

Maritime Interception: A Snapshot of Australian Policy, Law & Practice, and the Opportunity for Change

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Abstract

In September 2016, the United Nations General Assembly (UNGA) adopted the New York Declaration for Refugees and Migrants, reaffirming participating States' respect for a person's right to seek asylum, and for adherence to the non-refoulement obligation. Despite this aspirational multilateral undertaking, several Western States have tightened their migration policies and implemented more rigorous deflection mechanisms, to prevent asylum seekers from gaining access to their territories. For an asylum seeker, the denial of access to the territory of a safe country often results in the denial of access to international protection, as key human rights provisions only become applicable to persons within the territory or jurisdiction of a State Party to relevant treaties. The key focus of this article is on a person's right not to be returned, directly or indirectly, to a place where they are at risk of persecution or other serious human rights violations. This article explains the right of individuals to seek asylum and protection from persecution, whilst respecting the sovereignty of the asylum/destination state. The article also examines the circumstances under which maritime interceptions likely infringe international legal obligations. It then outlines how state policies could be framed to conform to the spirit of the New York Declaration and the emerging global compact on refugees due for consideration at the UNGA in 2018. The specific barrier to access considered in this article is the 'ring of steel' around Australia's northern sea borders.

Keywords

Maritime Interception; State Jurisdiction; State Obligations; Non-refoulement; New York Declaration

I INTRODUCTION

Inherent in the notion of sovereignty of nations is the right of states to exclude aliens from their territories. The marked increase in forced migration and the concomitant influx of 'unauthorised maritime arrivals'

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on the shores of Western destination states over the past few decades have produced a two-fold effect. First, this trend has led governments of several destination states to consider asylum seekers arriving by boat without a valid visa a threat to their sovereign right to determine who may, or may not, enter their territory.¹ Governments that have in principle agreed to admit and protect refugees (that is, by signing and ratifying the *Convention Relating to the Status of Refugees and its 1967 Protocol* ('*Refugees Convention*')² are increasingly adopting policies and measures designed to prevent refugees from reaching their territory. Notably, the Australian Government has repeatedly reviewed and reformulated its policy on irregular migration by sea since the *Tampa* rescue in 2001.³ Its focus has been on exclusionary approaches.

Key strategies to prevent asylum-seekers from entering territory include maritime interception, purported legislative excision of parts of a state's territory and the transfer of asylum seekers to the territories of third states for determination of their claims to international protection.⁴ For a refugee, these practices often render their right to seek asylum futile. For the intercepting state, such practices are subject to the rules of customary international law, most relevantly, the prohibition on *refoulement*.⁵ These practices are also subject to treaty obligations, if undertaken by the agents of a state that is a party to the *Refugees Convention* or other applicable human rights instruments.

On the other hand, the United Nations High Commission for Refugees ('UNHCR'), refugee advocates, civil society groups, academics and non-government organisations ('NGOs') have been working on potential solutions to humanitarian crises and the disproportionate burden on lesser-

¹ For example, s 5AA of Australia's *Migration Act 1958* (Cth) defines unauthorised maritime arrivals to include a person who 'entered Australia by sea' and who 'became an unlawful non-citizen because of that entry'. This term is not generally used in this article, as interceptions often take place before asylum seekers reach the territory of the destination state. This article refers to asylum seekers which includes refugees (that is, persons who have been declared refugees upon completion of their status determination).

² *Convention Relating to the Status of Refugees*, opened for signature 28 July 1951, 189 UNTS 137 (entered into force 22 April 1954) as amended by the *Protocol Relating to the Status of Refugees*, adopted 31 January 1967, 606 UNTS 267 (entered into force 4 October 1967) (collectively: ('*Refugees Convention*')).

³ On 26 August 2001, the Norwegian freighter *Tampa* rescued 433 asylum seekers whose boat was sinking in international waters. The asylum seekers asked to be taken to Christmas Island, part of Australian territory, but the Australian Government refused to allow the asylum seekers to disembark. The Australian authorities eventually boarded the *Tampa*, removed the asylum seekers and forcefully transferred them to a detention centre in Nauru. See, eg, Susan Melcalfe, *The Pacific Solution* (Australian Scholarly Publishing, 2010) 27–62.

⁴ Sam Blay et al, 'Interception and Offshore Processing of Asylum-Seekers: The International Law Dimension' (2007) 9 *University of Technology Sydney Law Review* 7, 8.

⁵ *Non-refoulement* has arguably become a rule of customary international law, as discussed in part III section C.

developed transit countries. These efforts, in combination, have contributed to the culmination of the *New York Declaration for Refugees and Migrants 2016* ('New York Declaration'),⁶ the first truly multilateral instrument on the rights of refugees since the *Refugees Convention 1951 and its 1967 Protocol*.⁷ At the United Nations ('UN') summit on 19 September 2016, the 193 member states to the UN unanimously adopted the New York Declaration.⁸ The New York Declaration sets out the best approaches the international community should adopt to address 'the growing global phenomenon of large movements of refugees and migrants'.⁹ Volker Türk, Assistant High Commissioner, UNHCR, has described the adoption of the New York Declaration as 'an important and unprecedented achievement... particularly impressive given the xenophobic and anti-refugee rhetoric currently on display in many countries around the world'.¹⁰ The New York Declaration is not a legally binding instrument. Rather, it expresses the political will of participating states.¹¹ The key commitments by participating states, insofar as they are relevant for the purposes of this article, and the work yet to be completed in developing a global compact are outlined in Part V below.

Part I of this article provides a general introduction. Part II outlines recent developments in Australian policy and practice towards asylum seekers without a valid visa who reach, or attempt to reach, Australian territory by sea. Part III briefly introduces the relationship between the asylum seeker and the destination state. This analysis is followed by a discussion of the prohibition on *refoulement* which prevents states from returning asylum seekers to places where they face a real risk of being persecuted or subjected to other serious human rights violations. This part also explains how the prohibition on *refoulement* is likely to become operative in respect of persons intercepted at sea: even though they may never actually reach Australian territory. Part IV explains the law surrounding maritime interceptions, and then discusses the circumstances under which the turn-backs and take-backs currently undertaken by the Australian Government may amount to a breach of Australia's international legal obligations. Part

⁶ *New York Declaration for Refugees and Migrants*, UNGA, 71st sess, Items 13 and 117 of the Provisional Agenda, UN Doc A/71/L.1 (19 September 2016) (New York Declaration) <http://www.un.org/ga/search/view_doc.asp?symbol=A/71/L.1>.

⁷ The New York Declaration contains commitments that apply to both migrants and refugees (arts 22–40), commitments for migrants (arts 41–63 and annex 2) and commitments for refugees (arts 64–87 and annex 1). This article will consider key commitments for refugees.

⁸ *Ibid.*

⁹ New York Declaration, [2].

¹⁰ Volker Türk, 'The New York Declaration: Once in a Lifetime Opportunity to Enhance Refugee Protection', 11 October 2016 <<http://www.kaldorcentre.unsw.edu.au/news/new-york-declaration-once-lifetime-opportunity-enhance-refugee-protection>>.

