

# INTERCEPTION AND OFFSHORE PROCESSING OF ASYLUM SEEKERS: THE INTERNATIONAL LAW DIMENSIONS

An Introduction to Volume 9 of UTS Law Review

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For decades the international community has conducted a delicate and politically charged balancing act trying to reconcile the inexorable increase in refugees—and the need to find permanent homes for them—with the fundamental right of all countries to have secure frontiers. While the notion of non-refoulement remains fundamental to the treatment of asylum seekers, their rights vis à vis the states in which they seek asylum are significantly circumscribed by their alien status. States have a right to control entry to their territories. In the development of asylum law and policy, the central difficulty for states, and indeed the international community, is how to construct an appropriate balance between the urgent humanitarian demands to protect those who are genuinely in need of asylum, and the exclusion of those who do not qualify for humanitarian protection. For the last two or more decades, this central difficulty has been exacerbated by the development of people trafficking and smuggling. The concern with the construction and maintenance of asylum policies that are humane yet politically viable cuts across the traditional distinction between states such as Australia, the United States and Canada that have traditionally courted immigration, and those such as the United Kingdom and Germany that have discouraged it. On the other hand, all these states have traditionally had open immigration and refugee processing procedures. The task in international law is how to construct an acceptable interception framework that accommodates the right of a state to exclude entry into its territory without undermining the humanitarian imperatives of non-refoulement and related obligations under the *Refugee Convention*.

The problem with the *Refugee Convention* is that it is territorial in its application. While article 33 enshrines the notion of non-refoulement and article 32 sets out the related obligations of contracting states not to expel

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a refugee who is in their territory except on grounds of national security or public order with due process of law, under article 32 does not define nor provide guidance as to what constitutes 'entry' into the territory of a state or arrival at the frontier of a state. More significantly, it provides no proper indication of the scope of the state parties' obligations with respect to their treatment of asylum seekers outside their territorial boundaries. The result is that states anxious to restrict refugee influx apply exclusionary strategies to deny 'entry' into their territories.

In general, a state may use a combination of 'offshore' and 'onshore' administrative measures and strategies to regulate the admission of aliens and in particular asylum seekers into its territory. The offshore strategies or measures available to a state may be described in these terms:

There are three main forms of 'offshore' exclusionary strategies: the most basic form is interception, which denies the asylum-seeker access to the territory of a prospective receiving state and thereby excludes the asylum-seeker from seeking protection from that state. Another strategy is to define 'entry' restrictively by excluding or excising part or parts of a state's territory from 'entry' into the state for the purposes of immigration and for seeking asylum for that matter. Thirdly, a state may attempt to deny or prevent entry of asylum-seekers into its territory by diverting, encouraging or causing their transfer into the territory of another state. By their nature, all three exclusionary strategies have the potential to undermine the humanitarian character of the Convention and are of doubtful legal validity. Where these strategies are adopted without adequate justification, a state runs the risk of breaching its obligations under the Convention.<sup>1</sup>

Where an asylum seeker manages to secure entry into a state, there are yet onshore strategies that the state may adopt to discourage or limit asylum applications. Members of the *Refugee Convention* are obliged by it to undertake to process asylum seekers in the territory of a contracting state. However, there is no international standard as such for the processing of asylum seekers, beyond the minimum requirements set in the recommendations the Executive Committee of the United Nations High Commissioner for Refugees' Programme (the UNHCR Executive Committee) in 1977.<sup>2</sup> While the United Nations High Commissioner for Refugees (UNHCR) *Handbook on Procedures and Criteria for Determining Refugee Status* also provides basic guidance on determination procedures,

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1 Sam Blay, 'Restrictive Trends in Migration Flows: A Post Card from Australia', (2006) 2(1) *Journal of Migration and Refugee Issues*, 29–42.

2 Such minimum standards for status determination include the issuing of appropriate instructions to the competent officials in dealing with asylum seekers, the provision of necessary guidance to asylum seekers, and the clear identification of the authority to deal with asylum applications (see *UNHCR Handbook on Procedures and Criteria for Determining Refugee Status* HCR/IP/4/Eng/REV.1, re-edited, para 192 (Geneva, January 1992)).

it admits that it is not possible to prescribe identical determination procedures for signatory states to the Convention. The *Handbook* notes that it is left to each state 'to establish the procedure that it considers most appropriate, having regard to its particular constitutional and administrative structure'.<sup>3</sup> The processing procedures adopted by states therefore vary. More importantly, it is possible for a state to adopt restrictive onshore procedures that discourage asylum applications. Such measures may consist of 'administrative' or 'immigration' detention. It may also include specific limitations on administrative or review proceedings in the status determination process.

Australia has adopted a combination of onshore and offshore strategies to deal with the arrival of asylum seekers. In specific terms, the strategies include: the excision of territory, the interception and processing of asylum seekers offshore in neighbouring Pacific states through the 'Pacific Solution', mandatory detention, temporary protection visas and the use of the privative clause to limit access to judicial review.

This volume of the *UTS Law Review* is a collection of essays on some of the significant aspects of restrictive practices relating to the treatment of asylum seekers.

The essays are the result of the deliberations and discussions of a two day international conference organised as part of a research project funded by an Australian Research Council Discovery Grant awarded to us as chief investigators. The essence of the project and indeed the conference was not so much to dispute the right of a state to restrict undocumented arrivals in its territory, but to investigate and highlight the legitimate parameters within which a state can restrict such arrivals. The conference was unique in that it brought together distinguished international academics in asylum law; and more importantly Australian legal practitioners who have been involved in and litigated some of the most controversial cases in Australian asylum law that cover the complex mix of Australia's onshore and offshore restrictive practices in dealing with asylum seekers. The result is an excellent intellectual and practical discourse that provides a rich insight into the controversial questions underpinning Australian asylum law and practice.

