Refugee Protection in the Howard Years: Obstructing the Right to Seek Asylum

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> We will decide who comes to this country and the circumstances in which they come.
>
> Prime Minister John Howard (2001)[1]

I. Introduction

Had the hundreds of sections of the Migration Act 1958 (Cth) been condensed into a single policy statement under the Howard government, this familiar mantra would have been it. Howard's pledge to safeguard the Australian border, made in the heightened national security climate in the immediate aftermath of 11 September 2001, came to underpin a rhetorical – and, ultimately, legal – divide between the rights of so-called 'genuine' refugees, resettled in Australia from camps and settlements abroad through the offshore humanitarian program, and those arriving spontaneously in Australia, typically by boat, described variously as 'illegals', 'queue jumpers', and 'unauthorised arrivals'. This line between the 'invited' and the 'uninvited' – a distinction of no significance to the right to seek asylum and of little importance as far as protection under international law is concerned – facilitated the elaborate construction of migration excision zones, offshore processing arrangements, temporary protection visas for Convention refugees, as well as the maintenance of mandatory detention. As each stone was added to 'Fortress Australia',[2] so one of Australia's obligations under international law was chipped away. By seeking to collapse Australia's protection duties under international law into the purely discretionary realm of domestic immigration control and national security, both as a matter of discourse and policy, the Howard government was able to elicit public support for its deterrence mechanisms, deflection strategies, and treatment of asylum seekers and certain Convention refugees. Taken together, these laws were uniquely draconian in the industrialised world and inconsistent with Australia's international law commitments.

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1 Prime Minister John Howard, 'Transcript of the Prime Minister the Hon John Howard MP Address at the Federal Liberal Party Launch Sydney' (28 October 2001) <http://australianpolitics.com/news/2001/01-10-28.shtml>.

2 This draws on the EU notion of 'Fortress Europe'.

Insofar as Howard's proclamation above encapsulated the essence of his government's approach to asylum seekers, and arguably won him the 2001 federal election, it provides a convenient starting point for a broader analysis of Australian refugee law and policy over the last 11 years. This article accordingly examines certain aspects of Australia's domestic legal approach to people in search of protection from 1996–2007 in light of international law standards. Since international refugee law forms part of international human rights law more generally, the article's evaluation of the Howard government's asylum legacy necessarily requires an analysis of specific refugee law obligations, as well as underlying human rights ones.

Like any state, Australia has a sovereign right to determine who enters its territory. However, that right is not absolute. It is limited by obligations that Australia has voluntarily accepted under international treaty law and customary international law. These mandate that Australia must not return refugees – either directly or by virtue of deflection or interception policies – to territories in which they face, or risk removal to, persecution on account of their race, religion, nationality, political opinion or membership of a political social group, or torture or cruel, inhuman or degrading treatment or punishment.[3] International refugee law, in combination with human rights law, places limits on the otherwise unfettered exercise of state sovereignty, both at the point of admission to the territory and in subsequent state action relating to the treatment of refugees and asylum seekers.

The Howard government's failure (deliberate or otherwise) to distinguish between the discretionary nature of migration control – within Australia's sovereign competence – and the obligatory character of refugee protection – pursuant to Australia's voluntarily assumed international obligations – was characteristic of the government's fraught relationship with international law and its institutions.[4] International treaty obligations relating to human rights and refugees were viewed as something that only the Australian government was competent to assess and interpret, at least in relation to Australia (if not the world).[5] Responding to unfavourable comments by United Nations human rights

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3 Convention relating to the Status of Refugees (28 July 1951), 189 UNTS 137, art 33 (Refugee Convention); Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (10 December 1984), 1465 UNTS 85, art 3 (CAT); International Covenant on Civil and Political Rights (16 December 1966), 999 UNTS 171, art 7 (ICCPR).

4 See generally H Charlesworth, M Chiam, D Hovell and G Williams, *No Country is an Island: Australia and International Law* (2006).

5 See eg Commonwealth Department of Immigration, Multicultural and Indigenous Affairs, *Interpreting the Refugees Convention: An Australian Contribution* (2002), which was distributed by the government delegation at the 2002 Executive Committee meeting in Geneva. In the Foreword, then Immigration Minister, Philip Ruddock, wrote: 'This volume brings together part of my department's intellectual contribution to the Consultations [on International Protection, run by UNHCR]. It reflects a rigorous analysis of current international law and Australia's considered position on interpretation of some of the important provisions of the Convention. I commend this volume to you as a contribution to international discussion and debate.' See also discussion of 'Export of the Australian Approach' in Human Rights Watch, '"Not for

treaty committees about Australian policies, the government's view was that 'we'll work out our own destiny within our own shores'.[6] Federal Attorney-General, Daryl Williams, opined that: 'The Committee is not a court, and does not render binding decisions or judgments. It provides views and opinions, and it is up to countries to decide whether they agree with those views and how they will respond to them.'[7] Howard himself remonstrated: 'can't these things be resolved by Australians in Australia and not us having to dance attendance on the views of committees that are a long way from Australia ... I mean we are mature enough to make these decisions ourselves'.[8] As Charlesworth and others have observed, it was this attitude that fractured Australia's relationship with the UN human rights treaty bodies, not least due to the government's almost wholesale rejection of any adverse views expressed by the Human Rights Committee, most of which concerned the mistreatment of asylum seekers in relation to immigration detention, visa cancellation, and deportation.[9]

Export": Why the International Community Should Reject Australia's Refugee Policies' (Briefing Paper, September 2002) <http://www.hrw.org/press/2002/09/ausbrf0926.htm#_ftn8>; see also 'Follow My Lead on Refugees, Ruddock tells Europeans' *Sydney Morning Herald* (24 August 2002).

6 Comment by Foreign Minister Alexander Downer in 'Government to Review Participation in UN Treaty Committee System', *The 7.30 Report*, ABC Television (30 March 2000) <http://www.abc.net.au/7.30/stories/s114903.htm>, cited in D Kinley and P Martin, 'International Human Rights Law at Home: Addressing the Politics of Denial' (2002) 26 *Melbourne University Law Review* 466, 468.

7 Daryl Williams (Attorney-General) and Philip Ruddock (Minister for Immigration and Multicultural Affairs), 'Australian Government Responds to the United Nations Human Rights Committee' (Press Release, 17 December 1997), cited in ibid.

8 Quoted in L Wright, 'Howard Softens Stand on UN', *Canberra Times* (3 April 2000) 1, cited in Kinley and Martin, above n 6. The United Nations High Commissioner for Refugees (UNHCR) and its Executive Committee were also singled out as international bodies that ought to 'maintain their focus on their primary objectives': Joint media release by Australian Minister for Foreign Affairs, Alexander Downer, Attorney-General, Daryl Williams, Minister for Immigration and Multicultural Affairs, Philip Ruddock, 'Improving the Effectiveness of United Nations Committees' (29 August 2000) <http://www.foreignminister.gov.au/releases/2000/fa097_2000.html>.

9 H Charlesworth, 'Human Rights: Australia versus the UN', Democratic Audit of Australia, Discussion Paper 22/06 (August 2006) 2; see also Charlesworth, Chiam, et al, above n 4, 82-91. See eg *GT v Australia*, UN Doc CCPR/C/61/D/706/1996 (12 April 1997); *A v Australia*, UN Doc CCPR/C/59/D/560/1993 (30 April 1997); *ARJ v Australia*, UN Doc CCPR/C/60/D/692/1996 (11 August 1997); *Winata v Australia*, UN Doc CCPR/C/72/D/930/2000 (16 August 2001); *C v Australia*, UN Doc CCPR/C/76/D/900/1999 (13 November 2002); *Baban v Australia*, UN Doc CCPR/C/78/D/1014/2001 (18 September 2003); *Cabal v Australia* UN Doc CCPR/C/78/D/1020/2001 (19 September 2003); *Bakhtiyari v Australia*, UN Doc CCPR/C/79/D/1069/2002 (6 November 2003); *Madafferi v Australia*, UN Doc CCPR/C/81/D/1011/2001 (26 August 2004); *Karawa v Australia*, UN Doc CCPR/C/84/D/1127/2002 (4 August 2005); *D and E v Australia*, UN Doc CCPR/C/87/D/1050/2002 (9 August 2006); *Lim v Australia*, UN Doc CCPR/C/87/D/1175/2003 (10 August 2006); *Shafiq v Australia*, UN Doc CCPR/C/88/D/1324/2004 (13 November 2006); *Dranichnikov v Australia*, UN Doc CCPR/C/88/D/1291/2004 (16 January 2007). These cases were taken from UNHCR Refworld, UNHRC-Cases-Australia, <http://www.unhcr.org/cgi-

II. The Right to Seek Asylum in International Law

Under international law, individuals have a right to seek and enjoy asylum from persecution.[10] Although state practice does not yet support a concomitant duty on states to grant asylum – in the sense of residence and durable protection[11] – to all who seek it, the principle of *non-refoulement*, extending as it does to non-rejection at the frontier, requires states to admit asylum seekers at least temporarily in order to determine their status.[12] As a rule clearly designed to assist the refugee, its benefit should not be predicated upon formal recognition of refugee status. This is not only because it may be impractical in the circumstances (for example, in the absence of effective procedures or in a mass influx),[13] but also because this is the only way that a state can ensure it does not return an individual to persecution or other serious harm. State practice from around the world now overwhelmingly supports the view that the benefit of *non-refoulement* attaches at the moment when an asylum seeker presents himself or herself for entry, whether within the state or at its border, and it accordingly precludes removal before status determination has been carried out.[14] Hathaway describes this as a 'de facto duty to admit the refugee',[15] while Noll views it as 'a right to transgress an administrative border'.[16]

In 1948, as Article 14 of the Universal Declaration of Human Rights[17] on the right to seek and enjoy asylum was drafted, the Australian delegate argued that each state had to be free to decide the form in which the right of asylum should be applied.[18] That same approach continued to prevail some 50 years later. The Howard government's view that 'while the Refugees Convention provides a

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10 Universal Declaration of Human Rights GA Res 217A(III) (10 December 1948), art 14.

