
People smuggling: Defending Australia's national interest

Lieutenant Commander N. P. Tate, RAN

I looked down through the open shuttle ramps, saw those people, and felt I was back in history, on a prison ship. It is wrong!

Lieutenant Commander D. Murphy, RANR¹

Introduction

The issue of people smuggling was a major election issue for the 2001 federal election. One contention was the apparent politicising of the ADF, and in particular naval personnel and their actions in supporting the government's people smuggling initiatives. The mix of domestic disquiet during the election, a feeling of being politicised by the government,² and international condemnation, created moral questions in the minds of some ADF personnel, thereby reducing their effectiveness.³ As an example, late in 2001 HMAS *Tobruk* performed two bulk transport tasks of suspected unlawful non-citizens⁴ (SUNC) from Ashmore Reef: one to Nauru and the other to Christmas Island. During the first task, Lieutenant Commander Murphy expressed his concerns on the morality of the Australian Government's actions in using *Tobruk* that way. His concerns affected his ability to undertake his duties and he subsequently left the ship before the second.

The catalyst to the election disquiet was the MV *Tampa* incident of late August 2001.⁵ However, prior to this event, the Australian Government had already spent considerable time developing new domestic legislation as people smuggling had increased significantly and had become an important issue. When the *Tampa* incident occurred, the government found the new legislation was inadequate for their aims and so created additional powers to their enforcement actions, all in the heat of the public and international denunciation.

The purpose of this paper is to identify whether the *United Nations Convention on the Law of the Sea*, 1982⁶ (UNCLOS) and the *Convention Relating to the Status of Refugees*, 1951⁷ (Refugee Convention) are impediments⁸ to current efforts by Australia to address the problem of people smuggling into Australia. This will be achieved by firstly providing context by reviewing the more recent history of people smuggling to Australia including domestic legislation, border control operations, and the domestic and international condemnation of Australia's actions.

Once these issues are in context, the more visible concerns of the international community will be reviewed to show how they relate to either UNCLOS or the Refugee Convention. This will allow commentary on how the Australian Government's compliance, or otherwise, has driven public opinion and subsequently impacted on ADF personnel involved in the operations against people smuggling.

People smuggling and Australia

Before reviewing Australia's international obligations, it is useful to provide a brief description of the history of people smuggling in Australia, the domestic legislation changes that have been made, and the operations conducted in support of enforcing that legislation.

A review of government records indicates the increase of people smuggling by boat in recent years. Figure 1 identifies the increasing numbers of unauthorised boat arrivals from 1988–2003. Since the successful intervention of Operation RELEX, the multi-departmental response to people smuggling, with one exception,⁹ there have been no known unauthorised boat arrivals since 16 December 2001.

There were two undetected landings of illegal entrants on the eastern coast of Australia in 1999.¹⁰ Consequently, the Prime Minister established a Coastal Surveillance Task Force to review the situation.¹¹ The task force recommended that 'comprehensive legislative amendments be introduced to further strengthen maritime investigatory and enforcement powers against both Australian and foreign flag vessels.'¹² Whilst the task force recommended only legislative changes, the government approach to the problem of people smuggling remains two pronged with both legislative and enforcement operations to back up the legislation.

The pertinent Australian domestic legislation when dealing with the issues of people smuggling is the *Customs Act 1901* and the *Migration Act 1958*. The main changes to this legislation occurred in 1999 because of the report from the Prime Minister's Coastal Surveillance Task Force. The *Border Protection Legislation Amendment Act 1999* gave the ADF a greater range of new powers without the requirement to obtain a warrant. The legislation attempted to enshrine in Australian domestic law some of the principles from UNCLOS such as hot pursuit, the contiguous zone, and powers over ships without nationality on the high seas.¹³

Figure 1. Interception of Illegal Immigrants¹⁴

Financial Year	Boats	Boat Arrivals
1988-89	2	
1989-90	3	243
1990-91	5	172
1991-92	3	81
1992-93	4	198
1993-94	6	200
1994-95	21	1089
1995-96	14	591
1996-97	12	365
1997-98	17	190
1998-99	42	923
1999-00	76	4189
2000-01	53	4118
2001-02	18	3265
2002-03	0	0
2003-04	1	54
TOTAL	277	15678