Once asylum seekers depart their states of origin, the prospective destination state wishing to restrict or prevent their arrival at its shores is left with a primary strategy: interception. Indeed, interception as such is a primary precursor to the offshore processing of asylum seekers because processing offshore necessarily involves the 'interception' of the asylum seekers before they enter the territory of the state (or in Australia's case, the Migration Zone). The discourse on offshore processing and the attendant legal issues must therefore necessarily begin with the question

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3 Ibid, para 189.

of interception. This introductory commentary is therefore devoted to interception as a general prologue to the essays in the volume.

## **Interception: The Genesis of a Restrictive Culture in Dealing with Asylum Seekers**

Interception is the most basic exclusionary strategy which may be employed by a state. It denies the asylum seeker access to the territory of the state and thereby excludes the asylum seeker from seeking protection from the state or limits the asylum seeker's access to protection.<sup>4</sup>

A graphic illustration of interception as an exclusionary strategy was the September 2001 case of the *Tampa*, a Norwegian container carrier which was intercepted in Australian territorial waters and denied permission to enter Australia with its cargo of some 460 refugees. While Australia's action attracted worldwide criticism, the Federal Court of Australia upheld the validity of the act and went so far as to endorse its consistency with the *Refugee Convention*<sup>5</sup>. Interception is not practiced only by Australia. However, the Australian response to the *Tampa* highlights the fundamental difficulties associated with interception in international refugee law.

However a state chooses to construct and operate interception asylum seekers, interception only provides the beginning of a far more complex issue in international law: how does a state manage the intercepted asylum seeker consistent with the state's international legal obligations?

## **Interception: The Rationale**

In broad terms, interception is a common phenomenon in state practice. Interception occurs when a state prevents asylum seekers from reaching its territory to claim asylum. Interception can take the form of a direct 'turn back' at a land border or the refusal to let a person off an aircraft on a runway. It can also consist of escorting a boat of aliens into international waters or to the territorial seas of another country. In its most common form, states routinely 'intercept' aliens at their frontiers through border controls and other types of immigration restrictions or visa requirements. In its extreme forms and with particular reference to asylum seekers, states use their navies or coast guards to patrol their maritime zones to deny aliens direct entry into their territories.<sup>6</sup>

Interception activities can be categorised as either administrative or physical in nature.<sup>7</sup> Administrative measures include implementation of

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4 In the paper prepared for the Global Consultations discussion on asylum and migration, IOM states that '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.'

5 *Ruddock v Vadarlis* (2001) 110 FCR 491 (18 September 2001).

6 The 'Alien Migrant Interdiction Operations (AMIO)' of the US Coast Guard and Navy is a typical example.

7 See *UNHCR ExCom, Interception of Asylum Seekers and Refugees*, UN Doc. No. EC/50/SC/CRP. 17, 9 June 2000, paragraphs 12 and 13.

visa requirements, carrier obligations, safe third country and country of first asylum determinations, the posting of immigration officials in other countries' transit points to identify false documents or suspicious migrants and the training and posting of airline officials at overseas airports and other transit hubs to screen documents and migrants prior to boarding.<sup>8</sup> Administrative interception also includes legislative action such as the creation of 'international zones' or 'excised' territories where more special immigration laws are put into force. Australia's post-Tampa legislation is one such example, wherein certain territories were legislatively excised from Australia's migration laws.<sup>9</sup>

Physical interception is more limited and involves interference with vessels, usually in the maritime context, and may include the boarding, inspection, seizure, forfeiture and/or destruction of vessels.<sup>10</sup>

Whatever form of interception is adopted, the ultimate objective is the same: to deny entry to irregular migrants. Many states see interception as a highly effective means of preventing entry of undocumented persons as well as a tool for combating people smuggling and human trafficking.<sup>11</sup> The rationale behind interception is to reduce the incidence of people smuggling and misuse of the refugee determination system, which undermines its efficacy. This is especially the case since some of the undocumented arrivals travel from countries where they have already found a safe haven. As such, perceptions in some circles are that these people are not acting in a manner which upholds the spirit and principles of the resettlement régime.<sup>12</sup> States have also expressed concerns about the dangers and risks posed by people smugglers, especially when transporting asylum seekers in unseaworthy boats. Thus the argument is that interception can play a role in rescuing people, and hence save lives.<sup>13</sup>

The definition of interception under UNHCR Executive Committee Conclusion No. 97 adds an explicit humanitarian connotation by suggesting that interception 'also serves to protect the lives and security of the travelling public as well as persons being smuggled or transported in an irregular manner'. Humanitarian goals may be achieved in the interception of trafficking victims or smuggled persons exposed to serious

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8 See James C Hathaway and R. Alexander Neve, 'Fundamental Justice and the Deflection of Refugees from Canada' (1996) 34 *Osgoode Hall Law Journal* 213.

9 *Migration Amendment (Excision from Migration Zone) Act 2001*.

10 UNHCR, Interception of Asylum-Seekers and Refugees, above n 7, para 10.

11 See comments in 'The Global Consultations on International Protection', *Incorporating Refugee Protection Safeguards into Interception Measures* EC/GC/01/13 (31 May 2001).

12 *Ibid*, para 14.

