and George H. W. Bush administrations. Between 1982 and 1992, the Coast Guard interdicted 5,311 Cubans, an average of about 480 per year, but brought them to the United States. They were paroled into the United States, and under the terms of the Cuban Adjustment Act of 1966 were generally able to adjust to permanent resident status after staying for one year. In-country refugee processing from Cuba began in 1987, but was a relatively modest program admitting an average of 2,261 per year from 1988 through 1992.

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U.S. migration policy toward Cubans shifted dramatically during the Clinton administration, a time of massive upsurge in boat and raft departures. For the first time, the United States initiated a policy of interdiction and return of Haitians, and explicitly linked that policy to the existence of in-country processing. On May 2, 1995, the Clinton administration announced that the Coast Guard would interdict Cuban rafts and boats, hold abbreviated shipboard screening, and repatriate screened-out Cubans. In language reminiscent of Clinton's first announcement of his Haitian interdiction policy, Attorney General Janet Reno accompanied the new Cuban interdiction and return policy by saying, "effective immediately, Cuban migrants intercepted at sea attempting to enter the United States, or who enter Guantanamo illegally, will be taken to Cuba, where U.S. consular officers will assist those who wish to apply to come to the United States through already established mechanisms. Cubans must know that the only way to come to the United States is by applying in Cuba."

Reno's announcement, particularly the last sentence quoted, demonstrated a breathtaking disregard for fundamental refugee principles. To suggest that persons who have fled persecution should return to the very country where they fear persecution as the only avenue to seek protection from that persecution is absurd. Yet that became official policy.

Later that year, the INS issued written guidance to its officers going on shipboard detail in the Florida Straits instructing them how to implement this policy. Essentially the same statement is read to Cubans interdicted today. Then, as now, they are directed to read the following statement: "You are being taken back to Cuba. You will not be taken to the United States." It is not specified whether the ships carrying the interdicted Cubans are already traveling back to Cuba as INS (now Department of Homeland Security, or DHS) assessments of the Cubans are taking place, but the opening sentence tells the Cubans this is the case, and suggests to them a certain inevitability about the process.

The Cubans are next told: "U.S. government officials in Havana will meet the ship and will provide information to you if you wish to apply to go to the United States through established migration programs." Then the Cubans are assured that it is safe for them to go back to Cuba. The statement reads: "The government of Cuba has provided a commitment to the United States that you will suffer no adverse consequences or reprisals of any sort for illegal departure or for making application for legal migration to the United States at the U.S. Interests Section." They are then, again, reminded that "only those people who are approved by the U.S. Interests Section in Havana can be assured of entry to the United States."

The statement tells the Cubans only that the Cuban government has agreed that Cubans will not suffer adverse consequences for illegal departure or for applying at the U.S. Interests Section; it is silent about Cuba's lack of assurances about other adverse consequences for political dissent or other underlying reasons for fleeing the country.

The statement closes with an ambiguous invitation to come forward with any concern about returning to Cuba. The word actually used in the Spanish announcement is *asunto*, which more accurately translates as "matter" rather than "concern" as written in the official English text of the statement.[7] Although the interdicted Cubans are told that their *asunto* will be treated confidentially, the instruction to the INS officers only advises them to keep these interviews private and confidential "to the extent possible."

If a Cuban takes the initiative of approaching the INS officer, the memorandum instructs the officer to "arrange a meeting with that person." The odd choice of wording is specifically to avoid use of the terms "pre-screening" or "screening." In the meeting, INS officers are instructed to ask the Cubans whether they are aware of refugee processing at the U.S. Interests Section. If the Cuban persists in expressing a fear of return, the officer is instructed to apply a "credible fear of persecution standard." However, the instruction goes on to direct the officer: "In evaluating the objective basis for a person's fear under the credible fear standard in this program, you should consider the formal assurances made by the Cuban Government to the U.S. Government that no Cuban migrant will suffer adverse consequences or reprisals of any sort for irregular departure or for applying for refugee status, the monitoring of Cubans returned under this program by officials from the U.S. Interests Section, and the existence of an in-country processing program."