The *Tampa* incident highlighted some operational and policy problems with the legislation¹⁵ so the government pushed additional legislation through Parliament. The resulting *Border Protection (Validation and Enforcement) Act 2001* (BPVE) and *Migration (Excision from Migration Zone) Act 2001* adjusted the *Migration* and *Customs* Acts and again increased the ADF powers substantially.¹⁶ In particular, for ships or aircraft boarded for a suspected breach of either the *Customs Act* or the *Migration Act*, the legislation empowers all ADF personnel as officers under the relevant Act.¹⁷ The authorisation is generally limited to the purposes of boarding, search, seizure, confirm identity and arrest without warrant,¹⁸ and detention of SUNC.¹⁹ However, ADF personnel are not authorised to receive an application for a protection visa, which remains in the domain of immigration officials.²⁰ Implementation of the legislation is supported by border protection operations.

Coastwatch, a division of Customs, has coordinated border protection operations since its formation in 1988. The RAN has supported these operations since the late 1960s.²¹ From 2001, with the increased number of unauthorised boat arrivals, the government decided to boost its border protection operations.

Operation RELEX's aim was 'to prevent, in the first instance, the incursion of unauthorised vessels into Australian waters such that, ultimately, people smugglers and asylum seekers would be deterred from attempting to use Australia as a destination'.²² The lead government agency for RELEX is the ADF in lieu of Coastwatch. It consisted of the use of RAN major fleet units in addition to the usual patrol boats and Customs/Coastwatch regime. The initial instructions to those involved in RELEX were to intercept, board and hold unauthorised arrivals for shipment in sea transport, to a country to be designated. This policy was adjusted to, where possible, intercept, board and return the Suspected Illegal Entry Vessels (SIEVs) to Indonesia.²³ This policy was, however, problematic as the SIEV crew or SUNC started to place themselves in danger by attempting to set fire to, or sink their vessels. Their apparent objective was to ensure the ADF were obligated to save them under the Safety of Life at Sea provisions. Once the SUNC were picked up they were either taken directly to Christmas Island, or consolidated into HMAS *Tobruk* and moved to Nauru or Christmas Island by sea. A small number were also taken to Papua New Guinea.

Many commentators have professed their views on the people smuggling issue and Australia's attempts to address this problem.²⁴ A number list article after article of international conventions and then sum up by stating that the Australian Government actions do not meet these requirements. They appear to take a moralistic or emotional view and it is difficult to identify cogent arguments. Having identified the Australian domestic legislation and operational events that currently affect the issue of people smuggling, this paper will identify where Australia is accused of being in breach of the two main conventions.

Law of the Sea Convention 1982

The standing orders of Operation RELEX require Australian Government ships or aircraft to identify SIEVs and attempt to get them to turn away from Australia.²⁵ Notwithstanding any issues that may arise from Australia's obligations under the Refugee Convention,²⁶ this policy has been criticised as being contrary to some sections of UNCLOS. In particular the right of innocent passage by vessels through territorial seas, the responsibilities under SOLAS to provide assistance to unseaworthy vessels, and the policy of towing non-compliant vessels back to within sight of Indonesia.

Australia is a party to UNCLOS and has claimed internal waters,²⁷ a territorial sea,²⁸ contiguous zone²⁹ and exclusive economic zone (EEZ).³⁰ It is not the purpose of this paper to define all of the

issues with respect to each zone. However, simplistically, Australia is entitled to both legislate over, and enforce jurisdiction, for most domestic law to the territorial sea.³¹ One major exception applies to ships conducting ‘innocent passage’³² through the territorial sea. Jurisdiction diminishes as vessels get further away from land. In the contiguous zone, Australia is only entitled to enforce its domestic law with respect to either preventing or punishing infringements of its customs, fiscal, immigration or sanitary laws and regulations.³³ Sovereign rights over the EEZ do not include any relevant rights within the purview of this paper.