¹¹ The Office of the High Commissioner for Refugees (UNHCR), 'Towards a Global Compact on Refugees: A Roadmap' (17 May 2017) [1] <<http://www.unhcr.org/58e625aa7.pdf>>.

V summarises key commitments Australia has undertaken by adopting the New York Declaration, and explains the steps to be taken by the UNHCR and relevant stake-holders towards the development of the global compact of refugees. This part also analyses the potential benefits and shortfalls of the New York Declaration as identified in recent literature and commentary. Part VI concludes by explaining how Australia can shape and implement, in good faith, both its political commitments under the developing global compact and its existing international legal obligations.

II AUSTRALIA'S RING OF STEEL

In late 2016, Australian Prime Minister Malcolm Turnbull and then US President Barack Obama concluded a one-off arrangement under which refugees currently on Nauru and Manus Island may be offered resettlement in the United States.¹² The Australian Government was fearful that the announcement of this resettlement arrangement may trigger a surge in asylum seeker vessels heading for Australia's northern shores.¹³ In November 2016, the Australian Government therefore announced its decision to deploy military vessels to create a 'ring of steel' around Australia's Northern sea borders, under the auspices of the Royal Australian Navy, the Royal Australian Air Force and the Australian Border Force.¹⁴ The deployment has been described as one of the largest ever in peace-time history'.¹⁵ The 'ring of steel' is made up of Australian Defence Force assets including AP-3C Orion patrol aircraft, Navy Armidale Class Patrol Boats and Australian Border Force (ABF) patrol boats.¹⁶ Australian aircraft and vessels have daily presence 'throughout Australia's Northern offshore maritime areas'.¹⁷ However, the Australian Government does not release precise details of its maritime operations to the general public, as it considers these 'classified information'.¹⁸

Australia's deployment of patrol vessels and aerial surveillance craft for the purposes of deterrence and maritime interceptions is not new.¹⁹ The

¹² Stephanie Anderson et.al, 'Malcolm Turnbull, Peter Dutton Announce Refugee Resettlement Deal with US', *ABC News* (online) 13 November 2016 <<http://www.abc.net.au/news/2016-11-13/australia-announces-refugee-resettlement-deal-with-us/8021120>>.

¹³ Andrew Greene, 'Ring of Steel: Government Sends off 12 Naval, ABF Ships to Block People Smugglers' *ABC News* (online) 14 November 2016 <<http://www.abc.net.au/news/2016-11-14/dozen-naval,-abf-ships-sent-off-to-block-people-smugglers/8023636>>.

¹⁴ Ibid.

¹⁵ Ibid.

¹⁶ Ibid.

¹⁷ Australian Government, Department of Defence, Border Protection News, Operation Resolute, <<http://www.defence.gov.au/Operations/BorderProtection/>>.

¹⁸ Greene, above n 13.

¹⁹ See, eg, Angus Houston, Paris Aristotle and Michael L'Estrange, *Report of the Expert Panel on Asylum Seekers*, August 2012

Howard Government's Operation Relex (3 September 2001 to 13 March 2002) and Operation Relex II (14 March 2002 to 16 July 2006) were based on a policy of maritime interception which included turn-backs of 'suspected illegal entry vessels' (SIEVs) to the outer limits of Indonesia's territorial sea.²⁰ The 2007 Rudd Government adopted a policy of issuing warnings to vessels to return to Indonesia and the Gillard Government commissioned the 2012 Expert Panel on Asylum Seekers ('the Panel').²¹ The Panel considered Australia's international legal obligations, including the *non-refoulement* obligation, and it expressed the view that the conditions for 'effective, lawful and safe turnbacks' of asylum seeker vessels to Indonesia were not met at that time.²² The current Operation Sovereign Borders (OSB) is described as a 'military-led border security operation aimed at combating maritime people smuggling and protecting Australia's borders'.²³ Interceptions and the turning back of vessels are key features of OSB policy. During the three-and-a-half years between the commencement of OSB²⁴ and 17 April 2017, the Australian Government has turned back 30 boats carrying approximately 765 suspected asylum seekers.²⁵ The details of these interceptions are not known to the public, as there are no independent observers (such as, for example, the UNHCR or NGOs). Similarly, the fate of those intercepted and returned is largely unknown because the Australian Government does not follow up or keep records. Only few asylum seekers appear to have arrived on Australian shores by boat since 27 July 2014.²⁶

In comparison to the increasing number of interceptions since the commencement of OSB, there were only five turn-backs during Operations Relex and Relex II conducted between September 2001 and July 2006.²⁷

<http://artsonline.monash.edu.au/thebordercrossingobservatory/files/2015/03/expert_panel_on_asylum_seekers_full_report.pdf>.

²⁰ Frances Voon, *Factsheet: Turning Back Boats* (last updated May 2017) Andrew & Renata Kaldor Centre for International Refugee Law – UNSW Sydney, 1 <http://www.kaldorcentre.unsw.edu.au/sites/default/files/Factsheet_Turning_Back_Boats.pdf>.

²¹ Ibid.

²² Houston et al, above n 19, [3.80].

²³ Australian Government — Department of Immigration and Border Protection, 'Operation Sovereign Borders' <<http://www.osb.border.gov.au/>>.

²⁴ Ibid.

²⁵ Peter Dutton, 'Press Conference with AVM Stephen Osborne, Commander JATF, Austal Ship Yard, Western Australia', 7 April 2017 <<http://www.minister.border.gov.au/peterdutton/2017/Pages/press-conference-07042017.aspx>>.

²⁶ See, eg, Helen Davidson, 'Asylum Seeker Boat Arrives in the Australian Territory', *The Guardian* (online), 3 May 2016 <<https://www.theguardian.com/australia-news/2016/may/03/asylum-seeker-boat-arrives-in-cocos-islands>>; Ashlynn McGhee, 'Five People Smuggled to Australia by Boat, Australian Federal Police Alleges' *ABC News* (online) 30 August 2017 <<http://www.newsjs.com/url.php?p=http://www.abc.net.au/news/2017-08-30/two-men-charged-with-people-smuggling/8855164>>.

²⁷ Voon, above n 20, 1.

The concern with this sharp increase in turn-backs is not only the correlated risk of potential *refoulement*, but also the fact that the emerging literature, fact sheets and news items indicate some of the asylum seekers who were returned to their home countries by the Australian Government have allegedly been detained, interrogated, jailed or tortured upon their return.²⁸ Furthermore, others who have been sent back to the countries they have fled have made a second attempt at finding refuge and have subsequently been declared refugees by the UNHCR.²⁹ Any such outcomes indicate that the Australian Government does not have the required procedural safeguards in place to enable it to appropriately determine an asylum seeker's need for international protection *before* they are being rejected or returned to a place where their life might be at risk of persecution or other ill-treatment. The applicable legal standards and guarantees are briefly outlined in Part III below. Before turning to the discussion on whether Australia has in fact *refouled* asylum seekers under OSB and its ring of steel, it is first necessary to outline the legal relationship that exists between an asylum seeker and the state or states whose agents they encounter in the process of interdiction, turn-back, take-back or transfer to third countries for refugee status determination.