13 Para 15. See for example, US Government site for Alien Migrant Interdiction and the Coast Guard <<http://www.usg.mil/hq/g-o/g-opl/mle/AMIO.htm>>: 'When successful, illegal immigration can potentially cost US taxpayers billions of dollars each year in social services. In addition to relieving this financial burden on our citizens, the Coast Guard's efforts help to support the use of legal migration systems. Primarily, the Coast Guard maintains its humanitarian responsibility to prevent the loss of life at sea, since the majority of migrant vessels are dangerously overloaded, unseaworthy or otherwise unsafe'.

harm, but the net result of interception activities is less clear.<sup>14</sup>

With the entry into force of the *Protocol Against the Smuggling of Migrants by Land, Sea and Air*, maritime interception was implicitly acknowledged as a legitimate tool for border control and enforcement (article 2). Article 8 of the Protocol allows the search, boarding, and seizure of persons and cargo where there are reasonable grounds to suspect that the vessel is engaged in smuggling. The Protocol also permits boarding, search, and ‘appropriate measures . . . as authorized by the flag State’ where the suspected vessel is under the jurisdiction of another state, and that State has given authorisation for search and boarding; and boarding and search where the suspected vessel is without nationality, ‘in accordance with relevant domestic and international law.’ (Articles 8(1), 8(2), 8(7).)

In this instrument, interception is contemplated in a more cooperative context, where flag states may grant authorisation to foreign-flagged state vessels in order to facilitate interception of vessels suspected of smuggling vessels: article 8(4). This provision effectively dispenses with the concept of exclusive flag state jurisdiction by creating an interception-sharing scheme where authorised by the flag state. These provisions are exclusive to the maritime context of the Protocol, and include particular safeguards that include obligations to ‘ensure the safety and humane treatment of persons on board’ and ‘not to endanger the security of the vessel or its cargo’: articles 9(a), 9(b).

## Interception: The Current State of the Law

Whatever its form, interception poses important challenges to international asylum law. By its very nature, it can result in the refoulement of persons in need of international protection. The denial of access to the territory of a contracting state under the *Refugee Convention* through interception can undermine the right to seek asylum in other countries, and to access full and fair asylum determination procedures. More importantly, interception often takes place in areas where there is little or no outside access or monitoring: for example in restricted airport transit zones, on ships at sea, or in remote locations. In spite of these problems and the persistent and ever increasing use of interception measures, the issue has received very little attention in the literature of international asylum law.<sup>15</sup>

In 2000, the Standing Committee of the Executive Committee of the

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14 See eg, Michael Pugh, ‘Drowning Not Waving: Boat People and Humanitarianism at Sea’ (2004) 17 *Journal of Refugee Studies* 50, 62.

15 The few works on the subject have tended to be specific rather than general; statement of international law principles. See for instance: Bill Frelick, ‘Haitian Boat Interdiction and Return: First Asylum and First Principles of Refugee Protection’ (1994) 26 *Cornell International Law Journal*, 675; Hiroshi Motomura, ‘Haitian Asylum Seekers: Interdiction and Immigrants’ Rights’, *Cornell International Law Journal*. Among the more general works is the brief article by Francois Crepeau, ‘International Cooperation on Interdiction of Asylum Seekers—A Global Perspective’, found in the Canadian Council for Refugees, *Interdicting Refugees*, May 1998.

UNHCR observed that there is no internationally accepted definition of interception.<sup>16</sup> Nevertheless, it suggested that the term can be 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.<sup>17</sup>

This definition was far from satisfactory and underscored the lack of understanding of the substantive international legal issues that underpin interception. The Standing Committee's approach unduly emphasised the action taken by a state 'outside its national territory' to prevent or stop entry of persons. It overlooked the fact that a state can define or redefine 'entry' for the purposes of immigration and for any claims under the *Refugee Convention* to exclude sections of its territory as indeed Australia and the United States did later. In 2003 the Executive Committee adopted a wider definition and issued a Conclusion defining interception 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; and that such measures also serve to protect the lives and security of the travelling public as well as persons being smuggled or transported in an irregular manner ...<sup>18</sup>

The Executive Committee definition makes reference to physical *interception practices*, relating to 'control of vessels' in contrast to the implied reference to 'all measures' proposed by UNHCR in 2000. More significantly, it drops the extraterritorial element from the definition.

## International Obligations towards Intercepted Asylum Seekers

Interception can have significant consequences for asylum seekers. This is because interception measures normally make no distinction between illegal migrants who are merely pursuing better economic conditions,

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16 Executive Committee of the High Commissioner's Programme, 'Interception of Asylum Seekers and Refugees: The International Framework and Recommendations for a Comprehensive Approach', 9 June 2000, EC/50/SC/CRP/17, para 10. Also, note that the term 'interdiction' is sometimes used interchangeably or as an alternative to 'interception', especially in US sources.

17 *Interception of Asylum-Seekers and Refugees: The International Framework and Recommendation for a Comprehensive Approach* EC/50/SR/CRP.17.

18 See UNHCR ExCom, Conclusion No. 97. This definition maintains the focus on State intent to interrupt movement by undocumented persons. Other activities such as detention within the intercepting State territory for irregular migrants awaiting processing, hearings, deportation, or removal would also be captured, suggesting that the new definition is overly broad. See Bill Frelick, 'Abundantly Clear: Refoulement' (2004) 19 *Georgetown Immigration Law Journal* 245, 251.

and those asylum seekers who are genuinely fleeing persecution.<sup>19</sup> The difficulties posed by interception for asylum law are well summed up by Professor Goodwin-Gill when he notes that:

The refugee in international law occupies a legal space characterised, on the one hand, by the principle of State sovereignty and the related principles of territorial supremacy and self-preservation; and, on the other hand, by competing humanitarian principles deriving from general international law ... and from treaty.

