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# REPORT

## THE NEW “BOAT PEOPLE” Ensuring Safety and Determining Status

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# I. INTRODUCTION

For better or worse, migration has captured the popular imagination in the past decade. While the absolute numbers of global migrants have been rising, the percentage of the world's population that decides to move across an international border to seek work, a better life, or safety, is not significantly greater than it was a century ago. What has changed is the visibility of migration: its presence in political debate and in the media. But there is also the simple fact that various forms of communication, including transportation, have become easier—and so we see migration happening, and even people who do not pick up their whole life to cross continents have a sense of what such movement is like.

Although the vast majority of migrations are conducted over land or by air, it is the images of migrants at sea that seem to really grab the public's attention. Just one percent of all migrants to the US seek to enter by sea, and just some ten percent of Italy's irregular migrants arrive in this way. Some speculate that movements by sea are increasing as restrictions to entry through land crossings and airports increase.

Regardless of how many people attempt to migrate by sea, however, the images often seem to control the issue. Whether we are talking about a few hundred migrants on a rusty tanker, or rescued by a renowned international shipping company; a few dozen migrants in a smugglers' speedboat, or a handful on a makeshift vessel or rubber dinghy, migrants at sea conjure up images out of all proportion to their actual numbers in global migratory movements today. Migrants traveling by sea either become the most visible in the world—in the glare of media sensationalism while many millions of other migrants and refugees receive no attention at all—or the most invisible: lost in tragic accidents at sea that no-one will ever hear of. The plight of 100 migrants rescued by Spanish coastguards off the Canary Islands in August 2005 demonstrates this dichotomy: they had been lost at sea for two months, and nobody knew; two had died; but following their rescue—cast by the media as interception—they were amongst the top

international news stories.<sup>1</sup> The 100 Ecuadorians headed for the US but drowned off the Colombian coast reported the following day, while just nine fellow boat passengers were apparently rescued by Colombian fishermen, were unusual in that their loss came to the attention of the world.<sup>2</sup>

Some states have established policies to intercept would-be migrants while they are at sea and deter irregular arrivals. Other migrants are found in distress at sea and rescued. Attempts to arrive by sea which become subject to interception or become rescue situations often involve a wide range of actors, well beyond the usual authorities and NGOs involved in migration and asylum entries. Such actors might include coast guards and fishermen, additional international organizations, such as the International Maritime Organization, commercial shipping companies, and a wider range of countries and their various government departments than might usually engage in dealing with migration or asylum. Many of these actors are drawn into the rescue and its aftermath because the scene of activity (the sea) is often outside the usual arenas of state responsibility and clear territorial control. The involvement of such a wide range of actors is just one example of the complexities of these approaches to deal with attempted arrivals by sea.

In order to bring new light to the issues of migration by sea, and in particular interception and rescue, the Migration Policy Institute embarked on the project of which this report is a key result. Four regional background papers on the Mediterranean, the US and Caribbean, Australia and Canada were drawn up. These are attached as Appendices to this report. An international meeting was convened, serving two key purposes.<sup>3</sup> One was to bring together national policy-

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1 See e.g. BBC News, "Migrant Boat Found off Canaries," August 16, 2005, <http://news.bbc.co.uk/2/hi/europe/4156018.stm>.

2 See BBC news, "'Many Drown' in Ecuador Shipwreck," August 17, 2005, <http://news.bbc.co.uk/2/hi/americas/4161050.stm> and CNN, "100 Missing after Boat Sinks off Columbia," August 17, 2005, <http://edition.cnn.com/2005/WORLD/americas/08/17/ecuador.ship.ap/index.html>.

3 MPI gratefully acknowledges financial support received from the United Nations High Commissioner for Refugees (UNHCR) which was instrumental in ensuring the success of the international meeting component of this project.



makers, international organizations and NGO representatives and academics to share their thinking in an open dialogue, with the aim of forging connections and advancing understanding in such a way that all participants could benefit in their future work from the two days of discussion.

The second purpose of the meeting was to provide a research resource for MPI staff—a resource on which this report is based. This report is not an event summary—the discussion was off the record: no participant will be cited or recognized in the course of this text, although in acknowledgement of their input, a list of those attending the roundtable is included at the end of the report. In effect, the two-day meeting provided a rich forum replacing a series of research interviews which would have had to be conducted on three continents to provide the same wealth of insights and materials—and which would have taken many weeks.<sup>4</sup> The findings reported here are those of the authors, and do not reflect any consensus reached during the meeting.

The main body of this report is split into two parts. The first provides factual, background information; the second provides analysis of that information and the handling of these issues worldwide.

The background section sets out definitions of interception and rescue, followed by a summary of various states' approaches to interception in particular. (More detailed information on specific states' approaches are set out in Appendices A-D.) The international ramifications of interception and rescue are explored, with particular attention to three “watershed” type moments in the evolution of these approaches: the DISERO (Disembarkation Resettlement Offers), RASRO (Rescue at Sea Resettlement Offers) and CPA (Comprehensive Plan of Action) approaches in Southeast Asia; the Safe Haven approach in the Caribbean; and the *Tampa* incident together with Australia's “Pacific Strategy,” under which Australia made agreements with the Pacific nations of Nauru and Papua New Guinea to divert seaborne migrants

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4 We are grateful to Julia Gelatt, Eliot Turner and Jennifer Yau for taking extensive notes for us during the course of the two day meeting, helping us to recall the details of the wide-ranging and very thoughtful conversation.

en route to Australia for processing in centers in those countries.<sup>5</sup> Given the international ramifications described we then turn to information on the roles of various international actors.

In analyzing this information we clarify conceptually the distinctions and connections between interception and rescue. We then broach the humanitarian needs involved in such situations—focusing on rescue and protection (two distinct humanitarian activities linked to rescue at sea in particular) and the safety and status issues noted in the title of this report. While the humanitarian issues are stark, if sometimes confused, it is clear that where arrival by sea is concerned, as on so many other migration matters, states and governments feel the strong need not only to be in control, but to demonstrate to the public that they are in control. As a result governments want to dominate occurrences of attempts to arrive by sea, sometimes in ways which conflict with the international obligations they have agreed to carry.

The central issue which emerges in all of this discussion is that of the disembarkation of people who have tried to migrate by sea: where can they get back onto dry land, and under what circumstances? And once on dry land, how will they be treated?

Knowing whether the existing approaches are effective—or to what degree they are effective—is key to thinking about any future solutions. We therefore assess the effectiveness of current policies, and then turn to one of the most often proposed solutions to keep the issue on dry land: better cooperation with third countries (of origin or transit), and the feasibility of that suggestion. Finally, before moving to our own

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5 Since it was developed in 2001, media, academic and NGO reports—as well as statements by opposition Australian politicians and responses to them by the Australian Immigration Ministers, Philip Ruddock and later Amanda Vanstone—have referred to the “Pacific Solution.” For example, a 2004 press release states that “onshore processing will inevitably mean a return to the flood of boats experienced prior to the introduction of the Pacific Solution in 2001.” Amanda Vanstone, “Latham Rolls Out Welcome Mat for People Smugglers,” Media Centre VPS 021/2004 (January 14, 2004). However, since late 2004 at least, the Department of Immigration and Multicultural and Indigenous Affairs (DIMIA) has noted that the name of this approach is the “Pacific Strategy”. As this is the official given name at the point of writing, we have adopted the term “Pacific Strategy” except in citations of sources which call it the “Pacific Solution.”

conclusions and some recommendations, we try to identify the future steps that could be taken at a regional and global level.

## **II. BACKGROUND: MIGRATION BY SEA IN CONTEXT**

There is a sense in which the simple fact of the attention given to them makes arrivals by sea appear to be unique. Yet a major question for appropriate policy handling of such migratory flows is whether in fact arrivals of migrants, asylum seekers and refugees by sea, as compared to arrivals by land or by air, are so remarkable. For people seeking asylum, once on dry land, the means of arrival should, according to international law, have no negative impact on the case (this point will be further elaborated below).

If there are distinctions that do arise as a result of the mode of arrival, then they are most apparent in the potential need for rescue. Interception happens on land, including at airports, as well as at sea. Rescue at sea, however, has particular aspects which distinguish it from any of the situations in which migrants using other means of transportation might find themselves. Primary among these is the obligation on shipmasters to rescue anyone who needs it, regardless of who they are. This makes migration by sea different from overland migration even though the latter may result in spontaneous rescue as a result of dehydration or other physical difficulties.

### **A. Defining “Interception”**

In large part as a result of the negative perception of arrivals by sea, systems of interception have been established. Interception occurs when mandated authorities representing a state locate a boat, prevent its onward movement, and either take the passengers and crew onto their own vessel, accompany the vessel to port, or force an alteration in its course. (This may occur in territorial or international waters—the

details of when interception occurs vary from state to state and will be discussed below.)

Migrants intercepted at sea may sometimes request access to an asylum procedure. Initial screening for potential refugee protection needs while at sea may be part of the process of interception, or it may need to be formally requested by the individual (at least through the expression of some fear of persecution). Once again, the precise mechanisms according to which this is done vary from state to state, and will be discussed below.

No matter how it is conducted, interception could be said to be a state’s policy reaction to attempts to arrive by sea—a reaction which demonstrates that states oppose this practice. That opposition is most frequently based on the way in which arrivals by sea challenge states’ general immigration admissions procedures and programs. Migration by boat towards industrialized countries today is most often, but not always, part of a smuggling operation. While interception is used to deter irregular migrants using smugglers, its broad application by some states means also that people fleeing a country of origin where they fear for their lives are prevented from making that movement. In some cases states try to justify this by looking at whether asylum seekers are fleeing directly from their country of origin: if they are not doing so, the state may label their movement “secondary” and say that it is this particular aspect of having first found protection in one place and then trying to move to another that they are trying to deter.

## **B. What is “Rescue”—and How Does it Differ from Interception?**

Rescue at sea, or the practice of assisting seaborne persons in some form of trouble or distress, is a quite different (but sometimes overlapping) matter. Rescue often gains more attention than interception—it is more dramatic. Those who set sail enter a realm of law and international norms which does not exist on land. Under the United Nations Convention on the Law of the Sea (UNCLOS), if any vessel is in trouble at sea, the crews of all other ships are under an obligation to rescue

those in distress.<sup>6</sup> These provisions reflect a long-standing tradition among seafarers, and a well-established rule of customary international law. In particular under Article 98(1):

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

This rescue is one form of humanitarianism.

What occurs after rescue is another matter, and may come up against a different form of humanitarianism. Those who are rescued should be given the opportunity to disembark. Various states could be locations for their disembarkation: the flag country of the rescuing ship; the closest land to where the rescue takes place; the next port of call on the rescuing ship's established route; the nation from which those rescued originally set out to sea. None is, or has been, clearly obliged under international law to be the state where disembarkation occurs.<sup>7</sup> This situation should change as a result of recent IMO agreed amendments to the International Convention for the Safety of Life at Sea (SOLAS).<sup>8</sup> Once these amendments enter into force, governments which have contracted to SOLAS and have maritime search and rescue regions will be responsible for coordinating disembarkation in cases of rescue. It remains to be seen what changes this will make in practice.

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6 United Nations Convention on the Law of the Sea (UNCLOS), opened for signature December 10, 1982, UN Doc. A/CONF.62/122 (1982). There are now 149 States party to UNCLOS, which entered into force on November 16, 1994.

7 It is presumed that those who are rescued will be disembarked at a place of safety. The UNHCR Executive Committee Conclusions state that those rescued at sea "should normally be disembarked at the next port of call," but has also made recommendations for determining "the most appropriate port for disembarkation purposes," thereby suggesting that the next port of call may not always be the most appropriate port for disembarkation, particularly if it is the country of origin of people claiming to be refugees. UNHCR *Conclusion No. 23: Problems Related to the Rescue of Asylum-Seekers in Distress at Sea*, UNHCR Executive Committee, para. 3 (October 21, 1981); UNHCR, *Background Note on the Protection of Asylum-Seekers and Refugees Rescued at Sea*, sec. II (31) (March 18, 2002).

8 See Section II.F below.

If a boat reaches a port of call, that state is expected to take on responsibility for the people rescued and assess their status and situation—but sometimes states seek to avoid being put into that position. On other occasions, the next port of call might be the very place from which people have fled, in which case the shipmaster should probably try to avoid returning them to harm’s way, although, as a non-state actor, there is no obligation for him or her to do so. IMO Guidelines on the Treatment of Persons Rescued at Sea suggest that the master take protection needs into account and weight that factor in determining where to disembark. In reality this may sometimes result in return to the country of origin. On some occasions, setting course for the country of origin has resulted in those rescued refusing to disembark, or even becoming quite violent or threatening, in efforts to provoke a change in route.

Recent examples of rescue situations around the world have seen disembarkation at next ports of call, at the closest port to the rescue, and at ports of countries not involved but requested (and sometimes paid) by other states to accept disembarkation. In the latter cases in particular, it has been demonstrated that the place of disembarkation does not necessarily have to be the place in which a long-term protection solution is made available to those among the rescued who are refugees.

Several countries and international organizations could potentially become involved in seeking a location for disembarkation. This would be the case following a rescue by a commercial or pleasure vessel, for example. If rescue is conducted by state authorities, however, a situation more similar to that of interception might ensue. If the boat carrying migrants is poorly constructed and poses a danger to them, if it is overloaded or clearly lacks safety equipment, food or water, or if the conditions at sea are themselves perilous, state authorities which come across the vessel are required to assist the passengers, likely by transferring them to their own coast guard vessel, because international law has created an obligation to render assistance to persons found at sea who are in distress or in danger of being lost. In these cases, the crews of many coast guard vessels which are authorized to intercept and interdict may well be carrying out what is in fact a humanitarian act of rescue. However, once safety is ensured, the relationship between the “rescuing” authority and the often vulnerable migrants becomes one between the controlling and the controlled, and the

full breadth of measures employed by the specific state to deal with those intercepted at sea will apply. If the migrants are to be disembarked, that will usually, in cases involving state authorities, be either in the state whose coast guard has conducted the rescue, or at a location with which that state has an established agreement for such disembarkations. In some situations disembarkation following interception may occur at a port in the country of origin, if initial asylum screening on board the intercepting vessel has taken place for those who request it and revealed those who are returned to the country of origin not to have a protection claim.<sup>9</sup>

### C. Disembarkation

Perhaps, therefore, the major issue in both interception and rescue at sea—though it is more pronounced in a situation of rescue by a non-government related vessel—is disembarkation. Following rescue there is the question of where disembarkation will take place. Following interception (at least in cases where the vessel’s passengers are taken aboard the intercepting ship) that question might seem to have a more ready answer—the state which intercepts (or which rescues). However, as noted above, in practice this is not always the case.

For those passengers who request access to an asylum procedure, a final decision regarding their need for protection as a refugee (or other humanitarian protection) will take place only after disembarkation. At that point, international law stipulates that no distinction should be made regarding how a person arrived in the country when considering a protection claim.<sup>10</sup> However, states may find a way around this stipu-

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9 Anyone with an apparent basis for entry to an asylum procedure may be removed to another vessel and taken to a location in which that claim can be assessed.

10 “1. The Contracting States shall not impose penalties, on account of their illegal entry or presence, on refugees who, coming directly from a territory where their life or freedom was threatened in the sense of article 1, enter or are present in their territory without authorization, provided they present themselves without delay to the authorities and show good cause for their illegal entry or presence.

2. The Contracting States shall not apply to the movements of such refugees restrictions other than those which are necessary and such restrictions shall only be applied until their status in the country is regularized or they obtain admission into another country. The Contracting States shall allow such refugees a reasonable period and all the necessary facilities to obtain admission into another country.”

Convention relating to the Status of Refugees, 189 UNTS 150, *entered into force* on April 22, 1954: Article 31.

lation if the people are labeled “secondary movers”. From the moment of arrival on land, the fact of arrival by sea should be of no relevance for refugees. For would-be economic migrants, however, the fact of arriving by sea, often with a smuggler, will be the relevant factor in pointing to the irregularity and (in the vast majority of cases) illegality of the arrival. If smugglers are among those who reach land, they will be treated in line with national laws on their crimes, and should be treated in accordance with international agreements including the protocols to the Convention on Transnational Organized Crime.<sup>11</sup> However, the distinction between a smuggler and the smuggled may not always be clear. Sometimes a person may simply have been the one to organize a collective journey—and not a smuggler in the sense of running systematic operations. On other occasions, prior to departure, a passenger may have been identified by the smuggler (who does not travel with the migrants) as the one on board who can steer the boat: does he or she then take on the role of working for or with the smuggler?

#### D. How Individual States Deal with the New “Boat People”

Given the distinctions, both in practice and conceptually, between interception and rescue, it is useful to point out the variety of ways in which different countries put these approaches into operation—and their reasons for doing so. Understanding their policies and approaches is essential for getting to the heart of any global issues involved in dealing with attempts to arrive by sea. (See Appendices A-D for more detailed background information on European states, the US, Australia and Canada.) These states have a variety of practices, and can best be sketched for our purposes in two groups: Australia and the US, which have specific interception approaches; and Canada and the European states, which have been less interception focused (although some European states are moving towards interception practices and policies).

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11 Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, Supplementing the United Nations Convention Against Transnational Organized Crime, GA Res. 25, annex II, UN GAOR, 55th Sess., Supp. No. 49, at 60: *entered into force* on Sept. 9, 2003; Protocol Against the Smuggling of Migrants by Land, Sea and Air, Supplementing the United Nations Convention Against Transnational Crime, GA res. 55/25, annex III, 55 UN GAOR Supp. (No. 49) at 65 (2001).



The United States and Australia currently carry out interception—in other words, they use maritime patrols of coast guard or navy vessels to forcibly prevent the arrival of migrant-carrying boats. However, each country has a different policy with regard to the geographic locations in which it is willing or able to intercept. Australia has, since September 1999, used its navy and the National Maritime Unit of the Australian Customs Service to intercept within its territorial waters and the contiguous zone extending between twelve and twenty-four nautical miles from the baselines used to delimit the territorial sea. The domestic power to do this was created under the Border Protection Legislation Amendment Act on December 16, 1999 (which retrospectively validated actions taken during and after the *Tampa* affair). In contrast, the United States attempts to prevent migrant-carrying ships from entering US territorial waters. It uses coast guard patrols to monitor common migrant transit routes on the high seas and intercepts boats as far as possible from US shores. The current US approach dates from 1992,<sup>12</sup> although the US began the practice of interdiction in September 1981, with a Presidential Proclamation and Executive Order.<sup>13</sup> In both the US and Australian cases, for those conducting interception or rescue and still at sea, safety will be ensured as a priority, with the provision of water, food, shelter and, where necessary, basic medical treatment.

When the US intercepts a vessel it is either returned to the country of origin (the most frequent scenario in deterring Haitians) or the passengers, after making a protection need known and initial on-board screening, are diverted to Guantánamo Bay Naval Base.<sup>14</sup>

Screening for protection needs is in the US case part of the interception process; however, access to screening is not uniformly available.

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12 United States Office of the President, “Interdiction of Illegal Aliens,” Executive Order 12587 (Federal Register 87, No. 105, June 1, 1992), May 24, 1992.

13 See Executive Order No. 12,807, 57 Fed. Reg. 23133, summarized in Guy S. Goodwin-Gill, *The Refugee in International Law* (Oxford: Clarendon Press, 2nd edn, 1996), pp. 141-145.

14 Guantánamo Bay is land on the island of Cuba, leased by the US government. Though physically located in Cuba, the Naval Base is completely under the control of the US military. Since 2001 it has become most (in)famous for the facilities used there to house international prisoners of war (or “enemy combatants”) in the “War on Terror.” During the 1990s it was more known as a facility housing people seeking refuge—and part of the territory is still used for that purpose.

Cubans and Chinese migrants intercepted by the US Coast Guard are subject to special rules which automatically give them the opportunity to express any fears of persecution. Cuban migrants are read a statement explaining that they will be given a credible fear interview if they desire, and Chinese migrants are given a written questionnaire asking why they have left China (providing the opportunity to express a fear of return, if they have one). However, all other migrants, including Haitians as the largest group, are only given a credible fear interview if they spontaneously show or state a fear of return. This is known as the "shout test."

*Refoulement* is a particular concern in situations such as that sketched in the previous paragraph: if the Haitians, for example, are too frightened to actually show their fear specifically of return, then they can well be returned. The US has claimed there is no situation of *refoulement* if the individuals have not landed on US shores.<sup>15</sup> There has also been concern in the US about the specific treatment of Haitians following President Bush's statement in February 2004 that "refugees" would be intercepted and returned to Haiti during that country's 2004 crisis (thus implying that all Haitians would be returned regardless of the validity of their asylum claim).<sup>16</sup> Both the United States and Australia generally seek to repatriate rejected asylum seekers to their countries of origin—as do other states, although few, if any, are systematically successful in these attempts.

For those migrants who successfully demonstrate a fear of return during the interception process, any ultimate granting of refugee status following an in-depth on-land asylum procedure most frequently does not involve asylum in the intended destination country. As a deterrence measure, the US seeks resettlement options elsewhere for people found to be refugees after an offshore procedure according to their own

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15 In the US Supreme Court Case, *Sale v. Haitian Centers Council, Inc.*, the Court countenanced the return of intercepted boat people. The majority opinion determined that the US Immigration and Nationality Act does not apply beyond US borders and designated territories. At the time, UNHCR called the decision "a setback to modern international refugee law." See Bill Frelick, "'Abundantly Clear': Refoulement," *Georgetown Immigration Law Review* 19/2, 2005: 245-275.

16 Quote from President Bush: "I have made it abundantly clear to the Coast Guard that we will turn back any refugee that attempts to reach our shores." *Id.*

refugee status determination procedures in Guantánamo. The US has been steadfast in implementing this policy. Even Cubans who are intercepted at sea are to be resettled to third countries if found during processing in Guantánamo to be refugees, although (unlike migrants from other countries of origin) Cubans who arrive on US shores are allowed to stay under the “wet foot/dry foot” policy.<sup>17</sup> Canada and countries in Latin America are the main locations of eventual resettlement for Haïtians and Cubans found to be refugees at Guantánamo, although that process has frequently faced significant delays.

