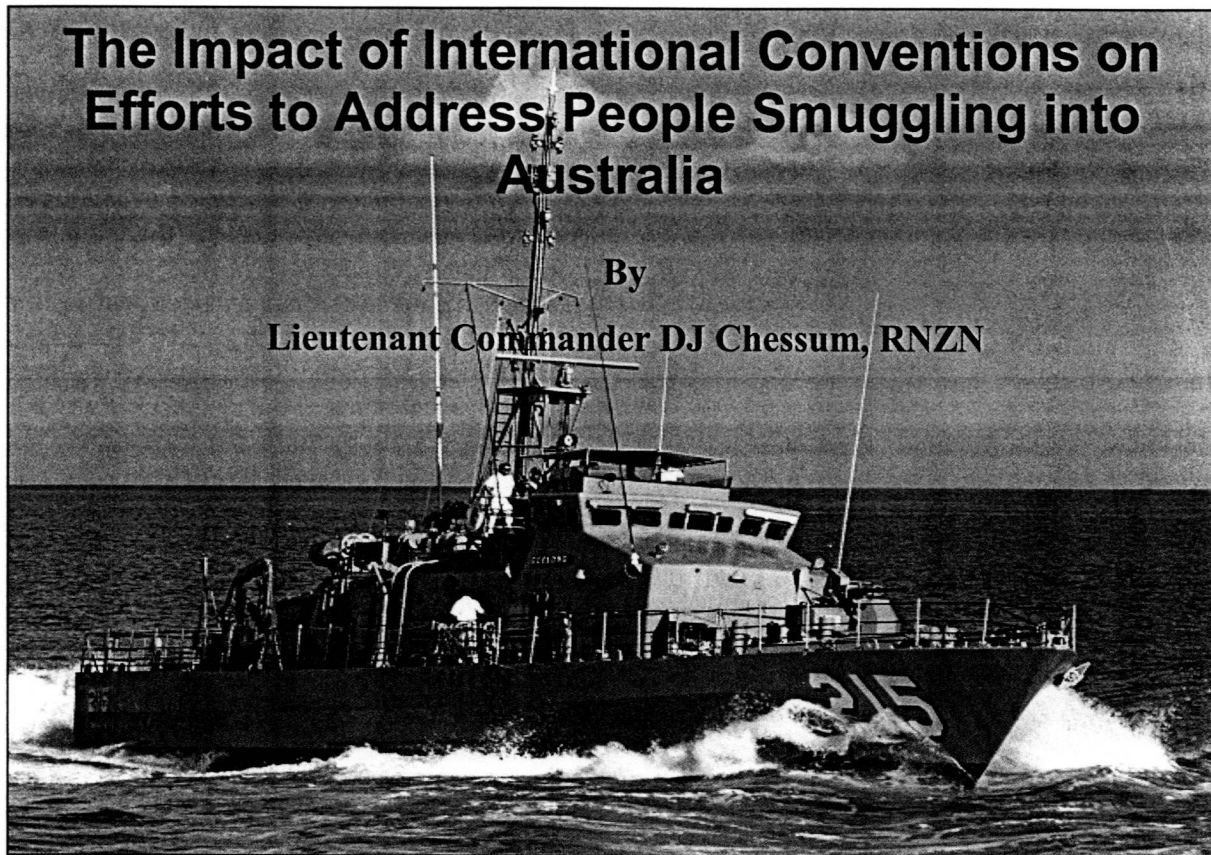


The Impact of International Conventions on Efforts to Address People Smuggling into Australia

By

Lieutenant Commander DJ Chessum, RNZN



Recent incidents and operations to the north of Australia have highlighted the challenges facing a modern maritime democracy that chooses to restrict entry to aspiring asylum seekers.

A combination of oppressive regimes and poverty in the Middle East and South Asia have created an environment where significant numbers of people are willing to embark on a risky boat passage to Australia's offshore territories in the hope of achieving asylum in Australia. This situation is exacerbated by the operation of people smugglers prepared to profit from the misery of their charges, and intermediate countries that are either unwilling, or unable, to prevent the flow of asylum seekers through their territories. This article considers whether the 1982 *UN Convention on the Law of the Sea* (hereafter the Convention) and the 1951 *United Nations Convention Relating to the Status of Refugees* (hereafter the Refugee Convention) are impediments to current efforts by Australia to address the problem of people smuggling into Australia. People smuggling by sea has increased significantly in recent years,¹

and has been described by the United Nations Secretary General as:

*"a reckless exploitation of people in distress, and thus ... a reprehensible form of international crime."*²