It is indisputable that immigration control in general is a sovereign prerogative. On the one hand, it can thus easily be arguable that when a state intercepts an undocumented alien arriving at its borders, it is not because it has sought to deny the right to seek asylum but rather because it has sought to control its borders. It would follow that the 'mere' interception of an alien transiting or attempting to enter the border of a state may not necessarily entitle the alien to protection from the state. If a state was obliged to hear and determine the claims of asylum seekers upon interception, even during transit while still outside its territorial border, then the state's obligation to hear their claims at that point would amount to a *de facto* obligation to authorise their entry. In essence, their claims themselves would become the conceptual equivalent of a visa subject to the determination of their claims. This would undermine the state's capacity to control its borders, because anyone making an asylum claim before the interdicting state's officials (or agents thereof) will be entitled thereby to continue their in-bound journey and enter to have the claim processed.<sup>20</sup>

On the other hand it can be argued equally strongly that the sovereign right of a state to protect its borders including the right of interception to prevent entry into its territory must be read and interpreted in conjunction with its obligations under convention and customary international law. In particular, the interception protocols of states must conform to international human rights standards, and where asylum seekers are involved, with their obligations under the *Refugee Convention*. The relevant obligation of the state may be assessed best under two types of interceptions: intervention (for the purposes of preventing entry) and rescue interception (to assist those in distress, for instance at sea).

## Rescue Interception at Sea

A state may engage in interception by 'default' particularly in circumstances where asylum seekers are in distress at sea. As was demonstrated in the case of the *MV Tampa*, rescue interception brings into play complex legal issues that impact on the intercepting state, the shipping industry and ultimately

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<sup>19</sup> Para 17.

<sup>20</sup> G Goodwin-Gill, *The Refugee in International Law* (1996) 157.



the asylum seekers in distress.<sup>21</sup> Just as the principle of non-refoulement lies at the very core of refugee law, the requirement for assisting people in distress at sea is a cornerstone of maritime law. There is general acceptance that a vessel in distress may enter the territorial waters of a state in search of assistance.<sup>22</sup> Furthermore explicit international legal obligations relating to aiding people in peril at sea are set out in:

- the *United Nations Convention on the Law of the Sea* of 1982 ('UNCLOS')
- the *International Convention for the Safety of Life at Sea* of 1974 (as amended) ('SOLAS')
- the *International Convention on Maritime Search and Rescue* of 1979 (as amended) ('SAR')
- the 1958 *Convention on the High Seas* (insofar as it has not been overridden by UNCLOS).<sup>23</sup>

The numbers of people, mode of transport, or status of people in question are immaterial and have no impact on the obligations to assist people in distress at sea.<sup>24</sup> A relevant example of these express provisions is found in paragraph 2.1.10 of chapter 2 of the Annex to SAR:

Parties shall ensure that assistance be provided to any person in distress at sea. *They shall do so regardless of the nationality or status of such a person or the circumstances in which that person is found.*<sup>25</sup> [emphasis added]

Ship masters, coastal states, flag states and international organisations all have a role to play in upholding these obligations. Ship masters are obliged by international law to render assistance, to provide assistance and/or rescue. Failure to comply with this requirement may lead to criminal penalties in some national jurisdictions, such as in the United Kingdom and Germany. Furthermore, the ship master must ensure the general safety of his vessel,<sup>26</sup> whilst coastal states must develop adequate search and rescue services<sup>27</sup> and flag states must uphold international maritime law.<sup>28</sup> Indeed the issue with respect to rescue interception is not whether there is an obligation to rescue or not. An obligation to rescue exists in conventional law and can plainly be justified on humanitarian grounds. The issue in asylum law is what happens after the rescue.

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21 A similar view was adopted by Beaumont J in *Ruddock v Vadarlis* (includes corrigendum dated 20 September 2001) [2001] FCA 1329 (18 September 2001) [110] in relation to the jurisdiction of the court and the right of the rescuees in the *Tampa* to enter Australia.

22 United Nations High Commissioner for Refugees, 'Background Note on the Protection of Asylum-Seekers and Refugees Rescued at Sea', 18 March 2002, para 1.

23 DJ Devine, 'The Cape's False Bay: A Possible Haven for Ships in Distress' (1991) 16 *South African Yearbook of International Law* 81, 84; AV Lowe, 'The Right of Entry into Maritime Ports in International Law' (1997) 14 *San Diego Law Review* 597, 610.

24 *Ibid*, paras 4-5.

25 *Above n 22*, para 5.

26 *Above n 22*, para 5 and footnote 1 of 'Background Note'.

27 *Above n 22*, para 6; see also Australia's *Navigation Act 1912* (Cth), ss 265, 317A.

28 *Above n 22*, para 7.

## After Rescue: The Legal Void

The question of responsibility for processing and possible resettlement of rescued asylum seekers is problematic. A major flaw in international maritime law is that none of the legislative instruments sets out the procedure to be followed after a rescue has taken place.<sup>29</sup> Faced with this lack of legal provision, the UNHCR argues for 'prompt disembarkation at the next port of call'.<sup>30</sup> However, in this regard, the term 'next port of call' is not defined in any instrument. It is suggested by the UNHCR that the 'next port of call' would need to be the nearest port in situations where there are large numbers of people and safety concerns. Another suggestion is that the point of embarkation could also serve as the point of disembarkation since that state has obligations to stop unseaworthy vessels from travelling from its territory. Further possibilities include the next scheduled port of call, or even a further port with better facilities in its territory for traumatised or injured persons. In situations where state vessels have intercepted illegal immigrants, the nearest port of that state could be the most suitable place for disembarkation.<sup>31</sup>