11 See G S Goodwin-Gill and J McAdam, *The Refugee in International Law* (3rd ed, 2007) 369, who note that United Nations General Assembly (UNGA or GA) resolutions simply affirm the right to seek asylum, and do not explain the meaning of the concept: GA Res 50/152 (21 December 1995) [4]; GA Res 51/75 (12 December 1996) [3]; GA Res 52/103 (9 February 1998) [5]; GA Res 53/125 (12 February 1999) [5]; GA Res 54/146 (17 December 1999) [6]; GA Res 55/74 (4 December 2000) [6].

12 Ibid 215-16.

13 Ibid 205; see further 206-08.

14 Ibid 208. For express acceptance of this principle, see also Cartagena Declaration on Refugees (22 November 1984), Conclusions and Recommendations, III, 5, in Annual Report of the Inter-American Commission on Human Rights, OAS Doc OEA/Ser.L/V/II.66/doc.10, rev.1, 190-93 (1984-85). In the context of the European Union, it has even been argued that the right to seek asylum has now transformed into a right *to* asylum: see M-T Gil-Bazo, 'The Charter of Fundamental Rights of the European Union and the Right to Be Granted Asylum in the Union's Law' (2008) 27(2) *Refugee Survey Quarterly* 33.

15 J C Hathaway, *The Rights of Refugees under International Law* (2005) 301.

16 G Noll, 'Seeking Asylum at Embassies: A Right to Entry under International Law?' (2005) 17 *International Journal of Refugee Law* 542, 548.

17 Above n 10.

18 UNGA Official Records Part 1 (3rd Session, 1948), 'Summary Records of Meetings', 121st Meeting (3 November 1948), 338 (Mr Watt, Australia).

definition of the term "refugee", it does not give to a person who falls within the definition any right to enter or remain in the territory of a Contracting State'[19] was inherently flawed as a matter of international law. As the Human Rights Committee noted as early as 1986, although the ICCPR does not contain a right of aliens to enter or reside in the territory of a state party, 'in certain circumstances an alien may enjoy the protection of the Covenant even in relation to entry or residence, for example, when considerations of non-discrimination, prohibition of inhuman treatment and respect for family life arise'.[20] In the asylum context, the UN High Commissioner for Refugees's (UNHCR) Executive Committee (to which Australia belongs) has stated that this necessarily requires that asylum seekers have 'access to fair and effective procedures for determining [their] status and protection needs'.[21]

Thus, although every state has the sovereign right to grant asylum to refugees within its territory, it must not remove them – or place them at risk of removal – to any place where they face a risk of persecution (pursuant to the Refugee Convention) or torture or cruel, inhuman or degrading treatment or punishment (by virtue of the expanded principle of *non-refoulement* under human rights law).[22] This means that a state that sends a refugee to a country that in turn expels him or her to face persecution or other serious harm will itself be liable under international law for *refoulement*, jointly or severally with the state that carries out the actual expulsion.[23] Furthermore, removal by the first state may also breach other

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19 *Interpreting the Refugees Convention: An Australian Contribution*, above n 5, 46.

20 Human Rights Committee, 'General Comment 15: The Position of Aliens under the Covenant' (1986) [5].

21 This is supported by Executive Committee Conclusions No 85 (1998) and No 99 (2004) requiring 'access to fair and effective procedures for determining status and protection needs'. On non-rejection at the frontier, see also Executive Committee Conclusion No 22 (1981). The Executive Committee is comprised of 76 states that meet annually to approve UNHCR's programs and budget, discuss issues pertaining to the protection of refugees and other displaced persons, and adopt non-binding Conclusions about matters relating to international protection.

22 ICCPR, art 7; CAT, art 3; in the European context, see also European Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights, as amended) (4 November 1950), 213 UNTS 222, art 3 (ECHR). It is also a principle of customary international law: see eg Goodwin-Gill and McAdam, above n 11, 345-54; E Lauterpacht and D Bethlehem, 'The Scope and Content of the Principle of *Non-Refoulement*: Opinion' in E Feller, V Türk and F Nicholson (eds), *Refugee Protection in International Law: UNHCR's Global Consultations on International Protection* (2003) 87.

23 See eg Goodwin-Gill and McAdam, above n 11, 353, referring to Committee against Torture, 'General Comment No 1: Implementation of Article 3 of the Convention in the Context of Article 22' (1997) [2]; *Korban v Sweden*, UN Doc CAT/C/21/D/88/1997 (16 November 1998); Human Rights Committee, 'General Comment 31: Nature of the General Legal Obligation on States Parties to the Covenant' (2004) [12]; *R v Secretary of State for the Home Dept, ex parte Adan* [2001] 2 AC 477 (HL); *TI v UK* [2000] INLR 211; GA Res 56/83, 'Responsibility of States for Internationally Wrongful Acts' (12 December 2001) Annex, art 47; Articles on Responsibility of States for Internationally Wrongful Acts 2001, annex to GA Res 56/83 (12 December 2001), art 16, as discussed in S H Legomsky, 'Secondary

applicable human rights provisions, such as where the process of refusal and return amounts to cruel, inhuman or degrading treatment.

The selected examples considered in this article highlight some of the ways in which the Howard government sought to interrupt the right to seek asylum under international law, understood within a human rights paradigm.[24]

III. Historical Background

In 1996, the Howard government inherited an immigration regime already preoccupied with domestic control over transnational human movement. Labor amendments in 1989 and 1994, under Prime Ministers Hawke and Keating respectively, prefigured a number of the later policies of Howard's coalition government. Most notably, provision for the detention and compulsory deportation of 'illegal entrants',[25] as well as the authority to sell their possessions to recover ensuing costs;[26] the introduction of 'temporary protection' into refugee and humanitarian category visas, subject to four-year periods of renewal;[27] and mandatory detention for all 'unlawful non-citizens' (non-citizens without a valid visa)[28] were Labor initiatives. Plans were made in 1989 for the establishment of the remote Port Hedland Detention Centre, which became operational in 1991. These developments were largely in response to the arrival of Cambodian, Vietnamese, and Chinese 'boat people' who fled to Australia (among other countries) after 1975, and again following the events at Tiananmen Square in 1989. The predominant aim, as Crock observes, was to limit curial review, perceived by the government as undue activism.[29] Cases such as *Re Chan Yee* in 1989 and *Chu Kheng Lim* in 1992, which questioned the legality of immigration detention and deportation, were effectively undercut by express statutory authorisation of those practices.[30] Under the Keating government, the grounds for judicial review were also codified and considerably circumscribed in the process.[31]

Refugee Movements and the Return of Asylum Seekers to Third Countries: The Meaning of Effective Protection' (2003) 15 *International Journal of Refugee Law* 567, 620-1, 642ff (the 'complicity principle').

24 On this point, see A Edwards, 'Human Rights, Refugees, and the Right "To Enjoy" Asylum' (2005) 17 *International Journal of Refugee Law* 293, 298.

25 After a grace period of 28 days; a leniency struck out by the Migration Reform Act 1992 (Cth).

26 Migration Legislation Amendment Act 1989 (Cth), s 12.

27 Minister for Immigration, Local Government and Ethnic Affairs, Media Release (27 June 1990), cited in B York, 'Australia and Refugees, 1901-2002: An Annotated Chronology Based on Official Sources' (last updated 16 June 2003) <http://www.aph.gov.au/library/pubs/online/Refugees_s3.htm>.

28 Migration Reform Act 1992 (Cth), s 13.

29 M Crock, 'Judicial Review and Part 8 of the Migration Act: Necessary Reform or Overkill?' (1996) 18 *Sydney Law Review* 267, 268.

30 *Chan Yee Kin v Minister of Immigration, Local Government and Ethnic Affairs* [1989] FCA 511, (1989) 169 CLR 179; *Chu Kheng Lim v Minister for Immigration, Local Government and Ethnic Affairs* [1992] HCA 64, (1992) 176 CLR 1. Many of the amendments to the Migration Act 1958 (Cth) can be directly pinpointed to particular court decisions, the effect of which the government sought to overturn.

31 Responding to cases such as *Kioa v West* [1985] HCA 81, (1985) 159 CLR 550;

From their initial election win in 1996 to their defeat in November 2007, the Howard government pursued an even more uncompromising policy of control over 'unlawful non-citizens' entering Australia. Between 1996 and mid-2001, developments included the formal implementation of Temporary Protection Visas for all 'unauthorised arrivals' assessed as being in need of protection,[32] and the introduction of the infamous 'super' privative clause, to reduce the 'manipulation of Australia's judicial system by unlawful non-citizens seeking to delay their departure from Australia' by 'narrowing the scope of judicial review by the High Court, and ... Federal Court'.[33] Resonance with earlier Labor policies was evident. However, their blanket application to 'unlawful non-citizens', and their undue impact upon asylum seekers as the largest group within that category, represented a significant point of departure. From late 2001, spurred on (whether through genuine concern or opportunism) by catalytic events in the United States, the Howard government unapologetically embraced a draconian 'hard-line' approach to immigration law and policy.

IV. The Development of the Pacific Strategy

(a) The *Tampa*

Although the *Tampa* incident occurred half way through Howard's 11-year period of office, it became emblematic of his government's approach to asylum generally. As the catalyst for a considerable tightening of Australia's immigration laws, it was used to justify pre-existing policies such as mandatory detention, as well as new legislative changes to border security and the processing of asylum seekers. This had a significant impact on individuals' ability to seek asylum and obtain protection in accordance with international law.