During the *Tampa* incident, much was stated in the media about the right of innocent passage. There are small pockets of complaint that the ADF were boarding SIEVs despite their right to innocent passage. Ships of all states have the right of ‘innocent passage’ through the territorial sea of a coastal state.³⁴ However, this passage must also not be prejudicial to the ‘peace, good order or security’ of the coastal state. Normally, infringing immigration laws is regarded under the treaty as prejudicial and is so prohibited.³⁵ The ADF only board a vessel, either in the contiguous zone or territorial sea. In these areas, Australian legislation provides the right to board vessels where an officer believes there may be a breach of the *Migration Act*³⁶ and therefore, the actions of the ADF are consistent with UNCLOS. Subsequently, ADF personnel appear to have no difficulty in performing this aspect of their duties.

Some commentators are concerned that Australia is irresponsible in dealing with SIEVs that are overloaded, lack safety equipment, or are generally unseaworthy when turned back. Amnesty International quoted naval officers’ assessments that some of the asylum seekers’ boats were only marginally seaworthy.³⁷ They claimed that the ADF’s actions were not in keeping with their responsibilities for the protection and preservation of safety of life at sea. However, the ADF’s commitment to meeting safety of life at sea requirements was acknowledged during the recent Senate Select Committee on a Certain Maritime Incident.³⁸ On balance, these claims appear to be inconsistent with the ADF’s professional approach to safety. Although unsettling to some personnel, the claims do not appear to have had a great impact in the performance of their duties.

Another issue scorned by international commentators is the ‘tow-back’ policy.³⁹ The government directed the Navy to escort or tow-back SIEVs from the Australian contiguous zone to the edge of Indonesian waters.⁴⁰ The ‘safety of life at sea’ issues have already been discussed. However, whether the policy is in accord with UNCLOS is debatable. On the one hand, by towing the vessels through the high seas, the tow-back policy could be viewed as contrary to freedom of navigation on the high seas.⁴¹ However, in Australia’s favour is the apparent acquiescence by Indonesia over the practice. Indonesia as the Flag State of all vessels that have been towed so far has not complained. In addition, the policy is in accord with other states’ practice, such as Malaysia, Italy and the United States. For example, since at least 1979, Malaysia has had a policy of tow-out of potential refugee boats.⁴² As such, this practice could be viewed as customary law, as it has both elements of history and acceptance by other states. Therefore, it appears that this policy is not impeded by UNCLOS. Furthermore, the safe conduct of the evolution by the Navy is well established, and so the detrimental coverage is unlikely to have affected ADF personnel in the conduct of their responsibilities.

From this brief overview, Australia appears to be meeting its obligations under UNCLOS. The impact of detractors using UNCLOS as the basis for their complaints does not appear to have created great angst with ADF personnel. Therefore, UNCLOS is not considered as either a legal or a moral impediment to the current efforts by Australia to address the problem of people smuggling into Australia.

Refugee Convention 1951

The *Migration Act* provides the Australian domestic legislative framework incorporating its obligations as a party to the Refugee Convention.⁴³ The original *Migration Act* recognised Australia's obligations to refugees in accordance with the Refugee Convention,⁴⁴ in particular the articles on non-discrimination of applicants,⁴⁵ claimant's access to courts,⁴⁶ and the prohibition of expulsion or return ('Refoulement') of refugees.⁴⁷

International and domestic commentators have decried the Australian Government's changes to the domestic legislation particularly those changes made after the *Tampa* incident.⁴⁸ Of this general denouncement, there are three issues concerning the Refugee Convention that relate to this paper. These issues include the Australian Government's excision of Australian territory, which effectively abrogates its responsibility for applying treaties to all of its territory.⁴⁹ Australia has also been accused of refusing access to the courts system for those denied a protection visa,⁵⁰ denying refugee status to applicants who have transited through third states, and being effectively guilty of the refoulement of refugees.⁵¹

Australia has been accused of abrogating its responsibility under the Refugee Convention by its use of the *Migration (Excision from Migration Zone) Act 2001* to amend the *Migration Act* to limit its obligations⁵² as it excludes portions of sovereign territory for the purposes of claiming asylum. In defence of its policy, the Australian Government has stated that the Refugee Convention still applies in excised areas. The only difference is that non-citizens applying for recognition as a refugee in these areas will not be able to apply for Australian visas. However, they are still guaranteed access to asylum determination processes to ensure that any protection needs are identified and addressed.⁵³