Factors identified by the UNHCR which bear on the disembarkation of rescued people, especially asylum seekers and refugees, encompass:

- legal obligations
- practical, security and humanitarian concerns
- commercial interests.<sup>32</sup>

The UNHCR further states:

It is crucial that ship masters are actively facilitated in their efforts to save lives, confident that safe and timely disembarkation will be guaranteed.<sup>33</sup>

At the same time, the UNHCR recognises the valid concerns of states when some of those rescued include asylum seekers, since following these guidelines could: 'result in a strain on their asylum systems, encourage irregular movement and even contribute to smuggling operations'.<sup>34</sup>

Where rescues at sea include individuals seeking international protection, the mechanisms and principles of international refugee law do apply. States' obligations under refugee law apply as soon as it is

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29 Above n 22, para 8.

30 Above n 22, paras 11–12.

31 Above n 22, para 12.

32 In the Australian Tampa incident of 2001, 140 of the people rescued by the *Tampa* were accepted by New Zealand and have been granted refugee status as well as assistance with housing and education. The Tampa incident instigated the 'Pacific Solution' in Australia, whereby asylum seekers are processed offshore, with camps established at Nauru and the Lombrum Naval Base on Manus Island. The Pacific States do not undertake the responsibility for processing, the UNHCR and Australian immigration officials do. For a brief summary, see <<http://news.bbc.co.uk/1/hi/world/asia-pacific/1802364.stm>>.

33 UNHCR (2002) *Background Note on the Protection of Asylum Seekers and Refugees Rescued at Sea*, 8 <<http://www.unhcr.org/cgi-bin/texis/vtx/protect/opendoc.pdf?tbl=PROTECTION&id=3e5f35e94>>.

34 *Ibid.*

clear asylum seekers have been rescued. UNHCR Executive Committee Conclusions include:

In all cases, the fundamental principle of non-refoulement including—non-rejection at the frontier—must be scrupulously observed'.<sup>35</sup>

Later EXCOM Conclusions restate:

the need to admit refugees to the territory of States, which includes no rejection at frontiers without access to fair and efficient procedures for determining status and protection needs.<sup>36</sup>

The UNHCR states that for procedures to be fair and efficient, after prompt disembarkation, it is necessary to (i) identify which rescued individuals seek asylum and (ii) identify which state is responsible for processing those asylum claims.<sup>37</sup>

The method of lodging an asylum application when at sea is unclear.<sup>38</sup> The UNHCR generally prefers asylum processing to take place on *terra firma* because onboard methods have been problematic in the past (e.g. due to physical conditions, lack of translators and legal counsel on board, lack of appeal procedures).<sup>39</sup> In most situations, such as where there are large numbers of people or where their mental/physical state means that immediate processing is not appropriate, then it will continue to be the best option that the processing occurs after prompt disembarkation.<sup>40</sup>

The question arises as to which state should be responsible for processing the claims for international protection. Normally, this will be the state where disembarkation occurs.<sup>41</sup> However, the flag state (of the rescue vessel) could also bear the main responsibility towards the asylum seekers in circumstances where (a) the asylum seekers clearly were intending to seek asylum in that state; or (b) where there are small numbers of asylum seekers and it may be reasonable for them to remain on board until the ship reaches the territory of its flag state; or (c) disembarkation could occur at a transitional third state without that state adopting any responsibility towards the processing of the asylum seekers.

A further strong argument for the flag state to bear responsibility is where it is involved in interception measures, even on the high seas, since there is a nexus between the original intended destination of the asylum seeker and the deliberate intervention by the flag State to stop the asylum seeker from reaching the final destination.<sup>42</sup>

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35 Above n 32, para 26.

36 EXCOM Conclusion No. 22, 1981, Part II A, para 2, cited at para 18 of Background Notes.

37 EXCOM Conclusion No. 85 (1998) para q, also cited at para 18 of Background Notes. EXCOM Conclusion No. 82 (1997) also contains almost identical wording.

38 Above n 36, para 20.

39 Above n 36, para 21.

40 Above n 36, para 23.

41 Above n 36, para 24.

42 Above n 36, para 25.

Some directives can be found in the Executive Committee Conclusions:

It is the humanitarian obligation of all coastal States to allow vessels in distress to seek haven in their waters and to grant asylum, or at least temporary refuge, to persons on board wishing to seek asylum.<sup>43</sup>

In accordance with international practice, supported by the relevant international instruments, persons rescued at sea should normally be disembarked at the next port of call. This practice should also be applied to asylum-seekers rescued at sea. In cases of large scale influx, asylum-seekers rescued at sea should always be admitted, at least on a temporary basis. States should assist in facilitating their disembarkation by acting in accordance with the principles of international solidarity and burden-sharing in granting resettlement opportunities.<sup>44</sup>

The Executive Committee conclusions have two important features. First they do not purport to state a general position in international law that imposes specific legal obligations on states to settle or admit and process asylum seekers. Second, whatever the conclusions purport to say, they are in the nature of recommendations and at most a statement of 'soft law'. The current international legal position does not impose any obligation on the rescuing state to admit, process or resettle rescued asylum seekers. In *Ruddock v Vadarlis* Beaumont J was of a similar opinion when he observed:

whilst customary international law imposes an obligation upon a coastal state to provide humanitarian assistance to vessels in distress, international law imposes no obligation upon the coastal state to resettle those rescued in the coastal state's territory. This accords with the principles of the Refugee Convention. By Art 33, a person who has established refugee status may not be expelled to a territory where his life and freedom would be threatened for a Convention reason. Again, there is no obligation on the coastal state to resettle in its own territory. Any extra-judicial assessment of Executive policy in the present circumstances should be seen in this context.<sup>45</sup>

French J agreed and with this view and added:

The primary obligation which Australia has to refugees to whom the Convention applies is the obligation under Article 33 not to expel or return them to the frontiers of territories where their lives or freedoms would be threatened on account of their race, religion, nationality, or membership of a particular social group or their political opinions ... In this case, in my opinion, the question is moot because nothing done by the Executive on the face of it amounts to a breach of Australia's obligations in respect of non-refoulement under the Refugee Convention.<sup>46</sup>

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43 Above n 36, para 26.