On 26 August 2001, in response to an Australian-coordinated search and rescue operation, the Norwegian *MV Tampa* rescued 433 Afghan and Iraqi asylum seekers from a sinking Indonesian ferry located 65 nautical miles off the Australian coast. The Australian Search and Rescue organisation recommended that the asylum seekers be transported to Merak in Indonesia, but in response to pleas and threats from the clearly distressed survivors that they would jump overboard if taken there, Captain Arne Rinnan instead headed for Australia's Christmas Island.[34] For three days, the *Tampa* hovered just outside the 10 nautical mile radius of Australia's territorial sea, with Australian authorities denying the ship entry into territorial waters. Captain Rinnan was warned that if he sought to disembark the asylum

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Migration Act 1958 (Cth) as amended by the Migration Reform Act 1992 (Cth) s 476; Crock, above n 29, 272.

32 Migration Amendment Regulations 1999 (Cth).

33 Migration Amendment (Judicial Review) Act 2001 (Cth), s 474; P Ruddock, 'The Broad Implications for Administrative Law under the Coalition Government with Particular Reference to Migration Matters' in J McMillan (ed), *Administrative Law under the Coalition Government* (1997) 18.

34 Captain Arne Rinnan of the *MV Tampa* in an interview with Kerry O'Brien, *The 7.30 Report*, ABC Television (6 September 2001) <http://www.abc.net.au/7.30/content/2001/s360554.htm>.

seekers within Australia, he would be subject to prosecution under the Migration Act 1958 (Cth) for people smuggling.[35] On the fourth day, however, after receiving advice from a Norwegian healthcare expert that 10 unconscious survivors and one pregnant woman in considerable pain was a 'massive crisis', and with no medical aid forthcoming (despite requests), the ship entered Australian waters.[36] Shortly thereafter, members of the Australian Defence Force approached and boarded the vessel, ordering its return to international waters. Captain Rinnan's refusal to do so led to an eight-day standoff in the waters off Christmas Island, ultimately concluding with the transfer of all asylum seekers to Nauru and New Zealand for refugee status determination.

The legal basis for the Australian government's refusal to disembark the rescued asylum seekers was never made entirely clear,[37] although Howard's mantra about border control and national security certainly played a domestic political role. It is relevant to note that just hours after an initially successful challenge was made in the Federal Court of Australia to the government's 'detention' of the asylum seekers at sea,[38] planes crashed into the World Trade Centre in New York. This is important contextual background to the subsequent border security legislation that passed swiftly through the Australian Parliament late at night, without objection by the Labor opposition. The Howard government skillfully manipulated the events of 9/11 to suggest that the asylum seekers on board the *Tampa* might themselves be terrorists and thus present a danger to the security of Australia, harnessing public support for the ensuing Pacific Strategy.[39]

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35 See D Rothwell, 'The Law of the Sea and the M/V *Tampa* Incident: Reconciling Maritime Principles with Coastal State Sovereignty' (2002) 13 *Public Law Review* 118, 118; see also M Crock, 'In the Wake of the *Tampa*: Conflicting Visions of International Refugee Law in the Management of Refugee Flows' (2003) 12 *Pacific Rim and Policy Journal* 49, 59. A year later, the Australian Immigration Minister was still describing the arrivals as 'unauthorised refugees brought to Australia by people smugglers': UN Doc A/AC.96/ SR.562 [13] (2002) (Mr Ruddock, Australia).

36 Rinnan interview with O'Brien, above n 34.

37 See Crock, above n 35, 55; see also P Mathew, 'Australian Refugee Protection in the Wake of the Tampa' (2002) 96 *American Journal of International Law* 661, 671-72; *Ruddock v Vadarlis* [2001] FCA 1329, (2001) 183 ALR 1.

38 *Victorian Council for Civil Liberties Inc v Minister for Immigration and Multicultural Affairs* [2001] FCA 1297, (2001) 110 FCR 452. This was subsequently overturned by the Full Federal Court in *Ruddock v Vadarlis* [2001] FCA 1329, (2001) 183 ALR 1.

39 Mathew describes a radio interview by Derryn Hinch with then Australian Minister for Defence, Peter Reith, which illustrates how the government let such associations be made: 'Derryn Hinch suggested that while most Afghan boat people would be fleeing the Taliban, "you have to think of the possibility that some of those males could be bin Laden appointees and could be terrorists". Mr Reith, who was then the Minister, said, "Derryn, look I don't know that. We don't know that". Mr Reith went on to comment that unlawful entry "can be a pipeline for terrorists to come in and use your country as a staging post for terrorist activities".' See P Mathew, 'Resolution 1373 – A Call to Pre-empt Asylum Seekers? (or "Osama, the Asylum Seeker")' in J McAdam (ed), *Forced Migration, Human Rights and Security* (2008) 21 (fn omitted), referring to Minister for Defence and Parliamentary Secretary interview with Derryn Hinch, Radio 3AK (13 September 2001) <http://www.minister.defence.gov.au/ReithSpeechtpl.cfm?CurrentId=999>.

Norway's legal position – that Australia had a duty under international law to allow those rescued to disembark at the nearest port (Christmas Island) – was clear and defensible. It was based on Article 98 of the Law of the Sea Convention,[40] customary international law, and humanitarian standards reflected *inter alia* in Executive Committee Conclusions from the time of the Indo-Chinese crisis (when Australia had been active). It is a position that has since been buttressed – precisely as a result of *Tampa*[41] – by amendments to the Search and Rescue and the Safety of Life at Sea Conventions expressly requiring states to 'cooperate and coordinate' to ensure that ships' masters are allowed to disembark rescued persons to a place of safety, irrespective of the nationality or status of those rescued, and with minimal disruption to the ship's planned itinerary.[42] Amendments to the 1965 Convention on Facilitation of International Maritime Traffic impose an obligation on public authorities to facilitate the arrival and departure of ships engaged in rescuing distressed people at sea, so as to provide a place of safety for them.[43] The implication is that disembarkation should occur at the nearest coastal state, which is also UNHCR's preferred approach.[44] It is significant that no other state formally supported Australia's stance, a fact perhaps most symbolically illustrated by UNHCR's conferral of the 2002 Nansen Refugee Award on the captain and crew of the *Tampa*.[45]

As Goodwin-Gill and McAdam conclude, 'it is clear that Australia (even if not exclusively) had protection responsibilities towards those rescued by the *Tampa*, arising from the undeniable refugee character of the individuals concerned, the Australian military's assertion of effective control over them through the search and rescue operation, and the fact that asylum requests were lodged in Australian waters.'[46] Fundamental to the international protection regime, and the principle of good faith, is the requirement that states do not act unilaterally and in their own self-interest. Australia's actions in relation to the *Tampa* clearly undermined this.

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40 Convention on the Law of the Sea (10 December 1982), 1833 UNTS 3.

41 International Maritime Organization (IMO) Assembly resolution A.920(22) on 'Review of Safety Measures and Procedures for the Treatment of Persons Rescued at Sea' (2001).

42 Amendments adopted May 2004, in force 1 July 2006. The amendments were based on the already applicable IMO Guidelines on the Treatment of Persons Rescued at Sea, MSC.167 (78). See International Convention on Maritime Search and Rescue (27 April 1979), 1405 UNTS 97; International Convention for the Safety of Life at Sea (1 November 1974), 1184 UNTS 278.

43 Amendments adopted 7 July 2005, in force 1 November 2006. See Convention on Facilitation of International Maritime Traffic (9 April 1965), 591 UNTS 265.

44 See eg Statement by Ms Erika Feller, Director, Department of International Protection, UNHCR, to the 24th Meeting of the Standing Committee (Geneva, 25 June 2002); UNHCR, 'Note on International Protection', UN GA Official Records, 53rd session, UN Doc A/AC.96/965 (2002) [20]; UNHCR, *Agenda for Protection* (3rd ed, October 2003) 47.

45 See also Executive Committee Conclusion No 97 (2003). Contrast the *Tampa* with the Danish/UK *Clementine Maersk* incident in 2005: see J van Selm and B Cooper, *The New 'Boat People': Ensuring Safety and Determining Status*, Migration Policy Institute, Washington DC (2005) 27.

46 Goodwin-Gill and McAdam, above n 11, 282 (fn omitted).

The *Tampa* incident, followed in close succession by the sinking of the SIEV X and the SIEV 4 'children overboard' affair in October 2001 (discussed below), led to the creation of the 'Pacific Solution', later renamed the 'Pacific Strategy'. Following the diversion of the asylum seekers on the *Tampa* to New Zealand and Nauru, the Australian government passed three new Acts comprising the 'Pacific Solution': the Border Protection (Validation and Enforcement Powers) Act 2001 (Cth); the Migration Amendment (Excision from Migration Zone) Act 2001 (Cth); and the Migration Amendment (Excision from Migration Zone) (Consequential Provisions) Act 2001 (Cth). This package of legislation was designed both as a retrospective and a prospective basis for the interdiction and offshore processing of 'unlawful' boat arrivals. The Migration Act 1958 (Cth) was amended (purportedly) to 'clarify the application of the [Refugee] Convention ... and strengthen powers to protect asylum processes against an increasing incidence of fraud in the presentation of claims'.[47] As one scholar emphasised in a recent paper, these provisions cannot be divorced from the political context: the carefully constructed 'political spectacle' of the *Tampa* stand-off set the resolute defenders of the sovereign nation against the uncertain threat of the 'other' in an emotive juxtaposition, ensuring Coalition victory in the 2001 federal election.[48]

(b) Border protection and 'Operation Relex'

The Border Protection (Validation and Enforcement Powers) Act 2001 (Cth) enshrined the Executive's right, confirmed as constitutional in *Ruddock v Vadarlis*,[49] to protect Australian borders by ejecting or detaining entrants under the Migration Act (sections 7A and 245F(8)). The primary purpose of the Act was to retrospectively validate the action taken by the government in respect of the *Tampa*. The second was to 'provide increased powers to protect Australia's borders' and to limit, if not preclude, civil or criminal litigation in respect of action taken to do so.[50] Most significantly, the Act authorised officers to remove people on detained vessels from Australia.[51] Once an 'unauthorised arrival' entered an 'excised' area, he or she could be detained and taken to a 'declared country' (with reasonable force if necessary).[52] This package of legislation formed the basis for the operational strategy developed by the Australian Defence Force (ADF) under the code name 'Operation Relex', approved by both the Defence Minister and Prime Minister for commencement in September 2001.