III HUMAN RIGHTS AND STATE OBLIGATIONS

A The Asylum Seeker and the State

The relationship between the asylum seeker and the state may be described as a 'politically charged balancing act' between the individual's right to seek asylum and their plight for a permanent solution on the one hand, and a state's sovereign right to secure its borders and exclude aliens on the other.³⁰ The *Universal Declaration of Human Rights 1948* ('UDHR')³¹ and the *International Covenant on Civil and Political Rights 1966* ('ICCPR')³² accord individuals a right to leave any country, including their own. The UDHR further provides that all persons have 'the right to seek and to enjoy in other countries asylum from persecution'.³³ This principle is also a part of the 2016 New York Declaration, in which the UN state

²⁸ Ibid, 4.

²⁹ See, eg, Shira Sebban, 'Turned Back by Australia, Vietnamese Recognised as Refugees in Indonesia', *Sydney Morning Herald* (online), 11 June 2017 <<http://www.smh.com.au/world/turned-back-by-australia-vietnamese-recognised-as-refugees-in-indonesia-20170608-gwn475.html>>.

³⁰ Blay et al, above n 4, 7.

³¹ *Universal Declaration of Human Rights*, GA Res 217A (III), December 1948 GA 217 (III) A, UN GOAR 3rd sess, 183rd plen mtg, UN Doc A/810 (10 December 1948) (UDHR) art 13(2).

³² *International Covenant on Civil and Political Rights*, opened for signature 19 December 1966, 999 UNTS 171 (entered into force 23 March 1976) art 12(2).

³³ UDHR art 14(1). See also, UNGA res 52/103 mtg 70, UN Doc A/52/639 (12 December 1997) 5, which provides that: '...everyone is entitled to the right to seek and enjoy in other countries asylum from persecution ... as asylum is an indispensable instrument for the protection of refugees'.

parties 'reaffirm respect for the institution of asylum and the right to seek asylum'.³⁴ The right to seek asylum is, however, illusory in the absence of a corresponding duty on states to admit a person to their territory. While the UDHR and the New York Declaration set out aspirational pledges and commitments, these fall short of creating any legally binding obligations.³⁵ Applicable UN Conventions (discussed below) also do not expressly impose a duty on state parties to admit a person to their territory. In the absence of a positive duty to admit, either by way of treaty obligation or customary international law states should, as a general rule, be free to exercise their sovereign right to refuse entry. There is, however, a negative duty not to *refoule* an asylum seeker or refugee.³⁶ The duty not to *refoule* is a key term of the *Refugees Convention*, and it is also a feature in the ICCPR, the *Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment 1984* ('CAT') and the New York Declaration.³⁷ Goodwin-Gill and McAdam convincingly argue that the principles of *non-refoulement* and non-rejection at the border effectively impose a duty on states not to frustrate the exercise of a person's right to leave and seek asylum, whenever the individual's return or rejection will expose them to a real risk of persecution or other serious violations of human rights.³⁸ The UNHCR, in its advisory opinion, considers that state parties to the *Refugees Convention* are 'required' to grant refugees access to their territory and to 'fair and efficient asylum procedures', to give effect to the prohibition on *refoulement*.³⁹ It is also noted that a state's sovereign power to exclude non-citizens from admission to its territory need not only comply with the state's international legal obligations, but must also be exercised in good faith.⁴⁰

Putting aside for now the question on whether a right to seek asylum exists as a principle of law, the mechanisms to enforce such a right are either not in place (UDHR and New York Declaration) or are only rarely being utilised (*Refugees Convention*, ICCPR and CAT). However, the obligation not to *refoule* or not to subject a person to inhuman or degrading treatment, is legally binding. Under principles of public international law, state

³⁴ New York Declaration art 67.

³⁵ For a more detailed discussion on the right to leave any country, see, eg, Guy S Goodwin-Gill and Jane McAdam, *The Refugee in International Law* (Oxford University Press, 3rd ed, 2007) 380–84.

³⁶ The *Refugees Convention* expressly prohibits *refoulement*, and the prohibition is also implied under art 7 of the ICCPR and art 3 of the CAT, see generally part III below.

³⁷ While the terms of the ICCPR are legally binding on state parties, the UDHR and the New York Declaration are not.

³⁸ Goodwin-Gill and McAdam, above n 35, 383.

³⁹ UNHCR, *Advisory Opinion on the Extraterritorial Application of Non-Refoulement Obligations under the 1951 Convention Relating to the Status of Refugees and its 1967 Protocol* (Geneva (26 January 2007) [8] <<http://www.refworld.org/docid/45f17a1a4.html>>.

⁴⁰ Guy-Goodwin Gill, 'The Extra-Territorial Processing of Claims to Asylum or Protection: The Legal Responsibilities of States and International Organisations' (2007) *University of Technology Sydney Law Review* 26, 30.

responsibility ensues from the breach of an international obligation (for example, the obligation not to *refoule*) that is attributable to a state.⁴¹ Acts attributable to a state, in turn, comprise conduct engaged in by the organs or agents of the state, irrespective of the place where the conduct in question is being, or has been, carried out.⁴² However, the principles of state responsibility have little or no practical relevance to the asylum seeker in search of a state that may be willing to respect and ensure their rights in a climate where the need for assistance is overwhelming and the available asylum space is scarce. It is therefore important that States adhere to the legal obligations they have voluntarily agreed to accept. The contents of key legal obligations applicable in the context of maritime interceptions requires brief analysis, to determine how states could or should go about working within the boundaries of their international legal obligations and the political commitments they have accepted. It remains to be seen what impact the New York Declaration will have on states' compliance, and their commitment to better protect refugees through 'international coordination and burden and responsibility sharing'.⁴³

B *Non-Refoulement and the Refugees Convention*

A number of UN conventions contain provisions relating to the international legal obligations of destination (coastal) states and flag states of vessels. Some of these pertain to the law of the sea, and others to the protection of human rights generally, or refugee rights specifically. There is a degree of overlap between the latter two. A discussion of the terms of treaties relating to the law of the sea is beyond the scope of this article.⁴⁴ The key focus of this article is on the right of a person not to be *refouled*, that is, not to be rejected or returned to a place where they face a real risk of persecution, ill-treatment or torture.⁴⁵

The prohibition on *refoulement*, contained in art 33(1) of the *Refugees Convention*, is central to the protection of asylum seekers and refugees.⁴⁶ Its paramount importance is reflected in the fact that state parties to the

⁴¹ International Law Commission, *Draft Articles on Responsibility of States for Internationally Wrongful Acts*, arts 1–3 <www.refworld.org/docid/3ddb8f804.html> (ILC Draft articles).