44 EXCOM Conclusion No. 15 (1979) para c, cited in Background Paper, para 28.

45 (2001) 110 FCR 491, 126.

46 *Ruddock v Vadarlis* (includes corrigendum dated 20 September 2001) (2001) 110 FCR 491, 125

## Interception for the Purposes of Preventing Entry

As noted earlier, it is the sovereign right of a state to regulate entry into its territory. The interception of an undocumented attempt to enter the territory of a state is therefore a legitimate exercise of sovereign authority and the right of a state to protect its borders. As in the case of rescue interception, the issue is not whether a state is entitled to intercept undocumented arrivals or not; the issue concerns the international legal obligations that are triggered once a state intercepts asylum seekers before they enter its territory.

This underlying precept of refugee law is that a person with a legitimate claim to refugee status must not be sent back to the country in which he or she was subjected to persecution. This of course is the essence of non refoulement and provides the foundation of the primary obligation of states in asylum law. The right of a state to intercept undocumented arrivals including asylum seekers is subject to the non refoulement obligation.

Interception of asylum seekers before entry into the territory of the state, while seemingly an extraterritorial activity, may not necessarily excuse a state from its *non-refoulement* obligation. Admittedly, Article 33 'does not affirmatively establish a duty on the part of states to receive refugees' and 'State parties may therefore deny entry to refugees so long as there is no real chance that their refusal will result in the return of the refugee to face the risk of being persecuted.'<sup>47</sup> This interpretation relies on the qualification that, where rejection at the frontier involves any real risk of harm, 'Article 33 amounts to a de facto duty to admit the refugee, since admission is normally the only means of avoiding the alternative, impermissible consequence of exposure to risk.' Under this reading, article 33 is not violated where refugees are rejected at the border, unless such rejection involves any real risk of return. In the maritime context, where private commercial vessels have undertaken a legal duty to rescue those in distress at sea, refusal of disembarkation would result in an unknown final destination—something that, depending on the proximity of the persecuting State to later disembarkation points, could qualify as an 'impermissible . . . exposure to risk.'<sup>48</sup>

It is well settled under international law that a provision of national law cannot justify a breach of international law that is binding on the state.<sup>49</sup> Likewise, a state's national law on immigration and immigration control must not be implemented in a way which breaches its obligations under international customary law or treaties to which it is a party. In effect, under such an interpretation, all refugees arriving by sea who manage to

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47 See James C Hathaway, *The Rights of Refugees under International Law* 355 (2005) (characterising interception as 'extraterritorial refoulement') 301, 355.

48 *Ibid.*

49 Under US law however, the 'last in time' principle governs conflicts between treaties and national laws.

reach a state's territorial waters should accordingly be granted entry to the territory itself.

The object and purpose of the Convention itself would be rendered meaningless if states could sidestep legal safeguards by moving their actions outside of their territory. The plain language of article 33 explicitly bans *refoulement* 'in any manner whatsoever,' and the view that the provision has extraterritorial effect has been supported by the UNHCR in a variety of contexts, including an *amicus curiae* brief to the U.S. Supreme Court in *Sale v Haitian Centers Council Inc.*<sup>50</sup>

According to Professor Hathaway, refugees are entitled to a range of rights, the nature and extent of which depend on the refugee's level of attachment to the asylum state.<sup>51</sup> He argues that article 33 is among 'a small number of core rights' that apply to asylum seekers regardless of their 'level of attachment' to a state territory, so that certain rights and protections inhere even before a refugee reaches a particular state, where a refugee is merely subject to a state's jurisdiction. Drawing on both the text of the Convention and general principles of public international law, he concludes that, 'the governments of state parties are bound to honour these rights not only in territory over which they have formal, *de jure* jurisdiction, but equally in places where they exercise effective or *de facto* jurisdiction outside their own territory.'<sup>52</sup> This would include situations in which a state's consular or other agents take control of persons abroad, such as the high seas. While state procedural bars may limit access to the courts, by means such as standing requirements, the geographic scope of article 33, while still debated, is likely to extend beyond state territory to State exercises of effective or *de facto* jurisdiction.

Within this context, there are four basic options open to a state that intercepts asylum seekers attempting to enter its territory. Firstly, upon interception, the state may choose to escort the asylum seekers into its territory. Such an option will rarely be exercised by the state since it defeats the essential purpose of interception to prevent entry into the state. The second option is for the state to turn away the asylum seekers without regard to their final destination. While such an action technically falls short of breaching the obligation of non *refoulement* it is inconsistent with the humanitarian elements of international protection principles. More significantly, it carries a real risk that the asylum seekers turned away may eventually be returned to the countries of origin in breach of non *refoulement*.

The third option for the state is to transfer the asylum seekers to a third state for resettlement. A fourth option is to transfer the asylum seekers to a third state or an offshore location with the view to processing

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<sup>50</sup> 509 U.S. 155, 113 S.Ct. 2549 (1993).