The arrival of unauthorised arrival of immigrants by boat is not a new phenomenon for Australia. More than 2000 Indochinese arrived during 1975-1980, and a further two hundred Cambodians arrived in 1989-1990. Throughout the 1990s there was a regular flow of Chinese, with 1867 arriving between 1989 and 2000.³ In 1999, however, there was a substantial shift in the pattern of illegal migration. In the two years prior to June 2001, the number of unauthorised boat arrivals (8316) was more than double the total for the previous ten years, and there was a distinct shift in the nationality profile from mostly Asian to mostly Middle Eastern in origin. Furthermore people smuggling was now behind a large proportion of

the unauthorised arrivals, with Indonesia becoming a staging post for the movement of people to Australia.⁴

United Nations Convention on the Law of the Sea 1982

The rights and obligations of coastal States in offshore waters are prescribed by the Convention. For the purposes of immigration control, the sea can be divided into four zones; internal waters, the territorial sea, the contiguous zone, and areas outside the contiguous zone (the exclusive economic zone (EEZ) and the high seas).

The Convention prescribes that "except as provided in Part IV, waters on the landward side of the baseline of the territorial sea form part of the internal waters of the State."⁵ Sovereignty over internal waters is not explicitly defined, however it can be inferred that States are entitled to exercise the same absolute sovereignty in internal waters as they are on their land territory.⁶ In Australia this sovereignty is asserted by the *Seas and Submerged Lands Act 1973*.⁷

Outside internal waters is the territorial sea: "sovereignty of a coast state extends, beyond its land territory and internal waters ... to an adjacent belt of sea, described as the territorial sea."⁸ Sovereignty over the territorial sea is not, however, absolute as the "sovereignty over the territorial sea is exercised subject to this Convention and to other rules of international law."⁹

One limitation on a coastal State's sovereignty in the territorial sea is the right of innocent passage, whereby "ships of all States ... enjoy the right of innocent passage through the territorial sea."¹⁰ Passage is defined as innocent only "so long as it is not prejudicial to the peace, good order or security of the coastal State".¹¹ Moreover "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 ... the loading or unloading of any ... person contrary to the ... immigration ... laws and regulations of the coastal State."¹²

The coastal State's rights of protection are defined in Article 25 where "The coastal State may take the necessary steps in its territorial sea to prevent passage which is not innocent."¹³ Furthermore, "in the case of ships

proceeding to internal waters ... the coastal State ... has the right to take the necessary steps to prevent any breach of the conditions to which admission of those ships to internal waters or such a call is subject."¹⁴

It can therefore be seen that Convention provides adequate provision for the control of people smugglers in the territorial sea. If people smugglers intend to unload persons in the territorial sea contrary to a coastal State's immigration laws and regulations, then their passage is not innocent, and the coastal State may take the necessary steps to prevent their passage. If they intend to proceed into the coastal State's internal waters to unload persons, then the coastal State has the right to take necessary steps provided the unloading of such persons is a breach of the conditions to which ships are admitted to internal waters. The establishment of immigration laws and regulations, and the setting of conditions for ships to enter internal waters, are matters of domestic law not limited by the Convention.

A further provision that strengthens the ability of coastal States to control people smugglers in the territorial sea is Article 27. "*The criminal jurisdiction of the coastal State should not be exercised on board a foreign ship passing through the territorial sea to arrest any person or to conduct any investigation in connection with any crime committed on board the ship during its passage, save only ... if the consequences of the crime extend to the coastal State.*"¹⁵

As the consequences of illegal immigration clearly extend to the coastal State, then this provision allows coastal States to stop and arrest vessels in the territorial sea if they are in breach of domestic immigration legislation.

Outside the territorial sea, is the contiguous zone where a coastal State "may exercise the control necessary to ... prevent infringement of its ... immigration ... laws and regulations within its territory or territorial sea, [and] punish infringement of the above laws and regulations committed within its territory or territorial sea."¹⁶ This allows for the control of people smugglers in the contiguous zone.

Outside the contiguous zone lies the EEZ and high seas. The sovereign rights granted to coastal States with respect to the EEZ are limited to those specified in the Convention. These primarily relate to the economic resources

of the EEZ, and do not include immigration. Outside the EEZ lies the high seas where “no State may validly purport to subject any part of the high seas to its sovereignty.”¹⁷ The rights of a coastal State to stop and board vessels on the high seas are limited to those circumstances prescribed by Article 110, which does not cover immigration issues. The Convention therefore makes no provision for a coastal State to act against people smugglers either in the EEZ or on the high seas.