The INS guidance requires its shipboard officers to perform two mutually exclusive functions: first, to conduct a sales pitch for in-country processing to convince the Cuban that it is safe to return; then, to act as an adjudicator to determine whether the same person has a credible fear of return. Directing the adjudicator to tell the applicant that it is safe to return hopelessly prejudices any such adjudication.

The United States concluded a migration agreement with Cuba in September 1994 whereby the United States agreed to admit 20,000 immigrants per year and Cuba agreed to prevent unauthorized boat departures. The agreement on its face put the U.S. government in the position of demanding that the Cuban government violate Article 13 of the Universal Declaration of Human Rights, which guarantees everyone the right to leave his or her own country. The September 9, 1994, agreement said that Cuba would "take effective measures in every way it possibly can to prevent

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unsafe departures using mainly persuasive methods." The language of taking measures "every way it possibly can," and explicitly not limited to persuasive methods, is chilling. Deputy Assistant Secretary of State Michael M. Skol, the chief U.S. negotiator in the talks, told the press, "We expect a dramatic reduction in departures."

Conclusion

The agencies endorsing this statement support a generous immigration policy for Haitians provided there is no *quid pro quo* that requires the Haitian government to prevent its citizens from leaving the country in violation of international human rights principles.

The agencies supporting this statement also encourage the U.S. government to consider Haitian refugee processing from first-asylum countries in the region, including the Dominican Republic and the Bahamas.

The agencies supporting this statement remain fundamentally opposed to past and current U.S. interdiction practices because they do not afford asylum seekers an opportunity for fair hearings of their refugee claims, and because the U.S. government through the interdiction program does not recognize its obligations under Article 33 of the 1951 Refugee Convention.

For the same reasons that in-country processing in Haiti in the early 1990s was a failure, and arguably was used as a justification for returning to persecution far more people than it saved, in-country processing should not now be regarded as representing a genuine mechanism of protection for Haitians actively fearful of being persecuted. The very existence of a small aperture through which only a relatively few selected individuals will be able to pass for legal admission to the United States under the U.S. refugee admissions program is too likely to erode the rights of many more Haitian asylum seekers seeking to leave spontaneously and, in particular, to serve to rationalize migration control measures that seriously compromise the right to seek asylum itself.

This statement has been endorsed by the following nongovernmental organizations:

Amnesty International USA
Lawyers Committee for Human Rights
TransAfrica Forum
Immigration and Refugee Services of America/
U.S. Committee for Refugees

Notes

1. The memorandum, written by Wendy Young and addressed to Matt Waxman of the National Security Council, was endorsed by the National Coalition for Haitian Rights, the National Immigration Forum, the U.S. Conference of Catholic Bishops, and the Women's Commission for Refugee Women and Children.
2. Bureau of Population, Migration and Refugee Affairs, Report to Congress on Proposed Refugee Admissions for Fiscal Year 1995.
3. *Id.*, the screening criteria is outlined in the State Department's FY 1995 Report to Congress, and further elaborated in "Changing U.S.-Haitian Refugee Policy: New In-country Processing System; Shipboard Adjudications Resume," by Bill Frelick, Refugee Reports, Vol. 15, No. 5, May 31, 1994, at 2. Nevertheless, the INS Assistant Officer in Charge in Haiti at that time recently said that this standard was not actually implemented.
4. *Id.*, at 4.
5. "Yon Sèl Dwèt Pa Manje Kalalou: Haiti on the Eve of Its Bicentennial," National Coalition of Haitian Rights, September 2003, at 19.
6. Ricardo Inzunza, "The Refugee Act of 1980: Ten Years After—Still the Way To Go," International Journal of Refugee Law, Vol. 2, No. 3 (1990) 421–22.
7. Report on the First Three Years of Implementation of Expedited Removal, Center for Human Rights and International Justice, University of California, Hastings College of Law, note 357, at 125–26, which includes the full text of the statement read to interdicted Cubans.

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