⁴² ILC Draft Articles, arts 4–11.

⁴³ New York Declaration, annex 1 [1].

⁴⁴ *United Nations Convention on the Law of the Sea*, opened for signature 10 December 1982, 1833 UNTS 3 (entered into force 16 November 1994) (UNCLOS); *International Convention for the Safety of Life at Sea*, 1974, opened for signature 1 November 1947 (entered into force 25 May 1980).

⁴⁵ For a treatise on the *non-refoulement* obligation see: Sir Elihu Lauterpacht and Daniel Bethlehem, 'The Scope and Content of the Principle of *Non-Refoulement*: Opinion' in Erika Feller et al (eds), *Refugee Protection in International Law* (Cambridge University Press 2003) 87 <<http://www.refworld.org/docid/470a33af0.html>>.

⁴⁶ *Refugees Convention*, art 33(1); see also, UNHCR, *Advisory Opinion on the Extraterritorial Application of Non-Refoulement Obligations under the 1951 Convention Relating to the Status of Refugees and its 1967 Protocol* (Geneva (26 January 2007) [8]–[9] <<http://www.refworld.org/docid/45f17a1a4.html>>).

Refugees Convention are prohibited from making reservations to this article. Because of its central significance to the protection of refugees, the obligation of *non-refoulement* also features in subsequently concluded UN human rights treaties, and in the recently documented and adopted New York Declaration.⁴⁷ Article 33(1) of the *Refugees Convention 1951* provides:

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

The terms of the *Refugees Convention* are limited in scope in that they are only applicable to persons falling within the definition of a refugee set out in art 1A(2) of the *Refugees Convention*. A refugee, in turn, is a 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.⁴⁹

This definition of a refugee also includes asylum-seekers whose claims to international protection are yet to be determined, and who have therefore not yet been declared refugees.⁵⁰ This broad interpretation is commonly accepted, as otherwise there would be no effective protection for asylum-seekers (who may in fact be refugees).⁵¹ Asylum-seekers therefore 'must be treated on the assumption that they are refugees until their status has been determined.'⁵² For a state to owe protection obligations to an asylum-seeker, there must be a link or nexus between the person and the state. This is covered in the following section.

C The Vexed Question of Jurisdiction

In most instances, the right not to be *refouled* becomes applicable to an individual once they are within the territory or within the jurisdiction of a state party to one or more of the UN conventions referred to above. In consequence, the place where, and the circumstances under which, an

⁴⁷ New York Declaration, art 67.

⁴⁸ *Refugees Convention*, art 33(1).

⁴⁹ *Refugees Convention*, art 1A(2).

⁵⁰ Lauterpacht and Bethlehem, above n 45, 118.

⁵¹ Goodwin Gill and McAdam, above n 35, 232.

⁵² Executive Committee, Office of the United Nations High Commissioner for Refugees (EXCOM), *Note on International Protection*, UN doc A/AC.96/815, 31 August 1993, [11]. See also: Cornelis Wolfram Wouters, *International Legal Standards for the Protection from Refoulement* (PhD Thesis, University of Leiden, 2009), 33.

asylum seeker first encounters the agents of the destination or intercepting state are a crucial factor in determining the extent, if any, of protection obligations owed to the individual. States that are unwilling to accommodate the protection needs of asylum-seekers setting out to sea without a valid visa therefore attempt to preclude jurisdiction by controlling or re-directing the movement of vessels before the asylum-seekers are able to physically present themselves at the border to raise their claims to international protection.⁵³

In an effort to prevent asylum seekers from reaching territory, maritime interceptions are often carried out on the high seas, as the high seas are not subject to the jurisdiction of any one state.⁵⁴ In such cases, the scope of application of relevant UN conventions requires examination. The *Refugees Convention* is silent about its extraterritorial reach. However, the article 33(1) prohibition on *refoulement* of a refugee ‘in any manner whatsoever’ is indicative of broad application.⁵⁵ The answer to the question on whether the obligation not to *refoule* has extraterritorial application has not always been consistent. Earlier case law suggests that it does not. For example, in *Sale v Haitian Centres Council*⁵⁶ the United States Supreme Court found in favour of a general presumption against extraterritorial jurisdiction.⁵⁷ The United States Supreme Court found that the obligation not to ‘return’ (*refoule*) a refugee only concerned the person’s exclusion at the state’s border, and that it did not apply to refugees located beyond the state’s border, that is, in international waters.⁵⁸ However, subsequent jurisprudence, especially that of the European Court of Human Rights,⁵⁹ and more recent academic literature indicate that a person likely comes within the jurisdiction of a state acting extraterritorially whenever the state’s acts result in the asylum seeker coming ‘within the power, effective control or authority’ of that state.⁶⁰ As noted above, the *Refugees Convention* prohibits *refoulement* of a refugee ‘in any manner

⁵³ Maarten Den Heijer, *Europe and Extraterritorial Asylum* (PhD Thesis, University of Leiden, 2011) 79.

⁵⁴ The high seas are not subject to the jurisdiction of any state or states. See UNCLOS art 87.

⁵⁵ *Refugees Convention* art 33(1).

⁵⁶ *Sale v Haitian Centres Council* 113 SCt 2549 (1993) (No.92–334), 509 US 155 (1993).

⁵⁷ Thomas Gammeltoft-Hansen, *Access to Asylum — International Refugee Law and the Globalisation of Migration Control* (Cambridge University Press, 2011) 122; *ibid* 14–32; Tara Magner, ‘A Less than Pacific Solution for Asylum Seekers in Australia’ (2004) 16(1) *International Journal of Refugee Law* 53, 73. See also New York Times 22 June 1993 <<http://www.nytimes.com/1993/06/22/us/supreme-court-excerpts-high-court-decision-upholding-policy-haitian-refugees.html?pagewanted=all>>.

⁵⁸ For more detail, see, eg, Andrew G Pizzor, ‘Sale v Haitian Centers Council: The Return of Haitian Refugees’ (1993) 17(1) *Fordham International Law Journal* 1062.

⁵⁹ See, eg, *Bankovic and Others v Belgium and Others* [2001] Eur Court HR, Application No. 52207/99, [71].

