ASYLUM SEEKER POLICY IN AUSTRALIA: SENDING REFUGEES BACK TO PERSECUTION

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DECLARATION OF ORIGINALITY

I declare this thesis is a true account of my own research, unless otherwise indicated, and has not previously been submitted for examination at Murdoch University or any other institution.

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ABSTRACT

Australia has shifted the way it conceives its international obligations under the Refugee Convention, calling into question its continuing viability as a protection instrument. The Refugee Convention was a progressive step towards the international recognition of human rights and justice. It invokes the key obligation of non-refoulement, which prohibits State Parties from returning a vulnerable person to a place where their life or security is threatened. The Refugee Convention must contend with state sovereignty, which is the integral right of states to control the entry and residence of those within their territories. In the last few decades, the Refugee Convention has been confronted by a number of major challenges. In the current climate, the principle of state sovereignty is in competition with the humanitarian goal of protecting refugees. When faced with asylum seekers at their borders, many States have adopted restrictive practices in order to evade their protection obligations. This indicates a clear preference for sovereignty at the expense of human rights. While historically committed to the Refugee Convention, the governments of Australia have since implemented a range of measures to deter refugees from seeking asylum. Of these, the most contentious include prolonged mandatory detention and offshore processing. These policies are a blatant violation of Australia’s obligations under the Refugee Convention, especially with respect to non-refoulement. It is clear that the Refugee Convention is not being honoured in the way that it once was. It will be argued that despite contemporary issues, the Refugee Convention’s key principle of non-refoulement is the most significant obligation for protecting refugees and remains highly significant.
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I INTRODUCTION

The Convention Relating to the Status of Refugees (Refugee Convention)\(^1\) is the single most important international instrument for the protection of refugees. Established in 1951, the Refugee Convention was developed in a truly humanitarian spirit at a time where there was a genuine desire to help.\(^2\) The most fundamental obligation under the Refugee Convention is the principle of non-refoulement, which prohibits States from returning a vulnerable person to a place where they may face persecution.\(^3\) In acceding to the Refugee Convention, States also undertake to afford people the right to seek asylum\(^4\) and not to be penalised for doing so.\(^5\) Historically, Australia demonstrated a commitment and generosity towards the Refugee Convention, having been commended for resettling significant numbers of refugees from United Nations High Commissioner for Refugees (UNHCR) recognised camps.\(^6\) However since the 1980’s, the Refugee Convention has faced a number of protection challenges. With the global number of people forced to flee their home country currently at 33.3 million,\(^7\) the continuing viability of the Refugee Convention has been called into question.

Australia has experienced waves of asylum seekers arriving to its shores by boat. Given Australia’s geographical isolation and the state of international travel, Brennan proposes that Australia did not envisage that, when acceding to the obligations under the Refugee Convention, it would be confronted with asylum

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\(^3\) Refugee Convention art 33.
\(^4\) This right is grounded in the Universal Declaration of Human Rights, GA Res 217A (III), UN GAOR, 3rd sess, 183rd plen mtg, UN Doc A/810 (10 December 1948) art 14.
\(^5\) Refugee Convention art 31.
seekers at its borders. The governments from both major political parties have responded to each wave in an increasingly restrictive way, demonstrating a disregard for Australia’s international responsibilities. Australia’s asylum seeker policy has attracted considerable criticism for violating human rights, both under the Refugee Convention and other human rights treaties. Significantly, particular elements of Australia’s policy are clear violations of non-refoulement: the very heart of the Refugee Convention. The Australian Government has made it clear that state sovereignty has been preferred to the adherence to international obligations. As John Howard notoriously asserted:

We have the right to decide who comes to this country, and the circumstances in which they come.¹⁰

The courts have shown a tendency to be complacent in Parliament’s rejection of the obligations under the Refugee Convention. Until relatively recently, most High Court challenges to asylum seeker policies have been unsuccessful, showing a pattern of judicial acceptance. This research will provide a comprehensive overview of Australia’s asylum seeker policy and its consequent breaches of human rights. It will turn to examine why States are no longer willing to honour the Refugee Convention. Thus the object of this paper is:

How has Australia shifted the way it conceives its international responsibilities under the Refugee Convention, and what does this mean for the future of the Refugee Convention?