Before intercepting boats, Australian naval or customs vessels will attempt to warn them, beyond Australia’s “contiguous zone,” to stay out of Australian waters and convince them to turn back. If boats refuse to heed these warnings, then once within the contiguous zone, Australian authorities may use more forceful deterrence measures, such as firing warning shots into the ocean.<sup>18</sup> In the face of continuing refusal, an armed boarding party will be dispatched to undertake a “non cooperative boarding” and assume control of the vessel. Strenuous attempts will then be made to return the boat (usually to Indonesian waters). In the weeks after the arrival of the *Tampa*, Australia managed to return more than 600 people to Indonesia on four boats through such procedures. During this process, Australian officials make no attempt to ascertain whether or not passengers aboard the boats may be seeking to make a protection claim under the Refugee Convention and there is no evidence to suggest that anything similar to the US “shout test” applies.

It is in cases where Australian authorities fail in their attempts to return boats to Indonesian waters, that the “Pacific Strategy” comes into play. In this situation, the migrants will be transferred to a naval

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17 The US government under the Clinton Administration determined that Cubans are special refugees fleeing from communism and gives them parolee status (see section III.D below), as long as they set foot on US soil (feet dry) having avoided being intercepted by the Coast Guard, which is supposed to repatriate them if they are intercepted (feet wet). However, it should be noted that special treatment of Cubans has been ongoing since the Cuban revolution and in US law since the first Cuban Adjustment Act of 1966.

18 See for example the story of the Suspected Illegal Entry Vessel (SIEV 4) from which asylum seekers were erroneously alleged to have thrown their children overboard. Peter Mares, *Borderline* (Sydney: University of New South Wales Press, 2002) pp. 135-139.

vessel and shipped either to Papua New Guinea or Nauru, or to one of Australia's excised offshore locations. Australia has taken steps to alter what it calls its "migration zone," meaning that after September 2001 the external territories of Ashmore, Cartier, Christmas and Cocos Islands, as well as resource installations, were "excised."<sup>19</sup> These had been the most significant locations of arrivals of "boat people" during the 1990s. People classed as "unlawful non-citizens" who travel in an irregular way to these territories are defined as "offshore entry persons" and cannot make a valid application for any kind of visa, including a protection visa, unless they are given special permission to do so by the Minister. The waters around the islands remain subject to Australian sovereignty and jurisdiction and would-be migrants intercepted in those waters, as elsewhere in the territorial or contiguous waters, may be taken either to one of these excised offshore places or to Nauru or Papua New Guinea, where people seeking asylum will be given "access to effective procedures for assessing their claims."<sup>20</sup> Claims are assessed by Australian government officials "in accordance with the 1951 UN Refugee Convention"<sup>21</sup> but asylum seekers have no recourse to Australian courts or tribunals.

The Australian government had expressed the goal of not accepting for settlement all those people who had arrived irregularly by sea, even if they were found during offshore procedures to be in need of protection.<sup>22</sup> Of 1,547 people taken to the offshore processing centers, 1,032 have been resettled (967 refugees and fifty-four non-refugees). Australia has taken 568 of the refugees and seventeen of the non-refugees—so despite its stated policy, Australia has resettled more than half of those found to be refugees or otherwise in need of protection.<sup>23</sup> Australia's neighbor and traditional ally New Zealand agreed to

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19 More islands were excised from the Migration Zone in July 2005.

20 DIMIA Fact Sheet No. 76, "Offshore Processing Arrangements" <http://www.immi.gov.au/facts/76offshore.htm>.

21 *Id.*

22 UNHCR is responsible for status determination for those intercepted on land under the regional program in Indonesia, as part of regular refugee status determination activities, although it is not a party to the Australia-Indonesia Agreement. Australia now conducts the procedures on both Nauru and Papua New Guinea.

23 This caseload counts towards Australia's total annual refugee intake, which was 12,000 until the end of 2003, and since then has been 13,000.

take most of the other people resettled from Nauru and Papua New Guinea (401 in total), with small numbers going to Sweden (twenty), Canada (sixteen), Norway (four) and Denmark (six).<sup>24</sup>

These figures attest to the difficulty of finding third countries willing to accept resettled refugees under this type of circumstance. There are only some eighteen resettlement countries worldwide, and those countries would often prefer their scarce resettlement places to be used for people coming from countries of first asylum in their regions of origin (usually Africa, the Middle East or Asia) and not from the offshore processing sites that developed countries have established in order to keep refugees and migrants from arriving by sea.

Third countries can be reluctant to resettle refugees when there is a rich industrialized country that it appears should logically have responsibility for them. There have been suggestions, for example, that Australia initially found it difficult to convince other countries to accept refugees, which had been part of the Indonesian Regional Cooperation Arrangements (RCA)—an interception strategy prior to the final sea journey towards Australian territory. Under the RCA, transit migrants were detained in Indonesia, before they had the opportunity to embark by boat in an effort to reach Australia. The International Organization for Migration (IOM) was employed to assess their conditions, and if someone expressed a protection need they would be sent to UNHCR. Following UNHCR status determination, resettlement places were sought. Other resettlement countries apparently viewed this caseload as a creation of Australian policy.<sup>25</sup> UNHCR has so far determined 1,179 people to be refugees under the Indonesia based program (30 percent of the total caseload). After originally refusing to offer resettlement to any of this group, Australia has now accepted 22 percent of the people determined to be refugees, the highest caseload of any individual country. (As not all of those people determined to be refugees

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24 DIMIA Fact Sheet No. 76 (see n. 18). As of mid August 2005, thirty-two rejected asylum seekers remained on Nauru. The eleven Afghans, sixteen Iraqis, two Iranians, two Bangladeshis and a Pakistani have now spent four years there. (Michael Gordon, "Another Four Afghans Given Refugee Status", *The Age*, August 19, 2005.)

25 Human Rights Watch, "By Invitation Only": *Australian Asylum Policy*, December 2002, p. 59.

have been resettled, this actually translates to 26 percent of the total number of people resettled to date.) The RCA provides grounds for the Australian authorities to turn vessels back towards Indonesia under the interception procedures described above, without ascertaining their need for protection. Those requiring protection should, according to the RCA, be able to seek it by applying to the UNHCR office in Jakarta.

Some states do not intercept vessels at sea, and instead allow migrants to reach land (unless they are in distress) and then use varying practices to determine any protection needs. However, these states also deal with non-refugee migrants (and even some asylum seekers) in a way which they hope will deter future arrivals. In particular, several European governments, as well as the Canadians, are notable for their refusal to develop explicit practices of interception at sea, although their approaches also vary. Several European states are showing increasing interest in interception, and specifically in supporting the countries in Northern Africa on migrants' transit routes to Europe to undertake various interception activities on land and at sea.

Among European states, efforts to deter migrant entries by sea and over land have been developed since the 1990s. The Mediterranean states have been most prominent, both as potential targets of irregular immigration by sea, and in terms of the measures they have taken to deter such migration. Although many outside Europe presume there would be a pan-EU approach to this issue (as indeed they tend to expect a pan-EU approach to many migration issues), things have not yet progressed so far. In fact, the actual handling of all migration issues remains the affair of national governments, and on the issue of arrival by sea specifically, there is no broad EU policy approach.

Italy, Spain, Malta and Greece have been on the frontline of arrivals by sea—although France and, on occasion, the UK have seen such arrivals. Due to geographic location, such arrivals to the UK have not involved craft operated by smuggling networks, but rather migrants have traveled on cross-channel or North Sea ferries as part of a longer smuggling route, often involving concealment in commercially operated trucks.

With regard to interception, none of the European states has set up concentrated operations of the sort practiced by the US, for example, or explicit policies of sustained interceptions. Italy has come closest with its efforts to turn back vessels from Albania, particularly during the 1990s. Those efforts were, however, attempts to turn the smuggling vessels around—not to pull the vessels and transfer the passengers to a coast guard cutter and then determine what to do with the people in question. Such operations frequently turned to rescue as smugglers threw their human cargo overboard rather than take them back and risk demands for a return of advance payments. Other efforts resembling interception include diverting boats from North Africa to the Italian island of Lampedusa, from which migrants are then most often returned to Libya or Tunisia, through which they had transited. These practices are set out in Appendix A, as is Spain's practice of intercepting migrants who enter its two enclaves in Northern Morocco with the aim of thereby reaching the Spanish mainland and the EU.

In principle persons requesting asylum have access to a national asylum procedure once on land, and are not discriminated against on the basis of their means of arrival. However, it is of concern to many NGOs in Europe, and other humanitarian actors, that people arriving on Lampedusa since 2003 have not had consistent access to either UNHCR or Italian NGOs, and that these organizations therefore have been unable to ascertain that those who would want to seek asylum have had the opportunity to do so. Many arrivals by sea, particularly those crossing the narrow Straits of Gibraltar by one- or two-person dinghies or rafts, if they are successful in making the crossing, go undetected—and therefore there is no question of them making an asylum claim unless, perhaps, they do so later in their migration journey somewhere in Europe.

The Canadian government, in contrast both to the various policies of European Union Member States and to the interceptions practiced by the US and Australia, on the occasion on which it experienced significant arrivals by sea (in 1999) allowed those involved to land without hindrance, and permitted them to make claims for protection as needed. Canada continues this approach for the very few people arriving on its shores. In 1985, the Canadian Supreme Court ruled that the Canadian

Charter of Rights and Freedoms gives refugee claimants in Canada those rights and legal protections of Canadian citizens which are not specifically limited to citizens, including that people seeking refuge in Canada are entitled to an oral hearing on their claim.

However, the fact that Canada does not prevent boats from landing does not, of course, mean that the migrants are allowed to enter and stay. Pressure from the media and public led Canada to detain the majority of Chinese migrants during the offshore arrival of four boats in 1999. Many of these migrants were held in converted jail facilities. And while Canada has one of the most liberal asylum regimes in the world, only twenty-four of those individuals who made asylum applications were eventually granted refuge, a rate of about five percent, even though the average approval rate for other refugee claimants from China in 1999 was 58 percent. Canada later deported many of those who were not considered to have a credible fear of persecution.

Developing countries are most frequently heard of in the context of interception and of rescue at sea, as countries of transit or origin—or in the cases of Nauru or Papua New Guinea, for example, as holding countries. However, they do face disembarkation issues of their own, particularly following rescue, shipwreck, or stranded and misdirected vessels. The challenges facing countries in Latin America, Africa and Asia are simply less high profile. Their approaches and policies also tend to be less highly developed—or restrictive—than those of the industrialized countries, except where supported, financially or otherwise, by wealthier countries with an interest in preventing boat arrivals on their own shores.

In sum, there are many differences at the regional and national level in the ways in which migrants who are intercepted or rescued at sea are treated. Nonetheless, the main issues facing states which experience arrivals by sea—including whether to practice interception, where (and whether) to disembark, and how to deal with protection claims—remain similar across the board.



## E. The International Ramifications of Interception and Rescue

Individual nations have the right to, and do, use substantial discretion in making many decisions regarding the treatment of individuals intercepted or rescued at sea. However, the visible nature of arrivals by sea—and particular watershed incidents—often reverberate across the world. The decisions of one country have often set precedents for others; for example, the US based its policy of conducting interception in its territorial waters on the precedent of Southeast Asian states during the Indochina refugee crisis.<sup>26</sup> But in some cases—which have become less frequent as more “boat people” are perceived to be economic migrants and not refugees—the international community has cooperated to deal with the consequences of a mass outflow of refugees by sea. The major form of such cooperation was to be found during the Indochinese refugee crisis. Later watershed policy examples include the Safe Haven approach by the US in the mid-1990s and the Australian handling of the *MV Tampa* incident followed by its Pacific Strategy.

### **DISERO, RASRO, and the Comprehensive Plan of Action**

While in recent times international cooperation has been used as a method through which powerful nations seek to divert their responsibility for intercepted or rescued migrants, this has not always been the case. In response to the hundreds of thousands of Vietnamese refugees stranded in Indochina following the end of the Vietnam War, the United Nations convened a groundbreaking conference of international stakeholders in Geneva, Switzerland, in 1979.<sup>27</sup> As a result, worldwide resettlement commitments more than doubled the following year, and resettlement countries (with guidance from UNHCR) negotiated a number of agreements to deal with the particular circumstances of migrants

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26 Many countries refuse to intercept boats in territorial waters, or even at all. However, the US has made a policy of doing so, arguing that the prohibition against *refoulement*, or the return of refugees, applies only to the nation's territory itself. Guy S. Goodwin-Gill, “Refugees and Responsibility in the Twenty-First Century: More Lessons Learned from the South Pacific,” *Pacific Rim Law and Policy Journal* 12, no. 1, January 2003.

27 W. Courtland Robinson, “The Comprehensive Plan of Action for Indochinese Refugees, 1989-1997: Sharing the Burden and Passing the Buck,” *Journal of Refugee Studies* 17, no. 3, September 2004.

at sea. In particular, under the "DISERO" program that began in 1979 (DISERO being a derivation of "Disembarkation Resettlement Offers"), some resettlement countries agreed to accept any Vietnamese refugee rescued at sea by a ship of a country that was not itself participating in the resettlement of these refugees. Additionally, under a companion program begun in 1985 called Rescue at Sea Resettlement Offers (RASRO), sixteen countries pledged to resettle a certain number of the refugees rescued at sea.<sup>28</sup> As the pace of resettlement exceeded the rate of arrivals, government officials were optimistic that the crisis had passed.

However, as outflows of Vietnamese surged again into neighboring countries, and as fewer of those leaving fitted the convention definition of a refugee, the 1989 Comprehensive Plan of Action (CPA) was established by the international community to handle the outflows of Indochinese refugees, particularly the hundreds of thousands of Vietnamese boat people. Among the goals of the CPA was to resettle those Vietnamese refugees who could neither remain in the region nor return to Vietnam in an orderly, organized manner, in order to avoid them feeling the need to take to the seas.<sup>29</sup> UNHCR set up refugee camps in neighboring countries, and began to screen arrivals for refugee status. (Thus, while temporary refuge was still guaranteed for boat people, the DISERO program was brought to a close because not all of the boat people were presumed to be refugees.) Over time, most of the refugees were resettled in Western Europe, North America and Australia and those who had landed in states in the region and who were found not to be refugees were told to return to Vietnam. As a result of the CPA, the number of departing boat people dropped considerably, and the plan is generally thought to have been a success. Why has a similar program not been enacted in modern times? The major difference—of course—between the treatment of the Vietnamese and today's travelers by sea is that the Vietnamese were by and large considered to be genuine refugees in need of international protection—at least prior to 1989. In the wake of the Vietnam War, and with the world still divided into Communist and non-Communist blocs, boat

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28 US Citizenship and Immigration Services, "This Month in Immigration History: July 1979," <http://uscis.gov/graphics/aboutus/history/july79.htm>.

29 Robinson, "Comprehensive Plan of Action."

people fleeing Indochina could also count on powerful political actors within developed nations to champion their cause. In today's post-Cold War, post 9/11 world, migrants are regarded with much greater suspicion.

### **The Safe Haven Policy**

In 1994, faced with an outflow of Haïtians (following the coup against Haïtian President Jean-Bertrand Aristide), the US initially conducted processing on board the *USS Comfort* and transferred those recognized as refugees to the Guantánamo Bay Naval Base, while returning failed cases to Port au Prince. After the ship became overwhelmed by the number of people intercepted, the US decided to establish a “safe haven scenario” for Haïtians found at sea. The whole of the large outflow was then directed to the Guantánamo Bay Naval Base for safety. The US wanted to avoid the magnet effect of permitting entry to US territory, while also providing safety to those individuals who tried to flee the island. Intercepted passengers were taken to Guantánamo (their boats were destroyed). Following disembarkation, the Haïtians were provided with food and shelter, but were only given the options to voluntarily repatriate to their home country or to wait for another “safe haven” to be found.<sup>30</sup> The government later decided to apply the same policy to Cubans. Some criticized the “safe haven solution” because some Haïtians were eventually involuntarily repatriated after the restoration of Aristide (when the situation was deemed to have changed, so that even those who had been refugees ceased to qualify for that status). However, others believe that the “safe haven” was not a bad model to respond to an emergency, considering that the outflows from Haïti and Cuba slowed as a result.

### **The Tampa and the “Pacific Strategy”**

Another example of a watershed event was the incident involving the *MV Tampa* and the impact that it had on Australia. For several years in the 1990s, significant numbers of migrants and asylum seekers had boarded vessels in Indonesia to travel to Australia. On August 26,

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30 SPF Douglas Ide, “Waiting It Out In Cuba,” *Soldiers*, September 1994, <http://www.army.mil/soldiers/sept94/p4.html>.

2001, the Norwegian container ship the *MV Tampa* rescued 433 such would-be asylum seekers from a boat (the *Palapa*) sinking in international waters between Indonesia and Christmas Island, part of Australian territory. The Master of the *MV Tampa* had been alerted to the distress of the *Palapa* by the Australian Maritime Safety Authority, but when he attempted to bring the rescued asylum seekers to Australian territory for disembarkation, a dramatic political incident ensued, with varying accounts which, four years after the events, remain disputed.<sup>31</sup>

The captain of the ship first headed toward Indonesia, as he was technically in the Indonesian search and rescue zone. This reportedly elicited threats from some of the passengers, who asked to be taken to Christmas Island. According to the captain's account, when consulted, the Australian search and rescue authorities said that he, as shipmaster, must decide where to go.<sup>32</sup> The immigration authorities reacted differently, saying he risked prosecution for migrant smuggling.<sup>33</sup> So he took the ship to within the twelve mile exclusion zone of Christmas Island. There he awaited company instructions. The politics of the situation in which the *Tampa* had become involved through the rescue of the would-be asylum seekers had become extremely complex. These complexities already existed domestically, in Australia, as demonstrated in the tension between search and rescue and the reported responses of the Department of Immigration and Multicultural and Indigenous Affairs (DIMIA). The domestic impact was heightened by the impending national elections. The incident also gave rise to a very complex international political situation.

The Australian government claimed that the port facilities on Christmas Island could not accommodate a vessel the size of the *Tampa*; the Captain remained outside the exclusion zone as long as he could, waiting for promised medical assistance which did not come. Eventually the *Tampa* entered the territorial waters, where on August 29 the Australian Special Air Services intercepted and boarded it.

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31 This brief account draws on the roundtable discussion, but also on the book *Borderline* by Peter Mares (Sydney: University of New South Wales, 2002).

32 Peter Mares, *Borderline*, p.122.

33 Id.; see also Human Rights Watch, "By Invitation Only."

Various states and international organizations had become involved in the negotiations aimed at finding an appropriate disembarkation solution. The ultimate resolution decided upon by the Australian government was to take the passengers to the island state of Nauru, which had accepted payment for facilities in which, at its request, UNHCR would conduct status determination during the asylum seekers' temporary stay. New Zealand accepted 150 people from the *Tampa* (families and a number of unaccompanied teenage boys) and further refugees subsequently as part of its own resettlement program over the following months.

The year before the landing of the *Tampa*, Australia had already established the "Regional Cooperation Arrangement" with Indonesia. Australia's post-*Tampa* policies took international cooperation to a new level. The country negotiated the "Pacific Strategy" with Nauru and Papua New Guinea, small nation states that are heavily dependent on Australian aid, which have agreed to accept, on a temporary basis,<sup>34</sup> passengers transferred from boats intercepted by Australia and not returned to Indonesia. In exchange, Australia has agreed to pay all the costs of accommodating and processing the asylum seekers.<sup>35</sup> Australia also increased aggressive efforts to intercept unauthorized boats before they reach Australian territory, and excised many of its offshore territories from its migration zone.

The "Pacific Strategy," negotiated by offering financial incentives to the poor governments of Nauru and Papua New Guinea, is a trailblazer as a deterrent policy and as a regional processing agreement. The policy has had a substantial impact on the international community; other countries, including some member states of the European Union, have contemplated enacting their own versions of regional processing agreements as a result.

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34 There appears, however, to be no time limit as such, as some people have now been on Nauru for four years.

35 Nauru received an initial aid package of AUS\$20 million (about US\$10 million) in return for allowing the arrival of migrants from the *Tampa*. Later deals were struck in relation to the "Pacific Strategy." Papua New Guinea received an initial AUS\$1 million, as well as unspecified additional assistance, in return for agreeing to process migrants from unauthorized boat arrivals. Papua New Guinea reportedly received AUS\$20 million for reform of its Defense Force. The Australian government denied that additional assistance in the form of various types of debt relief to the two islands, and much of the assistance noted above, was related to the migration arrangements. See Human Rights Watch, "By Invitation Only," and Mares, *Borderline*, pp. 127-131.

## F. The Role of International Actors

Thus far, this section has focused on the role of states, providing background information on the approaches influenced by their sense of sovereignty and responsibility. However, a number of other actors, including international organizations, commercial shippers, and the media, are also important to this issue and worthy of particular note.

As a precursor to this discussion, it should be noted that international laws, many of which have already been referenced, frame the work which both state and non-state actors perform. The United Nations Convention on the Law of the Sea, the protocols to the Convention on Transnational Organized Crime, and the 1951 Convention relating to the Status of Refugees (and subsequent 1967 protocol) are the major laws that direct how interception and rescue can be performed. (The latter is applicable only in relation to protection obligations and not in any specifics to the actual activities of interception or rescue.) There are also a number of maritime-specific laws that impact rescue more broadly. The International Convention for the Safety of Life at Sea (32 UST 47, TIAS No. 9700, November 1, 1975) and the International Convention on Maritime Search and Rescue (1405 UNTS 97, TIAS No. 11093, April 27, 1979) are but two examples. Both reflect the obligation to rescue those in distress at sea, regardless of their nationality or circumstances. The Executive Committee of the United Nations High Commissioner for Refugees (UNHCR ExCom) has also adopted a number of conclusions that serve as guidance.<sup>36</sup> These include No. 22—Protection of Asylum Seekers in Situations of Large Scale Influx,<sup>37</sup> No. 23—

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36 The UNHCR Executive Committee includes the US and Australia, which have thus also participated in discussions and agreed to these conclusions.

37 UNHCR ExCom 22, 1981.

“A. Admission and non-refoulement

1. In situations of large-scale influx, asylum seekers should be admitted to the State in which they first seek refuge and if that State is unable to admit them on a durable basis, it should always admit them at least on a temporary basis and provide them with protection according to the principles set out below. They should be admitted without any discrimination as to race, religion, political opinion, nationality, country of origin or physical incapacity.

2. In all cases the fundamental principle of non-refoulement including non-rejection at the frontier-must be scrupulously observed.”

