

# 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<sup>1</sup>

**T**he 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

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.<sup>2</sup> 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.<sup>3</sup> 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.<sup>4</sup>

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...<sup>5</sup>

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.<sup>6</sup> 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)<sup>7</sup> 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.<sup>8</sup> 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.<sup>9</sup> 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.

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.<sup>10</sup> 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.<sup>11</sup> 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.<sup>12</sup> 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.”<sup>13</sup> 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.<sup>14</sup> 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,<sup>15</sup> 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.<sup>16</sup>

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.”<sup>17</sup> In other cases, where government institutions have collapsed due to civil

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.<sup>18</sup> 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.”<sup>19</sup>

### *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.”<sup>20</sup> 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.<sup>21</sup>

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...<sup>22</sup>

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.<sup>23</sup>

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<sup>24</sup> 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.<sup>25</sup>

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

1990 Schengen Implementation Agreement, for example, obliges all members of the EU to implement carrier sanctions.<sup>27</sup> This was followed in 2001 by a European Council Directive<sup>28</sup> 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.<sup>29</sup>

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.<sup>30</sup> 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,<sup>31</sup> 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.<sup>32</sup>

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.<sup>33</sup>

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*.<sup>34</sup>

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

In order to assist 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 offi-

cial 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.<sup>35</sup> 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."<sup>36</sup> 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."<sup>37</sup> 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."<sup>38</sup>

Canada currently has a large global network of such officers,<sup>39</sup> 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."<sup>40</sup>

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.<sup>41</sup>

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.<sup>42</sup> 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-

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.<sup>43</sup>

#### *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.<sup>44</sup>

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."<sup>45</sup>

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<sup>46</sup> 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,<sup>47</sup> 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.<sup>48</sup>

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.<sup>49</sup>

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.<sup>50</sup>

An area of considerable complexity is rescue at sea. States have an obligation under international maritime law to rescue those on unseaworthy vessels.<sup>51</sup> 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.<sup>52</sup>

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.<sup>53</sup> Most were from Haiti, the Dominican Republic, or Cuba, though Ecuadorians, Chinese, and others have also been intercepted.<sup>54</sup>

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.<sup>55</sup> 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.<sup>56</sup> (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).<sup>57</sup>

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.<sup>58</sup>

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.”<sup>59</sup> 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.<sup>60</sup> 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-

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*.<sup>61</sup> 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.<sup>62</sup> 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,<sup>63</sup> adopted with consensus on "virtually all points"<sup>64</sup> 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

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.<sup>65</sup>

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.<sup>66</sup>

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.<sup>67</sup> 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.”<sup>68</sup>

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]<sup>69</sup>

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.<sup>70</sup> 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,<sup>71</sup> there is a countervailing emerging obligation to intercept in order to combat certain types of crime, including smuggling and trafficking in persons.<sup>72</sup> Similarly, as noted above, states are obliged to go to the aid of ships in distress regardless of where they are.<sup>73</sup>

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,<sup>74</sup> and must be exercised within the parameters of international law.

### *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).<sup>75</sup>

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.<sup>76</sup> 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.”<sup>77</sup> 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.<sup>78</sup> 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.<sup>79</sup>

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.<sup>80</sup>

### *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.<sup>81</sup> The prohibition applies irrespective of whether such persons have been formally recognized as refugees.<sup>82</sup> It is explicitly included in the 1951 Refugee Convention,<sup>83</sup> the 1984 Convention Against Torture (CAT),<sup>84</sup> and several regional treaties.<sup>85</sup> The UN Human Rights Committee has found that the principle of *non-refoulement* is also a component of Article 7 of the 1966 ICCPR.<sup>86</sup> 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<sup>87</sup> and is progressively evolving into a preemptory norm of international law.<sup>88</sup>

The principle of *non-refoulement* does not include any explicit geographical limitation,<sup>89</sup> 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.<sup>90</sup>

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.<sup>91</sup> To deny an asylum seeker access to fair and effective procedures for the determination of his or her refugee claim could result in *refoulement*,<sup>92</sup> 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.*<sup>93</sup> 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

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.<sup>94</sup> UNHCR itself, whose mandate it is to supervise the application of the provisions of the 1951 Refugee Convention,<sup>95</sup> took the same position in its *amicus curiae* brief submitted to the U.S. Supreme Court.<sup>96</sup> 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.<sup>97</sup>

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*.<sup>98</sup>

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.<sup>99</sup>

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.<sup>100</sup> 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.<sup>101</sup>

### *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,<sup>102</sup> Article 2(1) of the 1966 ICCPR,<sup>103</sup> and Article 2(2) of the 1966 International Covenant on Economic, Social and Cultural Rights (ICESCR).<sup>104</sup> It is also, of course, the motivating principle of the 1969 Convention on the Elimination of All Forms of Racial Discrimination (CERD).<sup>105</sup>

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.<sup>106</sup>

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.<sup>107</sup> *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,<sup>108</sup> 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

carrier sanctions and other “pre-frontier arrangements” may violate Article 12(2).<sup>109</sup> 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.<sup>110</sup>

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).”<sup>111</sup> 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.<sup>112</sup> 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.”<sup>113</sup>

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.<sup>114</sup> However, the extension of state enforcement mechanisms beyond state territory carries with it an obligation to ensure international protection for those who require it.<sup>115</sup>

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.”<sup>116</sup>

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*.<sup>117</sup> States have both a legal and moral obligation to ensure that refugees and asylum seekers may enjoy their human rights, including access to protection.<sup>118</sup> 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-

tive Committee. In earlier years, the Committee had dealt extensively with the matter of rescue at sea.<sup>119</sup> 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.”<sup>120</sup> In May 2001, UNHCR organized a regional workshop in Ottawa on “Incorporating Refugee Protection Safeguards into Interception Measures,”<sup>121</sup> the conclusions of which were presented to a meeting of the Global Consultations on International Protection in June of that year.<sup>122</sup> In March 2002 UNHCR convened an Expert Roundtable on Rescue at Sea,<sup>123</sup> 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.”<sup>124</sup>

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.<sup>125</sup>

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

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)<sup>126</sup> 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-

- 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*, 6<sup>th</sup> 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/2002/12/20021206-1.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 675ff.
  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 18<sup>th</sup> 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

- 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 québécoise 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](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

- 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/instreet/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

- 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 ensure 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).

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.”

---

*Andrew Brouwer is a member of the Executive Committee of the Canadian Council for Refugees. Judith Kumin is Visiting Professor at Carleton University, on leave from the UNHCR. The opinions expressed in this paper are those of the authors and do not represent the views of the United Nations or of the UNHCR.*

*The authors wish to thank Volker Turk and Grainne O’Hara (UNHCR), Janet Dench (Canadian Council for Refugees) and Chantal Bostock (Australia/UK) for their helpful comments on various aspects of this article.*

---