To address this aim, Part II will consider the strength of Australia’s past commitment to both migration and to the Refugee Convention. This will provide a contextual background to be contrasted with Australia’s current implementation of its obligations.

Part III will firstly analyse the shifts in how the principles of the Refugee Convention have been implemented in domestic law and policy over time. To that end, several waves of arrivals will be identified, and the legislative response to each discussed.

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⁹ Ibid 10.
Part III will also consider the ways in which Australia’s asylum seeker policy has breached obligations under the *Refugee Convention*. It will be argued that Australia’s policies have serious implications for human rights under the *Refugee Convention* as well as other international human rights treaties. Secondly, the role of the courts in the interpretation and enforcement of Australia’s international obligations will also be considered. The corresponding case law will be analysed in order to highlight a pattern in jurisprudence. It will be asserted that with each wave of arrivals, Parliament has responded in a successively restrictive way, with the Courts typically accepting Parliament’s disregard for the *Refugee Convention*.

Finally, Part IV will assess the shortfalls of the *Refugee Convention* and seek to determine whether it remains an effective instrument of protection. The major barriers to protection will be highlighted, and a conclusion will be made as to whether this renders the *Refugee Convention* unviable. While accepting that there are many significant barriers to providing protection under the *Refugee Convention*, it will be concluded that the obligations under the *Refugee Convention*, particularly *non-refoulement* are so fundamental for refugee protection that it cannot be abandoned.

## II  HISTORICAL ANALYSIS OF THE *REFUGEES CONVENTION* AND AUSTRALIA’S EXPERIENCE

### A  Historical Context of the Refugee Convention

In order to understand the rights, obligations and purpose of the *Refugee Convention*, it is valuable to first turn to the historical context in which it was developed. Prior to WWI, there was little concern with the movement of refugees. Groups of refugees on the move were relatively small and immigration was for the most part uncontrolled.\(^1\) From 1914 to 1918, millions of people were forcibly displaced due to the war.\(^2\) At this time, the Western World began to experience a rise in political and economic

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nationalism.\(^{13}\) While there was a strong concern for human suffering, there was also a concern among governments in the controlling of immigration and the movement of refugees.\(^{14}\) These factors triggered the international community to take action.

Shortly after the war ended, several countries, including Australia, were involved in the founding of the League of Nations.\(^{1}\) The central objective of the League of Nations was keeping peace, but notably, it contained some provision for refugees.\(^{15}\) This was the first attempt at regulating refugees in international law.\(^{16}\) However, definitions of a refugee were based on national origin, and whether to afford protection was a political decision.\(^{17}\) With the onset of WWII, it had become clear that the League of Nations could not fulfil its peacekeeping objective; support was gradually withdrawn and it was disbanded.

The League of Nations was replaced by the United Nations, which officially came into existence on 24 October 1945. The WWII had caused millions of people in Europe to be forcibly displaced and deported.\(^{18}\) To assist with the resettlement of these people, the United Nations created the International Refugee Organisation (IRO) in 1946.\(^{19}\) The IRO was a temporary body, and was soon replaced by the United Nations High Commissioner for Refugees (UNHCR) in 1952.\(^{20}\) The object of the UNHCR is to co-ordinate international refugee protection and to assist states in providing solutions for the refugee situation.\(^{21}\) Significantly, a short time later, the United Nations created the Refugee Convention, which entered into force on 22 April 1954. The UNHCR now oversees the implementation of the Refugee Convention.