Australia is a party to the *Vienna Convention on Treaties* (Vienna Convention),⁵⁴ *ipso facto* it has agreed to apply treaties to all of their territory unless a different intention is in that treaty. Since the Refugee Convention applies to all of a contracting state's territory⁵⁵ and UNCLOS includes a state's territorial sea as part of its territory⁵⁶ the Refugee Convention should apply to the territorial sea claimed by Australia. Furthermore, in all other respects, Australia applies its domestic legislation to its full sovereign territory, which is taken to include the territorial sea.⁵⁷ Notwithstanding whether the revised *Migration Act* does breach this requirement, the real issue is perception. It is that perception that has provided an opportunity for opponents to attack Australia's integrity.

With respect to the Australian Government's defence, the Vienna Convention limits signatories with a prohibition on using internal or domestic laws to justify a breach of a treaty.⁵⁸ Whilst the government maintains it is still meeting its obligations under the Refugee Convention, the different treatment of asylum seekers due to their method of attempted entry is viewed as contrary to article 31.⁵⁹ Therefore, reliance on domestic law is not a defence and the *Migration Act*, whilst correct in the domestic environment,⁶⁰ appears to violate international law. In this case, there is a perception that Australia is not acting in good faith. The resulting international clamour is providing more ammunition for the doubt of some ADF personnel.

The Australian Government has been accused by the Refugee Council of Australia⁶¹ that their removal of access to the courts for an applicant to dispute denial of a protection visa is contrary to the Refugee Convention.⁶² Others state that it is unfair and inaccurate to conclude that all unsuccessful applicants are non-genuine refugees who are seeking to abuse the refugee determination process as there are many reasons why people are unsuccessful in their refugee claims.⁶³ For example, some applicants could be disadvantaged by the lack of access to legal advice and representation. This is exacerbated by poor English language skills and cultural barriers to accessing community services.⁶⁴

The 'Pacific Solution' where some SUNC are taken to a third country or an 'excised' part of Australian territory, is also condemned as it further reduces the ability of asylum seekers to access appropriate legal support.

Whilst not supporting the 'Pacific Solution', Amnesty International has accepted that Australia has retained responsibility for the SUNC as a part of its arrangements. Therefore, the only real issue is access to the courts (ensuring due process and the process of appeal).

The *Migration Act* includes a process for deciding whether a person is recognised as a refugee by Australia. The Act provides for the issue of a protection visa and describes the process of claiming refugee status by an asylum seeker to be that of applying for a protection visa. Where a protection visa is refused or cancelled,⁶⁵ a non-citizen is usually able to apply to the Refugee Review Tribunal⁶⁶ for arbitration. The Minister for Immigration is also available to review individual circumstances providing a third layer to the review process. The removal of the courts from adding another layer of review appears reasonable to the author.

Notwithstanding arguments about location of processing, it is widely accepted that the state is the sole arbiter of refugee status.⁶⁷ Therefore, as long as the process is correct in domestic legislation, and in this case, the Federal Court of Australia has upheld the process,⁶⁸ then international concerns are not relevant. However, if these types of issues are not managed properly by ensuring proper consultation and information to the public, they become a distraction to the government and create doubt in the minds of those enforcing the policy.

Amnesty International has also raised serious concerns over Australia's policy of denying refugee status to applicants who have transited through third states, effectively being accused of the refoulement of refugees.⁶⁹ There are essentially two issues included in this charge. The first is that the government has breached Article 31 of the Refugee Convention⁷⁰ by treating them differently due to their method of arrival. The second is an accusation of refoulement.