UN Convention Relating to the Status of Refugees 1951

The Refugee Convention was adopted in December 1951, and entered into effect in April 1954.¹⁸ A refugee is defined as 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.”*¹⁹

The Refugee Convention initially applied only to persons whose fear of persecution resulted from events occurring before 1 January 1951, however the amending 1967 *Protocol relating to the Status of Refugees* extended this coverage to include all persons who met the above definition.²⁰ Australia acceded to the Refugee Convention on 22 January 1954 and the 1967 Protocol on 13 December 1973.²¹ The Refugee Convention is effectively brought into Australian law by the *Migration Act 1958*, and the *Migration Regulations*. Protection as a refugee is given by granting a protection visa, which confers permanent residence on the holder.²²

The Refugee Convention requires receiving states to provide a wide range of services to refugees, including education, social security, access to courts of law, and the right to obtain gainful employment.²³ These requirements mean that the quality of life accorded to refugees in developed countries such as Australia may be considerably superior to the quality of life experienced by many people in the developing world. This creates a situation where there is an incentive for



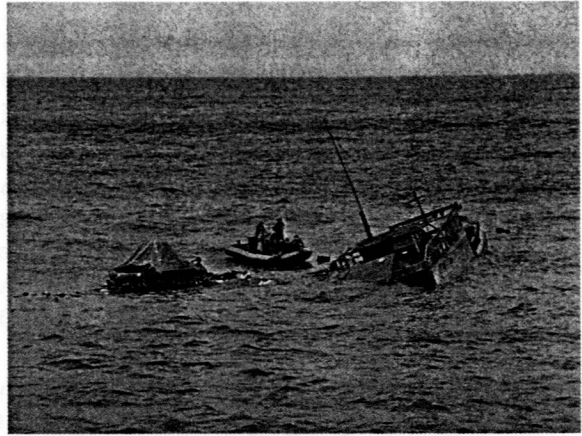
individuals who do not meet the criteria established by the Refugee Convention, to travel to a developed country and claim refugee status. Such people are commonly referred to as economic migrants, and they form much of the customer base for organised criminal gangs of people smugglers.²⁴

The Refugee Convention contains two key obligations that impact on the ability of a coastal state to counter people smuggling. The first is the prohibition of expulsion or return: "no Contracting State shall expel or return ... a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion."²⁵ Secondly, "the Contracting States shall not impose penalties, on account of their illegal entry..., on refugees who, coming directly from a territory where their life or freedom was threatened ... enter ... their territory without authorisation [sic], provided they present themselves without delay to the authorities and show good cause for their illegal entry or presence."²⁶ The impact of these two obligations is that asylum seekers who enter Australia by boat, and then claim refugee status immediately upon arrival, cannot be immediately returned to their home countries, nor can they be penalised for their illegal entry.

The Tampa Incident

On 26 August 2001, a vessel carrying 433 potential asylum seekers to Australia broke down approximately 80 miles north-west of Christmas Is. The Norwegian container ship MV *Tampa*, responding to a call from Australian Search and Rescue, intercepted the vessel, and embarked the passengers. The master of the *Tampa* had intended to take the passengers to Indonesia, but diverted to Christmas Is at the passengers' request. The *Tampa* was instructed to remain in Australia's contiguous zone, however on 29 August the *Tampa* issued a distress signal, and proceeded into Australian territorial waters surrounding Christmas Is where it was boarded by soldiers of the Special Air Service. The refugees were subsequently transferred to the HMAS *Manoora*, and then landed on Nauru.²⁷

Australia's international obligations with regard to the removal of the refugees from Australia's territorial waters arise from the



prohibition of expelling or returning a refugee in Article 32 of the Refugee Convention. This provision prevents refugees from being returned to a place of persecution, however by making appropriate arrangements with Nauru and New Zealand for their subsequent protection, Australia ensured that the asylum seekers were not being returned to a place of persecution. The Refugee Convention does not confer a right on refugees to choose their country of asylum, and Australia's actions therefore met Australia's obligations under the Refugee Convention.²⁸

Legislative Amendments

In response to the *Tampa* incident, and the ongoing pressure from people smugglers, Australian recently enacted a number of measures to counter people smuggling.

The *Migration Amendment (Excision from Migration Zone) Act 2001* removes a number of offshore territories, including Christmas and Cocos Islands, and the Ashmore Reef from the migration zone. The *Migration Amendment (Excision from Migration Zone) (Consequential Provisions) Act 2001* limits the

Refugee Convention. While compliance with the Convention limited the ability of the Government to act decisively against the asylum seekers onboard the *Tampa* until the *Tampa* had entered Australia's territorial sea, this restriction did not preclude effective action being taken before the *Tampa* reached internal waters.

Recent changes to Australian domestic law have sought to discourage the practice of people smuggling. Initiatives include limiting the rights of asylum seekers arriving in Australia's offshore territories, making provision for them to be moved on to third countries, improving the enforcement powers under the *Customs Act* and the *Migration Act*,

and imposing mandatory sentencing for people smugglers. These initiatives are all compatible with Australia's obligations under the Refugee Convention.