Problems Relating to the Rescue of Asylum Seekers in Distress at Sea,<sup>38</sup> and No. 97—Conclusion on Protection Safeguards in Interception Measures.<sup>39</sup>

In part in reaction to the *Tampa* incident, the International Maritime Organization (IMO) has also directly undertaken action to help resolve the problems (both real and perceived) with international maritime law. In 2001 the IMO Assembly adopted a resolution in which it recommended that a review of procedures and safety measures for the treatment of persons rescued at sea be undertaken, and restated its commitment to this review in 2002.<sup>40</sup> Additional follow-up actions include the convening of an inter-agency group composed of representatives from the main international organizations with a stake in various facets of rescue at sea, including UNHCR, and the continued work performed by various

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38 UNHCR ExCom 23, 1981.

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

39 UNHCR ExCom 97, 2003. This conclusion defines interception as follows:

*Understanding* that for the purposes of this conclusion, and without prejudice to international law, particularly international human rights law and refugee law, with a view to providing protection safeguards to intercepted persons, interception is one of the measures employed by States to:

- i) prevent embarkation of persons on an international journey;
- ii) prevent further onward international travel by persons who have commenced their journey; or
- iii) assert control of vessels where there are reasonable grounds to believe the vessel is transporting persons contrary to international or national maritime law;

where, in relation to the above, the person or persons do not have the required documentation or valid permission to enter; and that such measures also serve to protect the lives and security of the travelling public as well as persons being smuggled or transported in an irregular manner;

The Conclusion further notes that “The State within whose sovereign territory, or territorial waters, interception takes place has the primary responsibility for addressing any protection needs of intercepted persons.”

40 International Maritime Organization, *Review of Safety Measures and Procedures for the Treatment of Persons Rescued at Sea*, 22nd Sess., 8, IMO Assembly Res. A. 920(22) (November 2001).

IMO committees to review and amend the key instruments of international maritime law relevant to rescue at sea. Two IMO committees in particular, the Communications and Search and Rescue Sub Committee (COMSAR) and its oversight body, the Maritime Safety Committee (MSC), have been most proactive. Both the 1974 International Convention for the Safety of Life at Sea and the 1979 International Convention on Maritime Search and Rescue have been amended with similar language placing a more explicit responsibility on Contracting Governments for coordinating disembarkation.<sup>41</sup> Guidelines on rescue have also been agreed upon by IMO member states.<sup>42</sup>

International humanitarian organizations like UNHCR may also have a role in assisting states to respond to arrivals by sea where those involved may have protection needs. This role can be consultative, or it can mean direct involvement of UNHCR in the determination of refugee status and the offering of protection. UNHCR also played a key role both in overseeing the negotiations of the DISERO agreement and CPA, and in advising and monitoring at Guantánamo during the 1994 Haitian refugee crisis. It also has varying degrees of access in the Italian situation on Lampedusa, and has been involved in EU consultations on the potential for interception in the context of broader consultations on general migration and asylum policy in the European Union.

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41 "Contracting Governments shall co-ordinate and co-operate to ensure that masters of ships providing assistance by embarking persons in distress at sea are released from their obligations with minimum further deviation from the ships' intended voyage, provided that releasing the master of the ship from the obligations under the current regulation does not further endanger the safety of life at sea. The Contracting Government responsible for the search and rescue region in which such assistance is rendered shall exercise primary responsibility for ensuring such co ordination and co-operation occurs, so that survivors assisted are disembarked from the assisting ship and delivered to a place of safety, taking into account the particular circumstances of the case and guidelines developed by the Organization." International Maritime Organization, *Adoption of Amendments to the International Convention for the Safety of Life at Sea, As Amended*, Draft Resolution MSC.158(72) (May 20, 2004). See also International Maritime Organization, *Adoption of Amendments to the International Convention on Maritime Search and Rescue, As Amended*, Draft Resolution MSC.155(78) (May 20, 2004).

42 International Maritime Organization, *Guidelines on the Treatment of Persons Rescued at Sea*, MSC.167(78) (May 20, 2004).



Other actors, who have always been involved and significant but are of growing acknowledged importance, particularly for rescue at sea, are commercial shippers. As the *Tampa* incident clearly demonstrated, shipmasters are often thrust into the middle of the complex scenarios and negotiations surrounding disembarkation when it transpires that those they have rescued are people either seeking asylum or seeking a specific migration outcome.

The position of shipmasters is potentially complicated by the fact that they are not, as individuals, bound by international refugee law, which binds only states. Ships are bound to rescue persons in distress at sea under international law. Theoretically at least, a shipmaster could return people to a country of danger if it is the nearest country and the only one allowing disembarkation. One thing that makes this possible is that the shipmaster is not involved in any way in determining the status of people rescued, and has no obligations or responsibilities in that regard. However, not only would the moral and humanitarian impulses of the shipmaster most likely lead him or her to avoid doing so, but also the guidelines on the treatment of persons rescued at sea instruct the shipmaster not to take people to a place where their lives may be in danger. Given that the shipmaster is not required to enter discussions with those rescued about their status, for such *refoulement* to be avoided there must be sufficient communication between the crew and those rescued about destinations and any opposition to a certain course.

The incident of the *Clementine Maersk*, a Danish ship that rescued twenty-seven migrants in the Mediterranean in June 2005 and disembarked them in the UK, the ship's next scheduled port of call, rather than at any other port en route demonstrates that international maritime law, custom, and moral imperatives can successfully harmonize in potentially treacherous rescue situations, and that international organizations, commercial shippers, insurance companies and states acting together can find a relatively tranquil solution to rescue situations.<sup>43</sup>

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43 Peter Kessler, "UNHCR Thanks Danish Ship For Rescuing Asylum Seekers Stranded At Sea," UNHCR News Stories, June 8, 2005, [http://www.maersksealand.com/HomePage/link/download/maersk/localsite/en\\_GB/europe/unitedkingdom/localnews/unhcr.pdf](http://www.maersksealand.com/HomePage/link/download/maersk/localsite/en_GB/europe/unitedkingdom/localnews/unhcr.pdf).

The British tabloid media may have expressed astonishment at this course of events and the arrivals in the UK,<sup>44</sup> but the story quickly left the front pages and did not become a major incident. This story also provided an example of how some commercial shippers no longer fulfill their duty to rescue those in distress: the craft had floated for eight days, being passed by cargo ships, some of which informed the passengers they would request coast guard assistance for them—though none came.

The roles of various non-governmental organizations should also be taken into account, particularly in the circumstances following rescue. Very few NGOs have become involved in rescue themselves—an exception being the German humanitarian group Cap Anamur, which rescued thirty-seven migrants in the Mediterranean in June 2004, advertised the rescue to the media, and sailed for weeks without finding a state which would allow disembarkation.

However, NGOs have involved themselves in post-rescue or interception situations to help ensure that protection is achieved for those refugees who need it. In Canada and the United States, for example, pro bono attorneys, refugee resettlement organizations, and other non-profit organizations cooperated with state and local government officials during the disembarkation, detention, and (in some cases) resettlement process. The public-private partnerships in Canada that enabled large numbers of unaccompanied children to be cared for were particularly notable.

Finally, the role of public opinion and the media should be noted, particularly as these “stakeholders” can be directly or indirectly influential in policy decisions. Since the time of the CPA, public opinion and media portrayals of migrants, at sea in particular, have shifted from sympathy to suspicion, creating problems for well-intentioned governments who wish to protect them. In some cases, boat arrivals have

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44 The *Daily Express* on June 8, 2005 headlined: “MAD: Illegal Immigrants Rescued in the Mediterranean and Ship’s Captain Brings Them 2,000 Miles to ... Britain.” The article goes on to use the terms “asylum seeker”, “refugee” and “illegal immigrant” interchangeably to describe the twenty-seven people disembarked at Felixstowe in southern England. The *Daily Star* headlined: “Boat Full of Refugees Sent Straight to UK: Migrants Rescued near Italy.”

been portrayed as national security risks; in others, they are seen as economic migrants circumventing the rule of law, or even “invaders,” as several British newspapers labeled a group of some 187 Roma arriving in Dover by cross-channel ferry in 1998. Whatever their motivations for coming, however, the perception that arrivals by sea are somehow invading foreign countries—particularly when those from the poorest countries arrive on the shores of the richest—is a major sticking point in the disembarkation process. Arrivals by sea are taken by the public at large as a sign of impending chaos.

## G. Summary

Fundamentally, the challenges presented by irregular migration by sea exist in other forms of unauthorized migration—but are often exacerbated by the nature of maritime travel. The state’s need to demonstrate sovereignty by controlling its borders, the complexity of participating actors, and the role of the media in changing the public’s perception are all elements common to migration flows more broadly. But migrants who take to the seas in a rickety, unstable boat must already be desperate enough to risk their lives (if in fact they are aware that is what they are doing—in some smuggling situations they may not be), whether it is to find a real, lasting protection outcome, or a better economic livelihood. Thus, the determination of the state to guard its borders, the need for migrants to find a better life abroad, and the desire of the international community to protect genuine refugees, all come into play at heightened intensity during situations of interception and of rescue. The following sections of this report examine in more detail the topics laid out in this background, focusing particularly on the various actors’ interests and the interactions between them during the different stages of the interception and rescue processes.

## **III. ANALYSIS: POLICIES AND APPROACHES**

The above overview of interception and rescue at sea not only describes how the two phenomena have occurred and developed in the

last three decades, but also hints at several avenues of analysis for further thinking about policy making to handle arrivals by sea.

In developing a policy-focused analysis, we should first briefly recall the distinctions and connections between interception and rescue. As the human rights perspective is often paramount in reporting on rescue in particular, we then turn to an assessment of what the “humanitarian” factors and responses are in cases of arrival by sea. Specifically we identify and isolate two different forms of humanitarianism which are often confused in general thinking on this issue: (1) the humanitarian act and responsibility of rescue of persons in distress at sea and (2) the quite distinct humanitarian and legal response through an asylum procedure and ultimate refugee protection for those persons fleeing persecution or other violent circumstances in their country of origin.

Like many other issues in international politics, the response to attempts to migrate by sea is filled with tensions between human rights and state sovereignty. We therefore turn next to the ways in which the states faced by boat arrivals seek to demonstrate that they are in control. The key area of tension between individual rights and state sovereignty in relation to irregular maritime migration is disembarkation—which is both the central issue in fact, and thus the central issue to be analyzed.

Having dealt with the major and general points, we will turn to specific policy issues: firstly the effectiveness of the policies described above; secondly the prospects for the various policy approaches which are frequently aired by politicians and policy makers but have not (yet) been put into practice and thirdly we will identify potential policy approaches which are not currently a central part of discussions, but could be considered, particularly at a global or regional level.

## **A. The Distinctions and Connections between Interception and Rescue**

Although the phenomena of interception and rescue at sea show some quite distinct features, the two issues are linked. Interception of a vessel by a coast guard or navy might in some situations preempt the need for actual rescue, for example. A relatively unseaworthy boat may still be

functioning intact when intercepted, but could have posed safety issues further into a journey. People rescued by national authorities will, as demonstrated above, have been effectively intercepted when it comes to the handling of their case beyond the need for safety at sea. Those rescued by commercial or pleasure boats will have seen one humanitarian need satisfied—they are safely on a seaworthy ship—but the satisfaction of other humanitarian needs, including refugee protection where that is an issue, remains dependant on a national authority. Their rescue might have come before they could be intercepted by a state with an interception policy, in which case where they would disembark would be clearer—as it would be in the intercepting state or the location in which that state regularly, by agreement, processes intercepted cases. Following rescue, however, the issue of which national authority takes responsibility can, as described above, be the subject of intense international negotiation.

## **B. Humanitarian Needs: Rescue and Protection (Safety and Status)**

There has been a tendency among some groups, perhaps particularly human rights advocates, to conflate the two sets of humanitarian needs of persons intercepted and rescued at sea, and thus to view any migrant found at sea in need of rescue as a potential refugee. This conflation might not be too surprising: those in need of rescue are in definite humanitarian need—and that sense of helplessness and vulnerability can easily convert from a specific sense of the need for life-saving from potential drowning into an extended understanding of the need for other broader and still “life-saving” protection measures.

However, the individual’s asylum claim needs to be heard in its own right and quite distinct from the fact that their arrival in the country which assesses their claim to refugee status was the result of a humanitarian action to rescue them from disaster at sea. If the means of arrival is not to adversely impact a refugee status determination, as set out in the 1951 Convention, then it surely should also not be presumed to override an objective asylum hearing.

It is, however, to some degree paradoxical that those who actually disembark from the vessel on which they set out (i.e. who are neither

intercepted nor rescued while at sea) and request asylum are often less likely to be viewed as probable refugees, and more likely to be linked to notions of "invasions", particularly in media accounts, but often also by government administrations. This is the case of Haitians in the US, for example, but also of those who land on Greek islands, on Lampedusa and in southern Spain. Likewise, those intercepted at sea are most often portrayed as not credible as asylum seekers. People who are intercepted are also in a situation in which their non-admission to an asylum procedure is made much easier than is the case for those people who apply on dry land, whether they have arrived by air, land, or indeed sea.

People who are rescued at sea, meanwhile, perhaps appear to be "victims" and in need of protection simply because they needed the first category of humanitarianism described above. That seems to make them, in NGO and some media portrayals at least, more likely candidates for the second form of humanitarianism: i.e. refugee protection.

However, the facts of being in distress at sea; of being intercepted while at sea; or of proving capable of making a successful voyage by sea, have in reality, and should have in terms of handling of asylum cases on dry land, absolutely no relationship to any actual refugee protection need. The need for refugee status (or other forms of protection) relates to the reasons for flight, not to the means used to achieve a journey.

This range of issues of vulnerability, humanitarian needs, protection, rights, access to asylum procedures, credibility and exclusion, highlights the tension between human rights and state sovereignty in the context of (attempted) arrivals by sea, interception and rescue.

Advocates for human rights can appear disingenuous if they do not disaggregate the humanitarian issues involved into the two distinct categories of life-saving at sea, and protection as refugees for those who are refugees. The simple fact of moving by boat clearly does not make a person a refugee—and many advocates would not be suggesting that it does, although their advocacy might be misinterpreted in that way.

### C. The State's Need to Be in Control

At the same time, states are desperate to show in this most visible of contexts that they have control over migration and asylum issues. Governmental authorities might manage the immigration controls for millions of arrivals by air and land per year, including the exclusion of would-be irregular entrants and the removal of visa-overstayers, but those activities may be completely eclipsed in the media and public opinion by the arrival, interception or rescue of a hundred passengers on a single boat. From a political perspective, therefore, the state's primary concern is likely to be that of management—being seen to be in control. This scenario is repeated again and again: for Cubans in the 1980s; for the Indochinese during the 1980s; in the case of the *Tampa*; for the Italians with arrivals on Lampedusa. It is not necessarily that the state is not concerned with protection of those refugees involved: it is that in getting to a resolution which grants protection and upholds rights, the states want to be seen first and foremost as limiting the number of entries—and limiting the number of people who feel they need to make dangerous journeys to achieve protection (or another migration outcome). This type of activity is an expression of the political aspects of sovereignty, rather than the legal aspects. However, states also are and need to be cognizant of their national and international legal commitments—although these may not always completely coincide either with each other, or with the politics of the situation.

States need to be concerned both about managing entries to their territory and about living up to their protection obligations due to their sovereign authority in both areas. In considering attempted arrivals by sea, as in thinking about sovereignty in so many other aspects of domestic politics and international relations, due attention should be paid to states' sovereign position as a matter of law, and as a matter of politics. These are two different aspects of sovereignty—often conflated, but in fact quite distinct, and requiring disaggregation. States often invoke *political sovereignty* to justify arbitrary policy actions. In contrast, *legal sovereignty* is less broad, because while autonomous states have sovereignty over their national laws, they are still bound by international agreements. Thus, when universal principles—such as the dignity and inherent worth of every human being, or for that matter the duty to res-

cue at sea—are incorporated into international law, states will often use political “sovereignty” arguments to support any actions that go against those principles, whilst their legal, sovereign position is that they must uphold the principles to which they have agreed under international law. Political arguments are frequently based on a government’s desire to prove its upholding of a state’s sovereign powers—which it hopes will inspire the electorate to have confidence in it—by demonstrating that particular government’s ability (as leader of the state) to maintain control over its borders, economy and other national interests.

One aspect of sovereignty particularly pertinent to its political sphere is national security. Irregular immigration or entry to a territory has always been something states and their citizens oppose; although it has often been an essential means of seeking protection for refugees, for example, across Europe during the Second World War. In the context of the “War on Terror,” every irregular entrant might turn out to be a terrorist as they could be a refugee (since the very nature of irregular entry is that nothing is known about the individual concerned until they come into contact with authorities). Migrants arriving irregularly by sea (as by land) are less likely to come into contact with authorities than those arriving by air, unless methods of interception are established. Thus, the United States in particular has imposed tighter security checks and uses the national security rationale to justify the country’s willingness to turn around intending migrants before they reach US shores, even claiming that terrorists may pose as Haitian asylum seekers.<sup>45</sup>

Finally, attention needs to be given to the potential for a “tipping point” at which the state’s or a government’s concern with sovereignty and managing its borders can itself fuel a public perception of relative chaos. Such a perception neither helps to engage the public in efforts to deal with the reality of actual arrivals, nor does it help a government’s cause of wishing to be seen to be in control. A heavy focus on preventing the relatively small numbers of seaborne migrants can under some circumstances thus become counterproductive, and distract attention from

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45 Ruth Ellen Wasem, “US Immigration Policy on Haitian Migrants,” *Congressional Research Service*, CRS RS21349, January 31, 2005, [http://www.ndu.edu/library/docs/crs/crs\\_rs21349\\_21jan05.pdf](http://www.ndu.edu/library/docs/crs/crs_rs21349_21jan05.pdf).



quantitatively and qualitatively graver security situations including border crossings.

## D. The Centrality of Disembarkation

The issue of disembarkation—getting back onto dry land—is what makes arrival by sea, particularly when it involves interception or rescue, effectively different from other forms of migration in a way that goes beyond the high profile in the media and other more superficial aspects.

An international migrant is traveling between countries. Someone migrating over land takes a step towards or across a border, and may be detained or deterred in some way, but is on land and face to face with authorities who can decide his or her fate. Someone migrating by commercial aircraft lands with the plane, is in a country, is not expected to circle in the air for days or weeks, and again is face to face with immigration authorities who have rules and procedures to follow in dealing with his or her request for entry to the territory. Even if an airport, within the “passport” zone, is declared “international territory,”<sup>46</sup> there are authorities to deal with, and physical safety is pretty much assured.

For would-be migrants aiming to enter a territory irregularly from the sea, however, there are limited circumstances under which their entry to the territory of choice can be ensured. If they are lucky, they land undetected, and their presence becomes known only once they have disembarked. Those Cubans who arrive in the US undetected—or who manage to avoid interception—are rewarded for landing with their feet dry (in Florida) with automatic status, and are “paroled in” to the US—meaning they need no asylum hearing, and are also not refugees

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46 France created “waiting areas” within its airports, within the passport check area, in the early 1990s, leading to notorious cases of “refugees in orbit” who could neither enter France nor board any plane to leave the airport. In one case a man was left in the airport waiting area for years. Amendments to the laws in 2002 limit the period a person can be forced to remain in the waiting area to twenty days. In the late 1990s some 94 percent of people presenting claims at the airport were allowed to enter the country to pursue those asylum claims under normal procedures—9,752 people. European Council on Refugees and Exiles, France 2003, <http://www.ecre.org/conditions/2003/france.shtml>.

as such, but are rather on an immediate "fast track" to permanent residence and could eventually, therefore, become citizens. Non-Cuban would-be immigrants in Florida and elsewhere are rewarded for this feat with an immigration or asylum hearing, frequently (or always in the case of Haïtians) with detention, and most likely with removal and return to the country of origin or transit if they prove not to be refugees.

Those who are intercepted at sea by the US or Australia within the geographic zones in which those states operate interception policies, are either, in the case of some Haïtians, returned, or they are taken for disembarkation to a (respectively) non-US/non-Australian territory with which some kind of agreement has been reached to allow disembarkation, and any claim to a protection need as a refugee or for other humanitarian reasons is processed there. That does not mean the durable solution to their protection need is found in that territory—or in their initial place of destination—but they are on dry land and have their claim processed to some degree.

For those who are rescued at sea the story can, as sketched above, be quite different. As has been seen in some of the rescue situations described above, including the *MV Tampa*, migrants who are rescued, and their rescuers, can remain trapped on board ship for days if not weeks, at risk from the elements, often from overcrowding, with insufficient food and water.

How is it that this sort of long-term floating situation can be deemed tolerable—or indeed can happen at all?

The Law of the Sea contains no provision regarding the location of disembarkation for persons rescued at sea. Where international law offers no firm direction, national politics intrudes. In an era of high levels of intolerance for all forms of irregular immigration (and sometimes intolerance of all immigration) in most if not all western democracies, the domestic desire to show strength in refusing entry to migrants is the political breaking point between humanitarian rescue at sea and the obligation, if disembarkation is permitted, to assess any humanitarian protection need.

Once a person has landed on the shore of a given state there should be no difference in his or her treatment, and particularly in the handling of any asylum claim, from that of any other migrant or asylum seeker. There is, however, that intervening moment between rescue and arrival in which it appears that something can be done to show resolve and prevent a visible group of migrants, however small, from entering. If the ship in question has entered territorial waters there may be less opportunity for a decision about landing and responsibility—but even then states have, as exemplified by Australia, been creative with their territorial integrity when it suits them.

In essence, the fact that a state would need to determine status post-disembarkation frequently deters that state from being part of the conclusion to a rescue from danger to safety.

One part of the chain between rescue, disembarkation, status determination and a long-term protection solution could, however, be resettlement elsewhere—meaning that the decision to allow disembarkation is not equivalent to a decision to grant permanent immigration and residence even if the people disembarking are refugees who will require long-term residence outside their country of origin. For industrialized states, however, there is a definite concern, as demonstrated in the background section above, that other countries would have no reason to resettle refugees who have disembarked on the territory of, for example, Australia or the US, and thus strategies are sought which will leave the refugees in a temporary situation, for which help can be sought in finding a resolution.