Article 31 provides that refugees should not be subject to penalty for their illegal entry or presence when coming directly from a territory where their life or freedom was threatened. This article relies on the asylum seekers coming directly from harm's way. The Australian Government contends that some have suspended their journey in a safe country and therefore, are not subject to the protection of this article. With respect to whether the asylum seekers should be treated differently if they have transited through a third state, there were differences in opinion during the framing of the convention. The final wording appears to support the Australian Government's argument. It sought to 'protect States against refugees entering illegally from intermediate countries unless they were again facing persecution.'⁷¹ DIMIA⁷² argues; supported by the Federal Court of Australia, that international protection is protection of last resort, therefore a refugee should seek protection in a third country particularly if that is the transit point before arrival in Australia.⁷³ This stance appears to be supported by the Executive Committee of the UN High Commissioner for Refugees (ExCom) who have indicated general agreement to the concept that a refugee should place their claim at the first 'safe' country.⁷⁴ In effect, this indicates that the Australian Government's policy appears not to breach international requirements.

Notwithstanding this defence, commentators have condemned Australia for redirecting unauthorised arrivals back towards Indonesia, as many observers do not believe it is an appropriate destination.⁷⁵ The international arbiter, ExCom, is silent on whose responsibility it is to ensure the safety of a country.⁷⁶ The SUNC transported in *Tobruk's* first load had spent some time in Indonesia before attempting to gain access to Australia, all in excess of seven days.⁷⁷ By remaining in a third

country for more than seven days, Australia believes that these asylum seekers had suspended their journey.

Amnesty International⁷⁸ claim that international refugee law does not require a refugee to seek asylum in the first country whose territory he or she reaches.⁷⁹ They also argue that a state may be guilty of refoulement where it does not ensure a third country is safe for a refugee to remain.⁸⁰ Furthermore, a state is obligated to consider someone's asylum application substantively unless that responsibility is assumed by a safe third country. That requested state must establish that the third country is both safe and explicitly guarantees that it will take on the responsibility required before release.⁸¹

Amnesty International is essentially arguing against the Australian policy commonly known as the Pacific Solution⁸² where potential refugees are turned away from Australia to nations that are not bound by the Refugee Convention. Whilst the Refugee Convention is silent on this issue, DIMIA argues that Australia can choose to remove applicants for refugee status to a third country. In common law this is acceptable in circumstances where Article 33 of the convention will not be breached.⁸³ The Federal Court supported the policy expanding it to accept that the third country does not have to be a signatory to the Refugee Convention.⁸⁴ This concept is yet to be tested in the international court system. Again, whilst the actions of the Australian Government appear to be in accord with international law, their lack of strong argument against detractors has indicated some level of duplicity, again creating doubt in the mind of the enforcer.

Of the major arguments proposed by contemporary commentators, three areas of the Australian Government's approach have engendered international condemnation subsequently impacting on ADF personnel. Firstly, the reduction in application of the Refugee Convention to Australian sovereign territory, the limitation of access to the courts for those determined not to be refugees, and the perception of refoulement. All of these issues could be considered impediments to the current efforts by Australia to address the problem of people smuggling into Australia as they have directly impacted on the operational efficiency of some ADF personnel in undertaking their duties.

Conclusion

The issue of asylum seekers has proven to be an emotive subject and the members of the ADF were not immune to the debate that occurred during the 2001 federal election. Although domestic political parties, non-government organisations and foreign governments, have claimed that the Australian Government is not acting in good faith in its handling of the people smuggling issue,⁸⁵ the issues raised in this paper all indicate that Australia is meeting its obligations. Australia is a party to the *Vienna Convention on the law of Treaties*, and so must comply with these treaties⁸⁶ 'in good faith'⁸⁷ and there is nothing to indicate that this is not the case.

The thesis of this paper was that both domestic and international condemnation and disdain, has created angst for those involved in the enforcement operations. By failing to adequately argue or justify the government's position to the wider community and display good faith, some of these issues have disturbed Service personnel and impeded their implementation of government policy. Notwithstanding this breakdown in communication, the role of the ADF is to uphold the democratically elected government's policies. Therefore, whether we agree or not, our responsibility is to undertake our duties in a professional manner. It is unfortunate that some people decided that they were unable to do this.