\(^{13}\) Hathaway, ‘Evolution of Refugee Status’, Above n 11, 348.
\(^{14}\) Ibid.
\(^{16}\) Jane McAdam, Complementary Protection in International Refugee Law (Oxford University Press, 2007) 24.
\(^{17}\) Ibid 25.
\(^{20}\) The UNHCR was established under General Assembly resolution 428(v) on 14 December 1950.
The purpose of the *Refugee Convention* was to provide a way to deal with the displacement of Jews after WWII. There was reluctance among nations to take in these refugees. The *Refugee Convention* created an obligation to do so, as when a State Party becomes a signatory, they agree not to send vulnerable people back to persecution. This obligation to protect was limited in two ways: firstly it was geographically limited to Europe, and secondly it was temporally limited to people fleeing events that occurred before 1 January 1951. The scale of the refugee situation worldwide worsened. Recognising this, the United Nations responded in 1967 by expanding the scope of the *Refugee Convention*, through the *Optional Protocol Relating to the Status of Refugees (Optional Protocol)*. The *Optional Protocol* removed the geographical and date limitations of the *Refugee Convention*, so that from then on, the *Refugee Convention* would apply universally. The *Refugee Convention* has since become the single most important international instrument for refugee protection, and has been used to protect and resettle tens of millions of refugees. Australia was one of the first countries to sign the *Refugee Convention* and thereafter has been commended for its participation in the resettlement program and financial contribution to the UNHCR.

**B Content of the Obligations under the Refugee Convention**

To assess Australia’s compliance with the obligations under the *Refugee Convention*, it is necessary to examine the rights and obligations set out for refugees and those conferred on asylum seekers. A refugee, as amended by the *Optional Protocol*, is defined as: a person who has a well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political
opinion, whom is outside the country of their nationality, and whom is be unable or unwilling to return to that country due to the fear of being persecuted.\textsuperscript{30} The \textit{Refugee Convention} does not extend to persons for whom there is a serious reason for believing they have committed particular crimes, for example: war crimes; those who benefit under another United Nations agency; or those who have a status equivalent to nationals in the country of asylum.\textsuperscript{31}

For people who are recognised as refugees, the \textit{Refugee Convention} specifies several basic legal rights and protections to which they are entitled. Every person who has been recognised as a refugee was initially an asylum seeker. Therefore, State Parties must treat asylum seekers on the assumption that they may be refugees. The most important obligations under the \textit{Refugee Convention} are the right to seek asylum, the principle of \textit{non-refoulement}, non-penalisation and non-discrimination.

\textbf{1 The Right to Seek Asylum}

The right to seek asylum is at the heart of the \textit{Refugee Convention}. It is a legal right available to all human beings. This right is grounded in Article 14 of the \textit{Universal Declaration of Human Rights},\textsuperscript{32} which stipulates that everyone has the right to seek and to enjoy protection from persecution. It is important to note that refugees are not committing a crime by seeking asylum, as it is a legal right under international law.\textsuperscript{33} Therefore, the unauthorised entry into a country must not be considered illegal where the person is seeking asylum. In addition to the right to seek asylum, the \textit{Refugee Convention} obliges governments to ensure that people can make an application for asylum and have their status determined.

\textbf{2 Non-refoulement}

The most significant of the obligations under the \textit{Refugee Convention} is the principle of \textit{non-refoulement}. It is the cornerstone of refugee protection. \textit{Non-refoulement} is an prohibition on States not to expel or return a refugee, by any means, to the place in which his ‘life or freedom would be threatened on account of his race, religion,
nationality, membership of a particular social group or political opinion’. This principle applies to all human beings, whether they have been recognised as refugees or remain classified as asylum seekers. It is arguably the most important principle under the Refugee Convention for the protection of asylum seekers. State parties are unable to make reservations to this principle. The principle of non-refoulement is of such importance that it has gained the status of jus cogens under international law. In effect, this means that the non-refoulement principle is technically binding on all States, where they are signatories to the Refugee Convention or otherwise. However, Article 33 is limited in that there are circumstances where state sovereignty prevails over the obligation: States are permitted to refoul a person where that person is a security risk or has been convicted of certain criminal offences.