This was the course employed globally in the DISERO and RASRO programs, when developed states offered the longer-term solutions in the form of resettlement in exchange for states of Southeast Asia permitting disembarkation. Today, however, people rescued at sea are generally presumed not to be validly seeking protection (or not only seeking protection, as they are thought to be seeking what some states call “a migration outcome”) and are, in the high profile cases everyone hears about, not rescued in the vicinity of a Malaysia or Thailand, but off the shores of Australia, European states, the US or (more rarely) Canada.<sup>47</sup> Which

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47 The vast majority of rescue situations are never heard of by the general public at all.

state is supposed to (or likely to) offer resettlement to alleviate the “burden” on Australia, the US, Italy or Spain should they at least permit disembarkation? In some cases seemingly peculiar deals have been struck: in the case of the *Tampa*, New Zealand, Norway,<sup>48</sup> Sweden and Canada all took some of the people determined to be refugees—after initial disembarkation under Australian auspices and UNHCR status determination (and with Australian funding) on Nauru.

The use of an “island in the sun” option, where one is available, as Australia has used Nauru and Papua New Guinea not only for intercepted boats but also for the off-loading of persons rescued at sea en route to Australia, facilitates the process of requesting other states to resettle refugees as part of the durable solution. As the refugees are on Nauru and not in Sydney, their current situation can be more easily sketched as one that is not tenable for the longer term. The greater the role of Australia on Nauru, however, the greater the seeming chances that other states would suggest that Australia accept any refugees involved—unless the resettlement were a quid pro quo exchange for specific groups of similarly arriving refugees who the resettlement country prefers not to accommodate.

It would seem disingenuous for a developed country to be asking for such “solidarity”: it is really inter-governmental solidarity in the face of public dismay at the arrival of migrants generally and via visible means such as boats in particular (and often linked to electoral politics, making the nature of the “solidarity” even more open to question). Many would suggest there are other ways of dealing with that domestically rather than requiring refugees to move to countries with which they have no real connection, in which they will not achieve a higher standard of protection or greater opportunities than in the country in which they disembarked.

However, ensuring that migrants, including refugees, do not get what the state sees as the “migration outcome” they sought in terms of specific destination is viewed by many governments as an essential deterrent measure in the process of dealing with arrivals by sea. Perversely,

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48 Norway’s role is explained as it is the flag state of the *MV Tampa*.

if real deals were to be made between states to exchange intercepted refugees between countries as a deterrent measure, this could mean that a smuggler paid to get “clients” into the US would first drop them at sea quite close to Australia, for example. The situation has not (yet) gone that far.

On the other hand, offers of resettlement for persons on Lampedusa, for example, whose status is determined to be that of refugees could, in another area of refugee policy, be the way in which existing “traditional” resettlement countries convince their non-resettling European counterparts such as Italy of the benefits of being part of the community of resettlement countries—which could have longer-term benefits for a wider range of refugees than those who seek their durable solution by first taking a treacherous journey and requiring rescue at sea.

## E. The Effectiveness of Current Policies

The fact that migration by sea, interception and rescue all have such long histories indicates that no government has successfully devised a plan to avoid such arrivals over the long term. Maritime interception is, of course, in and of itself a policy designed to deter migrants traveling by boat—and its effectiveness needs to be measured in part by changes in the number of people and craft making journeys. However, interception is not an isolated policy in either the US or Australia. In the US it is linked to removals of Haitians, as set out above—and detention of Haitians landing in Florida—as well as processing in Guantánamo, for example. In Australia it is linked to the “Pacific Strategy” and disembarking of intercepted migrants on remote islands outside of Australian territory.

Establishing whether any of the policies tested have worked means defining what is meant by success—and what the actual goal of the policy is. The most obvious goal is the deterrence of arrivals—although some, including some in government, will nuance the statement of that goal by talking about deterring people from making the treacherous journey by boat. Part of that goal—and thus determining the success of the policy—could also be ensuring that protection is available. If refugees have the protection and assistance they need in a

first country of asylum, they are, the theory has it, less likely (or even unlikely) to try to move again to a more distant state at all, let alone risk doing so by sea. However, the people packing migrant smugglers’ boats are not all refugees—and some would argue that even amongst those who are refugees, a major reason for their movement is in fact the search for economic betterment and life opportunities through secondary migration—not a search for protection as such. This would only hold true where the refugee’s protection need was in fact already met in a country of first asylum.

As in any other policy area, the definition of the success of a particular approach is different for different actors. In order to achieve what all actors will perceive to be a success, some careful negotiation of basic principles as well as policy options would need to be undertaken. At heart this would mean finding a balance between the fundamental issues arising from both sovereignty and human rights concerns in order that the interests and requirements of actors who need to control access to territory, actors who should uphold human rights and actors that monitor and advocate humanitarian protection find common ground and might be satisfied. This may not always be possible; however, with such a range of hard fought interests, and people’s lives at risk both at sea and in the refugee protection context, a policy “success” may depend on finding this balance.

The policies that have been attempted have been described above and are examined in greater detail in the Appendices. They include interception, detention, and diversion to prearranged, remote locations—most frequently on islands that are not part of the territory of the desired destination state. The question is: Have these policies worked?

Some in Australia view the fact that there have been few if any boat arrivals since 2003 as an indication that the policies of detention of irregular entrants in Australia combined with the “Pacific Strategy” have worked. However, others point out that the detention policy was already in place long before the *Tampa* incident, and did not deter the migrants who were rescued by the *Tampa* or subsequent attempts to arrive in Australia by sea. Some suggest that the main reason why people are no longer trying to reach Australia by boat is that circumstances

have changed in the countries of origin of most of the previous arrivals or attempted arrivals, including Afghanistan and Iraq; fewer people are inclined to flee; and in Afghanistan in particular, more people look to a durable solution through return. Other factors contributing to the decline in unauthorized boat arrivals to Australia could be the more effective implementation of the Regional Cooperation Agreement with Indonesia, which has seen increased numbers of would-be asylum seekers intercepted and channeled to UNHCR in Jakarta, and more effective police work to break up Indonesia-based smuggling rings.

Where the US is concerned, the political and economic situation in Castro's Cuba has not changed, and violence continues to erupt in Haïti periodically, giving rise to new flight. Neither interception nor detentions have prevented people from leaving these islands in the easiest way they can: namely by boat. If they have no alternative but to seek protection, movement to a particular destination may be either the only option, or the most feasible in terms of certainty of the destination country being part of the protection regime, or of there being existing ties to that country. In addition, for Cubans and Haïtians traveling by boat, the US is, most often, a first destination—these are not secondary movements. This begs the question whether, if avoiding people moving by boat is indeed a key policy goal, states need to develop other approaches, including a stronger political and military role in another country's affairs or some form of humanitarian evacuations and resettlement or short-term protection. None of these alternatives appear particularly palatable to industrialized states. But if the states see themselves as having no alternative to offer, perhaps there needs to be broader understanding of the apparent lack of alternatives open to people seeking protection and longer-term safety.

A further policy approach to be considered is the range of opportunities offered to people to make it known that they wish to make a protection claim. Australia takes migrants to offshore locations to assess refugee status. The US only does so where an initial screening suggests a need to investigate a protection claim further. As described above, the US has a differentiated approach for "soliciting" or "allowing" an initial cry for help to be heard. Cubans hear a statement saying they can make a claim; Chinese receive a questionnaire allowing them to say

they fear return; all other people intercepted (with Haitians as the largest group) are given access to screening with an asylum officer only if they themselves express a fear of return (the “shout test”).

There is much discussion as to whether this approach is effective—and a sense among many commentators that it is unfair and politicized in its differentiations between countries of origin of those intercepted. The implication seems to be that Cubans and Chinese are likely to be refugees, whereas all others are not. If the asylum officer conducting initial screening at sea decides the individual may have a case and should progress to a hearing on their claim to refugee status, they are transferred to the US base at Guantánamo Bay.

This approach to initial screening is quite different from what happens on land in the US, including at airports. Under a 1996 policy on “expedited removals” any person, regardless of nationality, expressing a wish to apply for asylum is given a credible fear interview by an asylum officer. If a “significant” possibility of establishing eligibility for asylum is found, an immigration judge is asked to exempt the individual from removal. If no credible fear is found, the individual may be removed in the same way as other irregular entrants.

The use of third countries or offshore islands as destinations for processing has kept those intercepted (or, especially in the case of Australia, rescued at sea) away from the mainland territory—at least as long as refugee processing takes. In some cases, particularly the US, even those intercepted and found to be refugees have been kept out of the US, a result of the fact that the government will not settle even those found to be refugees in the US itself. Australia initially sought a similar approach. As such, disembarkation on the mainland has in these cases been avoided. However, in the Caribbean at least, this has not prevented people from trying to move. The fact that many people do succeed in avoiding interception (and for Cubans specifically, the fact that the prize at the end of that journey is automatic parole into the US), probably explains this persistence.

The other key approaches attempted, in particular by European governments relating to the Mediterranean situation, include rapid processing



and removals. This policy has been particularly apparent in Italian practice on Lampedusa. Few actors involved in migration and refugee protection regard the approach as successful to date. There is significant disquiet among humanitarian actors, the European Parliament and other EU member states about the fact that Italy appears not to be giving individuals access to an asylum procedure at all, and not to be giving NGOs and UNHCR access to the migrants or asylum seekers in their relatively short time on the island—whereas the Libyan authorities do have access. It may well be the case, as the Italian authorities strongly maintain, that the people coming ashore are all irregular migrants and none even request asylum; however, the approach of excluding monitors means that skepticism reigns. Removal to Libya gives rise to similar disquiet among the same group of humanitarian actors, MEPs and states, and the fact that the majority of those removed to Libya then remain in Libyan camps (some with Italian funding) for indefinite periods seems to many observers to be warehousing at its worst. This example seems to show that access to information and monitoring are important factors in making policy approaches more broadly acceptable. What is more, to date, Italy does not seem to have found the appropriate approach in terms of achieving its over-riding political goal of stopping the boats from arriving on Lampedusa.

Meanwhile, it has been seen over the years that government policies aimed at deterring arrivals by sea may, like other policies, have unintended consequences. A consequence of the reluctance to allow disembarkation following rescue, leaving commercial vessels at sea for days, is that some shipmasters and the companies for which they work are reneging on their obligation to rescue those in distress at sea. Other tragic incidents include, for example, the murder of stowaways, bodies thrown overboard, as shipmasters and crews try to avoid what seem like far more difficult consequences if they help the individuals in question ashore.

## **F. A Frequently Proposed Solution: Cooperation with Third Countries**

The most frequently proposed solution to irregular migration by sea is to create a situation in which people do not need to make perilous

journeys, by greater cooperation between the target countries, the countries of origin and any countries of transit. Thoughts of this "solution" are most often voiced in Europe—although the example of Australia's arrangement with Indonesia as a regional solution is a strong one, and the US's 1994 intervention in Haïti and support of Aristide could be said to fall into a similar category.

Taking the policy approach to handling arrivals by sea onto dry land has, of course, its attractions—from various perspectives. There is certainly the angle of individual or personal safety for the migrants themselves as for any coastguard or other crew of vessels which might intercept or need to rescue the individuals concerned.

In addition, prevention of the attempted movement while on dry land would avoid the post-rescue situation of needing to allow disembarkation, immediate care and a status processing opportunity for the migrants and asylum seekers involved.

However, the "solution" is not as cut and dried as it is often made to appear. Economic opportunities are not likely to be available for migrants who make it as far as the transit countries which Europe has in its sights—i.e. in North Africa. Removals from those countries, for example, are certain targets for human rights groups which can demonstrate documented cases of torture and/or mistreatment. If such policies even in non-European states could be construed as part of an EU program for avoiding migrant arrivals there would be possibilities for legal challenges within Europe.

The same type of human rights concerns mean that these transit countries are unlikely places for refugees to find protection—so any idea of enhancing protection "capacities" in those countries, as suggested by European policy makers, is greeted with broad skepticism and, if such skepticism were overcome, would require a significant European presence and resources to become a reality.

Relations with countries of origin, the other element to this suggested approach, cannot be based purely on a goal of deterring emigration from those countries and immigration to Europe. Again, there are obvi-

ous differences between the approaches that could be taken (through, for example, development projects) to countries which produce refugees and those which are the place of origin of economic migrants. Often, these mixed flows will come from one and the same country. It is difficult to imagine what kind of relations could be developed with significant producers of refugees and migrants, such as a Sudan or a Zimbabwe, if the situation, described by some as genocide, in Darfur persists, for example, and if the government of Zimbabwe continues with its policies of razing the homes of the poor, confiscating farm land and depriving large parts of the population of food and opportunities to work. If the general foreign policies of EU member states cannot tackle these major issues, how can external aspects of a migration deterrence policy be expected to do the trick?

The question for European policy makers is, however (as in Australia and the US), how can they handle movements by sea if this much proposed seeking of alternatives to such movements is a non-starter?

## **IV. IDENTIFYING POTENTIAL FUTURE STEPS—AT THE REGIONAL AND GLOBAL LEVELS**

The first step in identifying solutions to attempts to migrate irregularly by sea is to reach a consensus on what the problem is and its scope.

Too little is known about the numerical difference between people setting out on boats with the intention of migrating and those actually arriving somewhere—whether they arrive, are intercepted or are rescued. If boats can be intercepted after two months of being unseen off the coast of Africa, as was the case of the boatload of would-be migrants rescued off the Canary Islands in August 2005, how many other boats sink without trace off Africa, Asia, in the Pacific and in the Caribbean each year? The very nature of the issue means that we do not know. A coalition of European NGOs has documented at least 5,000 dead in the

Mediterranean over the past decade—but there is no way of knowing how accurate this number is in terms of actual departures. Can anything be done to help us find out and draw attention to that factor in migration by sea? Possibly not—unless some way could be found of monitoring departures; yet if departures can be monitored, given the known dangers at sea and the type of “welcome” to migrants who are intercepted or reach a developed country (with the exception of Cubans reaching the US “feet dry”), they should surely be at least discouraged from even attempting their journey.

Perhaps the most that could be done is for investigative journalists to trace the stories of people left behind who never hear again of their loved ones who set out by sea.

Beyond the human elements and tragedies, another step in identifying solutions is to ask whether attempts to arrive by sea are a problem facing only a few countries or a regional or global phenomenon requiring supra-national solutions. While the deterrence of interception en route to the US is starting to impact the Caribbean islands, in the form of more arrivals from Haïti in particular landing on those islands, the question of a supra-national impact is most pertinent in Europe. In 2005, Italy and Malta are the most impacted EU states in terms of arrivals by sea, followed by Spain and Greece. Italy has, for several years, received the largest total number of arrivals; Malta receives proportionally the greatest number per head of population. Italy’s response can be summarized as employing the island of Lampedusa as a temporary holding station; removing arrivals to Libya or Tunisia, dependent on which state they transited. Italy also has sought closer relations with those two North African countries, most particularly with Libya, including support to their coast guards (an approach learned through the experience with Albania in the 1990s) and financial support for holding camps and removals from Libya to the migrants’ countries of origin.<sup>49</sup> Malta has a less robust or systematic response, to date, but has removed irregular arrivals by sea to countries in northern Africa.

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48 The US operates a similar policy with regard to the Bahamas.

Italy has tried to push these measures through as European Union approaches. However, the other countries of the EU do not feel the impact in the same way. So long as Italy is removing the migrants, and any who do reach the mainland and travel further north to request asylum can be returned to Italy as a result of the EU's Dublin Regulation (determining the member state responsible for dealing with an asylum claim to be primarily the state through which an asylum seeker entered the EU), none of the other states need see this as anything but an Italian problem. Nonetheless, in the context of greater European integration on migration and asylum policies, Italy is surely within its political rights to push for a common approach.

This is a conundrum posed by arrivals by sea and by migration generally. Migration remains, even in the EU context, within the realm of national decision-making and implementation—other than for a handful of guidelines or broad directives from the supra-national level, which themselves require national level implementation. But can a state such as Italy, or the combination of Italy and Malta bilaterally, succeed in making this a regional issue to the EU—or to the Mediterranean—without taking extreme measures including the risk of *refoulement* of refugees, to bring their point home to their fellow EU states? European Union developments to date, including the Dublin Regulation and the Schengen Agreement with their tracking systems for asylum-seeking and irregular entrants who come into contact with authorities, predominantly result in the removal of individuals to the country through which they entered the Union as a whole. As such, what Italy and Malta call a “European” problem has, thanks to these regulations, reverted to being clearly their national problem—and a problem which, due to the nature of the subject, they will only share with other EU states with a Mediterranean coastline.

Any effort to make safety and status issues a more regional or global matter is significantly hampered by the fact that there are not only different real life experiences and priorities in different states, but also different legal systems dealing both with migration and asylum and with activities at sea. International law is not a straightforward and uniformly applicable body of law, but is complex and only partially governs what states will actually do. Most significantly for this issue,

there is nothing at all in international law about disembarkation following rescue at sea. Certain fictions are created as to universal standards through individual rights to seek asylum, or to leave any country, for example—but there are no corresponding duties on the part of states to accept that people land on their territory or may make their claim to receive protection in a specific country. Furthermore, the extension of territorial jurisdiction over areas of sea (territorial waters etc.) can mean that those areas also come under national jurisdiction with regard to any protection claims made by individuals intercepted or rescued within their scope—reinforcing the national element and aspect.

Where current policies and practices have made the end result of interception or rescue more of a global issue—a fact which could be used to trickle into policy steps that come earlier in the process of dealing with attempted arrivals by sea—is in attempts to find extra-regional resettlement places for those people found to be refugees. Both the US and Australia have adopted this approach, and Canada and several European states, as well as New Zealand, have agreed to accept resettled refugees at various times from either or both countries. One can ask whether this approach is strategic or surreal—moving people across the globe, apparently to avoid them achieving their goal of a new life in a specific destination (whereas for some the goal may just have been real protection somewhere, which they achieve through this resettlement).

Extra-regional resettlement can appear to be a rather convoluted final solution to the situation of refugees who have arrived by sea—and to the benefit primarily, or even exclusively, of their desired (or accidental) destination state. Such durable solution outcomes may, over time, give rise to new secondary migration dependent on why the refugees in question had chosen a particular destination state (if they had). If family members are involved, for example, the refugee is less likely to be satisfied by resettlement in a different country. In the case of Cubans particularly, experience has shown that those resettled out of Guantánamo to Latin American countries have subsequently made the perilous journey north through Central America to achieve their aim of reaching the US and reuniting with family members. That land journey may pose even greater personal danger than the boat journey. In addi-

tion, the notion that perverse movements could result—setting one state as the first destination of migration by sea in order to achieve resettlement to another state—seems odd, but should not be excluded.

Although these resettlements make a regional or global phenomenon of the entirety of movement by sea, they only really deal with the post-arrival protection situation, and have no impact on people's decisions to move, their choice of vessel, the possibility of distress and need for rescue or the ensnarement in an interception regime. They do little with regard to the disembarkation issue, with the exception of potentially encouraging a state to allow disembarkation in the belief that other states will provide the durable solution if one is needed.

Extra-regional resettlement also provides a long-term solution only for those people found to be refugees. In seeking out the way to a potential regional or global approach, it would be necessary to establish mechanisms to deal appropriately, and differently, with the different situations of the various categories of migrants involved in a mixed flow.

Economic migrants—including those who claim to need protection but are found not to be refugees—might have some form of temporary stay under certain conditions, such as medical needs. All states would likely look into removal policies—which would entail relations with states of origin, and potentially with transit states. Another group of arrivals might need a different treatment: the victims of trafficking in particular, and also the victims of smugglers. In some states such victims already receive short-term visas in exchange for participation in the prosecution of the criminals involved in their movement.

These elements of an approach once more, however, deal with the aftermath of arrival, not with interception or rescue, or with deterring departure in the first instance. One possible measure, which might not have any impact on the level of attempted movements but might help ensure one humanitarian need is met, is a global fund to compensate shipping companies which become caught up in rescue situations—and indeed to compensate small businesses, including fishermen, where appropriate or necessary. Such a fund could be established by states, potentially under UN auspices, and would provide a counterbalance to the potential impact of other policies (including not permitting

disembarkation or carrier sanctions) without necessarily implying a state responsibility to then allow disembarkation.

A lot of these suggestions regarding the way forward involve the sharing of broad responsibilities, not just for living up to protection obligations (which is the type of solidarity most frequently discussed) but also for dealing with the whole range of issues and problems involved in the phenomenon of migration by sea. Ultimately, ways of making departure by boat unnecessary must be considered; although as set out above, such thinking runs into road blocks at almost every turn.

## **V. CONCLUSIONS AND RECOMMENDATIONS**

### **A. Conclusions**

As noted above, the Roundtable discussion on which this report is primarily based was not aimed at achieving a set of Conclusions or Recommendations. Nonetheless, in reflecting on the discussions and additional research for this Report, we are able to draw some conclusions of our own, and to advance some suggestions or recommendations for future consideration and action by various actors.

One conclusion is that in previous decades, when governments have reached consensus on a particular exodus involving significant attempts to travel by sea to safety (attempts which often were unsafe in themselves and required rescue action), states have been able to develop international programs to deal with interception and rescue—in combination with a durable solution. Those programs include DISERO, RASRO and the Comprehensive Plan of Action as described and discussed above.

If states have done this previously, why can they not do it today? One reason, as developed in the previous section, may be that states currently



do not see any seaborne migration attempts as really international in the scope of their impact.

Another reason may be the image of the Indochinese in the 1970s and 1980s as primarily refugees, whereas the image of those who put to sea today is of irregular migrants. In the Indochinese case, the programs fell apart when the majority of people setting out from Vietnam and other countries in the region proved no longer to be refugees. In the current case, the image does not seem to be evenly true: the numbers of people recognized as refugees in the facilities Australia has established are quite high; no-one knows how many refugees are among those crossing the Mediterranean because the Italians have taken a “closed-island” policy on Lampedusa, and, like Malta, have undertaken summary expulsions; in the Caribbean, the US approach to both Haitians and Cubans is overwhelmingly political and politicized.

How might states go about taking a more international or collective approach to migration by sea? They probably will not unless and until there is an obviously humanitarian crisis compelling the departures, and it would probably have to be one in which the industrialized states in question were involved. (If Iraqis were currently taking to the sea in large numbers, might there be a new DISERO/RASRO or CPA, for example?)

At the same time, if so many states are facing people desperate enough to set to sea in unseaworthy or massively overcrowded vessels, and all states view this as a problem, should they not come together to resolve at least the central issue of disembarkation? Again, national interest is nowhere high enough for this to currently be a political priority; however, for states such as Australia, Italy, Malta and Spain the peaks of public interest and discontent might be powerful enough to inspire leadership at some point.