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47 Department of Immigration and Citizenship, 'Seeking Asylum in Australia', Fact Sheet 61 (revised 30 January 2007) <http://www.immi.gov.au/media/fact-sheets/61asylum.htm>.

48 K F Afeef, 'The Politics of Extraterritorial Processing: Offshore Asylum Policies in Europe and the Pacific', Refugee Studies Centre Working Paper No 36 (Department of International Development, University of Oxford, October 2006) 13, referring generally to the work of M Edelman, *The Symbolic Uses of Politics* (1985).

49 *Ruddock v Vadarlis* [2001] FCA 1329, (2001) 183 ALR 1 [193]-[203].

50 See Border Protection (Validation and Enforcement Powers) Act 2001 (Cth), ss 7, 9, sch 1.

51 Ibid s 9, sch 1.

52 Migration Amendment (Excision from Migration Zone) (Consequential Provisions) Act 2001 (Cth), s 198A.

Operation Relex marked a significant shift in Australia's border protection strategy, which had previously been limited to the reactive detection, interception, and escort of unauthorised boats in Australian waters to Australian ports.[53] It extended the government's new border protection policy beyond the border itself by combining operational strategies of disruption, interception, and deterrence on the high seas. The fundamental aim was to prevent the entry of unauthorised vessels into territorial waters and thereby deter asylum seekers (and people smugglers) from 'targeting' Australia. An unusual feature was the degree of micro-management from Canberra. Although the basic ADF mission was clear, certain events were to trigger directives from the government on particular operational decisions.[54]

Like other maritime operations, Operation Relex was subject to the broad directive contained in the Maritime Commander's Orders to ensure the safety of life at sea, reflecting relevant provisions in international and domestic law.[55] Two incidents in October 2001, however, brought to the fore an inherent tension between these obligations and the new legislative imperative to 'deter and deny'.

On 6 October 2001, the SIEV 4, a small wooden vessel carrying 233 asylum seekers was intercepted by *HMAS Adelaide* 103 nautical miles north of Christmas Island.[56] In accordance with Operation Relex, if the vessel gained entry to Australia's contiguous zone, a boarding party was to detain it, sail it to the outer edge of the zone, and release it if it were safe to do so. If the vessel re-entered the contiguous zone, then a boarding party was to detain the vessel, its passengers, and its crew, pending further directions from the government.[57] The aim was clear: 'at no stage were unauthorised arrivals to have access to the Australian migration zone'.[58]

The SIEV 4 entered the contiguous zone and was boarded and turned about. It was at this time that 14 distressed passengers threatening suicide jumped overboard. All were rescued and the vessel was returned to the high seas. However, Commander Banks of the *HMAS Adelaide* expressed concern about the vessel's seaworthiness. The following day, observing distress signals, the *HMAS Adelaide*

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53 Such as Operation Cranberry: see Senate Select Committee, *Report on a Certain Maritime Incident* (2002) 14, referring to '*Transcript of Evidence*', CMI 448 and 490.

54 The micro-management of Operation Relex is exemplified through documents obtained under freedom of information laws by the *Sydney Morning Herald.* Defence Minister, Peter Reith, advised then Chief of the Defence Force, Admiral Chris Barrie, in a handwritten note that: 'I'd appreciate a regular stream of sitreps [situation reports] – preferably in writing – 2 or 4 hourly': M Wilkinson, 'Secret File: Operation Relex' (28 Oct 2002) <http://www.smh.com.au/articles/2002/10/27/1035683303429.html >.

55 Provisions from both the 1947 International Convention for the Safety of Life at Sea and the 1978 Protocol concerning the obligation to 'assist other mariners in distress' are incorporated into the Commonwealth Navigation Act 1912 (Cth), ss 187, 191, schs 1 and 2.

56 *Report on a Certain Maritime Incident*, above n 53, 31-50. The description of events above is drawn from this report. 'SIEV' stands for 'Suspected Illegal Entry Vessel'.

57 Migration Act 1958 (Cth), ss 245C, 245F (see generally Div 12A).

58 Enclosure 2 to the Powell Report, HMAS Adelaide SIC I3M/LAB dated 101136Z Oct 01, cited in *Report on a Certain Maritime Incident*, above n 53, 34.

returned to the SIEV 4 and, after finding its mechanical equipment deliberately damaged, decided to tow it to Christmas Island subject to further government instructions. On the same day – notably, the day prior to the issue of writs for the federal election – then Immigration Minister, Philip Ruddock, publicly announced that the adult passengers of the SIEV 4 had thrown children overboard.[59] On 8 October, still 16 nautical miles off Christmas Island, the SIEV 4 suddenly began to sink. Passengers began entering the water as the bow of the vessel went under and were rescued by crew and life rafts from the *HMAS Adelaide*.

The following month, several senior Liberal senators and the Prime Minister ran the 'children overboard' affair as a key feature of the federal election campaign. Photographs of the rescue on 8 October, omitting the sinking SIEV 4, were disseminated as evidence of children being thrown into the water. This particular misrepresentation was exposed in the Senate Select Committee Inquiry on a Certain Maritime Incident in 2002, which also concluded that at no stage had children been thrown overboard, and that the Chief of the Defence Force was aware of this by 11 October 2001.[60] Prime Minister Howard's response was that he had acted on the intelligence available at the time. In 2004, under pressure from the Labor opposition following indications from a former senior advisor, Michael Scrafton, that the Prime Minister had known in November 2001 that the allegations were false, a second inquiry was launched. It concluded that Scrafton's claims were credible.[61]

The 2002 report of Senate Select Committee made the following observations regarding Operation Relex:

> It is clear that the policy 'to deter and deny' makes the requirement to ensure safety of life at sea paramount. At the same time, however, it requires that naval commanders do all in their power to avoid having to embark unauthorised boat arrivals on RAN vessels. *In practice*, there is significant tension between these two requirements just because, in practice, the line between a 'marginally seaworthy' vessel and a sinking fishing boat can be swiftly and unexpectedly crossed. When it is, the lives of both asylum seekers and naval personnel are placed suddenly in peril.[62]

The sinking of the SIEV X off the island of Java, Indonesia, just days after the SIEV 4 incident, resulted in the drowning of 352 asylum seekers in an area of ocean regularly patrolled by Australian border protection surveillance aircraft.[63] The incident again raised a number of questions concerning the measures taken to disrupt people smuggling under Operation Relex. The Senate Select Committee considered the absence of any direct action by the Australian navy in response to advice from the Australian Theatre Joint Intelligence Centre based on information from Coastwatch and Departmental compliance officers in Indonesia,

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59 M McLachlan, 'A Certain Maritime Incident' (2003) 3 *Counterpoints: The Flinders University Online Journal of Interdisciplinary Conference Papers* 89, 96.

60 *Report on a Certain Maritime Incident*, above n 53 [4.122].

61 Senate Select Committee on the Scrafton Evidence, *Report* (2004).

62 *Report on a Certain Maritime Incident*, above n 53 [3.40].

63 UNHCR Briefing Notes, 'Indonesia Boat Tragedy' (23 October 2001).

recommending a targeted search for SIEV X, either to prevent the vessel from sinking or to save more survivors.[64] The Committee concluded that while it could not be established beyond a reasonable doubt that intelligence at the time demanded an Australian response, it was 'extraordinary that a major human disaster could occur in the vicinity of a theatre of intensive Australian operations and remain undetected until three days after the event, without any concern being raised within intelligence and decision making circles'.[65] The Committee also emphasised that 'international and legal safety obligations should be given prominence in all mission tasking orders for ADF operations', and further recommended that 'more should be done to embed SOLAS) [Convention for the Safety of Life at Sea] obligations in the planning, orders and directives', expressing concern about 'the extent to which this imperative figured in the mission tasking of other arms of the government architecture supporting Operation Relex'.[66]

(c) Excision from the migration zone

Following *Tampa*, the Australian Parliament passed legislation to 'excise' islands and coastal ports from the migration zone:[67] ultimately around 4891 places.[68] The effect of excision was that 'unauthorised arrivals' not successfully deterred by Operation Relex and arriving at 'designated areas' to the north of the Australian mainland [69] were prohibited 'from making certain applications under the [Migration] act, particularly for a protection visa, unless the minister exercise[d] a non-compellable, non-delegable power to allow that application to occur'.[70] As Crock, Saul and Dastyari explain, excision went 'much further' than interdiction,

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64 *Report on a Certain Maritime Incident*, above n 53 [8.23], [9.2].

65 Ibid [9.145].

66 Ibid [9.147], [9.152].

67 Migration Amendment (Excision from Migration Zone) Act 2001 (Cth); Migration Amendment (Excision from Migration Zone (Consequential Provisions)) Act 2001 (Cth); Migration Amendment Regulations 2005 (No 6) (Cth) (which excised territories previously disallowed in the proposed Migration Amendment Regulations 2003 (No 8) (Cth)).

68 Response from the Department of Immigration, Multicultural and Indigenous Affairs to a question from the Committee: Senate Legal and Constitutional References Committee, *Migration Zone Exclusion: An Examination of the Migration Legislation Amendment (Further Border Protection Measures) Bill 2002 and Related Matters* (2002) 13 [2.34]. A Bill to excise the whole of the Australian mainland was withdrawn when the government realised it could not get the numbers to pass it: Migration Amendment (Designated Unauthorised Arrivals) Bill 2006 (Cth); see also Senate Legal and Constitutional Legislation Committee, *Provisions of the Migration Amendment (Designated Unauthorised Arrivals) Bill 2006* (2006).