⁶⁰ Robert McCorquodale and Penelope Simons, ‘Responsibility Beyond Borders: State Responsibility of Extraterritorial Violations by Corporations of International Human Rights Law’ (2007) *The Modern Law Review* 598, 605.

whatsoever'.⁶¹ The UNHCR also considers that, as a general rule, a state has jurisdiction (and therefore an obligation not to *refoule* a person) whenever a state has effective control (whether *de jure* or *de facto*) over a territory or over individuals.⁶² In addition, the obligation not to *refoule* a refugee has arguably developed into a rule of customary international law, and is thus binding on states inside and outside their territorial jurisdiction.⁶³ Hence, a state may have jurisdiction over a person wherever the conduct constituting a sufficient degree of control over the person is carried out, whether during interception or rejection at a state party's border, in 'excised' territories, on the high seas or in the territorial waters of another state.⁶⁴

D Non-Refoulement and the ICCPR and the CAT

The obligation not to *refoule* a person is also replicated in art 3(1) of the CAT and art 7 of the ICCPR.⁶⁵ Article 3 of the CAT prohibits the removal of a person 'where there are substantial grounds for believing that he would be in danger of being subjected to torture'. Article 7 of the ICCPR provides that 'no one shall be subjected to torture or cruel, inhuman or degrading treatment or punishment'. The UN Human Rights Committee ('HRC') has expressed the view that art 7 of the ICCPR imposes a duty on state parties not to return a person to any country where there is a real risk of irreparable harm of the type contemplated by the art 7 prohibition.⁶⁶ It is worth noting that the terms of the ICCPR and the CAT are broader in scope than art 33(1) of the *Refugees Convention*, in that they are applicable to all persons within jurisdiction of a state party.⁶⁷ On a literal reading, the terms of the ICCPR are applicable to individuals 'within a State Party's territory and subject to its jurisdiction'.⁶⁸ However, the HRC has provided comment that the terms of the ICCPR apply to persons present in the territory of a state

⁶¹ *Refugees Convention*, art 33(1).

⁶² UNHCR, *Maritime Interception Operations and the Processing of International Protection Claims: Legal Standards and Policy Considerations with Respect to Extraterritorial Processing*, Protection Policy Paper, November 2010, 3.

⁶³ Goodwin-Gill and McAdam, above n 35, 248.

⁶⁴ See, eg, UNHCR, *Advisory Opinion on the Extraterritorial Application of Non-Refoulement Obligations under the 1951 Convention Relating to the Status of Refugees and its 1967 Protocol* Geneva (26 January 2007) [24]

<<http://www.refworld.org/docid/45f17a1a4.html>>; Violeta Moreno-Lax, 'The Interdiction of Asylum Seekers at Sea: Law and Mal(Practice) in Europe and Australia' (Policy Brief 4, Kaldor Centre for International Refugee Law, UNSW Sydney, 2 May 2017) 9 <<http://www.kaldorcentre.unsw.edu.au/publication/policy-brief-4-interdiction-asylum-seekers-sea-law-and-malpractice-europe-and-australia>>.

⁶⁵ *Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, opened for signature 10 December 1984, 1465 UNTS 85 (entered into force 26 June 1987) art 3(1); ICCPR, art 7.

⁶⁶ HRC, *CCPR General Comment No. 20: Article 7 (Prohibition of Torture, or Other Cruel, Inhuman or Degrading Treatment or Punishment)*, 10 March 1992, [9] <<http://www.refworld.org/docid/453883fb0.html>>.

⁶⁷ ICCPR, art 2(1); CAT, art 2(1).

⁶⁸ *International Covenant on Civil and Political Rights*, art 2(1).

party or within a State Party's jurisdiction.⁶⁹ In *Delia Saldias de Lopez v Uruguay*, for example, the HRC stated that:

it would be unconscionable to so interpret the responsibility under article 2 of the Covenant as to permit a State party to perpetrate violations of the Covenant on the territory of another State, which violations it could not perpetrate on its own territory.⁷⁰

The ICCPR's protection obligations are also likely to apply to all persons 'within the power or effective control of a State Party, even if they are not situated within the territory of a State Party'.⁷¹ In summary then, the terms of the *Refugees Convention*, the ICCPR and the CAT have extraterritorial application.⁷²

E Types of *Refoulement*

Once a state has jurisdiction over a person, and therefore legal obligation not to *refoule* that person, it is necessary to distinguish between the different types of *refoulement*. There are three types that are relevant to the 'ring of steel': direct *refoulement*, chain or indirect *refoulement*, and constructive *refoulement*.⁷³ Direct *refoulement* is the return of an asylum seeker directly to a place where they are at risk of being persecuted on one or more of the grounds set out in art 1A(2) of the *Refugees Convention*. Direct *refoulement* includes, for instance, rejections at the border and forced repatriations, but it also includes returns to unsafe places pursuant to bilateral arrangements. Indirect or chain *refoulement* occurs when an asylum seeker is returned or redirected to a country where their lives do not appear to be at risk, but that other country subsequently returns the refugee, either directly or through a chain of events, to a place where they are in danger of persecution or other irreparable harm. This may be the case where the final destination country is either not a state party to a convention that prohibits *refoulement*, or fails to provide, as a matter of fact, effective protection to the individual concerned. Constructive *refoulement* is likely to occur whenever a state's domestic refugee status determination procedures have fundamental flaws. Sub-standard processing arrangements include the absence of legal representation or advice, as outlined in section F of this part.⁷⁴ As a consequence of defective

⁶⁹ HRC, General Comment 31, *Nature of the General Legal Obligation on State Parties to the Covenant*, U.N. Doc. CCPR/C/21/Rev.1/Add.13 (26 May 2004), [10] <<http://www.refworld.org/docid/478b26ae2.html>>.

⁷⁰ *Delia Saldias de Lopez v Uruguay*, CCPR/C/13/D/52/1979, UN Human Rights Committee [12.3], 29 July 1981, <<http://www.refworld.org/cases,HRC,4028d4954.html>>.

⁷¹ HRC, General Comment 31, above n 67, [10].

⁷² The International Court of Justice has authority to interpret the *Refugees Convention* and its interpretations are binding on state parties (while the Human Rights Committee's interpretations of the ICCPR and the CAT are not).

⁷³ Susan Kneebone, 'The Pacific Plan: The Provision of 'Effective Protection?' (2006) 18(3) *International Journal of Refugee Law* 696, 713.

⁷⁴ *Ibid* 716.

procedures, a person who is in fact in need of international protection may not be recognised and declared a refugee. The likely outcome is that they will be returned to the (or a) place of persecution.

F Other State Obligations

An asylum seeker's claims to international protection must be assessed on the basis of their individual circumstances and needs. Even though it is left to state parties to the *Refugees Convention* to determine the procedures for refugee status determination, procedural safeguards would require staff to have the required knowledge and experience to appropriately examine an individual asylum seeker's claim for protection.⁷⁵ If a person raises a claim to international protection during interception, then the intercepting state is required not to return or reject that person without first making an assessment of their claims.⁷⁶ The procedural safeguards should, amongst other things, also include appropriate facilities, a competent interpreter, the opportunity to contact a representative of the UNHCR and an opportunity to appeal in case of a negative decision.⁷⁷ Australia's enhanced screening process applicable to asylum seekers from Sri Lanka is unlikely to comply with the required safeguards. Under this process, asylum seekers are interviewed at sea by two officers from the Department of Immigration and Border Protection ('the Department') and they are 'screened out' of the status determination process if the officers determine that the asylum seekers do not 'raise claims that engage Australia's *non-refoulement* obligations'.⁷⁸ Such asylum seekers are subsequently removed from Australia.⁷⁹

Where persons are arbitrarily held at sea or transferred to regional processing centres whilst under the 'effective control' of the Australian Government, then the prohibition on inhuman and degrading treatment and the right to liberty and freedom from arbitrary detention also become applicable.⁸⁰ A discussion of the duties applicable in safe and rescue operations is beyond the scope of this article.⁸¹

⁷⁵ UNHCR, *Handbook on Procedures and Criteria for Determining Refugee Status*, (reissued Geneva, December 2011) [189]–[192] <<http://www.unhcr.org/en-au/publications/legal/3d58e13b4/handbook-procedures-criteria-determining-refugee-status-under-1951-convention.html>>.