As emphasized above, disembarkation is key in discussion of rescue in particular, bringing focus to the issues of safety and status. Many international and inter-actor relations can become involved in the resolution of a situation where it is not clear where to disembark, due to circumstances such as strong reactions from those rescued regarding potential desti-

nations, or the rescuing vessel's ability to sustain the rescued migrants in safety for any length of time. Commercial shippers and their insurers are challenged by acts of state (political) sovereignty in these situations, putting the whole long-standing tradition of rescue in jeopardy. If the tradition of rescue at sea is challenged, all shippers (commercial, tourists, navies and migrants among them) will be put at greater risk. The reciprocal understanding that when at sea people act to ensure each other's safety is too precious for all who go to sea for states to undermine it by putting overwhelming demands on those shipmasters who rescue migrants or find stowaway migrants on board.

In order to bolster the tradition of rescue and demonstrate to shippers that states understand the very particular nature and circumstances—and dangers—of rescue situations, and that they are quite distinct from questions of who has ultimate responsibility for the people rescued—states could establish a fund to cover the costs to shippers of delays, diversions and other inconveniences which can arise as a result of carrying out this vital humanitarian duty.

The establishment of such a fund would show that states recognize the difference between the two types of humanitarianism involved in rescue at sea: the humanitarian act of rescue of those in distress, and the humanitarian act, which can only be carried out by state authorities, of accepting to protect individuals who do not have the protection of another state (i.e. who are refugees).

NGOs likewise need to make this distinction. They need to make it particularly in order to be able to appropriately advocate for those in need of refugee protection. Not every person rescued at sea is a refugee—and states cannot be expected to accept non-refugees and grant them status on the basis of their having put themselves into danger by getting into a boat in seeking to migrate. However, this is not to deny that every person who claims a protection need should have their case looked at, and be given access to an asylum procedure—and states must ensure that asylum procedures are open to all who need them, and that they have ways and means of establishing who needs a procedure.

NGOs which are active within western states are only very exceptionally active at sea. This is a clear distinction between NGOs acting on human rights and refugee issues and those which are active on environmental issues, for example. There is, therefore, the question of whether NGOs ought to become more active actually at sea in enacting rescues, or any kind of monitoring activity. Given the existence of a comprehensive humanitarian rescue regime, it seems possible that any NGOs becoming involved might complicate rescue rather than bringing new benefits to those migrating by boat. So long as commercial and other shippers are not deterred from conducting rescue by high state-imposed penalties for assisting migrants who then disembark on their territories, or otherwise caused to avoid rather than conduct rescue activities, it would seem there is no real role for any other non-governmental actors.

There may be a role to play for non-governmental actors, be they investigative journalists, NGOs with an existing field presence, or academics, in trying to evaluate the real extent of *departures* on boats, to be linked to arrival caseloads in various western states, so that the real extent of the invisible problem of migrants who are not intercepted or rescued and who do not arrive at a destination is revealed. Without knowing this, it is difficult for any actors, governmental, inter-governmental or non-governmental, to really push for leadership and a solution. At present, all actors can only assess the extent of the “problem” of *arrivals* by sea.

Finally, independent evaluation of specific incidents and approaches, assessing the development and handling of the situation in the context of its specific circumstances and from the perspectives of all actors involved, would be advisable for coherent and comprehensive future policy-making at the national, regional and international levels.

## B. Recommendations

- States challenged by arrivals by sea, and which find the resolution of this issue to be important for themselves and for the individuals involved, should take leadership in demonstrating the need for an internationally coordinated plan of action. Those states should

then negotiate a mechanism by which the plan can be made operationally effective.

- To avoid jeopardizing a strong and valuable humanitarian tradition of rescue, states should establish a fund, perhaps under UN auspices, to cover the costs of delays and diversions for commercial and other private shippers, and counterbalance state policies which might otherwise deter these shippers from rescuing potential migrants and refugee.
- States should cooperate as much as possible in facilitating agreements regarding disembarkation in such a way as to demonstrate to shipmasters the value attached to the humanitarian service and obligation of rescue at sea.
- States and international organizations could consider designating one body as the focal point for international collaboration in the resolution of both general and particular problems related to attempts to migrate by sea.
- NGOs and the media, among others, should be conscious of the distinction between the humanitarian action of rescue at sea and any need for humanitarian protection, including refugee protection, after disembarkation in their advocacy and reporting on such incidents.
- States must ensure that all persons intercepted and rescued at sea have the opportunity to access an asylum procedure and ensure that individuals have access to humanitarian organizations as a basic guarantee in this process.
- Monitoring of *departures* and attempted departures is required to know the full extent of the broader problem of attempts to migrate by sea and its full dangers. Current knowledge is limited to arrivals. NGOs on the ground in developing countries, investigative journalists or academics could carry out such investigations over a period of time to gauge the degree to which would-be migrants in fact decide to make treacherous journeys and the planning they involve.

- Independent evaluations of specific incidents and general approaches are required, taking into account the perspectives of all actors involved, for lessons to be learned and progress to be made in dealing with migrations by sea.

## **APPENDIX A: EUROPE AND THE MEDITERRANEAN REGION**

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June 6, 2005

Throughout the centuries voyages across the Mediterranean in all directions by migrants with various causes and intentions have been the norm. The geographic proximity of Europe, Africa and the Middle East, clustered around the small Mediterranean Sea, has encouraged these movements.

Since the early 1990s, the main focus has been on migrants crossing to western Europe from Africa and countries with coastlines to the east of the European Union. During the 1990s the major flows were those from Turkey to Greece; from Albania to Italy; and from Morocco to Spain. However, the migrants were not all from those countries of origin: an increasing number are transit migrants from countries further east and south. Asians and migrants from the former Soviet Union in particular cross Turkey and Albania, and migrants from the whole continent of Africa cross through Morocco. Other countries in North Africa have also more recently become transit, as well as sending countries, particularly Tunisia and Libya. The flows coming to the EU from both directions have also been mixed: including people in need of protection at various times from Kosovo, Iraq, Sudan and other conflict zones in Africa, and people seeking better socio-economic opportunities than they could hope to find at home.

In 2004-2005 movements through North Africa towards Southern Europe, and particularly those through Libya to Italy's southernmost island, Lampedusa, are causing increasing concern. This is far from being the first case of significant sea-bound movements, but is striking for the intensity of the flow since 2003, particularly during the summer season, coming through a country with which the EU as a whole has no diplomatic relations (although nine Member States do).

None of the past cases is completely closed: there are still arrivals by sea, interceptions and the need for rescue of various types of crafts in the Aegean, Adriatic, and in the narrow straits between Morocco and southern Spain. However, in all of those cases, measures have been taken to deal with the flows in a more coordinated and organized manner.

The past cases of movements by sea from Albania to Italy and from Morocco to Spain will be described below, along with the measures adopted in each situation and their impact. Following that look at the recent past, the on-going situation with regard to movements on boats departing from the Libyan coast will be set out, together with a description and some analysis of the developments to date, with regard to the EU as a whole, as well as Italy, Malta and Libya in particular.

## The “Past”: From and Through Albania and Morocco to Italy, Spain and the Rest of the EU

Boat arrivals always make headlines. Highest in the publicity of their day have been the mass arrivals in Italy from Albania, followed by the mixed arrivals of Kosovar protection seekers and irregular migrants after the high-profile NATO intervention in the province in 1999. The arrival of smaller, individual raft and dinghy loads of migrants or asylum seekers in Spain, including the Canary Islands, and Greece have not had the same high profile, yet the overall impact in the media and the public domain is to signify something of chaos on the EU’s southern sea borders.

### Italy

It has in fact been calculated that just some 10 percent of irregular migrants arrive in Italy by sea: 15 percent enter by crossing borders with false documents, or hidden inside trucks and other means of transportation, while 75 percent are people who over-stay a period of legal stay.<sup>50</sup> It is not clear whether these percentages can be extrapolated to the other European states which face the arrival of boat people.

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50 Vincenzo Delicato (Central Directorate of Immigration and Border Police at the Italian Ministry of the Interior), *National Legislation and Good Practices in the Fight Against Illegal Migration: the Italian Model*, CARDS Programme, Rome, October 1, 2004.

Albanians leaving a country in which communism was collapsing formed the first wave of arrivals in Italy in 1991-1992. The first group of 23,000 migrants was welcomed fairly openly: the second group of 20,000 just five months after the first was not accepted.

The tide was turning, as was the case across most of western Europe following the end of the Cold War and the start of conflicts in the Balkans.

Although people continued to cross the Adriatic in the intervening years, the second major wave of Albanians arriving in Italy came in 1996-1997, when they

departed national unrest following the collapse of pyramid financial schemes. These migrants were not welcomed. This period saw the start of ad hoc in-country plans in Italy, including a temporary protection scheme for Albanians already in the country to distinguish them from newer irregular arrivals. These arrivals also gave rise later to comprehensive laws to deal with irregular arrivals and to Italy seeking greater management over quota-based legal arrivals.

From 1998 onwards, and particularly following the Kosovo refugee crisis of 1999, the vast majority of people attempting to reach Italy by sea from Albania have been non-Albanians. Also from 1998 onwards, Italy and Albania have been cooperating closely to limit departures from Albania, organize readmission of persons who do arrive in Italy, and ensure a quota for legal Albanian migration to Italy.

The number of intercepted arrivals from Albania has decreased gradually from 1998 to 2003 (see table 1) with an increase in 1999 which can be explained by the Kosovo crisis. The 137 migrants intercepted in 2003 were in just seven small vessels.<sup>51</sup>

**Table 1: Interceptions of Migrants by Italy and Albania in the Adriatic**

<b>Year</b>	<b>Migrants Intercepted</b>
1998	28,458
1999	46,481
2000	18,900
2001	8,546
2002	3,372
2003	137

51 Ibid.



### **The Impact of EU Developments in Asylum Policy**

Italy's approach to arrivals by sea has been impacted by the fact that until 1997, when the Dublin Convention came into force, followed by the Eurodac fingerprinting system and the 2002 Dublin Regulation, most migrants and asylum seekers transited Italy en route to the French and Austrian borders and then further north to Germany, the Netherlands, Scandinavian countries and the UK. Prior to the "Dublin measures" coming into force, this meant that Italy was effectively a "resting ground" for tired people, but that it was not faced with a longer-term problem of determining their status and thinking about how to integrate those who gained status (or those who stayed anyway) into its society.

Until these EU agreements started to have an effect, people arriving in Italy, even if they were seeking asylum, did not necessarily make themselves known to authorities, nor were they encouraged to do so. Neither the EU as a whole nor any individual member states have developed systems designed to encourage those who require protection to "say the right words"—rather it seems to be presumed that they will make their request for asylum known, if indeed they think they have a case—or even if they do not.

From the late 1990s onwards the impact of EU agreements has been to see a significant number of those people who enter the EU through Italy returned there for the processing of an asylum claim. In other words, what was a problem for the rest of the EU of irregular entry through Italy has become a more particularly Italian problem as a result of EU developments. These developments in the EU approach mean that whereas the arrivals on Lampedusa in 2003-2005 (described in detail below) would have been an EU-wide problem in the early 1990s, because they could likely have passed, potentially undetected or unhindered, through Italian territory to other member states, they are now much more of a directly and specifically Italian problem, even if the Union as a whole is slowly becoming involved, because the options for onward movement for the migrants through the EU have been curtailed. In some senses this is a paradoxical and counter-intuitive result of deepening European integration.

## Spain

The migration of Moroccans and other Africans to Spain has also frequently been a matter of transiting to other EU member states, in particular France where many have family. More of those people entering Spain from North Africa are irregular economic migrants rather than asylum seekers. Those departing Morocco have primarily done so on small rafts and boats, many unsuited to the rough seas of the straits they seek to cross. Others have sought opportunities to enter the EU through the Spanish enclaves of Ceuta and Melilla. These land entries to Spanish territory in North Africa both complicate the Spanish relationship with the Moroccan government on the subject of migration and mean that the Spanish authorities have the opportunity to intercept would-be "boat people" on land rather than once they are at sea. Spain has Centers of Refugees and Migrants in the two enclaves, and so can determine refugee status prior to movement to mainland Spain.

Spain and Morocco signed an agreement on better migration management in 1999, recognizing the Spanish need for agricultural and construction workers, and Morocco's ability to supply this labour legally. The workers who move are generally intended to do so temporarily, although it is acknowledged that some will stay for longer.

The Spanish government has been tackling arrival by sea in the context of a general strengthening of the country's frontiers since the mid-1990s, which tackles criminal activities from drugs smuggling to money laundering and is known as *Plan Sur*. Spain also seeks broader EU cooperation, measures to tackle the push factors of migration through development initiatives, and ways to decriminalize "illegal" migration. The Spanish desire to see immigrants on its territory regularized is surely at least partially driven by the desire to know who is in the country, particularly in the light of the terrorist attack of March 11, 2004.

## Engaging the Countries of Origin and Transit

In part as a result of the sea crossings (but also in the case of Albania due to land crossings and high profile strategic and security concerns in the mid- to late-1990s) Albania and Morocco were included in the first round of work for the EU's High Level Working Group on Asylum and Migration in 1998 to 1999. Morocco complained loudly at being

the subject of an EU report and plan on which it was at no time consulted. The resulting discussions during the last six years are one way in which the transit countries have started to impact EU policy, although their effect to date has been quite limited.

Another forum in which some of the transit countries can engage in dialogue on migration with the EU is the Euro-Mediterranean partnership called the Barcelona Process. Opened by the Barcelona Conference in 1995, this Process includes migration as a long-term subject of strategic discussion between the twelve participating Mediterranean countries and the EU. Libya is a key country which is not part of this group. The European Neighbourhood Policy (ENP), announced in a 2003 Commission Communication, includes the Euro-med countries, and the Commission and the Council have made it clear that they hope Libya will also join in that group. It is to be expected that the Action Plans for each individual ENP country's relationship with the EU will include points on limiting irregular migration flows, through interception on land and at sea as well as other means.

In terms of the EU's own actions, member states have been slow to engage in pan-EU cooperation on actions at sea. Various bi-, tri- and multi-lateral efforts have been undertaken, but there is to date no unified EU approach to any countries or situations of migration by sea. The closest to an EU approach are the new sea border centers in Greece and Spain. The 2004 Hague Programme, setting out the EU's agenda on migration and asylum issues until 2010, notes the tragedies in the Mediterranean and calls for intensified cooperation in preventing further loss of life. However, that work remains to be done. A Council meeting of June 3, 2005 requested the two sea border centers "to examine the

#### **Examples of Operations at Sea by EU Member States in Relation to Boat Arrivals Since the mid-1990s**

Operation Ulysses in the Mediterranean by the UK, France, Italy and Portugal

Operation Triton in the South East Mediterranean by Greece, Spain, France, Italy, UK, Cyprus and Malta

Project Deniz in the Turkish Seas led by the UK

creation of a temporary Task Force to which EU Member States' vessels and aircraft could be made available."<sup>52</sup>

## The Current Situation: Policy and Practice towards Departures from Libya

While none of the other streams of boat arrivals is completely dried up, current attention is focused on arrivals on the Italian island of Lampedusa, the closest EU territory for migrants who have transited Libya. Thousands of migrants have landed on Lampedusa since 2003; on October 2, 2004, 600 arrived in one night alone. In 2003 Italy registered a total of 14,017 arrivals from North Africa in 319 boats; in 2004, by December 212,737 illegal immigrants had landed from North Africa in 231 boats.<sup>53</sup> It is thought that in 2004 close to 2,000 would-be migrants died during the attempted sea crossing.

From October 2004 onwards, Italy reversed its policy towards these arrivals, who had initially been offered humanitarian shelter and given access to an asylum procedure after being brought ashore on Lampedusa, and started to expel them summarily. During the period October 2004 to March 2005 alone several hundred of these migrants were deported by Italy to Libya.

Malta registered 1,369 boat arrivals in 2004; a smaller total number, but proportionally much higher in relation to the size of the Maltese territory and population. In the period 2002-2004 over 3,500 people who had come from or through Libya illegally to Malta were apprehended.

### NGO and UNHCR Reactions

Human rights organizations are very concerned about the situation in relation to Lampedusa in particular. Their concerns are based on three key factors:

- Libya is not a signatory to the 1951 Convention relating to the Status

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52 Council Conclusions on initiating dialogue and cooperation with Libya on migration issues, June 3, 2005.

53 European Commission, *Technical Mission to Libya on Illegal Immigration, 27 November to 6 December 2004: Report*, Annex 7, Description of the Nature of the Migration Flows, 7753/05, Brussels, April 2005, p. 38.

of a Refugee and is widely documented for its abuse of human rights;

- There is no formal framework for dialogue and accountability in relations between the EU and Libya;
- While the EU as a whole engages in developing a framework for dialogue with Libya on migration and other issues, the gravity of the expulsion practice by Italy is being ignored.

One facet of island settings in dealing with boat people arrivals (as is seen in the case of Lampedusa, but also elsewhere) is that they often limit access for NGOs and UNHCR, or make it substantially easier for state authorities to restrict the admission and access of these organizations. At the same time, the vast majority of these humanitarian groups are “landlubbers”<sup>54</sup> and as yet have made little effort to adapt their own practices to become seaborne too in their efforts to protect refugees.

The one obvious exception to date is the German humanitarian group *Cap Anamur*, which in June 2004 rescued thirty-seven people from a boat in distress in the Mediterranean. They sailed for weeks with Malta, Germany and Italy all refusing to consider the asylum requests of the Africans involved, until the ship finally docked in Lampedusa, and the German captain of the *Cap Anamur* was arrested on charges of aiding and abetting illegal immigration. While the thirty-seven claimed to be from Darfur, the Italian authorities determined that five were Nigerian and the rest came from Ghana, and deported the would-be immigrants to those countries.

In the apparent *refoulement* situations from Lampedusa and elsewhere in Europe (e.g. Eritreans from Malta in mid-2003),<sup>55</sup> there has been inadequate if any access to asylum procedures. In March 2005, when 180 people were returned from Lampedusa to Libya, UNHCR, unlike the Libyan authorities, was not given access to the group, and expressed concern that it was unclear whether the necessary precautions had been taken to ensure *non-refoulement* as Libya could not be regarded as a place of safe asylum.

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54 Michael Pugh, *Europe's Boat People: Maritime Cooperation in the Mediterranean* (Institute for Security Studies of the WEU, July 2000).

55 Oxfam, *Foreign Territory: the Internationalization of EU Asylum Policy* (Oxfam GB, 2005), p. 39.

### **Italy's Bilateral Efforts**

Italy has embarked on bilateral efforts to encourage Libya to prevent migrants from embarking on sea crossings, including, according to media reports, supplying tents and other equipment for their shelter. In October 2004 there were reported plans by the Italian and German governments to establish some form of transit processing camps for migrants in Libya, although no written proposals have ever circulated. Other plans by Italy included copying their bilateral approach undertaken in cooperation with Tunisia, of joint coast-guard patrols close to the North African coast to intercept vessels. A significant practical problem standing in the way of these plans was the sanction regime against Libya, until that was removed. Another practical problem is that Libya only decided to establish a Coast Guard in 2004, and it is not yet operational. Italy is supplying one or two boats for use by the new Libyan Coast Guard.

There is not a great deal of clarity about the actual Italian approach: which policy options discussed by Italian politicians and officials in the media are unrealizable or unrealized wishes, and which are concrete steps that are being taken. Both the European Parliament and the European Court of Human Rights have demanded that Italy provide greater transparency on the conditions on Lampedusa and its bilateral agreement with Libya.<sup>56</sup>

### **The International Response and Engagement with Libya**

Among the EU member states with relations with Libya only Italy and Malta have specific bilateral cooperation with the North African country on migration issues, including (draft) readmission agreements. Other international migration related projects include an IOM project with Libya aimed at improving reception conditions; assisting return through voluntary programs and setting up dialog with countries of origin. The EU has also funded an ICMPD project in Libya which includes reports on the migration situation and initial Mediterranean dialog. In addition a European Commission funded UNHCR project in the Maghreb began in 2005 and will include a Mediterranean meeting on protection issues, including protection for those attempting to cross to Europe by sea.

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56 European Parliament resolution on Lampedusa, April 14, 2005 (Provisional edition).

### **The EU Approach**

The issue of relations with Libya is taxing to the EU as a whole, and is complicated by the context of Italy's advances in this direction. What makes this situation even more difficult, and frequently confusing, is the Italian rush to resolve their immediate practical problem of high levels of arrivals on a small island, while the EU more broadly is involved in a wide-ranging and slow-moving discussion about potential alternatives to relying on the asylum system alone for the admission of refugees.

The EU-wide decision to initiate cooperation with Libya on migration issues came in 2002. An initial exploratory mission to Libya by the European Commission was conducted in May 2003. Further missions were postponed due to bilateral issues which remained unresolved until steps were taken by Libya in 2003 to openly distance itself from certain military capabilities and specific anti-western military and terrorist intentions, and sanctions against the country were lifted.

A technical mission to Libya on illegal immigration issues was undertaken by Commission representatives, experts from fourteen of the twenty-five member states and a representative of EUROPOL in November 2004. A Justice and Home Affairs Council meeting was held on June 3, 2005 to discuss the report of the Technical Mission, released in April 2005, and decide on next steps. This Council concluded with a request to the European Commission to undertake ad hoc technical cooperation with Libya; nothing more formal is possible until Libya enters the Barcelona Process and the European Neighbourhood Policy.

### **Cause for Concern about Rights and Refugee Protection in Libya**

The aim of the 2004 technical mission for the EU participants was to understand the migration-related issues in Libya and to identify concrete measures for a balanced EU-Libya approach to illegal migration in particular. The EU team also aimed to explain EU migration policy to the Libyan authorities.

The mission and relations generally appear not to be focused on joint interception operations at sea, but on increasing Libya's capacity to protect so that people will not set sail from its coast to seek asylum in

Europe. The question for many humanitarian groups is whether Libya is really ready to accept protection obligations—and even if it appears to be so, how observers can be assured that they really are being upheld. In addition, refugee protection advocates are wary of the consequences of EU cooperation with Libya on migration and refugee issues for access to asylum procedures in Europe. In short, if there was concern about the closer ties with Albania and Morocco in dealing with migration and protection issues, as described above, there is something approaching panic at the idea of cooperation with Libya.