69 Border Protection (Validation and Enforcement Powers) Act 2001 (Cth), sch 1, s 9; see also Migration Amendment (Excision from Migration Zone) (Consequential Provisions) Act 2001 (Cth), s 198A: 'designated areas' include Christmas Island, Ashmore and Cartier Islands, Cocos (Keeling) Islands, and Australian sea and resources installations, as well as any other external territories, or state or territory islands, prescribed by regulations.

70 Senate Standing Committee on Legal and Constitutional Affairs, 'Estimates (Additional Budget Estimates)', *Hansard* (19 February 2008) L&CA 113, per Andrew Metcalfe (Departmental Secretary).

because whereas interdiction is aimed at preventing boats from reaching a state's territorial waters, excision allowed Australia to 'expel boat-loads of asylum seekers even when they ha[d] reached Australian territory and would ordinarily be subject to the general law'.[71]

Although 'the effect of excision [was] not to shrink the migration zone' per se,[72] its domestic legal effect was to render certain Australian islands 'outside' Australia for the purposes of lodging visa applications, the aim of which was to prevent asylum seekers arriving by boat at outlying territories from claiming refugee status. Under section 198A of the Migration Act, an 'unlawful non-citizen' entering an 'excised' area was to be detained and taken to a 'declared country' (with reasonable force if necessary). Such people were precluded from pursuing legal proceedings against the Commonwealth relating to their status as an 'unlawful non-citizen', the lawfulness of their detention, or their transfer to an offshore processing centre (on Manus Island in Papua New Guinea and Nauru) for refugee status determination.[73]

Both Papua New Guinea and Nauru were designated by the Immigration Minister as 'declared countries' that could provide asylum seekers with 'access to effective procedures for assessing their claims'.[74] Under section 198A, a 'declared country' must meet specified standards of protection, including access for asylum seekers to effective procedures for assessing their need for protection; protection for asylum seekers, pending determination of their refugee status; and protection to people granted refugee status, pending their voluntary repatriation to their country of origin or resettlement in another country. The 'declared country' must also meet relevant human rights standards in providing that protection.[75] It is relevant to note that Papua New Guinea and Nauru's agreements to establish processing centres for asylum seekers arriving in excised Australian territory resulted in significant financial assistance from the Australian government.[76]

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71 M Crock, B Saul and A Dastyari, *Future Seekers II: Refugees and Irregular Migration in Australia* (2006) 118.

72 Senate Estimates, above n 70, L&CA 113, per Andrew Metcalfe (Departmental Secretary).

73 Migration Act 1958 (Cth), s 494AA. This section does not exclude claims brought under the original jurisdiction of the High Court of Australia (Australian Constitution, s 75).

74 Department of Immigration and Citizenship, 'Offshore Processing Arrangements', Fact Sheet 76 (accessed 18 January 2008; removed from website as at 15 June 2008); Migration Amendment (Excision from Migration Zone) (Consequential Provisions) Act 2001 (Cth), s 198A.

75 Migration Act 1958 (Cth), s 198A.

76 The Australian government paid the Nauru government $A30 million to host asylum seekers following the *Tampa* incident. From its inception in September 2001 until 31 December 2007, the total number of asylum seekers processed on Nauru and Manus Island was 1367 people, and on average most were there for one year. The cost of this offshore processing amounted to $305 million; around $2500 per asylum seeker per week: Additional Budget Estimates Hearing, 19 February 2008 (Question 29 taken on Notice) <http://www.aph.gov.au/SENATE/committee/legcon_ctte/estimates/add_0708/diac/29.pdf>. The Refugee Council of Australia estimated that the cost of offshore processing was $250,000 per claim, compared to $50,000 for onshore

The following sections examine the impact of offshore processing on asylum seekers in two respects: first, in relation to status and protection, and second, in relation to the designation of Nauru and Papua New Guinea as 'safe third countries' which could provide 'effective protection'. The second of these has broader ramifications, in that the 'safe third country' notion underscored the Howard government's approach to Australia's protection obligations more generally and was also applied to the assessment of asylum seekers onshore.

(d) Offshore processing and protection

Although Australia did not expressly deny that it had international obligations towards asylum seekers arriving in excised places, to the extent that it acknowledged that its *non-refoulement* duties attached, one of the main aims of the offshore processing mechanism was to withhold certain procedural protections from such people. In Papua New Guinea, protection claims were assessed by Australian officials alone, while in Nauru, determinations were carried out in conjunction with UNHCR.[77] Decisions were notified on the letterhead of the Australian Immigration Department.[78] However, whereas asylum seekers whose status was determined on mainland Australia had access to both merits and judicial review, those processed offshore were denied access to these appeal mechanisms. Furthermore, this also removed their ability to apply for ministerial intervention on the basis of a rejected asylum claim, since pursuant to section 417 of the Migration Act, this is only possible following a negative decision by the Refugee Review Tribunal. International standards require that individuals have access to legal advice and representation; access to up-to-date, authoritative, and public country of origin information; written reasons for decisions; and an opportunity for appeal on matters of fact and law. Decisions that have been made according to such practices are defensible and can withstand public scrutiny and questioning, whereas

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processing (ie five times the cost), while Oxfam Australia and A Just Australia estimated that the daily offshore cost per person was $1830 per person, compared to $238 onshore (ie around seven-and-a-half times the cost): see, respectively, Refugee Council of Australia, 'Submission of the Refugee Council of Australia to the 2002-2003 Refugee and Humanitarian Program Size and Composition Review: Current Issues and Future Directions (2002); A Hewett and K Gauthier, 'Counting the Cost of Unaccountable Pacific Solution', Oxfam Australia and A Just Australia, 3 September 2007 (originally published in the *The Canberra Times*, 31 August 2007) <http://www.oxfam.org.au/media/article.php?id=389>; see also K Bem et al, *A Price Too High: The Cost of Australia's Approach to Asylum Seekers*, A Just Australia and Oxfam (2007). The cooperation of Nauru and Papua New Guinea was no doubt encouraged by a five-fold increase in the annual aid budget to Nauru (see eg table of AusAID country program in *A Price Too High*, above, 42; Oxfam, *Adrift in the Pacific: The Implications of Australia's Pacific Refugee Solution* (February 2002) 3), and the grant of $22 million to Papua New Guinea for defence reform around the time agreements were negotiated (see AusAID, 'Fact Sheet' <http://www.ausaid.gov.au/country/rgnrel.cfm?Region=PapuaNewGuinea>).

77 Department of Immigration and Citizenship, above n 74.

78 J Burnside QC, 'Who Cares about Human Rights' (2003) 26 *University of New South Wales Law Journal* 703, 713.

decisions that have (or which appear to have) been made without proper regard to due process and impartiality remain open to criticism.

Furthermore, the offshore system separated the process for *recognising* Convention refugees from the actual *granting* of protection visas. Whereas people recognised as Convention refugees within Australia are issued with protection visas (provided that they are not excludable), people declared offshore to be refugees had no assurance that they would *ever* receive a visa to settle in Australia or anywhere else. Without having sought guarantees for international responsibility-sharing and durable solutions, Australia effectively made a unilateral decision to offload refugees for which it was responsible on to the international community, in breach of the object and purpose of the Refugee Convention and the international obligation of good faith.[79]

When states, like Australia, accept a responsibility under international law to protect people fleeing persecution and other forms of serious harm who arrive in their territory, they waive any right to impose (formally or informally) conditions to which other prospective immigrants might be exposed, such as in relation to skills, education, and existing links to the country. By deeming asylum seekers who arrived in excised Australian territory ineligible to lodge a protection claim within Australia, the offshore processing policy effectively created offshore camps from which Australian authorities could, on a discretionary basis, pick and choose which refugees, if any, would be settled in Australia. It risked contributing to the significant problem of refugee 'warehousing', the practice by which refugees are kept 'in protracted situations of restricted mobility, enforced idleness, and dependency – their lives on indefinite hold – in violation of their basic rights under the 1951 UN Refugee Convention.'[80] From Australia's perspective, it effectively transformed asylum from a legal, humanitarian *responsibility* into a migration stream.[81]

The Refugee Convention is premised on the understanding that states will protect refugees in their territories, or cooperate with other states to find durable solutions for them (local integration, voluntary repatriation, and resettlement). Transferring asylum seekers to offshore processing centres was not a durable solution, and the processing mechanism in place meant that no durable solution was forthcoming for recognised refugees. Indeed, as the new Labor Immigration Minister, Senator Chris Evans, explained at a Senate Estimates Committee hearing in February 2008:

> The vast majority of the people who were subject to the Pacific solution ended up living in Australia. But the then government held out this sort of rhetorical position

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79 See discussion in Pt VI below.

80 M Smith, 'Warehousing Refugees: A Denial of Rights, A Waste of Humanity' in US Committee for Refugees, *World Refugee Survey 2004*, (2004) 38; see also G Chen, 'A Global Campaign to End Refugee Warehousing' in US Committee for Refugees, *World Refugee Survey 2004* (2004) 21.

81 By contrast to Australia's offshore humanitarian program, this scheme sought to divest Australia of any responsibility for durable protection. State practice is to provide at least interim protection to refugees, pending a durable solution.

> that somehow they were providing strong border security by leaving people on Nauru. The reality is that eventually the government had to bring them to Australia. Quite frankly, it seems to me that people were just left to rot for long periods because the government could not deliver on its promise to send them somewhere else. My advice is that the options for third country resettlement are extremely limited. We are not likely to get takers. The previous government had been unsuccessful in more recent times in finding alternative takers for those persons. So they were either left on Nauru or the government conceded and they came to Australia.[82]

This was supported by the Department of Immigration and Citizenship's Secretary, Andrew Metcalfe, who stated:

> There were of course some people – largely that group from the *Tampa* – who were resettled in New Zealand. But following that 2001 resettlement, there was very limited resettlement elsewhere. A number of people went to Scandinavia but the vast majority came to Australia. It is the department's assessment that resettlement of people in other places is extremely unlikely. That is essentially for the reason that those folks are seen as Australia's responsibility and Australia is a country with sufficient resources to deal with the issue.[83]

From an international law perspective, the excision of certain parts of Australian territory from the 'migration zone' never relieved Australia of its obligations under international law. [84] States retain jurisdiction, and hence responsibility, over all those within their territories, and over all whom they effectively control.[85] As a matter of state responsibility, liability for breaches of international law can be both joint and several. Given Australia's apparent assumption of control over asylum seekers held in Nauru and Papua New Guinea, it retained responsibility for any violations of international law relating to their treatment, under the Refugee Convention and its Protocol,[86] general international law, and human rights law. Although Australia's transfer of asylum seekers to Nauru and Papua New Guinea was premised on the notion that they were 'safe third countries', the next section goes on to show that this designation was questionable, both as a matter of law and fact.