⁷⁶ Ibid, [192(i)].

⁷⁷ Ibid, [192].

⁷⁸ Australian Human Rights Commission, 'Tell Me About: The "Enhanced Screening Process"', June 2013 <<https://www.humanrights.gov.au/our-work/asylum-seekers-and-refugees/publications/tell-me-about-enhanced-screening-process>>; see also, Violeta Moreno-Lax, above n 64, 11–12.

⁷⁹ Australian Human Rights Commission, 'Tell Me About: The "Enhanced Screening Process"', above n 78.

⁸⁰ ICCPR, arts 7 (inhuman or degrading treatment or punishment), 9(1) (right to liberty and security); *Refugees Convention*, art 26 (freedom of movement).

⁸¹ See, eg, UNHCR, above n 75, *Handbook on Procedures and Criteria for Determining Refugee Status*, 189–92.

IV MARITIME INTERCEPTION

A Key Concepts

‘Interception’ may be defined as including:

all measures applied by a State, outside its national territory, in order to prevent, interrupt or stop the movement of persons without the required documentation crossing international borders by land, air or sea, and making their way to the country of prospective destination.⁸²

This definition, because of its reference to ‘persons without the required documentation’, presupposes that interceptions are generally carried out to thwart the irregular flow of migrants or refugees. However, this may be too narrow a definition as interceptions can be carried out for a number of reasons.⁸³

The UNHCR recognises the paramount importance (and the legal obligation of states)⁸⁴ to intercept vessels whenever necessary in order to rescue and assist persons in distress at sea.⁸⁵ The legality or otherwise of a maritime interception and the subsequent dealings with those on board the intercepted vessel largely hinges on the question of whether the interception was carried out for humanitarian reasons, or whether its purpose was deter and deflect asylum seekers. To distinguish between interception measures that are compliant with principles of international law and those that likely are not, the UNHCR has stated:

Interception measures which are directed at avoiding or shifting refugee-protection responsibilities, which frustrate access to international protection or seek to deter asylum-seekers, which lead to a risk of *refoulement* or which endanger safety, are not consistent with international standards...⁸⁶

Interception may be in the form of contact measures (such as boarding, towing or returning vessels) or contactless measures which may include the issue of warnings, blockades or orders for vessels to change course.⁸⁷ The two interception practices most relevant for the purposes of this article (that is, those practised under the current OSB policy and Australia’s ‘ring of

⁸² EXCOM, *Interception of Asylum-Seekers and Refugees: The International Framework and Recommendations for a Comprehensive Approach*, 18th mtg, UN Doc EC/50/SC/CRP.17 (9 June 2000) 2 <<http://www.unhcr.org/4aa660c69.pdf>>. A broader definition is provided by EXCOM, *Conclusion on Protection Safeguards in Interception Measures*, UN doc A/AC.96/987, 10 October 2003, 2 <<http://www.unhcr.org/4aa0e1ce9.pdf>>.

⁸³ The EXCOM, in 2003, also adopted a broader definition, but the above is sufficient for the purposes of this article.

⁸⁴ See, eg, UNCLOS, art 98.

⁸⁵ UNHCR, ‘High Commissioners’ Dialogue on Protection Challenges: Protection at Sea’ (Background Paper, 11 November 2014) [11]–[16].

⁸⁶ *Ibid.*, [16].

⁸⁷ Moreno-Lax, above n 64, 9.

steel') are turn-backs and take-backs. During turn-back operations, the agents of the intercepting state return asylum seeker vessels to the edge of the territorial sea of the state where the vessel commenced its journey. During take-backs, on the other hand, the intercepting state transfers the passengers and crew back to the authorities of the state of the vessel's departure, usually pursuant to non-binding bilateral arrangements.⁸⁸ Irrespective of whether interceptions are conducted by way of active or passive measures, it is the exercise of effective control by the intercepting state that provides the basis for state jurisdiction.⁸⁹ As noted above, jurisdiction gives rise to state responsibility. It is the treatment of the asylum seeker subsequent to the interception (whenever such treatment amounts to a breach of a primary obligation) that triggers state responsibility, now codified by the ICL Draft Articles.⁹⁰

The UNHCR's opinion on maritime interceptions and refugee protection provides that all arrangements, whether carried out within or beyond State borders, must guarantee that no person is sent to a place where they are at real risk of persecution, torture, arbitrary deprivation of liberty or irreparable harm.⁹¹ The office of the UNHCR acknowledges that, while states may resort to interdiction policies and deflection measures in an effort to protect their legitimate interest in preventing or lessening irregular migration, states must only do so within the boundaries of their international legal obligations. These obligations include procedural safeguards that enable identification of individuals in need of international protection, as well as fair and transparent processes to determine asylum seekers' claims to protection.⁹² In practice, these obligations impose upon state parties a duty to provide, at the minimum, access to a safe place and access to a fair status determination procedure.⁹³

B Interception and Effective Control

Maritime interceptions pose specific jurisdictional questions, because they are often carried out on the high seas which are not subject to the exercise of sovereignty by any particular state. It is difficult to envisage circumstances in which a state engages in maritime intervention without exercising a sufficient degree of control so as to activate state jurisdiction over the persons subject to the interception. As noted above, state jurisdiction forms the basis upon which a state becomes subject to human rights obligations. The necessary link between the intercepting state and

⁸⁸ Voon, above n 20, 3.

⁸⁹ UNHCR, *Handbook on Procedures and Criteria for Determining Refugee Status*, above n 75, [189]–[192].

⁹⁰ ILC Draft Articles, arts 1–4.

⁹¹ UNHCR, Protection Policy Paper, above n 60, 4.

⁹² EXCOM Standing Committee, 18th mtg, *Interception of Asylum-Seekers and Refugees: The International Framework and Recommendations for a Comprehensive Approach*, UN doc. EC/50/SC/CRP.17 (9 June 2000) [17]–[18].

⁹³ Goodwin-Gill and McAdam, above n 35, 387.

the asylum seeker is the state's exercise of effective control over the individual by turning, pushing or towing back vessels, or by transferring individuals between vessels.⁹⁴ Whenever such interventions are carried out without proper procedures to determine the asylum seekers' claims to international protection, there is a risk that the acting state has breached the international obligation not to *refoule* a person to a place where they are at risk of harm.⁹⁵

C Interceptions under OSB and Australia's Ring of Steel

Interception measures under OSB policy and the deployment of the vessels and aircraft that comprise the 'ring of steel' are based on contact actions. These involve the redirecting and returning of vessels to the port of departure, and the handing over persons on board such vessels to the authorities in their countries of origin or departure. Previously, intercepted persons were routinely taken to regional processing centres, but as noted above there have been very few reported 'arrivals' since mid-2014. The following paragraphs examine how Australian policy and practice compare with Australia's international legal obligations.