3 Non-penalisation

The principle of non-penalisation is another fundamental protection for asylum seekers. It is contained under Article 31 of the Refugee Convention, and provides that States shall not impose penalties on refugees for their illegal entry or presence in the State’s territory. This principle prohibits states from penalising asylum seekers for committing immigration offences and criminal offences, and provides that asylum seekers cannot be arbitrarily detained on account of seeking asylum. This applies to asylum seekers who arrive both by regular means and irregular means. To comply with this principle, Australia must ensure that asylum seekers are not arbitrarily detained on account of their seeking asylum. This calls into question Australia’s policy of the mandatory detention of all irregular arrivals, which will be explored in detail below.

34 Refugee Convention art 33.
35 Fitzpatrick, Above n 24, 237.
36 Optional Protocol art VII(1).
4 *Non-Discrimination*

Another significant principle required by the *Refugee Convention* is that of non-discrimination, as provided for under Article 3. It stipulates that States must not discriminate between refugees on account of their race, religion or country of origin when applying the principles of the *Refugee Convention*. Further to these grounds, international law has prohibited discrimination on additional grounds of sex, age, disability or sexuality. State Parties are not permitted to make reservations to Article 3. Certain policies of Australia may have compromised the principle of non-discrimination between asylum seekers, for example the 2010 decision to suspend processing the claims of asylum seekers from Sri Lanka for 3 months and those from Afghanistan for 6 months.

Once recognised as a refugee, states are obliged to afford to refugees a range of civil, political, social and cultural rights and freedoms. Some important rights include the right to work, the right to housing, the right to education, the right to public relief and assistance, the right to freedom of religion, the right to access the courts, the right to freedom of movement within the territory, and the right to be issued identity and travel documents. These rights only extend to a person once they have been officially recognised as a refugee, and do not apply to asylum seekers.

It is important to note that the obligations under the *Refugee Convention* do not stand alone; they are to compliment international obligations under various other human rights treaties. Australia is a party to the *International Covenant on Civil and Political Rights (ICCPR)*, the *International Covenant on Economic, Social and Cultural Rights*, opened for signature 16 December 1966, 999 UNTS 171 and 1057 UNTS 407 (entered into force 23 March 1976).

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40 Ibid.
41 Chris Bowen, Minister for Immigration and Citizenship with Stephen Smith MP, Minister for Foreign Affairs and Brendan O’Connor MP, Minister for Home Affairs, ‘Changes to Australian Immigration Processing System’, (Joint Media Release, 9 April 2010).
42 *Refugee Convention* arts 17-19.
43 Ibid art 21.
44 Ibid art 22.
46 Ibid art 4.
47 Ibid art 16.
48 Ibid art 26.
Cultural Rights, the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (Convention Against Torture), and the Convention on the Rights of the Child. The Refugee Convention is supported and reinforced by these human rights treaties.

C Australia’s Historical Commitment

1 Commitment to the Refugee Convention

In order to assess how Australia has changed the way it conceived its obligations under the Refugee Convention, it is important to explore Australia’s historical commitment to the Refugee Convention. There are several factors that indicate that Australia was historically highly committed to the Refugee Convention. Australia was among the first state parties to accede to the Refugee Convention, signing the treaty when it came into force on 22 January 1954. Australia was a keen participant in the drafting of the Refugee Convention. Participating in drafting is not in itself a positive commitment to human rights. For example, Australia’s participation in the drafting of the Universal Declaration of Human Rights was not entirely conducive to refugee protection. As Brennan outlines, Australia was strongly opposed to the inclusion of the right to be granted asylum. Although in hindsight, it is clear that a right to be granted asylum would most likely cause a range of social, economic and political problems, given the number of people seeking asylum. In 1973, Australia committed to the Optional Protocol, submitting to the much broader application of the Refugee Convention. However, given Australia’s geographical isolation and the state of international travel, Brennan proposes that Australia may not have perceived that it would ever be confronted with asylum seekers on its shores.