By enacting appropriate domestic laws, and backing this up with effective enforcement action, the Australian government has effectively met the people smuggling challenge. It has achieved this while remaining in full compliance with both the Convention, and the Refugee Convention. Recent events have demonstrated that these conventions are not an impediment to current efforts by Australia to address the problem of people smuggling into Australia

About the Author

Lieutenant Commander John Chessum joined the RNZN in 1983 and served as the Weapon Electrical Engineering Officer on HMNZ Ships Southland and Waikato in 1993-96. He completed the inaugural Australian Command and Staff Course in 2001 before taking up his current posting as the Configuration Management Project Officer in the New Zealand Naval Support Command.

¹ *Cooperation for Law and Order at Sea*, CSCAP Memorandum No. 5, Council for Security Cooperation in the Asia Pacific, Feb 2001, p. 15.

² *Oceans and Law of the Sea: Report of the Secretary General*, UN Doc. A/53/456, 5 October 1998, supra note 2 at para. 134.

³ P Ruddock, *Background Paper on Unauthorised Arrivals Strategy*, 2001, http://www.minister.immi.gov.au/media_releases/media01/r01131_bgpaper.htm, p. 1.

⁴ *ibid*, p. 2.

⁵ United Nations, *The Law of the Sea*, New York, 1983 (hereafter LOSC), Article 8(1). Part IV of the Convention refers to archipelagic states, and therefore does not apply to Australia.

⁶ This article states that the "sovereignty of a coastal State extends, beyond its land territory and internal waters."

⁷ RD Lumb, 'Australian Coastal Jurisdiction' in KW Ryan (ed), *International Law in Australia*, 2nd ed, The Law Book Company Ltd, Sydney, 1984, p. 374.

⁸ LOSC, Article 2(1).

⁹ *ibid*, Article 2(3).

¹⁰ *ibid*, Article 17.

¹¹ *ibid*, Article 19(1).

¹² *ibid*, Articles 19(2) and 19(2)(g).

¹³ *ibid*, Article 25(1).

¹⁴ *ibid*, Article 25(2).

¹⁵ *ibid*, Articles 27(1) and 27(1)(a).

¹⁶ *ibid*, Article 33(1).

¹⁷ *ibid*, Article 89.

¹⁸ A Millbank, *The Problem with the 1951 Refugee Convention*, Parliament of Australia Parliamentary Library, Canberra 2000, p. 8.

¹⁹ Refugee Convention, Article 1(A)(2).

²⁰ A Millbank, *The Problem with the 1951 Refugee Convention*, p. 8.

²¹ A Millbank, *The Detention of Boat People*, Current Issues Brief 8 2000-1, Parliament of Australia Parliamentary Library, Canberra, 2001, p. 7.

²² S Chetty, *The Refugee Review Tribunal - Facilitating Australia Compliance with its Obligations Under the Refugees Convention*, www.australianpubliclaw.com/retreating/chetty1

²³ Refugee Convention, Articles 22, 23, 16, 17-19 respectively.

²⁴ C Williams, *Unlawful Activities at Sea - An Australian Perspective*, Paper presented at the Strategic Importance of Seaborne Trade and Shipping Conference, Canberra, 3 April 2001.

²⁵ Refugee Convention, Article 33(1).

²⁶ *ibid*.

²⁷ N Hancock, *Refugee Law - Recent Legislative Developments*, Parliament of Australia Parliamentary Library, Canberra 2001, p. 2.

²⁸ I Campbell, Speech to Australian Senate, 20 September 2001.

²⁹ D Spooner, & R Hancocok, *Migration Amendment (Excision from Migration Zone)(Consequential Provisions) Bill 2001*, Bills Digest No. 70 2001-02, Parliament of Australia Parliamentary Library, Canberra, 2001, p. 4.

³⁰ *ibid*, p. 2.

³¹ 'Refugee Imbroglio now Utterly Ridiculous' *Canberra Times*, 13 October 2001.

³² The *Aceng* was an Indonesian fishing boat that attempted to enter Australian waters near Ashmore Reef. The asylum seekers onboard were transferred to HMAS *Manoora*, which at the time was also carrying the former *Tampa* rescuees.

³³ The Parliament of the Commonwealth of Australia House of Representatives, *Border Protection (Validation and Enforcement Powers) Bill 2001 - Explanatory Memorandum*, p. 3.

³⁴ I Campbell, Speech to Australian Senate, 20 September 2001.

³⁵ C Hull, 'A litany of legal horrors mars Tampa refugee affair' *Canberra Times*, 22 September 2001.

³⁶ K Lawson, 'Debate gagged to race refugee Bill through' *Canberra Times*, 27 September 2001.

³⁷ C Hull, 'A litany of legal horrors mars Tampa refugee affair'

³⁸ D Spooner, & R Hancocok, *Migration Amendment (Excision from Migration Zone)(Consequential Provisions) Bill 2001*, Bills Digest No. 70 2001-02, p. 3.