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82 Senate Estimates, above n 70, L&CA 124, per Senator Chris Evans (Immigration Minister). The excision regime established by the Howard government remains in effect and the new Labor government does not propose to dismantle it, although it has agreed to cease processing asylum claims in other countries, such as Papua New Guinea and Nauru: see comments by Senator Chris Evans, L&CA 89, 139-40. Christmas Island, the Cocos Islands, Ashmore and Cartier Islands will definitely remain excised; no decision has formally been taken with respect to the other excised islands: L&CA 113.

83 Senate Estimates, above n 70, L&CA 124, per Andrew Metcalfe (Departmental Secretary).

84 See eg Vienna Convention on the Law of Treaties (23 May 1969), 1155 UNTS 331, arts 27, 29. See eg *Amuur v France* (1996) 22 EHRR 533; I Brownlie, *System of the Law of Nations: State Responsibility, Part I* (1983), 135-37, 159-66.

85 *Banković v Belgium* (2001) 11 BHRC 435.

86 Protocol relating to the Status of Refugees (31 January 1967), 606 UNTS 8791.

(e) Safe third countries and 'effective protection'

The Australian model of extraterritorial processing essentially relied upon an extension of the 'safe third country' notion. This mechanism facilitates the movement of asylum seekers elsewhere without consideration of the merits of their claims. It was used in Australia to justify the removal of asylum seekers to countries through which they had transited;[87] the denial of access to permanent protection for refugees who had spent at least seven days in a country where they could have received 'effective protection' on their way to Australia (a particularly restrictive form of the Temporary Protection Visa);[88] and the establishment of processing centres in Nauru and Papua New Guinea, to which unauthorised offshore arrivals would be removed.[89] As Foster notes, extraterritorial processing was a particularly extreme version of the safe third country notion, since it permitted the transfer of asylum seekers to countries through which they had never transited nor had any other connection.[90]

The 'safety' of the third country in principle justifies the transfer of protection obligations arising from asylum claims within territory or jurisdiction. Yet, although the transfer of asylum seekers to a third country may be permissible under international refugee law, this will only be the case where appropriate 'effective protection' safeguards are met.[91] Concerns about the due diligence with which states carry out assessments of 'safety' in order to rid themselves of certain asylum seekers or refugees have been the subject of extensive discussion by scholars and international institutions alike.[92] Any transfer agreement must, at a minimum,

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87 Migration Act 1958 (Cth), s 36(3).

88 Migration Regulations 1994 (Cth), sch 2, cl 866.215.

89 Migration Act 1958 (Cth), s 198A.

90 M Foster, 'Protection Elsewhere: The Legal Implications of Requiring Refugees to Seek Protection in Another State' (2007) 28 *Michigan Journal of International Law* 223, 224 fn 3. This article provides a very in-depth analysis of the concept of effective protection and its compatibility with the Refugee Convention.

91 Executive Committee Conclusion No 85 (1998), Executive Committee Conclusion No 87 (1999). Conclusion No 85 provides that the host country must treat the asylum seeker in accordance with accepted international standards, ensure protection against *refoulement*, and provide the asylum seeker with the possibility to seek and enjoy asylum. See generally Legomsky, above n 23, 567; S H Legomsky, *Secondary Refugee Movements and the Return of Asylum Seekers to Third Countries: The Meaning of Effective Protection*, UNHCR Legal and Protection Policy Research Series, Geneva, February 2003, PPLA/2003/01; Foster, above n 90; the Michigan Guidelines on Protection Elsewhere (2007) 28 *Michigan Journal of International Law* 207; S Kneebone, 'The Legal and Ethical Implications of Extraterritorial Processing of Asylum Seekers: The "Safe Third Country" Concept', in McAdam (ed), above n 39, 129; and a special journal issue on extraterritorial processing: (2006) 18 *International Journal of Refugee Law* 487ff.

92 See eg UNHCR, 'Note on International Protection' UN Doc A/AC.96/914 (7 July 1999); Report of the Human Rights Committee, vol 1, (2002-03) UNGA Official Records (58th Session) Supp No 40 (A/58/40), 'Estonia' [79(13)]; C Phuong, 'The Concept of "Effective Protection" in the Context of Irregular Secondary Movements and Protection in Regions of Origin', *Global Migration Perspectives* No 26 (April 2005); Lisbon Expert Roundtable, *Summary Conclusions on the Concept of 'Effective Protection' in the Context of Secondary Movements of Refugees and Asylum-Seekers*

ensure that the asylum seeker will be admitted, enjoy effective protection against *refoulement*, have access to a fair and effective asylum procedure, and be treated in accordance with international refugee and human rights law and standards.

In addition to justifying offshore processing, the Howard government also used safe third country provisions as a basis for denying refugee status determination altogether. In December 1999, section 36(3) was inserted into the Migration Act to provide:

> Australia is taken not to have protection obligations to a non-citizen who has not taken all possible steps to avail himself or herself of a right to enter and reside in, whether temporarily or permanently and however that right arose or is expressed, any country apart from Australia, including countries of which the non-citizen is a national.

This provision effectively rendered nugatory the High Court's decision in 2005 in *NAGV* that Australia owes protection obligations to all people in its territory who satisfy the 'refugee' definition, irrespective of the possibility of transfer to a 'safe third country'.[93] In essence, section 36(3) codified the long line of pre-*NAGV* jurisprudence, which had held that Australia had no protection obligations towards refugees who could be removed to a third state in which effective protection would be forthcoming.[94] In the government's words, this reflected the 'accepted principle that international protection is protection of last resort', and that 'national protection or other "effective protection" takes precedence over international protection provided by Australia'.[95]

Section 36(3) extends to people who have reached a so-called 'country of first asylum' – most often a country through which an asylum seeker has transited – the implication being that he or she has already found protection there.[96] In Australia, the 'seven-day rule' introduced by the Migration Amendment (Excision from Migration Zone) (Consequential Provisions) Act 2001) operates to deny to asylum seekers who have resided for at least seven days in a transit state where they could have sought 'effective protection' the right to seek asylum in Australia.[97] The Minister has a non-compellable, personal discretion to waive this bar if he or she considers it in the public interest to do so.[98]

(9-10 December 2002); Legomsky, above n 91; J van Selm, *Access to Procedures: 'Safe Third Countries', 'Safe Countries of Origin' and 'Time Limits'*, UNHCR and Carnegie Endowment for International Peace, Background Paper for Third Track of Global Consultations (2001); S Taylor, 'Protection Elsewhere/Nowhere' (2006) *International Journal of Refugee Law* 289; and the references above n 91.

93 *NAGV and NAGW of 2002 v Minister for Immigration and Multicultural and Indigenous Affairs* [2005] HCA 6, (2005) 213 ALR 668. Section 36(3) was not applicable in *NAGV*, since the applicants had applied for protection visas prior to its adoption.

94 The cases began with *Minister for Immigration and Multicultural Affairs v Thiyagarajah* (1997) 80 FCR 543.

95 *Interpreting the Refugees Convention: An Australian Contribution*, above n 5, 51.

96 Foster, above n 90, 224.

97 Migration Act 1958 (Cth), s 91P(2); Migration Regulations 1994 (Cth), sch 2, cls 200.212, 202.212, 204.213.

98 Migration Act 1958 (Cth), s 91Q.

Part 2, Division 3, Subdivision AI of the Migration Act 1958 sets out requirements for prescribing 'safe third countries', providing a legislative basis for denying altogether the right to apply for a protection (or other) visa to 'certain non-citizens'.[99] Under section 91D, the Minister must provide a statement in relation to a prescribed country, setting out its: (a) compliance with relevant international law concerning the protection of people seeking asylum; (b) compliance with relevant human rights standards for people in relation to whom the country is prescribed as a safe third country; and (c) willingness to allow any person in relation to whom the country is prescribed as a safe third country to: (i) go to the country; (ii) remain in the country during the period in which any claim by the person for asylum is determined; and (iii) if the person is determined to be a refugee while in the country, to remain until a durable solution relating to the permanent settlement of the person is found.

Under the Pacific Strategy, this concept was extended to all 'unlawful non-citizens' seeking protection at an 'excised offshore location'. Pursuant to section 198A(3) of the Migration Act, the Immigration Minister could designate as 'safe' countries to which such asylum seekers would be transferred for processing if they could provide: (a) access, for people seeking asylum, to effective procedures for assessing their need for protection; (b) assistance, pending status determination; (c) protection to recognised refugees, pending voluntary repatriation or resettlement; and (d) meet relevant human rights standards in providing that protection. Nauru and Papua New Guinea were declared as safe third countries under this provision (examined below). Whereas the practice of transferring asylum seekers to third states for processing had previously been limited to refugees who had passed through other countries on their way to Australia (section 36(3)), this new policy targeted individuals for whom Australia might be the first country in which asylum could be claimed: in other words, where they had come directly to Australia. The attempted extension of this policy to *all* boat arrivals, even those reaching mainland Australia,[100] made clear that the intention was to close down Australia as an asylum country for persons fleeing by boat, contravening the very foundation of the international protection regime and suggesting evidence of a lack of good faith in the implementation of Australia's obligations under international law. Ministerial discretion to admit certain asylum seekers to processing on the mainland would have been insufficient to overcome this breach.[101]

From an international law perspective, a key concern with the safe third country procedure is the absence of individualised assessment. Blanket designation of particular countries as 'safe' is inherently problematic, since safety for particular individuals will necessarily depend on their background and profile.[102] For this

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99 Migration Act 1958 (Cth), s 91A.