Australia engages in turn-backs of vessels and its passengers and crew to the territorial seas of transit states in the region, notably Indonesia. Indonesia is not a state party to the *Refugees Convention*, and as such is not bound by treaty obligation not to *refoule* an asylum seeker or refugee.⁹⁶ Indonesia does adhere to the principle of *non-refoulement* under customary international law.⁹⁷ However, there is real concern that asylum seekers returned to Indonesia are being detained, and that some facilities are overcrowded and lack basic necessities, including food.⁹⁸ Because the enhanced on-water screening processes applicable to Sri Lankan and Vietnamese asylum seekers lack the necessary procedural safeguards, there is a real risk of the *refoulement* of asylum seekers who are actually refugees.

A recent media article also indicates that Australia has *refouled* two mothers and their children to Vietnam where they faced imprisonment and severe ill-treatment.⁹⁹ These two families were turned back by Australia in 2015 after they were found not to be in need of international protection following their enhanced screening. They fled Vietnam a second time to seek refuge in Indonesia, where they were recently declared refugees by

⁹⁴ See, eg, Gammeltoft-Hansen, above n 57, 100, 107.

⁹⁵ The breach occurs irrespective of compliance with domestic legislation. Section 22 of the *Maritime Powers Act 2013* (Cth) provides that interdiction powers can be exercised even if they are not in compliance with Australia's international legal obligations. This Act therefore fails to implement Australia's *non-refoulement* obligations in good faith.

⁹⁶ Asia Pacific Refugee Rights Network, 'Factsheet: Indonesia' <http://aprrn.info/pdf/Indonesia%20Factsheet_MAR%202017.pdf>.

⁹⁷ *Ibid.*

⁹⁸ *Ibid.*

⁹⁹ Sebban, above n 29.

the UNHCR. The recognition of their status as refugees confirms that they were in fact persons in need of international protection. Similarly, the fact that they were turned back to a country where they risked persecution or other serious violations of human rights indicates that Australia has breached the protection obligations it owed to these families. Furthermore, their returns demonstrate the inadequacies inherent in enhanced screening and bilateral take-back arrangements.

The Australian Government currently has agreements with Vietnam and Sri Lanka, under which nationals from these states are returned to their countries of origin/departure without being assessed for any claims to protection they may raise.¹⁰⁰ Vietnam and Sri Lanka are not state parties to the *Refugees Convention*.

While Sri Lanka is a state party to the ICCPR and the CAT, the UNHCR Special Rapporteur went on a mission to the country in 2016 and concluded that a ‘culture of torture’ still exists in Sri Lanka.¹⁰¹ Australia risks being in breach of its *non-refoulement* obligation by handing asylum seekers back to Sri Lankan or Vietnamese authorities where there is a real possibility that they will be persecuted or subject to other irreparable harm.

To summarise, the maritime interceptions carried out under current Australian policy fail to comply with Australia’s treaty obligations. There is a role for Australia to re-examine its legal obligations as the work on the formulation of a global compact on refugees is under way. The remainder of this article briefly examines some of the key pledges states have made when they adopted the New York Declaration. These parts also outline the work undertaken so far, the road lying ahead, and how these initiatives could and should provide the impetus for change at the domestic and international level.

¹⁰⁰ Australian Government, Department of Foreign Affairs and Trade, ‘Memorandum of Understanding Between the Government of Australia and the Government of Sri Lanka Concerning Legal Cooperation Against the Smuggling of Migrants, signed 9 November 2009 (released under the FOI Act 1982 by the Attorney-General’s Department) <<https://www.ag.gov.au/RightsAndProtections/FOI/Documents/MOU%20with%20Sri%20Lanka%20on%20the%20Smuggling%20of%20Migrants.PDF>>; The Hon Peter Dutton MP, Minister for Immigration and Border Protection, Australia and Vietnam Further Cooperation to Stamp out People Smuggling’ (Media Release, 12 December 2016) <<http://www.minister.border.gov.au/peterdutton/Pages/Australia-and-Vietnam-further-cooperation-to-stamp-out-people-smuggling.aspx>>.

¹⁰¹ HRC, *Report of the Special Rapporteur on Torture and other Cruel, Inhuman and Degrading Treatment or Punishment on his Mission to Sri Lanka*, UNGA, 34th sess. Agenda Item 3, UN Doc A/HRC/34/54/Add2 (22 December 2016) [22] <http://www.ceylonews.com/wp-content/uploads/2017/01/Report_of_the_special_rapporteur_on_torture_2017.pdf>.

V THE NEW YORK DECLARATION FOR REFUGEES AND MIGRANTS

A Key Commitments

As noted in part I above, the New York Declaration for Refugees and Migrants was adopted by the UNGA on 19 September 2016. The New York Declaration sets out the political will of the UN Members to save lives and to enhance the protection of refugees and migrants on a global scale.¹⁰² The 193 Member States to the UN have made a broad range of commitments to improve the lives and prospects of refugees and migrants. This is to be achieved through the development of two global compacts, one for migrants and one for refugees, to be adopted in 2018.¹⁰³ Some of the commitments made by participating states are applicable to both refugees and migrants, some to refugees only, and some to migrants only. With respect to the large movements of migrants and refugees, participating states have committed to sharing responsibility in a compassionate manner through international cooperation, while fully respecting the human rights and fundamental freedoms of migrants and refugees.¹⁰⁴ This goal is to be achieved through ‘comprehensive policy support, assistance and protection, consistent with states’ obligations under international law’.¹⁰⁵

To improve the situation for refugees specifically, states have reaffirmed their ‘respect for the institution of asylum and the right to seek asylum’, and ‘adherence to the fundamental principle of *non-refoulement* in accordance with international refugee law’.¹⁰⁶ Participating states have also agreed that an effective refugee protection regime must be grounded in international cooperation with an equitable sharing of the burden and responsibility for receiving and supporting refugees, while at the same time recognizing and accommodating the ‘differing capacities and resources among States’.¹⁰⁷

The New York Declaration itself and the pledges made by UN states at the September 2016 summit have received a very mixed reception in the academic literature and commentary, largely due to their non-binding nature. Some consider the New York Declaration a welcome development, in that it is the first truly multilateral commitment with respect to refugees since the adoption of the *Refugees Convention* in 1951 and its

¹⁰² New York Declaration.

¹⁰³ UNHCR, ‘The New York Declaration for Refugees and Migrants — Answers to Frequently Asked Questions’, 2
<http://www.google.com.au/url?sa=t&rct=j&q=&esrc=s&source=web&cd=1&ved=0ahUKEwi5IM33n-vXAhWMW7wKHxwUDpAQFggyMAA&url=http%3A%2F%2Fwww.unhcr.org%2F584689257.pdf&usg=AOvVaw2upsxvzQBLETq1b1prjOYn>.