Endnotes

1. Officer of the watch HMAS *Tobruk*, October 2001.
2. M O'Connor, 'Is the ADF being politicised?', *Defender Magazine*, National Magazine of the Australia Defence Association, Vol XIX No 1, Autumn 2002, p. 5.
3. Drawn from personal experiences of author as Supply Officer HMAS *Tobruk* during Operation RELEX.
4. *Migration Act* s.14: 'Unlawful non-citizens (1) A non-citizen in the migration zone who is not a lawful non-citizen is an unlawful non-citizen.' Suspected Unlawful Non-Citizen (SUNC) is the term used by the ADF to identify a person they reasonably suspect is an unlawful non-citizen.
5. On 26 August 2001, Coastwatch detected a wooden fishing boat in the vicinity of Christmas Island. The boat broke down and was subsequently assisted by the MC *Tampa*. The *Tampa* took onboard 438 unauthorised arrivals but was prevented from landing the passengers at Christmas Island by the government's use of the ADF. Source: N Hancock, *Border Protection Bill 2001*, Bills Digest No.41 2001–02, Department of the Parliamentary Library.
6. UNCLOS came into effect 16 November 1994.
7. The Refugee Convention came into effect in 1954.
8. Impediment: 'obstruction or hindrance; obstacle', defined in Macquarie University, 1982, *The Macquarie Concise Dictionary*, Macquarie, Sydney, Australia, p. 480.
9. A vessel arrived off Port Hedland 1 July 2003 with 54 passengers, including 28 adult men, 17 adult women and 9 children believed to be from Vietnam. The vessel does not conform to the Operation RELEX profile.
10. L Kennedy, 'Call to stop the people smugglers', *Sydney Morning Herald*, 12 April 1999, p. 36.
11. N Hancock, *Border Protection Bill 2001*, Bills Digest No.41 2001–02, Department of the Parliamentary Library, p. 1. The task force was lead by Mr Max Moore-Wilton, Secretary of the Department of Prime Minister and Cabinet, with the Chief of the Defence Force, and Secretaries of the Departments of Defence and Immigration and Multicultural Affairs, Chief Executive Officer Australian Customs, and Director General Office of National Assessments.
12. Prime Minister's Coastal Surveillance Task Force, *Report of the Prime Minister's Coastal Surveillance Task Force*, June 1999, Recommendation 17.
13. W Gately, and C Moore, 2002, 'Protecting Australia's Maritime Borders: The Operational Aspects', in M Tsamenyi, and C Rahman, eds, *Protecting Australia's Maritime Borders: The MV Tampa and Beyond*, Wollongong Papers on Maritime Policy No. 13, Centre for Maritime Policy, University of Wollongong, Wollongong, 2002, pp. 37–57.
14. Source – Department of Prime Minister and Cabinet, Report of the Prime Minister's Coastal Surveillance Task Force, Canberra, 1999, Appendix B–1. Australian Customs Service, Annual Report 1999–2000, Figure 21, in Forbes, A, 2001, 'Protecting the National Interest: Naval Constabulary Operations in Australia's Exclusive Zone', p. 57 and OP RELEX matrix from Select Committee on a Certain Maritime Incident.
15. The legislation was written with an intercept, arrest and detain focus, whereas the policy changed to an intercept, repel or return focus.
16. W Gately and C Moore, loc. cit.
17. *Border Protection (Validation and Enforcement) Act*, *Customs Act*, and *Migration Act*
18. *Migration Act* s.245F, *Customs Act* s.185
19. *Migration Act* s.189
20. *Migration Act* s.45: The visa granted to persons accepted to be a refugee.
21. The RAN provides a historical minimum of 1,800 patrol boat days per year in support of this governmental approach to border protection. Source: Defence Annual Reports 1997–2001.
22. Select Committee on a Certain Maritime Incident report, Chapter 2, Operation RELEX, at <www.aph.gov.au/senate/committee/maritime_incident_ctte>, p. 13.
23. *ibid.*, p. 27.