100 See Migration Amendment (Designated Unauthorised Arrivals) Bill 2006 (Cth).

101 Migration Amendment (Designated Unauthorised Arrivals) Bill 2006 (Cth), proposed s 5F.

102 UNHCR, 'Note on International Protection', UN Doc A/AC.96/914 (7 July 1999) [20]. See also Executive Committee Conclusion No 85 (1998); Executive Committee

reason, transfer in accordance with the mechanism above placed Australia at risk of breaching the principle of *non-refoulement*, since it could not be guaranteed that each individual would be readmitted to the third country, enjoy effective protection against *refoulement*, have the possibility to seek and enjoy asylum, and be treated in accordance with accepted international standards.[103]

Indeed, in 2001, the Federal Court concluded that:

> The test for determining whether a particular country is a safe third country is necessarily a test related to the individual circumstances of the person seeking protection in Australia. The issue is whether the third country concerned will be safe for that person or whether there is a real chance that the third country will *refoule* the person to a country where he or she would be at risk of persecution for a Convention reason.[104]

Yet, it was held that the ability to enter and remain in a third country 'as a matter of practical reality', regardless of whether a formal legal right to do so existed, was sufficient to satisfy the requirement of effective protection.[105] Thus, in the government's view, removal on the basis of section 36(3) was consistent with Australia's *non-refoulement* and protection obligations. In 2002, the Full Federal Court affirmed this conclusion in the joint application of five Iraqi nationals who had transited through Syria before their arrival and claim for protection in Australia.[106]

From an international law perspective, while it is imperative that the third state comply with international refugee and human rights law in practice, not just in theory,[107] the absence of legal safeguards is significant. As the Lisbon Expert Roundtable on effective protection noted in 2002, the third state must be a signatory to the 1951 Convention and/or 1967 Protocol and comply with those instruments, or *at least* demonstrate that it has developed a practice akin to what those instruments require,[108] in addition to granting access to fair and efficient determination procedures, which include protection grounds that would be

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Conclusion No 87 (1999).

103 UNHCR, 'Note on International Protection', UN Doc A/AC.96/914 (7 July 1999) [19]. UNHCR has documented cases of *refoulement* as the result of applying the 'safe third country' mechanism: see eg UNHCR, 'Note on International Protection', UN Doc A/AC.96/898 (3 July 1998) [14].

104 *Al Toubi v Minister for Immigration and Multicultural Affairs* [2001] FCA 1381 [32]. See also *Al-Rahal v Minister for Immigration and Multicultural Affairs* [2001] FCA 1141, (2001) 184 ALR 698.

105 *Al-Rahal*, ibid 699 (Spender and Tamberlin JJ).

106 *V872/001 v Minister for Immigration and Multicultural Affairs* [2002] FCAFC 185, (2002) 190 ALR 268.

107 In particular, the third state must be a signatory to the Refugee Convention and/or its Protocol, and comply with those instruments, or at least demonstrate that it has developed a practice akin to what those instruments require: see Lisbon Expert Roundtable, 'Summary Conclusions on the Concept of "Effective Protection" in the Context of Secondary Movements of Refugees and Asylum-Seekers' (9-10 December 2002) [15(e)].

108 Ibid; see also UNHCR, 'Note on International Protection', UN Doc A/AC.96/914 (7 July 1999) [19].

recognised in the state in which asylum was originally sought, take into account any special vulnerabilities of the individual, and maintain the privacy interests of the individual and his or her family.[109] Although mere ratification of human rights and refugee instruments does not equate to compliance with their standards, an absence of ratification raises particular concerns about what level of protection might realistically be expected.[110]

For example, the designation of Nauru and Papua New Guinea as safe countries for offshore processing highlights some of these concerns. Nauru is not a party to the Refugee Convention or Protocol. Papua New Guinea is a party to those instruments, but has imposed reservations that reject Convention rights relating to employment, housing, education, freedom of movement, penalties, expulsion, and naturalisation. Neither Nauru nor Papua New Guinea is party to the International Covenant on Economic, Social and Cultural Rights (ICESCR).[111] Papua New Guinea is not a party to key human rights instruments such as the ICCPR and the Convention against Torture. Nauru has signed but not ratified those treaties, and hence has not agreed to be bound by them under international law. Undertakings via memoranda of understanding to respect the principle of *non-refoulement*, as undertaken between Australia and these countries, were political agreements only and not binding as a matter of international law.[112] Accordingly, they could not have exculpated Australia from its own *non-refoulement* obligations were acts of *refoulement* to occur. Furthermore, human rights abuses in Papua New Guinea have been well-documented,[113] including the use of torture (against adults and children) by police. It has been noted that although that country is formally a party to the Refugee Convention, 'it has not enacted enabling legislation and has not established a system for providing protection to refugees'.[114] Nauru has been

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109 Ibid [15]. See also Legomsky's seven elements of 'effective protection': Legomsky, above n 91, 52-81.

110 See concerns about the designation of Nauru and Papua New Guinea as safe countries under s 198A: J McAdam, 'Submission No 64' to Senate Legal and Constitutional Committee Inquiry into the Provisions of the Migration Amendment (Designated Unauthorised Arrivals) Bill 2006 (May 2006) 8-9 <http://www.aph.gov.au/Senate/committee/legcon_ctte/migration_unauthorised_arrivals/submissions/sub64.pdf>.

111 International Covenant on Economic, Social and Cultural Rights (16 December 1966), 993 UNTS 3 (ICESCR).

112 See discussion about the agreements Australia has undertaken with Nauru and Papua New Guinea in S Taylor, 'The Pacific Solution or a Pacific Nightmare? The Difference between Burden Shifting and Responsibility Sharing' (2005) 6 *Asian-Pacific Law and Policy Journal* 1, 8-9; see also 'MOU on Asylum Seekers Signed with Nauru', Australian Minister for Foreign Affairs, Media Release (11 December 2001) <http://www.dfat.gov.au/media/releases/foreign/2001/fa177_01.html>.

113 See eg US Department of State, *Country Reports on Human Rights Practices 2005*, 'Papua New Guinea' (8 March 2006) <http://www.state.gov/g/drl/rls/hrrpt/2005/61623.htm>; Human Rights Watch, *World Report 2006*, 'Papua New Guinea' <http://hrw.org/english/docs/2006/01/18/png12253.htm>; Amnesty International, *Amnesty International Report 2005*, 'Papua New Guinea' <http://web.amnesty.org/report2005/png-summary-eng>.

114 US Department of State, *Country Reports on Human Rights Practices 2005*, 'Papua New Guinea' (8 March 2006) <http://www.state.gov/g/drl/rls/hrrpt/2005/61623.htm>.

criticised for holding asylum seekers in 'isolated, Spartan living conditions in a refugee processing center', providing limited access to the centre, and for judicial delays.[115]

Even if third states are able to provide protection from *refoulement*, 'effective protection' requires more than that alone.[116] Following an extensive review of policy and practice, Goodwin-Gill and McAdam conclude that international law presently only permits the removal of refugees and asylum seekers to a third state where that state is able to provide effective guarantees, both substantive and procedural, including:

> (a) willingness to readmit asylum seekers; (b) acceptance of responsibility to determine claims to refugee status, notwithstanding departure from the country in question or the circumstances of initial entry; (c) the treatment of applicants during the determination process in accordance with generally accepted standards; and (d) some provision with respect to subsistence and human dignity issues, such as social assistance or access to the labour market in the interim, family unity, education of children, and so forth.[117]

V. The Interception of International Law?

Article 3 of the Refugee Convention prohibits countries from discriminating between refugees on the basis of race, religion, or country of origin, and this provision applies irrespective of whether a refugee's status has been finally determined. It is supported and extended by anti-discrimination provisions in international human rights law.[118] By implementing different processes and standards of treatment based solely on the place of arrival – on mainland Australia or an excised place – offshore processing arguably contravened these provisions.

Contrary to the Australian government's view, Article 3 of the Refugee Convention does not permit 'States to provide or withhold different rights and benefits from different groups of refugees over and above those required by the Convention, provided that discrimination does not occur within its obligatory provisions.'[119] International law permits distinctions between aliens who are in materially different circumstances, but prohibits unequal treatment of those

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115 US Department of State, *Country Reports on Human Rights Practices 2005*, 'Nauru' (8 March 2006) <http://www.state.gov/g/drl/rls/hrrpt/2005/61620.htm>.

116 Goodwin-Gill and McAdam, above n 11, 394; See Executive Committee Conclusion No 58 (1989); Executive Committee Conclusion No 15 (1979). On 29 November 2007, the Canadian Federal Court ruled that the US could not automatically be considered to be a 'safe third country' (pursuant to a bilateral safe third country agreement between the US and Canada, which took effect on 29 December 2004): *Canadian Council of Refugees v Canada* (2007) FC 1262. In his final order on 17 January 2008, Justice Phelan ruled that the designation of the US as a safe third country would be quashed as of 1 February 2008. However, on 31 January 2008, the Federal Court of Appeal granted a stay of the order while the government appeals the decision.