It is estimated that 75,000 to 100,000 foreigners enter Libya each year, but the flows and borders are poorly controlled. Many of these migrants view Libya as a destination: it is one of the richest countries in Africa.

What is not known, and is of concern to the European Commission and Parliament among others, is how many of these people who enter Libya (including those who transit through Libya to cross the Mediterranean) are persons in need of protection. The Libyan authorities do not acknowledge the presence of refugees and asylum seekers on their territory.<sup>57</sup> The authorities claim that if a person's country of origin is deemed to be a place in conflict they are not returned. However, the 2004 EU mission could not establish who takes such a decision and how it is then implemented in operational terms, and whether those not returned are granted some kind of residence permit in Libya and if so under what conditions.

The European Commission and Council view a robust asylum and refugee protection system in Libya as essential if cooperation in the area of migration is to be undertaken.<sup>58</sup> Libyan authorities are apparently concerned that introducing an asylum system will lead to an unmanageable situation in which every immigrant requests protection.

Libya has ratified the 1969 OAU Convention Governing the Specific Aspects of Refugee Problems in Africa, but not the 1951 Convention relating to the Status of Refugees or its 1967 Protocol. Furthermore, UNHCR has no official status in Libya, although it does have an office

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57 Technical Mission Report, Annex 10: Asylum Issues, p. 52.

58 Technical Mission Report p. 16.



in Tripoli, so it can only conduct status determination for a very limited number of applicants. The Commission and Council want to see Libya's full recognition of UNHCR's status in Libya and that the UN agency is allowed to fully exercise its mandate, as part of the required robust protection system. The Libyan Constitution includes what the EU mission report describes as "some sort of refugee protection."<sup>59</sup> The Constitution states that "the extradition of refugees is prohibited" and a 1991 law says that "the Jamahiriya supports the oppressed and the defenders on the road to freedom and they should not abandon the refugees and their protection." However, Libya has no administrative structure for determining refugee status.

Concerns about Italy's removal of migrants to Libya are heightened for many observers because the Libyan authorities are increasing their own efforts to repatriate irregular entrants to the country, in part assisted by Italy. Several people in reception camps for people to be repatriated to their countries of origin showed the EU team UNHCR refugee status cards issued in various African countries. The report notes that "the decision to return illegal immigrants seems to be taken without due consideration to detailed examination at an individual level."

According to a largely Italian drafted annex of the report, Italy has supported the construction of at least one reception centre for illegal immigrants in Libya and the construction of more camps is planned.<sup>60</sup> Italy has also financed a program of charter flights for the repatriation of illegal immigrants from Libya to their countries of origin. These Italian financed flights took 5,688 people back to countries of origin in the period August 2003 to end 2004.

In 2003 Libya repatriated a total of 43,000 illegal immigrants of various nationalities and by in 2004 had repatriated 54,000 people by November.<sup>61</sup>

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59 Technical Mission Report p. 13.

60 Technical Mission Report, Annex 13: International Cooperation between Libya and Third Countries: Malta and Italy, p. 59.

61 Among those held in a long-term detention center the Commission mission met some twenty Moroccans who said they did not understand why they were being detained after years of working in Libya—after all, if they had intended to go to the EU they would have done so from Morocco through Spain (p. 31).

In order to proceed the European Commission seeks a specific joint-dialog mechanism with Libya, to develop a strategic comprehensive approach to fight illegal immigration, and develop an action plan to incorporate all the measures that need to be undertaken in this context. Among the areas suggested for initial cooperation is the management of asylum, along with the reinforcement of Libyan institution-building, training initiatives, and increasing public awareness to discourage illegal immigration.

### **Ensuring Access to Protection**

It is striking that both the Technical Mission report and the Council Conclusions focus heavily on how Libya must improve its protection system in law, policy and practice and recognize an official role for UNHCR. Neither document discusses any measures that should or could be used by EU member states to ascertain the likelihood of a protection need for anyone intercepted at sea, nor indeed who lands on Lampedusa. Nor does either document request that Italy guarantee UNHCR or NGO access to migrants who land on Lampedusa.

### **Italy's Haste, the EU's Leisure?**

The discussion of Italy's specific plans, particularly through the media, but also by a range of NGOs, has conflated Italy's apparent thoughts on transit migration with two other EU approaches of recent years: the UK "Vision" proposals, including transit processing, which were rejected by the Union and withdrawn by the UK, and the Commission's focus on durable solutions.

The Commission has tried to initiate debate on establishing a clearer refugee protection program for European states, including access to durable solutions in the EU through a resettlement program such as those conducted currently by six EU member states<sup>62</sup> as well as the US, Canada, Australia, New Zealand, Norway and Brazil. Discussion of the prospects for an EU approach to resettlement has been simultaneously stimulated by the apparent chaos of arrivals by sea and abuse of the asylum systems across Europe, and hampered by the chaos of ad hoc national responses to both of those phenomena.

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62 Sweden, Finland, Denmark, the Netherlands, the UK and Ireland.

The conflation of these three approaches is not necessarily productive to a measured EU approach to either asylum or refugee protection more broadly.

## Conclusion

Europe is generally challenged by migration and asylum issues, and the arrival of irregular immigrants and asylum seekers by boat is no exception. Determining what is a national problem and what is a problem that requires full EU action is part of the picture. Achieving agreement on any collective action in a timely way, before any individual member states have had to take matters into their own hands, is another element.

As European populations at large express ever greater dissatisfaction with the apparent lack of control regarding immigration, the need to tackle the most eye catching type of irregular arrivals, those by boat, increases. On occasion, the desire to intercept, prevent and manage seems to overwhelm the obligation to investigate protection needs.

The key deterrents attempted to date, are readmission agreements and summary expulsions. While there is much discussion of transit camps, processing of claims to asylum outside the EU and the use of increased interception through coast guard cooperation and return to these camps, to date, little concrete seems to have come of these suggested approaches—although the lack of transparency on Italy’s actual actions, and the lack of access to Libya for most groups which might monitor such activities, mean that there can be no certainty that more is not being done in practice.

While Europe fiddles with new or adapted strategies, and its own institutional machinations around “subsidiarity”, migrants and refugees continue, in the worst cases, to either perish at sea, or be returned to persecution.

## **APPENDIX B: THE US AND THE CARIBBEAN**

Kathleen Newland, Migration Policy Institute

June 10, 2005

For the last quarter-century, the US government has instructed the US Coast Guard to intercept unauthorized persons approaching US shores by sea. A policy that started as a response to discrete episodes of mass irregular immigration has evolved into a standing method of border enforcement. Originally adopted in order to foil defiance of US immigration laws (and therefore of US sovereignty) and prevent a perceived threat to the welfare and safety of US communities receiving large numbers of unauthorized immigrants, interception is now also presented by US officials as a national security measure. The arrival of boats carrying immigrants and asylum-seekers highlights the continuing porosity of US sea borders—which, it is feared, could be exploited by terrorists if it can be exploited by migrants and migrant smugglers. In the effort to address this vulnerability, opportunities for asylum-seekers from island states in the Caribbean to present their claims for international protection to US authorities have been drastically reduced.

Following the terrorist attacks in the United States in September 2001, interception has been, for the first time, explicitly linked to deterrence of refugee as well as migrant flows. In the 1980s and 1990s, interception was presented as a necessary measure in which safeguards could be imbedded to ensure that refugees fleeing by boat were not prevented from seeking and finding protection—and indeed might be rescued in the course of mortally dangerous journeys. Although deeply flawed in practice, the safeguards put in place at that time acknowledged the need, though not a legal obligation, to open a humanitarian channel through the Coast Guard barrier. Post-September 11, however, this stance has been abandoned on the grounds that the effort of intercepting boats and screening passengers for refugee status creates an unaccept-

able diversion of law-enforcement resources from anti-terrorism priorities. For this reason, deterrence of refugee flows is now embraced by authorities as a goal, rather than as a perhaps-necessary evil.

The policy of interception followed by direct return to the country of origin leads many interested parties to conclude that the United States government is in violation of its obligations under the 1951 Convention relating to the Status of Refugees. The US government's position, confirmed by the Supreme Court, is that these obligations do not apply outside territorial waters. The government nonetheless maintains that any intercepted person who expresses a need for protection will have that need evaluated according to international standards and acted upon appropriately. There is widespread concern, however, that both the evaluation and the response are inadequate from a protection standpoint, and that both are implemented in a manner that discriminates on the basis of nationality.

*Refoulement*, deterrence, and discrimination are thus the major issues of concern that arise from US policies of interception at sea, particularly in the Caribbean.

## A Brief History of US Interception at Sea of Migrants and Refugees

According to the US Coast Guard historian, "From 1794 through 1980 the Coast Guard conduct migrant interdiction only as an adjunct to a primary mission such as Search and Rescue or though the boarding of a suspicious vessel." The earliest interdictions occurred after the banning and criminalization of the slave trade, in the late 18th and early 19th centuries, when the Coast Guard acted to prevent slave ships from landing in the United States, or from transporting slaves from the United States to places where the trade was still permitted, such as Cuba.

Contemporary US interception policies have been heavily influenced by domestic political and foreign policy interests, particularly in relation to Cuba. Coast Guard vessels intercepted migrants from Cuba in the mid 1960s, but primarily in a rescue mode and to impose some order on an outflow that was seen, in the Cold War context of the time,

as composed of *prima facie* refugees. Apart from some concern about the infiltration of spies, Cubans were generally welcomed. The dangers and chaos of departure by sea were replaced by a negotiated series of charter flights in 1965 (characterized by the US government as "freedom flights") to bring Cubans directly to the United States. The government of Fidel Castro acquiesced in the departure of its political opponents. Over 260,000 Cubans arrived in the US in this way between 1965 and 1971, and quickly became legal permanent residents.

A challenge to the "open door" policy toward Cuban refugees was mounted by the Cuban government in 1980. After a series of confrontations, Fidel Castro announced in 1980 that the Cuban police and military forces would not prevent boat departures from the port of the small town of Mariel. Thousands of Cubans scrambled to find places in Miami-bound boats, and members of the Cuban community in the US mounted a flotilla of private vessels that set out from Florida to pick up people from Cuba, in violation of US law. Castro also took the opportunity to deport inmates of some of Cuba's prisons and mental institutions. The ensuing chaos, in which twenty-seven migrants died at sea, overwhelmed US reception and processing capabilities. The Coast Guard was deployed to prevent US residents from sailing to Cuba to participate in what became known as the "Mariel Boatlift." It also intercepted Cuban boats and transported their passengers to points from which they were dispersed to processing centers around the United States. The Guard "assisted" 1,387 vessels during the Mariel operation, and a total of 124,776 Cuban migrants arrived in the US between April 1 and September 25, 1980. All were permitted to stay, although some of the criminals were jailed.

Migrant interdiction in the contemporary sense, involving the prevention of spontaneous arrivals, can be traced to the Mariel Boatlift. Other refugees or would-be immigrants from the region, the majority from Haiti, followed the Cuban example and attempted to reach US shores by boat. These individuals arrived in much smaller numbers, however, and were in part able to disappear into ethnic communities (particularly in Florida) or claim asylum under the newly passed US Refugee Law of 1980.

On September 28, 1981, President Ronald Reagan issued Presidential Proclamation 4865 on “High Seas Interdiction of Illegal Aliens,” which declared, in part, “The entry of undocumented aliens from the high seas is hereby suspended and shall be prevented by the interdiction of certain vessels carrying such aliens.”

Of course, saying it did not make it so, but with the Proclamation, the policy and practice of interception was firmly established. In fiscal year 1982, 171 migrants were intercepted by the Coast Guard, all of them from Haïti. The number of interceptions fluctuated in an upward trend for the next eight years, almost entirely in the Caribbean, and dominated in most years by Haïtians (see Table). In 1991, the Coast Guard carried out 4,990 interdictions, including a few in the Pacific Ocean of Chinese migrants.

With the installation of a popularly elected president in Haïti, boat departures and interceptions dropped dramatically between 1989 and 1990. A military coup in late 1991, however, caused departures to soar in 1992. Almost 38,000 Haïtians were interdicted by the Coast Guard in fiscal year 1992 (which began on October 1, 1991). President George H.W. Bush issued Executive Order 12807 on May 24, 1992, calling for “instructions to the Coast Guard in order to enforce the suspension of the entry of undocumented aliens at sea and the interdiction of any defined vessel carrying such aliens.” The instructions included: 1) stopping and boarding vessels, 2) questioning those on board, examining their documents and taking such actions as necessary; 3) returning the vessel and its passengers to the country from which it came, though with the stipulation that the Attorney General may at his discretion decide that a refugee will not be returned without his consent. The measures outlined in the Order were to be carried out only beyond the territorial waters of the United States. To enforce the Directive, the Coast Guard operation ABLE MANNER placed seventeen cutters, five Navy ships, and nine aircraft off the coast of Haïti to intercept boats from January 15, 1993 through November, 1994, after the elected president had been restored to office in Haïti.

In the meantime, boat departures from Cuba were increasing and tensions rising on the island after several ferry boats were hijacked in July and

August 1994 by would-be migrants. In one incident, thirty-two people drowned. In echoes of 1980, the Cuban government blamed the United States for encouraging the disorder and, on August 11, ordered security forces not to obstruct boat departures. The Coast Guard deployed to prevent private US vessels from going to Cuba to effect another boatlift, and a short time later, on August 19, the US government initiated a "Cuban Mass Emergency Plan" to prevent illegal entry of undocumented Cubans in the United States. The operation, named ABLE VIGIL, stationed thirty-five cutters in the Straits of Florida on interception duty. In the week of August 22 alone, more Cubans (10,190) were intercepted than during the decade 1983-1993.

In both operations, intercepted migrants had no opportunity to proceed directly to the US, even if they were able to demonstrate a credible fear of persecution. After President Bill Clinton assumed office in 1993, the policy of summary return of all Haitians intercepted at sea was modified. In 1993, the US governments had attempted shipboard refugee determination, which carried concern about safety and fairness, but these concerns were quickly overwhelmed by the sheer numbers. Adjudications were suspended, and Haitians intercepted at sea were held at Guantánamo as a "safe haven" until the restoration of the Aristide government brought a measure of calm, at least temporarily, to their homeland. Most of the Haitians were then repatriated on the assumption that even if there were some refugees among them, the country was safe enough for return.

Cubans were also taken to Guantánamo and some other locations in the Caribbean. A few of these Cubans were accepted for settlement in third countries, but most were eventually paroled into the United States.

Operation ABLE VIGIL ended in September 1994 with the conclusion of a bilateral migration agreement between Cuba and the United States. It provided for the admission of a total of 20,000 Cubans per year, both refugees and immigrants, to be processed in Havana. The goal of current US-Cuba policy in the immigration field, according to the US Department of State, is "to see that no Cuban finds it necessary to risk his or her life on the high seas to come to the United States." Cuban exceptionalism, thus, remains—both with the direct departure programs and in a unique practice that allows Cubans who manage to



evade Coast Guard patrols and land on US soil illegally, to remain in the US and adjust their status to legal permanent residence after one year. This policy gives Cubans an incentive to continue to attempt unauthorized entry by sea even though alternative channels are available, if imperfect. Unauthorized migrants of other nationalities who arrive on the US shores of the Caribbean are subject to detention and removal.

The third most numerous group of migrants intercepted at sea by the US Coast Guard are departing from the Dominican Republic. There was a peak of arrivals from the DR in 1995-1996, which prompted the deployment of another Coast Guard operation, ABLE RESPONSE, in which 9,500 people were interdicted or forced to turn back to the Dominican Republic. In 2004, Dominicans accounted for more than half of the nearly 10,000 interceptions in the Caribbean. They outnumber both Cuban and Haïtian interceptions thus far in 2005 as well. Overall, Dominicans receive the same treatment as Haïtians in terms of screening and return.

## Current Issues

The end of the simultaneous Haïtian and Cuban migration “crises” of the mid-1990s opened a new era in US interception policy and practice in the Caribbean, marked by a determination to prevent unauthorized arrivals by boat and to deal harshly with those who defy the ban.

The actions of the Executive Branch vis-à-vis Cubans are constrained by Congressional provision for access to legal status by Cubans who manage to land on US territory. But for migrants, even Cubans, who are intercepted at sea, the door to the United States is quite firmly shut. Those who pass a credible fear screening are taken to Guantánamo. If, during adjudication procedures in Guantánamo, they are found to have valid refugee claims, the US government seeks a third country to accept them for resettlement. No refugees adjudicated in this manner are considered for resettlement in the United States, even if they have close family ties there. Some refugees have waited for long periods to be resettled from Guantánamo. In their 2004 Safe Third Country Agreement with the US, Canada accepted to take up to 200 refugees for resettlement from Guantánamo on an annual basis. Non-Cubans who arrive by boat in the US in an unauthorized manner are subject to

summary return if they do not meet the credible fear test, and to mandatory detention during their adjudication period if they do.

The most recent developments in US interception policies and practices in the Caribbean date from 2004, when political chaos and violence again reached a peak in Haïti, forcing President Aristide to flee the country for a second time. The US government reacted to the prospect of new large outflows from Haïti with another Coast Guard interdiction, called operation ABLE SENTRY. In introducing the new operation, President George Bush emphasized, "I have made it abundantly clear to the Coast Guard that we will turn back any refugee that attempts to reach our shore." That statement, combined with then-Attorney General John Ashcroft's characterization of Haïtian boat arrivals as a threat to national security because of the diversion of Coast Guard resources, seems to indicate that US interception policy in the Caribbean has moved beyond rescue and prevention, with safeguards for refugees, to a policy of pure deterrence. The logic behind the new strategy is that even refugees in need of protection will not approach US shores without authorization if they are convinced that no channels to legal stay and protection in the US run across the Caribbean.

The policy of deterrence seems to be having the intended effect, as interdictions are down in 2005 compared to the same period of 2004: 1,344 Haïtians arrived between January and June 2005, compared to 3,053 by June of 2004 and 2,084 Dominicans arrived as of June 2005 compared to 4,359 midway through 2004. Not surprisingly, given the exceptional treatment they enjoy, Cuban arrivals have not declined. Rather, they are almost double in 2005 compared to the same period of 2004.<sup>63</sup>

A number of grave concerns arise from a policy of deterrence that makes no allowance for the fact that unauthorized journeys are often the only means of escape open to refugees. If such individuals are systematically prevented from making such an escape, the system of inter-

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63 It is important to note here that Haïtians have also arrived by boat in recent years in Jamaica, Cuba and the Dominican Republic. The Bahamas, meanwhile, have followed the US lead in interdictions. Cubans intercepted in Bahamian waters, whether by the US or the Bahamian Coast Guard, have their asylum claims processed in the Bahamas. It is understood that intercepted Haïtians are returned to Haïti.

national protection is seriously weakened. At best, the responsibility for protecting these refugees is unilaterally deflected to other states; at worst, they are forced to remain in a situation where they are vulnerable to persecution. Harsh treatment of unauthorized asylum-seekers challenges the Refugee Convention's Article 31, which says that states party to the convention should not impose penalties on refugees because they have arrived illegally.

The procedures for recognizing fear of persecution on the part of Haïtians intercepted at sea appear, since February 2004, to be so exacting as to fail to meet even the barest of minimum standards. Since that date, nearly every Haïtian intercepted at sea has been returned directly to Haïti, which seems to suggest a change in interpretation of credible fear during the so-called "shout test." Of the first 1,000 interceptions after February 2004, only three people were recognized as indicating a fear of return—an "inexplicably low" rate, according to UNHCR. By July 2004, of the 2,830 Haïtians intercepted, only thirty-five had credible fear interviews and only six were recognized as refugees and put in line for resettlement from Guantánamo. This implies that refugee protection measures are not being taken seriously, and raises the real concern that refugees are being refouled.

Intercepted Cubans, on the other hand, are asked if they have concerns about returning to Cuba, and are automatically given a credible fear interview if they answer in the affirmative. If they arrive by boat in the US, they are not subject to expedited removal procedures and are usually released from detention shortly after filing an asylum claim. Cubans who arrive in this manner are eligible to adjust to lawful permanent residence within one year.

The differential treatment accorded to Cubans as compared to all others from the Caribbean raises issues of discrimination on the grounds of nationality. (Although few Chinese are intercepted in the Caribbean, those who do are asked, via a written form, why they left China. Some special protection programs apply to those who left for reasons of coercive family planning measures.)

## Conclusion

The US Coast Guard, as the instrument of US migrant interception policy, has interdicted people from sixty-three countries. The epicenter of this policy lies in the Caribbean, in particular the waters that separate Cuba and Haïti from the United States. Policy development has been crisis-driven, shaped by the Mariel Boatlift, the large exoduses from Haïti and Cuba in the mid-1990s, and September 11.

Policies forged during crisis do not always age well, as more enduring concerns and principles may reassert themselves. It is too early to tell whether US interception policy will eventually return to its origins as a means of bringing order and greater safety to mixed outflows, or if it is leading the way to a rejection of the concept of territorial asylum on which the international refugee system is currently based. In the meantime, profound concerns about refoulement, deterrence, and discrimination need close examination.