24. Examples can be seen at <<http://www.law.unimelb.edu.au/icil/tampa/bpts.html>>.
25. A repel or return policy.
26. Potential inconsistencies with the Refugee Convention will be addressed later in this paper
27. UNCLOS, Art. 8: Internal Waters. '... waters on the landward side of the baseline of the territorial sea form part of the internal waters of the State.'
28. UNCLOS, Art. 2: Territorial Sea. 'The sovereignty of a coastal State extends, beyond its land territory and internal waters and, in the case of an archipelagic State, its archipelagic waters, to an adjacent belt of sea, described as the territorial sea. UNCLOS, Art. 3: Breadth of the territorial sea. Australia claims 12nm from a baseline set in accordance with Articles 5–16.
29. UNCLOS, Art. 33: Contiguous Zone. Contiguous to the territorial sea, claimed by Australia out to 24nm from baseline.
30. UNCLOS, Art. 55–75: Exclusive Economic Zone. Australia claims an EEZ from 12nm from baseline to 200nm from the baseline.
31. However, sovereignty over the territorial sea is not total. It is exercised subject to UNCLOS and to other rules of international law.
32. UNCLOS, Art. 17: '... ships of all States ... enjoy innocent passage through the territorial sea.'
33. UNCLOS, Art. 33(1): 'In ... the contiguous zone, the coastal State may exercise the control necessary to: (a) prevent infringement of its customs, fiscal, immigration or sanitary laws and regulations within its territory or territorial sea; (b) punish infringement of the above laws and regulations committed within its territory or territorial sea.'
34. UNCLOS, Art. 19(1): Passage is defined as '... innocent so long as it is not prejudicial to the peace, good order or security of the coastal State.'
35. UNCLOS, Art. 19(2): 'Passage of a foreign ship shall be considered to be prejudicial to the peace, good order or security of the coastal State if in the territorial sea it engages in ...'(g) '... the loading or unloading of any ...person contrary to the customs, ...immigration ...laws and regulations of the coastal State.'
36. The *Migration Act* is the domestic immigration law of Australia.
37. Amnesty International, Australia–Pacific, *Offending human dignity – the 'Pacific Solution'*, 26 August 2002, (AI Index: ASA 12/009/2002), p. 6.
38. Select Committee on a Certain Maritime Incident report, op. cit., p. 15.
39. *ibid.*, p. 18. Various articles and anecdotes on being forced back towards Indonesia by asylum seekers are at <<http://www.sievx.com>>.
40. Select Committee on a Certain Maritime Incident report, op. cit., p. 18. A Government Directive dated 12 October 2001.
41. UNCLOS, Art. 87: Freedom of the high seas.
42. E MacFarquhar, 'The survivors who seek their place in paradise', *The Economist*, 21 July 1979, p. 19.
43. The Refugee Convention refers to a party as a 'contracting state.'
44. Refugee Convention, Art. 1: The term 'refugee' shall apply to any person who: 'owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it.'
45. Refugee Convention, Art. 3: 'The Contracting States shall apply the provisions of this Convention to refugees without discrimination as to race, religion or country of origin.'
46. Refugee Convention, Art. 16 (1): 'A refugee shall have free access to the courts of law on the territory of all Contracting States.'