117 Goodwin-Gill and McAdam, above n 11, 396 (fn omitted).

118 Eg ICCPR, art 2; ICESCR, art 2.

119 See *Interpreting the Refugees Convention: An Australian Contribution*, above n 5, 146.

similarly placed.[120] In general, differential treatment between non-citizens is allowed where the distinction pursues a legitimate aim, has an objective justification,[121] and there is reasonable proportionality between the means used and the aims sought to be realised.[122] While Australia might have sought to invoke immigration control as a 'legitimate aim' in this context, it would have been much more difficult to establish that the means by which that aim is sought to be realised were *proportionate* to the aim itself. In this context, the difference in treatment was based solely on place (and usually therefore also mode – boat rather than air) of arrival. Asylum seekers, whether held onshore or offshore, are otherwise in materially identical circumstances: they are seeking protection from persecution and other forms of serious harm and have an equal need for fair procedures and humane conditions in which to have their protection claims determined. Justifying differential treatment by domestically recharacterising Australian territory is an arbitrary distinction contrary to international law. This is emphasised by Article 31 of the Refugee Convention, which prohibits states from imposing penalties on asylum seekers who arrive without passports or visas.

Article 31(1) of the Refugee Convention provides that states must not impose penalties on refugees for illegal entry or presence, provided that they have come directly from a territory where their life or freedom was threatened, present themselves without delay to the authorities, and show good cause for their illegal entry or presence. Having a well-founded fear of persecution is generally recognised in itself as constituting 'good cause'.[123] This protection applies not only to those ultimately accorded refugee status, but also to people claiming asylum in good faith, including those travelling on false documents.[124] This is a fundamental aspect of the Refugee Convention because it underscores the right of people in distress to seek protection, even if their actions constitute a breach of the domestic laws of a country of asylum. It recognises that the circumstances compelling flight commonly force refugees to travel without passports, visas, or other documentation, coupled with the fact that restrictive immigration policies mean that

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120 N Blake and R Husain, *Immigration, Asylum and Human Rights* (2003) [6.16]; see also *Minister for Immigration and Multicultural Affairs v Ibrahim* [2000] HCA 55, (2000) 204 CLR 1 [29]-[34] (Gaudron J); *Lithgow v UK* (1986) 8 EHRR 329.

121 Committee on the Elimination of Racial Discrimination, 'General Recommendation XIV: Definition of Discrimination' (22 March 1993) [2]; Human Rights Committee, 'General Comment 18: Non-Discrimination' (1989) [13]; *Abdulaziz v UK* (1985) 7 EHRR 471 [78].

122 G S Goodwin-Gill, *International Law and the Movement of Persons between States*, (1978) 78; Human Rights Committee, 'General Comment 18' above n 121 [13]; ECOSOC Commission on Human Rights, 'Prevention of Discrimination: The Rights of Non-Citizens' (26 May 2003), UN Doc E/CN.4/Sub.2/2003/23 [24]; *Belilos v Switzerland* (1988) 10 EHRR 466.

123 G S Goodwin-Gill, 'Article 31 of the 1951 Convention relating to the Status of Refugees: Non-Penalization, Detention, and Protection' in Feller, Türk and Nicholson (eds), above n 22, 196; and Expert Roundtable, 'Summary Conclusions: Article 31 of the 1951 Convention' (Geneva, 8-9 November 2001) [10(e)] in Feller, Türk and Nicholson (eds), above n 22, 253. See also *R v Uxbridge Magistrates' Court; ex parte Adimi* [2001] QB 667, 678; Executive Committee Conclusion No 15 (1979) [(h)].

124 *R v Uxbridge Magistrates' Court; ex parte Adimi* [1999] Imm AR 560.

most refugees are likely to be ineligible for visas sought through official migration channels.

Whether or not the term 'penalties' encompasses only criminal sanctions, or also extends to administrative penalties, is not resolved by the text of the Refugee Convention itself. However, Goodwin-Gill and McAdam argue that 'Article 31 warrants a broad interpretation reflective of its aim to proscribe sanctions on account of illegal entry or presence', on the basis that an 'overly formal or restrictive approach is inappropriate, since it may circumvent the fundamental protection intended'.[125] In particular, Executive Committee Conclusion No 22 (1981) provides that asylum seekers should 'not be penalized or exposed to any unfavourable treatment solely on the ground that their presence in the country is considered unlawful'.[126] Irregular or 'unlawful' movement does not reveal anything about the credibility of a protection claim. Yet, asylum seekers arriving at excised places had access to a markedly inferior determination regime, which lacked the protection outcomes and procedural safeguards of the onshore system.[127] At the very least, this, in combination with the other aspects of the Pacific Strategy, constituted a breach of Australia's good faith obligations under international law.[128]

VI. Conclusion: In Good Faith?

International law distinguishes between conduct that constitutes a substantive breach of a rule, and conduct that, while technically within the letter of the law, cannot be said to be a good faith interpretation of it (although the former may also encompass the latter).[129] A breach of good faith arises when, objectively assessed, a state's acts or omissions, either alone or combined, render the fulfillment of treaty obligations obsolete, or defeat a treaty's object and purpose. A lack of good faith

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125 Goodwin-Gill and McAdam, above n 11, 266 (fn omitted).

126 Executive Committee Conclusion No 22 (1981), s IIB(2)(a).

127 Note that the Immigration Minister made clear that the differing procedures and entitlements were intended to deter arrivals: 'These changes send a strong message to people who want to risk their lives by travelling to Australia illegally': 'Minister Seeks To Strengthen Border Measures' (11 May 2006) <http://www.minister.immi.gov.au/media_releases/media06/v06113.htm>.

128 See also A Edwards, 'Tampering with Refugee Protection: The Case of Australia' (2003) 15 *International Journal of Refugee Law* 192, 197.

129 This section of the article draws heavily on Goodwin-Gill and McAdam, above n 11, 387-90. See Vienna Convention on the Law of Treaties, arts 26, 31; Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States in accordance with the Charter of the United Nations, GA Res 2625 (XXV) (24 October 1970) [3]; see generally G S Goodwin-Gill, 'State Responsibility and the "Good Faith" Obligation in International Law', in M Fitzmaurice and D Sarooshi (eds), *Issues of State Responsibility before International Judicial Institutions: The Clifford Chance Lectures* (2004) 75; UNHCR's submissions in *R (European Roma Rights Centre) v Immigration Officer at Prague Airport, (UNHCR Intervening)* [2004] UKHL 55 [2005] 2 AC 1: UNHCR, 'Written Case' (2005) 17 *International Journal of Refugee Law* 427 [24]-[38]. The House of Lords rejected the issue of good faith on the basis that the 1951 Convention did not apply, as the individuals concerned had not yet left their country of origin: *Roma Rights Case* [64] (Lord Hope).

will therefore arise if a state 'seeks to avoid or to "divert" the obligation which it has accepted, or to do indirectly what it is not permitted to do directly'.[130] Through its restrictive interpretation of the Refugee Convention, its attempts to distance Australia from its responsibilities arising under that treaty, and the absence of domestically enforceable rights stemming from Australia's international human rights law obligations, the Howard government engaged in practices designed to avoid literal breaches of the Refugee Convention, but which together could not be said to reflect a good faith interpretation of its provisions.

Although the Refugee Convention does not contain a provision expressly requiring states to process asylum seekers within their borders:

> the right to seek asylum, when read in conjunction with the right to freedom of movement and the totality of rights protected by the Universal Declaration and ICCPR, implies an obligation on States to respect the individual's right to leave his or her country in search of protection. Thus, States that impose barriers on individuals seeking to leave their own country, or that seek to deflect or obstruct access to asylum procedures, may breach this obligation and, more generally, demonstrate a lack of good faith in implementing their treaty obligations.[131]

Thus, while states do not have a positive obligation to facilitate travel by asylum seekers to their territories, they do not have an unfettered sovereign right to frustrate their movement either. Any measures of immigration control must be exercised proportionately and within the boundaries of international law. This applies not only to refugees within a state's own territory, but also those subject to enforcement action outside its territorial jurisdiction, and requires states to ensure 'that refugees are not returned in any manner to territories in which they face – or risk return to – persecution, torture, or other cruel, inhuman or degrading treatment or punishment; *and*, if sent elsewhere, have access to protection and durable solutions'.[132]

Australia's attempt to contract out its obligations to Nauru and Papua New Guinea undermined the multilateral nature of the Refugee Convention regime and frustrated its object and purpose.[133] As UNHCR powerfully observed:

> such an agreement would create disparities between different parts of the world with regard to respect for international obligations and matters for which a common and coherent international practice is required. Such disparities have the effect of distorting the burden-sharing rationale underlying the 1951 Convention, by shifting the responsibility for examining certain types of asylum claims to other countries. The 1951 Convention, together with the 1967 Protocol, is framed to apply without geographic restrictions or discrimination. Its efficacy depends on it being global in scope and adherence, and if *inter se* agreements were permitted, the treaty regime as a whole would be rendered meaningless.[134]

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130 UNHCR, 'Written Case', above n 129 [32].

131 Goodwin-Gill and McAdam, above n 11, 370 (fns omitted).

132 Ibid 389-90.

133 Ibid 390.

134 UNHCR as intervener in *R (European Roma Rights Centre) v Secretary of State for the Home Department* [2003] EWCA Civ 785: UNHCR Skeleton Argument for the Court of Appeal [102].

The broader international protection regime, comprising refugee law, human rights law, and more generally applicable rules informed by the principle of good faith, provide a normative and institutional framework for solutions. Indeed, unilateral action on this front may be counter-productive: it may undermine other states' willingness to find solutions jointly, since '[t]he very nature of the international protection regime is premised on States *not* acting unilaterally and in their own self-interest.'[135] As the International Court of Justice emphasised in 1951, in human rights treaties (such as the Refugee Convention), 'the contracting States do not have any interests of their own; they merely have, one and all, a common interest, namely, the accomplishment of those high purposes which are the *raison d'être* of the [Genocide] convention'.[136] By obstructing the right to seek asylum, the Howard government sought to avoid engaging Australia's protection obligations under the Refugee Convention. The cumulative effect of Australia's deflection policies, its application of the Refugee Convention, and its treatment of asylum seekers and certain Convention refugees, cannot be regarded as a good faith interpretation of international law.

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135 Goodwin-Gill and McAdam, above n 11, 390.

136 *Reservations to the Genocide Convention* (Advisory Opinion) [1951] ICJ Rep 15, 23.