**Total Interdictions—Fiscal Year 1982 to Present****As of: Thursday, June 09, 2005 01:06 PM**

Year	Haiti	DR	PRC	Cuba	Mexico	Other	Ecuador	Total
1982	171	0	0	0	0	0	0	171
1983	511	6	0	44	0	5	0	566
1984	1581	181	0	7	2	37	0	1808
1985	3721	113	12	51	0	177	0	4074
1986	3422	189	11	28	1	74	0	3725
1987	2866	40	0	46	1	38	0	2991
1988	4262	254	0	60	11	13	0	4600
1989	4902	664	5	257	30	5	0	5863
1990	871	1426	0	443	1	95	0	2836
1991	2065	1007	138	1722	0	58	0	4990
1992	37618	588	181	2066	0	174	0	40627
1993	4270	873	2511	2882	0	48	0	10584
1994	25302	232	291	38560	0	58	0	64443
1995	909	3388	509	525	0	36	0	5367
1996	2295	6273	61	411	0	38	2	9080
1997	288	1200	240	421	0	45	0	2194
1998	1369	1097	212	903	30	37	0	3648
1999	1039	583	1092	1619	171	24	298	4826
2000	1113	499	261	1000	49	44	1244	4210
2001	1391	659	53	777	17	31	1020	3948
2002	1486	177	80	666	32	55	1608	4104
2003	2013	1748	15	1555	0	34	703	6068
2004	3229	5014	68	1225	86	88	1189	10899
2005	1345	2084	32	1452	55	42	767	5777
Grand Total	108,039	28,295	5772	56,720	486	1256	6831	207,399

(Source: US Coast Guard Statistics)

## **APPENDIX C: AUSTRALIA AND THE PACIFIC STRATEGY**

Erin Patrick and Betsy Cooper, Migration Policy Institute

June 7, 2005 (Revised September 26, 2005)<sup>64</sup>

Australia's relative geographic proximity to the developing world, as well as its robust economy, has made it a popular destination both for asylum seekers and economic migrants. In response to a growing number of unauthorized migrants arriving by boat on Australian shores or offshore territories during the 1990s, many of whom claimed asylum, Australia has put in place a combination of policies aimed at decreasing the number of arrivals by sea. As a result of these efforts, the number of maritime arrivals has dropped significantly in recent years, and no major arrivals have occurred in the past twelve months. The government can claim policy successes in terms of meeting its stated goals. However, critics believe that the policies are unnecessarily harsh at best, and at worst, put Australia in breach of its protection obligations under the 1951 Refugee Convention. This paper will briefly discuss the Australian experience with interception at sea, drawing out major themes and areas for future analysis.

### **Background**

Alongside a broad legal immigration system, Australia operates an annual humanitarian program of 13,000 places per year (up from 12,000 per year prior to 2004). This program includes both refugees and people who have successfully sought asylum in Australia. Those arriving from outside Australia (through "offshore processing") include refugees referred by UNHCR for resettlement to Australia and residents of refugee camps who have not been referred by UNHCR but have been determined by the Australian authorities to fall within the "special humanitarian program," a specific category generally reserved

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64 The authors are grateful to staff of DIMIA for comments on the earlier draft, and to Peter Mares for comments on Australia in general, from which this paper has benefited.

for those with ties to the country. Because the resettlement and asylum strands are linked in this manner, every spontaneous asylum seeker (an “onshore” candidate) effectively “takes a spot” from a candidate who would otherwise be chosen by the Australian authorities from an overseas location (“offshore”), although this does not mean that a successful asylum applicant inside Australian territory would be denied a place because all had been offered to resettling refugees. The program’s operation is, in several senses, numerically flexible. Offshore processing of refugee claims is the “preferred” choice of the Australian authorities, as it inserts a degree of predictability and control into the process. Under some approaches, including the Pacific Strategy,<sup>65</sup> Australia also refers the cases of individuals seeking protection in offshore locations to other resettlement countries.

After a substantial flow of Vietnamese asylum seekers fleeing the aftermath of the Vietnam War arrived in Australia by boat in the late 1970s, there was an overall lull in asylum applications lodged during the 1980s.<sup>66</sup> The 1989 Comprehensive Plan of Action (CPA) for the hundreds of thousands of Vietnamese refugees stranded in Indochina since the end of the war brought with it a large upswing in the number of refugees accepted by Australia. The goal of the CPA, however, was to resettle the Vietnamese refugee caseload in an orderly, organized manner, to avoid the need for them to take to the seas and arrive by boat. The plan is generally thought to have been a success.

Between 1989 and 2001, 259 boats carrying 13,489 people landed in Australia in an unauthorized manner.<sup>67</sup> The vast majority of these maritime arrivals came after 1999, following an increase in activity by

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65 Initially known as the “Pacific Solution” and referred to as such in sources cited in this paper, and in others, including DIMIA press releases, the official name given by DIMIA at the time of writing is the “Pacific Strategy”—and that is thus the title for this approach used throughout this paper.

66 The exception to this was the surge of Chinese “students” applying for asylum in the late 1980s and early 1990s following the Tiananmen Square incident.

67 These figures should be noted in context: as of 2000, there were thought to be over four times as many visa overstayers in Australia than there had been maritime arrivals (see Peter Mares, *Borderline*, Sydney: University of New South Wales Press, 2002: 30). Visa overstayers are viewed very differently by authorities than smuggled, unauthorized arrivals, because their background has at least had the checks required for the initial visa to be issued.

human smugglers in the region as well as declining protection standards in and increased harassment by state authorities in countries of first arrival, particularly Pakistan and Iran.<sup>68</sup> By 1999, the majority of asylum seekers in Australia were from Afghanistan and Iraq. Many of these individuals had already sought asylum or received some form of protected status in countries of first arrival (for example, Pakistan or Iran) but, finding genuine protection lacking and/or seeking to reunite with family members, transited forward through Indonesia on their way to Australia.<sup>69</sup> In the eyes of the Australian authorities, the absence of protection in countries through which refugees had transited, and family unity are unlikely to have been the sole motives for this "secondary movement": Australia's other attractions include its strong economy, welfare system and reputation for widespread acceptance of a multicultural society.

Current Australian policy on interception at sea is largely the result of a continuum of decision-making on the issue that can be seen as beginning with the CPA and becoming increasingly restrictive throughout the 1990s as the number of boat arrivals continued to grow and the countries of origin began to diversify. In 1992 the government introduced legislation providing for the detention of designated boat arrivals. By 1994, a policy of mandatory detention for all unauthorized arrivals was instituted. This includes a very significant number of asylum seekers.

In 1999 the Australian asylum system was altered to create separate temporary and permanent protection categories based on the manner of arrival. Under this new regime, even if an asylum claim is determined to be successful, an applicant who entered Australia in an "unauthorized" manner can only be granted a temporary visa for up to three years (after which point he or she can apply for a permanent visa, but must again prove a well-founded fear of persecution). Refugees who enter Australia in an "authorized" manner (that is, with a visa—whether the application for that visa was based on a protection reason, e.g. through resettlement, or on another reason) and request asylum after their authorized entry may immediately be granted a permanent protection visa.

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68 Human Rights Watch, *"By Invitation Only": Australian Asylum Policy*, December 2002, pp. 15-20.

69 Such individuals often traveled by air to Malaysia, which granted visa-free entry for citizens of Islamic countries, and then traveled overland to Indonesia before setting off for Australia by boat.



Despite these efforts, however, “unauthorized” arrivals continued to increase.

### **A Regional Approach**

A key component of Australia’s strategy toward unauthorized migration has been cooperative agreements with source countries, countries of first asylum, and transit countries for unauthorized migrants to Australia. In this sense, the CPA can be seen as one of the first such arrangements. However, the most prominent regional agreement of the last decade was the “Regional Cooperation Arrangements” agreed by Indonesia and Australia in July 2000, and which involves activities by the International Organization for Migration (IOM) and the United Nations High Commissioner for Refugees (UNHCR).

Under this agreement, Indonesian authorities can identify and detain persons they suspect are unauthorized migrants. When the authorities do so, they also contact IOM to assess the situation of the persons being detained. IOM then informs the migrants of the possibilities for voluntary assisted return or points them to another country that they may have permission to enter. They are also told that they may contact UNHCR if they have a fear of returning home. The majority of those dealt with under the agreement chose the latter option. UNHCR then determines the status of the protection seekers and their qualification for resettlement. Those who are determined to be refugees in need of resettlement await the availability of a resettlement place in a third country, which could be Australia, or could be another resettlement country. IOM is called on to remove those individuals found not to be in need of international protection. Although Indonesia is not a signatory to the 1951 Refugee Convention, under the agreement the government will permit protection seekers to remain in the country while UNHCR processes their claim. The Australian government plays a significant financial role in this arrangement, paying for the accommodation of most of the individuals throughout their status determination, as well as for the administrative, processing and transportation costs.<sup>70</sup>

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70 Jana Mason, “Paying the Price: Australia, Indonesia Join forces to Stop ‘Irregular Migration’ of Asylum seekers,” *Refugee Reports* 22, 8 (2002): 5.

The majority of those whose status has been determined by UNHCR through this arrangement have been found not to be refugees. Just 1,179 out of 3,878—or 30 percent—have been found to be refugees, although others have been found to be in need of some form of protection. However, a 30 percent “success” rate in refugee status determination is sufficiently low to lead analysts and advocates to question the Australian government’s claim that most asylum seekers attempting to reach Australia by boat are “queue jumpers,” whether they are refugees—i.e. people who have not waited their appropriate turn for resettlement—or are secondary movers.

Initially, the Australian government was unwilling to resettle to Australia any of the protection seekers found under the arrangement to be refugees, expressing concern that resettling such individuals would set a dangerous precedent, encouraging more migrants to attempt the journey and effectively “rewarding” what the government sees as illegal movement. However, after protest from other countries, including resettlement destinations like the United States, Australia agreed to resettle those refugees with “family links” in Australia.<sup>71</sup> By July 31, 2005, Australia had taken 262 (or 22 percent) of the people determined by UNHCR to be refugees. As not all the refugees had been resettled, the proportion of the actually resettled refugees who had gone to Australia was 26 percent.

### **The *Tampa* and the Pacific Strategy**

Only a year after the enactment of the Indonesian Regional Cooperation Arrangements (and after initial reports stated that arrivals were decreasing as a result), Australian policies for unauthorized maritime arrivals were thrust into the international spotlight as a result of what has come to be known as the *Tampa* incident. On August 26, 2001, the Norwegian container ship the *MV Tampa* rescued 433 would-be asylum seekers (mostly Hazara, an ethnic and religious minority group from Afghanistan) from a sinking boat in international waters between Indonesia and Christmas Island, an Australian outpost. Though the captain of the ship at first headed toward Indonesia, as he was within the Indonesian Search and Rescue area, several of the individuals on board apparently

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71 Ibid., p.6.

threatened to commit suicide if they were not taken to Australia. The *Tampa* reversed course towards Christmas Island. While the Australian Search and Rescue authorities indicated that the captain was within his rights to do this, the Immigration authorities were opposed to the arrival of the ship—and the overall government position was to deny permission to enter Australian territorial waters. The Department of Immigration and Multicultural and Indigenous Affairs (DIMIA) noted, according to some sources, that carrier sanctions would apply.<sup>72</sup> As health and safety conditions on board worsened and the government stood firm despite the captain's issuing of distress signals, the ship made its way towards the coast of Christmas Island. The stand off continued, and after several days a "solution" involving UNHCR status determination on the Pacific island republic of Nauru and resettlement to several countries was agreed. The passengers were transferred to an Australian military vessel, the *HMAS Manoora*, for the journey to Nauru.<sup>73</sup> Around 150 people were rapidly resettled, following status determination, to New Zealand. During the voyage from the vicinity of Christmas Island to Nauru, a second boat called the *Aceng* was intercepted by the Australian military, and its passengers also transferred to the *Manoora*.

Precisely one month after the beginning of the *Tampa* incident, Australia announced its "Pacific Strategy" to resolve the problem of unauthorized boat arrivals: a complex series of deterrence and enforcement measures against maritime arrivals as well as expanded cooperation agreements with two of its neighbors, Papua New Guinea and, again, Nauru.

The Pacific Strategy is in large part defined through two major legislative initiatives, the seven bills which comprise the Border Protection Act (Validation and Enforcement Powers) of September 27, 2001, and the Migration Legislation Amendment (Further Border Protection Measures) Bill of June 20, 2002. For international observers, perhaps

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72 Mares, *Borderline*, pp. 122-123.

73 UNHCR initially agreed to screen the passengers from the *Tampa* and *Aceng* on Nauru (as it is not a signatory of the 1951 Refugee Convention), but decided not to review any additional claims on the island once it became clear that Australia would divert all future attempted boat arrivals to Papua New Guinea and Nauru. New Zealand agreed to accept 150 *Tampa* passengers prior to the commencement of processing on Nauru, and to take more refugees under their managed refugee resettlement program.

the most dramatic element of the new legislation is the "excising" of Australia's offshore territories, including Christmas and Ashmore Islands, from Australia's asylum regime under the Migration Act of 1958. Unauthorized non-citizens who land on or are intercepted in the waters around these islands are ineligible for a visa to enter Australia, other than with the Minister's express permission. Instead, such persons are generally transferred by Australian authorities to another (non-Australian) location, where they are processed and, if found to be in need of international protection, must await resettlement, either to Australia or to a third country. (Thus far, 58 percent of those found to be refugees following processing on Nauru and in Papua New Guinea have been resettled to Australia.)

The Pacific Strategy provides the basis for aggressive efforts at intercepting unauthorized boats before they can reach Australian territory. Immediately following the *Tampa* incident, the Royal Australian Navy and Customs Enforcement began intercepting and boarding any "Suspected Illegal Entry Vessel" (SIEV) found in or near Australian waters.<sup>74</sup> Intercepted boats are sometimes forcibly returned to Indonesia, where, the Australian authorities note, the passengers can seek status determination and resettlement through the UNHCR office under the RCA.<sup>75</sup> Australian authorities assure critics such as UNHCR that Indonesian authorities are informed of the returns, and note that the RCA establishes processes ensuring reception facilities for those returned from a journey en route to Australia. The Australians also point to RCA provisions for protection against *refoulement*. The critics remain unsure that these provisions are consistently upheld and operative in practice.

Under the Pacific Strategy, passengers of intercepted boats *not* returned to Indonesia are transferred to either of two other states with which Australia has agreements: Nauru or Papua New Guinea. On arrival they are automatically detained by the local authorities pending

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74 Between September and November 2001 and under the umbrella of the Pacific Strategy, "Operation Relax" intercepted a total of twelve boats.

75 It should be noted that UNHCR is not actually a party to the Regional Cooperation Arrangement, but an organization that, as a result of the RCA, receives this caseload of people transiting Indonesia en route to seeking asylum in Australia.

processing of their asylum applications. To ease the arrangements for use of facilities in these other nations, Australia entered into temporary agreements with the governments of Nauru and Papua New Guinea in September and October 2001, respectively. Under these agreements, Australia undertakes to pay nearly all the costs of accommodating and processing the asylum seekers, as well as providing other financial incentives<sup>76</sup> to its relatively poorer neighbors in return for their acceptance of the transferred individuals during processing. Apart from the *Tampa* and *Aceng* passengers on Nauru, whose status was determined by UNHCR as part of the initial compromise, the majority of asylum seekers in both countries are processed by officials from DIMIA.

Australia's original intention was to avoid the resettlement of refugees from the caseload diverted to Nauru and Papua New Guinea. To date, however, 536 of those resettled (58 percent) have gone to Australia. Others among the 974 people resettled have gone to New Zealand, Sweden, Canada, Denmark and Norway, under those countries' resettlement programs. Observers suggest that finding resettlement opportunities for these refugees has been to some degree hampered by the sense among resettlement countries that this caseload was Australia's "responsibility."<sup>77</sup>

### **Analysis: The Australian Experience**

The frequency of maritime arrivals in Australia during the 1990s was a key catalyst for the development of the restrictive policies currently in place. Even prior to the arrival of the *Tampa*, key Australian policies such as the mandatory detention of unauthorized arrivals and the initiation of a system for temporary protection based on manner of arrival were designed with one goal in mind—deterrence. There is little question that Australia has created a *de facto* new approach to interception with the implementation of the Pacific Strategy.<sup>78</sup> Whereas critics have argued that the new approach violates the spirit, if not the letter, of the

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76 According to Amnesty International ("Australia-Pacific: Offending Human Dignity—the 'Pacific Solution'," *AI Index*, ASA 12/009/2002), the Australian government budgeted roughly US\$75 million per year between 2002 and 2006 for activities in other Pacific countries aimed at preventing asylum seekers from reaching the Australian mainland.

77 Human Rights Watch, "*By Invitation Only*," p. 74.

78 Mason, "Paying the Price," p. 10.

Geneva Convention, Australian High Courts have largely determined that, at least under domestic law, Australia is acting within its rights.<sup>79</sup> And despite the criticisms, Australian authorities point to the vast decreases in maritime arrivals since the introduction of the Pacific Strategy as evidence that the approach, accepted or not, is working.

There are a number of key points that can be made about the Australian experience with interception.

1. *International Protection.* A number of analyses have concluded that Australia at least in part violated its obligations under international law by refusing to allow the *Tampa* to dock and its passengers to apply for refugee status. Critics have also suggested that Australia's attempt to excise some of its territories from its migration regime is illegal, and that any protection claims lodged on the islands or in their territorial waters must be dealt with appropriately.

The vast majority of asylum seekers in Australia are individuals who have chosen to leave a country of first asylum. They also tend to be young males who pay for the services of smugglers—according to the government, individuals who choose to leave and are able to afford their way. This may not negate the actual protection claim; however, the approach taken suggests the Australian government believes that rewarding these individuals with protected status may disadvantage other individuals, including women, children, and individuals unable to reach Australian territory who may be in (even) greater need. Many critics of the policy, however, do interpret this as an oversimplified approach which essentially does mean that the fact of paying a smuggler is used to negate any protection claim. These critics add that in actual fact, paying the smuggler may be an indication of the true need and desperation of these individuals.

2. *Forcible Return and Transfer to Third Countries.* Some critics have also suggested that, by transferring individuals to third

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79 Tara Magner, "A Less Than 'Pacific' Solution for Asylum Seekers in Australia," *International Journal of Refugee Law*, 16, 1 (2004), p. 55.

countries for asylum processing (particularly countries that are not signatories to the Geneva Convention, such as Nauru), Australian authorities are avoiding their protection responsibilities and shifting accountability for potential errors in adjudication or other problems. The conditions of detention on Nauru and Manus Island have also been called into question. A number of organizations including Human Rights Watch and Amnesty International, as well as detainees, have complained of “overcrowding, inadequate medical care, abuse by guards, [and] extreme heat or cold,” and others have called the conditions “subhuman.”<sup>80</sup> Critics have called for an inquiry into the detention system or at the very least, greater independent access to the centers.

Concerns about transfer to and detention in third countries are compounded by the fact that Australia provides financial incentives to the—very poor—governments of Papua New Guinea and Nauru to encourage their continued participation in the arrangement. The Australian government has defended its actions, stressing the voluntary and temporary nature of the cooperation agreements and denying that conditions in detention facilities are sub-par. Government authorities have also authorized IOM to allow detainees short day trips outside the centers.

The forcible return to Indonesia of intercepted vessels that may be carrying asylum seekers, without prior assessment of potential refugee claims, worries many protection advocates. The RCA appears insufficient to calm these concerns in the advocacy community, in spite of government assurances.

3. *Public Perceptions.* One of the major catalysts of policy in Australia has been the negative public opinion surrounding irregular immigration and asylum seekers, particularly in the lead-up to and aftermath of the *Tampa* incident. In keeping with government policy, the Australian public has traditionally been

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80 United States Committee for Refugees, “Sea Change: Australia’s New Approach to Asylum Seekers,” February 2002.

more sensitive to refugees or other "offshore" applicants, particularly those from East Timor, than it has to asylum seekers or "onshore" applicants. In recent years, the public has typically viewed intercepted asylum applicants as economic migrants seeking what the Australian government has termed a "preferred migration outcome." Whereas the tide of public opinion may be beginning to shift away from the type of strong anti-immigrant sentiment seen in the late 1990s and during the four years since the *Tampa* incident (particularly following some damaging and high profile incidents and reports connected to detention), government policy is only just starting to reflect any change.

## Conclusions

Australia continues to be a trailblazer in policies on interception at sea, particularly in terms of its innovative and controversial regional processing agreements and deterrence policies. Refugee advocates have expressed concern that the Australian experience may encourage other states or regions to implement similar policies with regard to boat arrivals, adding to the global trend of deterrence and burden-shifting with regard to international protection. At the same time, governments in the more attractive destinations for immigrants (regular and irregular alike) have to find ways to deter smuggling activities which put people's lives at risk, as well as ways to emphasize to citizens that they are in control. Getting such measures right is a difficult balancing act between protection obligations and appropriately strong tactics. As long as the numbers of boat arrivals continue to remain at next to zero, the Australian government is well-equipped to respond to any controversy concerning arrivals by sea by pointing out the success of its tactics in achieving its (and many other governments') stated objectives.



## APPENDIX D: CANADA AND THE “SUMMER OF THE BOATS”

Betsy Cooper, Migration Policy Institute

June 1, 2005

Though its geographical distance from many source countries makes arrival by sea for irregular migrants difficult, Canada is an attractive destination for sea-borne migrants and smugglers because the Canadian asylum system—compared to many of its counterparts in developed nations—is known to be generous. While the country has modified its refugee processing and interception procedures and operations since four boats arrived off the coast of British Columbia in the summer of 1999, the arrival of refugee claimants by sea has not fundamentally changed the Canadian commitment to humanitarian protection. This paper will briefly cover the Canadian history with interception, particularly the “Summer of the Boats” in 1999, and the major themes that derive from those experiences.

### History

The modern Canadian experience with interception at sea began with a notable episode involving the *St. Louis* in 1939. Over 900 Jews fleeing Nazi Germany en route to Cuba were not allowed to disembark in that country. They were then summarily rejected by a number of Latin American governments and the United States before the Canadian government finally also declined to allow the ship to land (despite an appeal by prominent Canadians). The passengers were returned to Europe, where many resettled in countries that eventually came under Nazi rule. Most did not survive the war. In part as a reaction to public outcry over the *St. Louis*, by the 1980s Canada had formulated a humanitarian framework for refugee determination based on the 1951 Geneva Convention and subsequent 1967 Protocol relating to the status of refugees.<sup>81</sup>

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81 Canada first formally opened its borders to large flows of displaced persons in 1947, and gradually liberalized its refugee policy thereafter through subsequent immigration laws. It is a signatory to both the 1951 Geneva Convention and the 1967 Protocol.

In 1985 the Canadian Supreme Court ruled that the Canadian Charter of Rights and Freedoms gives refugee claimants in Canada those rights and legal protections of Canadian citizens which are not specifically limited to citizens, including that people seeking refuge in Canada are entitled to an oral hearing on their claim. This policy de facto extends to people seeking refuge at sea; even those intercepted in Canadian waters are allowed to arrive in Canada and make refugee claims. Thus, Canada does not practice "interception at sea" as it is usually understood. Even if boats are intercepted before they land, passengers should be allowed to disembark and lodge refugee claims if they desire.