47. Refugee Convention, Art. 33 (1): 'No Contracting State shall expel or return ('refouler') a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion.'
48. Examples can be seen at <<http://www.law.unimelb.edu.au/icil/tampa/bpts.html>> or <http://journalism.uts.edu.au/subjects/oj1/oj1_a2001/refugee/shame.html>.
49. G Triggs, *International Law Aspects of the Tampa Affair: A Legal Twilight Zone*, <<http://www.law.unimelb.edu.au/icil/tampa/gilliantriggs.html>>, accessed 16 October 2003.
50. Refugee Council of Australia (RCOA) comments on Migration Legislation Amendment (Judicial Review) Bill 1998. <<http://www.refugeecouncil.org.au/html/resources/submibi.html>>.
51. G Thorn, 2001, *MV Tampa and the 1951 Refugee Convention: its Impact and Implications*, at <<http://pwww.law.unimel.edu.au/icil/tampa/grahamthom.ppt>>.
52. G Triggs, op. cit.
53. Department of Immigration & Multicultural & Indigenous Affairs (DIMIA) Fact Sheet 71: *New Measures to Strengthen Border Control*.
54. Vienna Convention, Art. 29: 'Territorial scope of treaties: Unless a different intention appears from the treaty or is otherwise established, a treaty is binding upon each party in respect of its entire territory.'
55. Refugee Convention, Art. 40: '... this Convention shall extend to all or any of the territories for the international relations of which it (the contracting state) is responsible.'
56. UNCLOS, Art. 2.
57. *Acts Interpretation Act*, 1901 s. 15b, 'Australia' includes the territorial sea.
58. B Kampmark, *Was it legal? The Howard Government's handling of the MV Tampa*, <<http://www.onlineopinion.com.au/2002/Jan02/Kampmark.htm>>, posted 15 January 2002, accessed 18 October 2003. Art 29: *The Vienna Convention on the Law of Treaties* (1969), 'A party may not invoke the provisions of its internal law as justification for its failure to perform a treaty.'
59. Refugee Convention, Art. 31: '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 ... enter or are present in their territory without authorization...' This concept will be explored further later in the paper.
60. CJ Gibbs, Mason, Deane, Brennan and JJ Dawson, in 'The Minister for Immigration and Ethnic Affairs v Mayer' (1985) 157 CLR 290 FC. In this case and others, the Justices appear to use the *Migration Act* as Australia's domestic implementation of the Refugee Convention. This indicates a tacit acceptance that it is correct in the domestic environment.
61. Refugee Council of Australia (RCOA), op. cit.
62. Refugee Convention, Art. 16: 'a refugee shall have free access to the courts of law on the territory of all Contracting States'
63. The Immigration Advice and Rights Centre (IARC) in submissions to the Joint Standing Committee on Migration.
64. Immigration Advice and Rights Centre (IARC) submission to the Joint Standing Committee on Migration review of Migration Regulation 4.31B, 2003, <<http://www.aph.gov.au/house/committee/mig/regulation2003/subs/sub06.pdf>>.
65. *Migration Act* s.411.
66. *Migration Act* s.457.
67. CJ Gibbs, Mason, Deane, Brennan and JJ Dawson, in 'The Minister for Immigration and Ethnic Affairs v Mayer' (1985) 157 CLR 290 FC. CJ Gibbs, (in the minority) stated 'It is left to the appropriate organs of government of any contracting party (whether it be the legislature or the executive) to determine whether a person has the status of a refugee, and if so to see that the provisions of the treaties are observed so far as that person is concerned.' This concept is different to the circumstances where domestic law is used to limit exposure as previously discussed.
68. R Sackville, *Refugee Law: The Shifting Balance*, p. 5, in the Judicial Conference of Australia (Colloquium 2003), held in Darwin 30 May–01 June 2003, accessed at <<http://www.jca.asn.au/sackville03.pdf>>.

69. G Thorn, op. cit.
70. Refugee Convention, Art. 31: '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 ... enter or are present in their territory without authorization...'
71. DIMIA, 2002, *Interpreting the Refugees Convention – an Australian contribution*, Canberra, p. 132.
72. Department of Immigration & Multicultural & Indigenous Affairs (DIMIA): The Australian Government Department responsible for the administration of the *Migration Act*.
73. DIMIA, op. cit., p. 136.
74. *ibid.*
75. J Mason, 2002, 'Sea Change: Australia's New Approach To Asylum Seekers', *Immigration and Refugee Services of America*, pp. 10–14.
76. DIMIA, loc. cit.
77. Based on conversations between the author and SUNC embarked in HMAS *Tobruk* October 2001.
78. G Thorn, loc. cit., presented to The Centre for Comparative Constitutional Studies and the Institute for Comparative and International Law (University of Melbourne) presented a half-day seminar to explore the legal issues surrounding the Australian Government's response to the MV *Tampa* asylum seekers and the implications for the future of Australian refugee policy and practice. Seminar presentations can be found at <<http://www.law.unimelb.edu.au/icil/tampa/bpts.html>>.
79. *ibid.*
80. *ibid.*
81. *ibid.*
82. J Mason, op. cit. p. 32, also provides a perspective on the 'Pacific Solution'.
83. DIMIA, op. cit., p. 51.
84. *MIMA v Al-Sallal* (1999) 94 FCR 549.
85. Examples can be seen at <http://journalism.uts.edu.au/subjects/oj1/oj1_a2001/refugee/shame.html>.
86. UNCLOS and Refugee Convention.
87. Vienna Convention, Art. 26: 'Pacta sunt servanda: Every treaty in force is binding upon the parties to it and must be performed by them in good faith.'

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