¹⁰⁴ New York Declaration [11].

¹⁰⁵ *Ibid.*

¹⁰⁶ *Ibid* [67].

¹⁰⁷ *Ibid* [68].

Protocol in 1967. Volker Türk, the UNHCR's Assistant High Commissioner for Protection, has described the New York Declaration as a strong endorsement by states to observe the fundamental principles of refugee protection, and as an opportunity for further progress ahead.¹⁰⁸ Ferris acknowledges that compromise is needed to ensure both, broad participation by UN member states and impact of the pledges made by participating states.¹⁰⁹ Ferris concedes that the proposed framework for refugee protection has potential to change the way in which the international community responds to the needs of refugees, but that the two-year timeframe in which to develop a global compact for refugees was optimistic.¹¹⁰ Others are less enthusiastic about the potential for significant improvement. McAdam, for example, has stated that the pledges made by Australia at the summit fell short of what was needed to make any real difference to the global protection needs and that Australia could and should do more.¹¹¹ Larking criticised the New York Declaration for setting a very 'low baseline for the conduct of negotiations'.¹¹² Larking's main concerns include the lack of legally binding global compacts, the absence of a binding resettlement mechanism and the narrow definition of 'refugee' as per art 1A(2) of the *Refugees Convention*, which does not capture those fleeing poverty, war or natural disasters.¹¹³

It remains to be seen what impact the New York Declaration and the global compact on refugees will have on the plight and needs of refugees. However, given the current political climate and the humanitarian crises in the region and beyond, the New York Declaration is at least aspirational, and it stimulates debate. It also provides Australia with an opportunity and a role to take initiative and join in the gradual implementation of the global commitment towards finding sustainable solutions for refugees.

B *The Road Ahead*

Annex 1 to the New York Declaration sets out the processes to be adopted by the UNHCR to develop a comprehensive refugee response framework

¹⁰⁸ Türk, above n 10.

¹⁰⁹ Elizabeth Ferris, 'The Global Summit on Refugees and Migrants: the Pesky Issue of Level of Ambition', Andrew & Renata Kaldor Centre for International Refugee Law — UNSW Sydney (14 September 2016) <<http://www.kaldorcentre.unsw.edu.au/publication/2018-global-compacts-refugees-and-migration>>.

¹¹⁰ Ibid.

¹¹¹ 'Australia's Commitments at Refugee Summit fall Short, Says Professor Jane McAdam', Andrew & Renata Kaldor Centre for International Refugee Law — UNSW Sydney (21 September 2016) <<http://www.kaldorcentre.unsw.edu.au/news/australia%E2%80%99s-commitments-refugee-summit-fall-short-says-professor-jane-mcadam>>.

¹¹² Emma Larking, 'The New York Declaration for Refugees and Migrants – What's Missing?' Centre for International Governance & Justice, RegNet (24 October 2016) <<http://asiapacific.anu.edu.au/regarding-rights/2016/10/24/the-new-york-declaration-for-refugees-and-migrants-whats-missing/>>.

¹¹³ Ibid.

(CRRF) in consultation with multiple stakeholders at the international, national and regional level.¹¹⁴ The stakeholders include national and local authorities, regional organisations, civil society groups, the private sector and academia, to name a few.¹¹⁵ The framework comprises four key elements for a people-centred response to large movements of refugees, which are in accordance with international legal obligations and international best practice.¹¹⁶ These are well-supported reception and admission arrangements;¹¹⁷ adequate support for the immediate and ongoing needs of refugees relating to health, education and social services;¹¹⁸ adequate support for host countries and communities;¹¹⁹ and access to timely and durable solutions.¹²⁰

Following consultations between the UNHCR and selected governments which began in November 2016, the CRRF is currently being piloted in several geographically diverse nations.¹²¹ The ensuing discussions and formal consultations scheduled between the UNHCR and relevant stakeholders serve to assist the UNHCR in evaluating the practical application of the CRRF, which will ultimately feed into the development and formulation of the ‘global compact on refugees’.¹²² This global compact will be included in the UNHCR’s 2018 annual report, to be presented to the UN General Assembly during its 73rd session in 2018.¹²³

The success of such a compact, of course, heavily relies on the commitment of the UN member states to implement, and to adhere to, the key objectives of this compact, not only in policy, but also in practice.

VI CONCLUSION

In light of Australia’s acceptance of the commitments set out in the New York Declaration, there is now opportunity for Australia to reconsider its current approaches in policy and practice which have been undermining

¹¹⁴ New York Declaration, annex 1, [2].

¹¹⁵ Ibid.

¹¹⁶ Ibid [3].

¹¹⁷ Ibid [5].

¹¹⁸ Ibid [6]–[7].

¹¹⁹ Ibid [8].

¹²⁰ Ibid [9]–[16]. See also, Volker Türk and Madeline Garlick, ‘From Burdens and Responsibilities to Opportunities: The Comprehensive Refugee Response Framework and a Global Compact on Refugees’ (2016) 28(4) *International Journal of Refugee Law* pt 5; Jane McAdam, ‘The 2018 Global Compacts on Refugees and Migrants’, 4 April 2017 <<http://www.kaldorcentre.unsw.edu.au/publication/2018-global-compacts-refugees-and-migration>>.

¹²¹ UNHCR, ‘Comprehensive Refugee Response Framework: From the New York Declaration to a Global Compact on Refugees’ (5 December 2016) 2 <<http://www.unhcr.org/584687b57.pdf>>.

¹²² New York Declaration, annex 1, [18]–[19]; Türk, above n 10.

¹²³ New York Declaration, annex 1, [19]; UNHCR, ‘Towards a Global Compact on Refugees: A Roadmap’, above n 11, [4].

the efforts of the UNHCR and other countries in the region. Goodwin-Gill once poignantly noted that it is contradictory:

for governments to talk of their respect for human dignity and human rights, even as they organise programmes of interception, interdiction, and the return of people to territories and regimes where such respect is little known and perhaps even less understood.¹²⁴

With the announcement of the ‘ring of steel’ and Australia’s adoption of the New York Declaration only weeks apart in late 2016, there is misalignment between Australia as the good international citizen in name, and the sovereign state exercising its rights.

Australia has the capacity to make a valuable contribution towards formulating and reinforcing protection for refugees at the global level. Australia should become actively engaged in shaping the way in which the international community will work towards the realisation of the commitments contained in the New York Declaration. To echo Volker Türk’s sentiments introduced above, this may be the ‘once in a lifetime opportunity to enhance refugee protection’.¹²⁵

¹²⁴ Guy S Goodwin-Gill, Opinion, ‘The Right to Seek Asylum: Interception at Sea and the Principle of *Non-Refoulement*’, (2011) 23 *International Journal of Refugee Law* 443.

¹²⁵ Türk, above n 10.