The Canadian experience with sea-bound arrivals has evolved over time. Major incidents include:

- Over 150 Sri Lankan Tamils who arrived in 1986 in lifeboats off the coast of Newfoundland, and 174 people (mostly Indian Sikhs) in 1987 who waded ashore near Halifax. Many of these arrivals were granted refugee status and remained in major Canadian metropolises, including Montreal, Toronto, and Vancouver.<sup>82</sup> The flow of sea-borne migrants, as well as the political context of the time, led to an emergency recall of Parliament to pass Bill C84. The legislation allowed for the detention of migrants without proper documentation and gave the government the right to intercept boats without allowing them to land, as long as the individuals could apply for Convention refugee status in the country that embarked them.<sup>83</sup> However, due to significant opposition, the provision on interception had a sunset clause and was never used.

#### **The Summer of the Boats: 1999 Arrivals**

July 20, Nootka Sound: 123 migrants, 86 released.  
 August 11, Kunghit Island: 131 migrants, 31 children.  
 August 31, Esperanza Inlet, 190 migrants.  
 September 9, British Columbia Coast, 163 migrants.

82 CBC Newsworld, July 22, 1987.

83 Passengers who sought refugee status from the country of embarkation were to be removed from the vessel and brought ashore.

- Two Romanian stowaways on the *Maersk Dubai* from Europe were put on a raft and a third was believed to have been thrown overboard before arriving in Canada; none survived. It is believed that they may have been thrown overboard by the crew of the vessel to avoid carrier sanctions imposed by the Canadian government for bringing stowaways into the country. Due to the fact that the crime occurred in international waters, the accused were never prosecuted.<sup>84</sup>
- In 1998, the US and Canada experimented with joint interdiction, in collaboration with the IOM, by helping to arrange for the Senegalese navy to intercept a boat carrying 192 Tamils of Sri Lankan origin which had departed from the coast of West Africa.<sup>85</sup>
- In 1998 and again in 1999, two unmarked boats were found empty, presumably because the migrants had already arrived ashore. At least one of the boats was not discovered until some of the arrivals made refugee claims.

Canada's most high profile experience with marine arrivals, known as the "Summer of the Boats," occurred in 1999, when four migrant-filled vessels arrived between July and September off the coast of British Columbia, carrying nearly 600 passengers from Fujian, China.

### **"The Summer of the Boats"**

Citizenship and Immigration Canada (CIC) had had a contingency plan for marine arrivals since the late 1980s, and had recognized the risk for west coast arrivals since 1993. However, the great impetus for preparations for interception in the Pacific Ocean came in 1998, when boat arrivals in the US and Australia and the appearance of an empty ship off Canadian waters prompted Canadian officials to prepare both a "catch and contain" policy for land arrivals, and a contingency opera-

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84 Canadian Council for Refugees, "Interdicting Refugees," May 1998, <http://www.web.net/%7Eccr/Interd.pdf>.

85 Andrew Brouwer and Judith Kumin, "Interception and Asylum: when Migration Control and Human Rights Collide," *Refuge*, 4, 21, 2004.

tional response plan to deal with the ships while still at sea. In fact, CIC was so well prepared that some accused them of having advance notice of the arrival of these four boats.

Canada never attempted to prevent the migrants from arriving on shore. Canadian officials also used a number of techniques to protect and secure the migrants, and to keep them separate from the smugglers. These included search and rescue operations, airdrops of supplies to the boats, and the deployment of a medical team with Royal Canadian Mounted Police to secure the vessel.<sup>86</sup> Many of these activities were performed in conjunction with various government departments and international organizations. However, because preparations did not directly involve other agencies, CIC found it difficult to coordinate among them, and particularly so when the operational response plan was unclear. Some of those operating the boats, the migrant smugglers, were charged and convicted with crimes, though nine South Koreans were acquitted of charges after claiming that Chinese enforcers hijacked the ship and forced them to bring the migrants to Canada.<sup>87</sup>

It was suspected that many of the migrants arriving offshore were not planning to remain, but were actually in transit to the United States. Of the eighty-six who were processed and released from the first boat, many failed to return for their refugee claim appointments and reportedly transited to the United States.<sup>88</sup> Once it became known that many individuals did not intend or desire to remain in Canada, the situation was further complicated because the country's selection and admissions policies were not designed to accommodate migrants in transit. Additionally, negative pressure from the media in particular led to the creation of an "enforcement mentality" that reinforced in the minds of those in authority

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86 Alexandra Charlton, Suzanne Duff, Dan Grant, Alison Mountz, Robin Pike, Joshua Sohn and Chris Taylor, "The Challenges to Responding to Human Smuggling in Canada: Practitioners Reflect on the 1999 Boat Arrivals in British Columbia," Research on Immigration and Integration in the Metropolis (RIIM) Centre for Excellence in Vancouver. Working Paper Series 02-23, December 2002, <http://www.riim.metropolis.net/Virtual%20Library/2002/wp02-23.pdf>.

87 Criminal Intelligence Service Canada, "Asian Based Organized Crime," <http://www.cisc.gc.ca/AnnualReport2001/Cisc2001/asian2001.html>.

88 Once an applicant fails to appear for their hearing, the case is considered abandoned, the claimant loses all rights to asylum status, and a deportation order is issued.

the need for detention. As a result of these considerations, migrants from the second, third and fourth boats were detained upon arrival. Canada is legally authorized to detain migrants in three instances: if the migrant is a serious criminal or danger to the public; if the immigration official believes that the migrant has not established his/her identity; or if the migrant is unlikely to appear for subsequent hearings.<sup>89</sup>

Many of the migrants were initially processed at the Esquimalt military base on Vancouver Island (which, due to its island location, was difficult for attorneys and NGOs to access), and the Prince George Correctional Centre was reopened for long-term detention because nearby prisons were full. Many of those denied refugee status were held in custody for an extended time (sometimes longer than one year) before being removed back to China. Delays occurred in part because Canada had to obtain the appropriate documentation to return them, but also because the applicants frequently entered lengthy appeals processes of their refugee claim denials (despite the very remote possibility of having a denial overturned).

Given the last minute planning for such extensive detention facilities, there were a number of problems with capacity building. The United Nations High Commissioner for Refugees (UNHCR) intervened to train BC Corrections officers, who had been used to employing disciplinary and rehabilitation methods on convicts that were inappropriate for the migrants.<sup>90</sup> Despite these efforts, however, critics were outraged that Canada—so well known for its humanitarian policies—would hold individuals applying for refugee status in correctional facilities. While CIC has recommended that it continue to use detention as one option to counter flight in future cases, it stopped funding a contingency plan for migrant detention as of 2001.

There is some question regarding the extent to which refugee claimants from the four boats received access to protection. Ultimately, of the 599 migrants who arrived, the vast majority made refugee claims. Only

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89 US Committee for Refugees and Immigrants, "Country Report: Canada," *World Refugee Survey* 2003.

90 Charlton et al., "Challenges to Responding to Human Smuggling," p. 27.

twenty-four of those individuals were eventually granted refugee status (seventy-two other applications from the first boat were abandoned), a rate of about five percent, though the average approval rate for other refugee claimants from China in 1999 was 58 percent. One reason for the low approval rate is that many of the sea-bound migrants clearly expressed that their motivation for remaining in Canada was economic, not due to a fear of persecution. However, access to procedures was not consistently afforded; some applicants were initially excluded from making refugee claims, and others struggled to obtain access to counsel.

Canada had not planned or prepared for the large number (134) of children who arrived in 1999, many of whom were unaccompanied. Foster care was sought for the unaccompanied children from the first boat, and those from the later boats were housed in group facilities. The British Columbia Ministry of Children and Family Development assisted with refugee claims for the children, serving as their designated representatives. Most of the successful applicants for refugee status were women and children; however, many other children (including some that were suspected to be working with the smugglers) fled to the United States after their claims for legal status were denied.<sup>91</sup>

### **The Aftermath**

Since the "Summer of the Boats," the subsequent summers have passed without similar arrivals by sea (although continued instances of "vessel piracy" in Canadian waters have caused concern, and thirty-six Chinese migrants were found in Vancouver in 2001, lodged in containers in a ship destined for California). Even so, the summer of 1999 prompted numerous strategic and legislative reactions, intended to anticipate and prepare for future flows of similar magnitude.

The introduction of Bill S-8 in the Canadian Senate in December of 1999, designed to reinstate the provisions of Bill C84 that allowed for interception and return of boats at sea to countries compliant with the Geneva Convention, caused significant controversy. However, the Minister at the time was outspoken that the Government of Canada

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<sup>91</sup> *Ibid.*, p. 22.

would not turn back boats at sea, and actively fought, along with the Canadian NGO community, to achieve the Bill's defeat.

In addition, recent policy changes will affect the future handling of maritime arrivals. Canada's 2002 Immigration and Refugee Protection Act created a new system for refugee determination, and clarified a number of existing provisions, including those for detention. Canada has also begun to address the issue of state sovereignty in refugee claims, though not directly regarding maritime arrivals. Canada has the ability to designate safe third countries; if a refugee claimant passes through the safe third country on their way to Canada, that country would be responsible for considering applications for refugee status. In December 2002, Canada signed its first safe third country agreement with the United States, requiring refugee claimants to make their application in whichever country they arrive first; however, the agreement only covers land borders.

### Important Features for the Road Ahead: The Canadian Experience

Canada's geographic distance from most migrant-sending countries has de facto protected the country from many of the challenges facing other developed countries. No maritime arrivals of the same magnitude have been intercepted since 1999—though of course the possibility of undiscovered arrivals cannot be discounted.

Given the infrequency of arrivals, it is not surprising that the Canadian reaction has been more generous, and its commitment to *non-refoulement* stauncher, than it would be were the country to undertake interdiction more frequently. Nevertheless, there are important features of the Canadian experience, particularly in terms of government planning and migrant detention exercises, which require additional explanation. While some portions of the Canadian experience with migrants at sea have been quite successful, others have features that could be improved were another set of arrivals to occur today. And, given that Canada is growing to be a preferred destination, rather than transit, country for human smuggling, that possibility is not at all remote.<sup>92</sup>

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92 Jim Bronskill, "Study Released on Human-Smuggling Market," Canoe Network News, May 1, 2005, <http://cnews.canoe.ca/CNEWS/Canada/2005/05/01/pf-1021118.html>.

- *International Protection.* Canada never attempted to intercept boats and keep them from shore; however, the public perception that the refugee claimants were not genuine and the flight of applicants from the first boat impeded the Canadian effort to provide an open and generous protection policy. Additionally, many of those detained were initially prevented from making refugee claims because removal orders were issued, even though some had expressed fears of returning to China.

It is unclear whether or not the standards of protection for the at-sea claimants were different from the normally generous Canadian standard—while the success rate for these applicants was significantly lower than for Chinese refugee claimants who arrived by other means, even UNHCR recognized that many of the applicants did not express a fear of persecution. It is interesting to note both that most of the successful applicants were women and children, and that those initially prevented from making refugee claims had a slightly higher rate of success. Additionally, many of the successful applicants were detained in the Vancouver area, where the quality of refugee lawyers and translators was higher. These factors, which may have biased the results of the refugee acceptance rate, deserve additional examination; this is particularly true because the fact of being detained (unlike the migrants arriving by air and land—who were not detained) makes it much more difficult to pursue a refugee claim and may in part explain the lower acceptance rate.

- *Detention in Canada.* The use of detention to manage the migrant flows was a useful but criticized policy, particularly given the historical Canadian aversion to the concept. The location of detention centers limited access to legal counsel for many potential refugees.<sup>93</sup> The length of time (over one year for many individuals) and circumstances of detention (after refugee claims had already been denied) also caused concern. However, UNHCR did not intervene to end detention or request release, even though their guidelines do not provide for detention for flight risk, because they feared Canada’s refugee protection system might be perceived as

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93 Charlton et al., “Challenges to Responding to Human Smuggling,” p. 13-14.



porous and exploited in the future. Canada faces great challenges in balancing its generous refugee determination systems with policies for tracking those who apply—otherwise the incentive for systemic abuse is too great.

- *Planning.* Canada was relatively well prepared for the maritime arrivals that occurred in 1999. The federal government sponsored tabletop exercises with the regional CIC office, the Royal Canadian Mounted Police, the Department of National Defence, and the Canadian Coast Guard, and established a Marine Response Team. Nevertheless, the strategic planning that occurred did not sufficiently involve all the relevant stakeholders, creating a crisis-driven mentality particularly for those (like local government officials and NGOs) unprepared for their role. While CIC has revised its internal policies in response to the events of 1999, Canada still apparently does not have an overarching policy that involves all the relevant stakeholders or clarifies marine arrival policy, and contingency planning has decreased as a budget priority.

The importance of planning for unaccompanied minors deserves special note. While minors had a higher rate of acceptance for refugee claims, many minors in group homes apparently were contacted by human smugglers (or may have been linked to the smugglers themselves), leading to nearly three-quarters of those housed fleeing for the United States.

- *Resources.* Despite the relative success of advance planning, Canada was equipped with insufficient resources (particularly in terms of the capacity for detaining and making refugee determinations for large groups of people), and CIC struggled to coordinate the effort among the various levels of government involved.<sup>94</sup> Critics claim that these weaknesses may have biased and limited the access of refugees to the full-fledged refugee determination

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94 Alison Mountz, "Locating Borders and the Spaces Between States: Reflections on Canada's Response to Human Smuggling Movements from China," Maxwell School of Syracuse University, Campbell Public Affairs Institute, Workshop on Immigration Incorporation, October 24, 2003, <http://www.maxwell.syr.edu/campbell/Library%20Papers/Event%20papers/Immigrant/Mountz.pdf>.

system. CIC also struggled to take into account and communicate to the public the substantial amount of time required for every step of the process, from rescue to refugee determination, and the funding required to support the effort, particularly when lengthy periods of detention are involved (Canada spent over \$77 million above normal operating budgets to support the effort). While CIC converted a BC corrections facility into a reception and detention center, it has ceased to fund it or any other contingency facility on the West Coast as of 2001.

- *Public Perceptions.* On one hand, there was an engrained public perception doubting the legitimacy of the arrivals' refugee claims,<sup>95</sup> encouraging the "enforcement mentality" that arose. This occurred despite the fact that other migrants (and Fujianese in particular) were arriving by land and air and had a high rate of abandonment, but were not being systematically detained or receiving media attention. On the other hand, there was also a public outcry over the length of time that many of the applicants were detained, even though many were undergoing self-initiated appeals. These public perceptions, exacerbated by conflicting reports from the involved organizations, added unnecessary stress both for the officers making refugee determinations and those in charge of detention facilities. As of August 2002 there was no national communications strategy and some concern existed about record and information management for future flows.<sup>96</sup>

## Conclusions

Perhaps at least temporarily the tide has receded from issues related to Canadian interception at sea—and the issues of balance between economic migration and political refugee status that compound them. However, recent legislative activity, including the Safe Third Country Agreement with the United States and the Immigrant and Refugee Protection Act, will have a significant impact on the handling of any

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95 Ibid.

96 Citizenship and Immigration Canada, "Lessons Learned: 1999 Marine Arrivals in British Columbia," August 2002, <http://www.cic.gc.ca/english/research/evaluation/marine.html>.

future flows. While Canada may be reasonably well equipped to deal with future maritime arrivals, additional strategic planning and policy development could only help the nation deal with the unpleasant surprise of a future “Summer of the Boats.”

## **APPENDIX E: INTERCEPTION AND RESCUE AT SEA: ENSURING SAFETY AND DETERMINING STATUS**

Monday-Wednesday, June 13-15, 2005, Washington DC

June 13-14, 2005—Invitation Only Roundtable

### **Participants**

1. Eleanor Acer, Human Rights First
2. Eduardo Arboleda, Regional Office Washington, DC, UNHCR
3. Betsy Cooper, Migration Policy Institute
4. Phyllis Coven, Geneva, International Organization for Migration
5. Joseph Cuddihy, Citizenship and Immigration Services, US Department of Homeland Security
6. Elizabeth Dallam, Regional Office Washington, DC, UNHCR
7. Janet Dench, Canadian Council for Refugees
8. Sonia Dentzel, Bureau of Population, Refugees, and Migration, US Department of State
9. Kolude Doherty, Regional Office Washington, DC, UNHCR
10. Maria de Donato, Italian Council for Refugees
11. Raphaelle d'Yvoire-van Goethem, Department of International Protection, UNHCR
12. Bill Frelick, Refugee Program, Amnesty International USA
13. Gabriela Goettsche-Wanli, Division for Ocean Affairs and the Law of the Sea, Office of Legal Affairs, United Nations
14. Guy S. Goodwin-Gill, All Souls College, University of Oxford, UK
15. Clover Graham, Honorary Liaison, Jamaica, UNHCR
16. Nancy Iris, Bureau of Population, Refugees, and Migration, US Department of State
17. Erol Kekic, Church World Service
18. Kevin Kish, Allard K. Lowenstein International Human Rights Clinic, Yale Law School
19. Jane Kochman, Regional Office Washington, DC, UNHCR
20. Tara Magner, US Senate Committee on the Judiciary

21. Graham Mapplebeck, International Maritime Organization
22. Peter Mares, Institute for Social Research, Swinburne University of Technology
23. Janice Marshall, Regional Office Washington, DC, UNHCR
24. Jocelyn McCalla, National Coalition for Haitian Rights
25. Doris Meissner, Migration Policy Institute
26. Alison Mountz, Maxwell School, Syracuse University
27. Kathleen Newland, Migration Policy Institute
28. Grainne O'Hara, Department of International Protection, UNHCR
29. Lou Orsini, Office of Law Enforcement, US Coast Guard
30. Mark Anthony Pace, Embassy of Malta
31. Demetrios G. Papademetriou, Migration Policy Institute
32. Erin Patrick, Migration Policy Institute
33. Katherine Perkins, Bureau of Population, Refugees, and Migration, US Department of State
34. Robin Pike, Migrant Services, Ministry of Children and Family Development, Victoria BC
35. Tracy Renaud, Citizenship and Immigration Services, US Department of Homeland Security
36. Alessandra Ricci Ascoli, Amnesty International, Dutch Section
37. Luigi Rinella, Ministry of the Interior, Department of Public Security, Italian National Police
38. Joanne van Selm, Migration Policy Institute
39. Frances Sullivan, Washington, DC, International Organization for Migration
40. Jim Versteegh, Embassy of Canada
41. Karen Visser, International Cooperation Branch, Department of Immigration and Multicultural and Indigenous Affairs, Government of Australia
42. Jack Wallace, Florida Immigrant Advocacy Center
43. Ronald Whitney, Citizenship and Immigration Services, US Department of Homeland Security
44. Mark A. Zanker, Office of International Law, Attorney General's Office, Government of Australia



# ABOUT THE AUTHORS

## Joanne van Selm

Joanne van Selm, a Senior Policy Analyst at the Migration Policy Institute, focuses on European migration issues, refugee protection and international humanitarian response, and migration management. Dr. van Selm also serves as a Senior Researcher at the University of Amsterdam's Institute of Ethnic and Migration Studies.

Dr. van Selm has published widely on European migration, refugee and asylum policies, resettlement, temporary protection and other refugee—and migration—related topics. Her recent publications include two studies for the European Commission: one on the Transfer of Protection Status [2004] and the other on the Feasibility of Setting Up Resettlement Programmes in the EU [2003]. She also authored MPI's Policy Brief entitled *The Enlargement of an 'Area of Freedom, Security and Justice': Managing Migration in a European Union of 25 Members*.

Dr. van Selm is the Co-Editor of the *Journal of Refugee Studies*, and President of the International Association for the Study of Forced Migration. She holds an MA and PhD in International Relations from the University of Kent at Canterbury, UK.

## Betsy Cooper

Betsy Cooper is a former Research Assistant at the Migration Policy Institute, where she focused on US and European border, homeland security, and asylum policy. A Truman Scholar, United States Presidential Scholar, and Rotary Ambassadorial Scholar, Ms. Cooper is the co-author of *Secure Borders, Open Doors: Visa Procedures in the Post-September 11 Era* (with Stephen Yale-Loehr and Demetrios G. Papademetriou).

Ms. Cooper has compiled best practices of European Union integration policies for the Dutch Presidency of the European Union and edited a volume for the Hellenic Immigration Policy Institute. She has interned for Senators Hillary Rodham Clinton and Edward Kennedy, the latter in his immigration department, and is a Principal with the Truman National Security Project. She received her BS with honors from Cornell University's School of Industrial and Labor Relations, and will receive an MSc in Forced Migration from Oxford University in 2006.

## THE NEW “BOAT PEOPLE”: ENSURING SAFETY AND DETERMINING STATUS

Joanne van Selm and Betsy Cooper

For hundreds of years the high seas have provided a way to safety for those in fear of their lives, and a gateway for others desperately in search of a better life. For almost as long, the custom and tradition of the sea—the very law—has ensured that those found in distress at sea would be rescued, no matter their condition, their status, their nationality. But the modern age seems to tremble at the prospect of refugees and migrants arriving on our shores. States in all corners of the globe are taking up “interception” as a solution, but often with little thought to what happens next. The established principle of rescue at sea is threatened, not so much by ships’ masters who are a part of that tradition, as by next port of call and flag States, overly concerned about their prospective responsibilities and disinclined to co-operate internationally. This is what makes MPI’s Report on Interception at Sea so valuable, for policy-makers, law-makers and academics. It covers the world, bringing together a wealth of empirical information from the industrialized countries that have done most to react to arrivals by sea with serious analysis and policy recommendations that take the issues beyond national politics to the global level. Above all, it reminds us all that this is not a new phenomenon, and that principled responses do work.

—Guy S. Goodwin-Gill, Fellow, All Souls College, Oxford, former Professor of International Refugee Law, and author of *The Refugee in International Law*, Oxford: Oxford University Press, 2nd edn, 1996.

The movement of asylum seekers and irregular migrants by boat often leads to high drama, whether it be a rescue at sea or the interception of an unauthorized vessel by the coastguard or navy. Such incidents attract intense media attention and quickly arouse public passions. In the heat of the moment it can be difficult for governments to act in ways that both protect vulnerable people and satisfy domestic constituencies. In this paper from the Migration Policy Institute, Joanne van Selm and Betsy Cooper provide a calm and rational analysis of these emotionally charged issues. They propose modest reforms that could help to ensure the swift disembarkation of migrants intercepted or rescued at sea and the provision of adequate protection to refugees travelling by boat, without compromising the assertion of sovereignty by national governments.

—Peter Mares, Institute for Social Research, Swinburne University, Melbourne and author of *Borderline: Australia’s Response to Refugees and Asylum Seekers in the Wake of the Tampa*, UNSW Press, 2002.



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