<sup>51</sup> Above n 47, 304.

<sup>52</sup> *Ibid*, 169.

and determining their status. Australia has adopted the third and fourth options as the basis of the Pacific Solution in dealing with intercepted undocumented arrivals.<sup>53</sup> As Goodwin-Gill discusses in this volume, there is no clear prohibition on a state to transfer prospective asylum applicants to a third state where their lives are not endangered, for resettlement or processing and status determination. The transfer however must be consistent with specific international obligations. The scope of the international obligations on the state in the management of intercepted asylum seekers offshore is the focus of the essays in this volume.

While the *Tampa* incident and subsequent legislation in Australia has made the country the focus of most discussions on interception, it needs to be noted that Australia is not alone in intercepting asylum seekers before they reach its shores. Australia however stands out because of its pursuit of the Pacific Solution. The practice by the United States parallels that of Australia in several respects. A brief survey of the US practice is thus useful.

## Interception in the USA

For over two decades, the United States Coast Guard has engaged in 'interdiction' measures, intended to facilitate prompt handling of undocumented aliens by limiting their access to the US judicial system. The program follows US Supreme Court alienage jurisprudence which holds that 'an alien seeking initial admission to the United States requests a privilege and has no constitutional rights regarding his application for the power to admit or exclude aliens is a sovereign prerogative.'<sup>54</sup> Moreover the judiciary has long held that domestic laws—including the *Constitution*—do not apply abroad except when mandated by Congress.<sup>55</sup> Under US law the Executive has broad interpretive authority over terms and obligations of international agreements.<sup>56</sup> The Supreme Court has agreed that for the purposes of US law, the UN Protocol Relating to the Status of Refugees ('Refugee Protocol') does not require a state to offer protection to refugees beyond its borders.<sup>57</sup> A presidential order to the Coast Guard to intercept vessels on the high seas illegally transporting migrants to the USA, without first determining whether they may qualify as refugees, does not involve either the *Immigration and Nationality Act* (1952), which

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53 This also underlies the recent Australian–US accord to transfer aliens to each other's jurisdiction, discouraging refugees who may wish to join family members in their original destinations, but technically not violating the refoulement principle.

54 *Landon v Plasencia* 459 US 21, 32 (1982).

55 See eg, *Argentine Republic v Amerasia Shipping Corp.* 488 US 428, 440 (1989). ('When it desires to do so, Congress knows how to place the high seas within the jurisdictional reach of a statute.') The US treaty approval regime starkly limits the efficacy of international agreements without enabling legislation; only in exceptional instances do international agreements give rise to a cause of action.

56 *United States v Curtiss-Wright Export Corp.* 299 US 304 (1936).

57 *Sale v Haitian Centers Council, Inc.* 509 US 155, 178–79 (1993).

governs and provides protection for asylum seekers and refugees, or the Refugee Protocol. Because of the discretion afforded to the Coast Guard and of judgements limiting the territorial effect of US obligations under Refugee Protocol, aliens interdicted on the high seas have little recourse to US courts to challenge actions of Coast Guard personnel or decisions made as to their refugee status. With respect to undocumented arrivals generally the US Coast Guard bluntly states:

Thousands of people try to enter this country illegally every year using maritime routes, many via smuggling operations *Interdicting migrants at sea means they can be quickly returned to their countries of origin without the costly processes required if they successfully enter the United States* [emphasis added].

Where asylum seekers are found to be among the illegal migrants, the Coast Guard states:

the Department of State (Bureau of Population, Refugees and Migration) and the Bureau of Citizenship and Immigration Services establish the policies in this area and handle all potential asylum cases on our cutters.<sup>58</sup>

According to a press release of the Coast Guard from late 2002, migrants intercepted at sea in the US:

remain in Coast Guard custody, receiving food, water and medical care if necessary and *will normally be repatriated back to their country of origin according to existing policies*.<sup>59</sup>

Immigration officials have wide discretion in crafting policies without Congressional debate and can thus respond quickly to perceived urgency. Illegal mass migrations of Cubans and Haitians have been of particular concern to US authorities and various large scale operations have been implemented at times of mass influx, such as during the early 1980s and early 1990s.<sup>60</sup> Undocumented arrivals from China and the Dominican Republic have also been a focus of the US Coast Guard's operations.<sup>61</sup>

The US Immigration and Naturalization Service (INS) has developed policies specifically directed at illegal Cuban migrants.<sup>62</sup> In 1995, the Cuban and US governments signed a migration accord, which means that Cuban nationals intercepted by the US Coast Guard in either US or international waters are returned to Cuba.<sup>63</sup> However, if asylum seekers are included in those people intercepted, the US Coast Guard reports that they then:

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58 Ibid.

59 (Emphasis added) Washington File, 14 November 2002 'Coast Guard Repatriates 239 Migrants to Haiti': <<http://usinfo.state.gov/regional/ar/islands/02111402.htm>>.

60 See Executive Order 12807 (1992) authorising interdiction of Caribbean refugees.

61 US Coast Guard, 'Overview' <<http://www.uscg.mil/hq/g-o/g-opl/mle/AMIO.htm>>.

62 INS ceased to exist on 1 March 2003 in the federal government's reorganisation to create the Department of Homeland Security. INS functions are now divided amongst the US Citizenship and Immigration Services, the Immigration and Customs Enforcement, and Customs and Border Protection.

63 Immigration and Naturalization Service, Transcript of INS Telephone Message 'Cuban Migration Interdiction Process': <<http://www.immigration.gov/text/shared/lawenfor/interdiction.htm>>.



have the opportunity to speak with a specially trained INS asylum officer. This officer sends the information provided by each individual to INS Headquarters in Washington where senior INS officers determine whether the individual has a 'credible fear of persecution'.

People on board the Coast Guard cutter who are found to have a credible fear of persecution are transferred to the US Naval Base at Guantanamo Bay, Cuba. After having been interviewed a second time at Guantanamo Bay, those found to have legitimate protection concerns are resettled in third countries by the Department of State and not in the US, even though they may have close family in that country.<sup>64</sup>

Since 1982, the US Coast Guard has intercepted no less than 225,626 undocumented arrivals in its waters.<sup>65</sup> The table below provides a detailed account of US interception activities since 1982:

**Total interdictions by US Coast Guard, in fiscal years ending 30 June, as at 5 November 2007**

**As of: 5 November, 2007**

<b>Fiscal Year</b>	<b>Haitian</b>	<b>Dominican</b>	<b>PRC</b>	<b>Cuban</b>	<b>Mexican</b>	<b>Other</b>	<b>Ecuadorian</b>	<b>Total</b>
0	0	0	0	0	0	0	0	0
1982	171	0	0	0	0	0	0	171
1983	511	6	0	44	0	5	0	566
1984	1581	181	0	7	2	37	0	1808
1985	3721	113	12	51	0	177	0	4074
1986	3422	189	11	28	1	74	0	3725
1987	2866	40	0	46	1	38	0	2991
1988	4262	254	0	60	11	13	0	4600
1989	4902	664	5	257	30	5	0	5863
1990	871	1426	0	443	1	95	0	2836
1991	2065	1007	138	1722	0	58	0	4990
1992	37618	588	181	2066	0	174	0	40627
1993	4270	873	2511	2882	0	48	0	10584
1994	25302	232	291	38560	0	58	0	64443
1995	909	3388	509	525	0	36	0	5367
1996	2295	6273	61	411	0	38	2	9080
1997	288	1200	240	421	0	45	0	2194
1998	1369	1097	212	903	30	37	0	3648
1999	1039	583	1092	1619	171	24	298	4826
2000	1113	499	261	1000	49	44	1244	4210

<sup>64</sup> Ibid.

<sup>65</sup> From <<http://www.uscg.mil/hq/g-cp/comrel/factfile/index.htm>>.

<b>Fiscal Year</b>	<b>Haitian</b>	<b>Dominican</b>	<b>PRC</b>	<b>Cuban</b>	<b>Mexican</b>	<b>Other</b>	<b>Ecuadorian</b>	<b>Total</b>
2001	1391	659	53	777	17	31	1020	3948
2002	1486	177	80	666	32	55	1608	4104
2003	2013	1748	15	1555	0	34	703	6068
2004	3229	5014	68	1225	86	88	1189	10899
2005	1850	3612	32	2712	55	45	1149	9455
2006	1198	3011	31	2810	52	91	693	7886
2007	1610	1469	73	2868	26	165	125	6336
2008	0	87	0	232	0	8	0	327
<b>Grand Total</b>	<b>111352</b>	<b>34390</b>	<b>5876</b>	<b>63890</b>	<b>564</b>	<b>1523</b>	<b>8031</b>	<b>225626</b>

Source: <<http://www.uscg.mil/hq/g-cp/comrel/factfile/index.htm>> (8 November 2007)

## Conclusion

Interception, the Pacific Solution and offshore processing have become part of the controversial landscape of Australian asylum law. As Professor Rubenstein argues in this volume, ‘When a community determines who can come into its territory . . . it reflects upon and reaches . . . deep into the heart of the national political community and profoundly affects the nature of relations among those residing within.’ If the scope of the problem with offshore processing is anything to go by, then Australia needs a big heart to deal with the humanitarian issues that come with interception and offshore processing. There are now significant indications that Australia’s Pacific Solution and offshore processing strategy generally may have provided inspiration to other states looking for ways of restricting migration inflows. This does not augur well for asylum seekers, or for the health of principles of international protection. As Azadeh Dastyari argues in this volume, the Memorandum of Understanding between the United States and Australia on the swapping of refugees between Guantanamo and the Nauru has added an unusual dimension to the complex issue of offshore processing. As asylum law scholars and refugee advocates are left to ponder the logic of the Memorandum of Understanding, Justice John Von Doussa and Elizabeth Biok bring their wealth of experience from the bench and the bar to remind us that in the effort to exercise the sovereign right to protect its borders, a state is necessarily constrained in ‘exporting deterrence’ by the imperatives of international human rights standards. What is frequently overlooked in the asylum debate is that if the decision to admit an asylum seeker goes to the heart of the nation as Professor Rubenstein argues, then the plea for acceptance and the drawn-out process that offshore processing necessarily involves affect the mental capacity and stability of the asylum seeker. Claire O’Connor, who has considerable experience representing asylum seekers, reminds us in graphic terms of the humanitarian and mental health issues that flow from a punitive approach to preventive

detention. In the final analysis, asylum law is as much about politics and legislation as it about litigation. With his involvement in the celebrated case of *Plaintiff S157/2001*, the Honourable Duncan Kerr SC MP brings his parliamentary and legal expertise together to provide an insight to the complexities of privative clause litigation and the role of the Australian courts in dealing with the ever evolving terrain of asylum law.

For those of who attended the two day conference, it was a unique opportunity to experience first hand the accounts by Julian Burnside QC in his many endeavours to assist asylum seekers to find a voice, and to witness the intense questioning of the Immigration Minister's representative by several NGOs. We hope that the collection of essays in this volume in at least a small measure brings to our readers some of the many insights that were exchanged at the conference.