52 Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, opened for signature 10 December 1984, 1465 UNTS 85 (entered into force 26 June 1987).
55 Hugo, Above n 6.
56 Brennan, Above n 8, 15.
57 Ibid 2.
58 Ibid 16.
2 Commitment to the UNHCR

Australia has been commended for its role in various aspects of the UNHCR. As a member of several United Nations advisory bodies, Australia has made a contribution to the development of international policy. Reflecting its commitment to the Refugee Convention, Australia has made significant financial contributions to the UNHCR on a regular basis. Australia has been commended for its ongoing commitment in this area. This important contribution can be exemplified by the current pledge by the government of $93 million core funding to the UNHCR, over the period of 2013-2016.

One of the most important demonstrations of Australia’s commitment to the Refugee Convention is the offshore component of the ‘Humanitarian Programme’. Under the offshore component, Australia resettles UNHCR recognised refugees, who typically have fled their home country and are waiting in overseas camps for resettlement. Australia is one of only 10 countries to regularly resettle refugees in this way. Participation in the resettlement program is not obligatory, and goes beyond Australia’s obligations under the Refugee Convention.

D Australia’s Attitude towards Migration and Refugees

1 Australia’s experience with Migration

To gain an understanding of the current treatment of asylum seekers and refugees, it is interesting to examine Australia’s attitude historically towards both refugees and migrants in general. Australia has been built on migration, having encouraged and at times assisted people in migrating to Australia. Prior to Federation until WWI,

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59 For example Australia is a member of the UN Advisory Committee on Refugees and the UN Refugee Fund Executive Committee, which is now the UNHCR Executive Committee.
61 Hugo, Above n 6.
63 Brennan, Above n 8, 10.
65 Brennan, Above n 8, 1.
Australia had various migration schemes in place to encourage young, skilled British and other Europeans to relocate to Australia by offering incentives such as passage assistance and land grants. These programs were fuelled by Australia’s need to build the economy, increase the population and strengthen its national defence. However, from the outset the law and policy in Australia was selective and exclusive. This stemmed from the economic conflict between the Chinese population living in Australia and the European migrants in 1857. The conflict escalated to riots, and, as lawmakers perceived the Chinese as a threat to the economy and culture, they sought to exclude them.

One of the first laws passed after Federation was the Immigration Restriction Act 1901 (Cth), which prevented all non-Europeans from permanent entry. This act gave rise to the White Australia policy, as it allowed the government to select migrants on the basis of their race, work and skills. Under the act, prospective immigrants were made to undergo a Dictation Test in any prescribed European language. Officials were said to have purposefully manipulated the test to ensure undesirable applicants failed. According to Crock, Saul and Dastyari, the aim of this Act was to protect Australia from ‘threats’ of invasion from other non-British and non-European cultures, and particularly from Asian migrants.

The White Australia policy was abolished in 1973, but it had embedded a racist tone to immigration. The Eastern European migrants, who were once welcomed, arriving after WWII were treated with some hostility. Similar attitudes were also evident in 1996, with the rise of Pauline Hanson and the One Nation Party. The racist sentiment originating in the White Australia policy is an expression of the insecurity of

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67 Ibid.
69 Langfield, Above n 66.
70 Brennan, Above n 8, 1.
71 Mary Crock, Ben Saul and Azadeh Dastyari, Future Seekers II: Refugees and Irregular Migration in Australia, (Federation Press, 2006) 14.
72 Ibid.
73 McMaster, ‘Insecurity of a Nation’, Above n 68, 281.
74 Ibid 282.
Australia and its fear of the ‘other’.\textsuperscript{75} Australians perceive that migrants and refugees pose a threat to the economy, society and culture.\textsuperscript{76} This insecurity has manifested in the treatment of the Vietnamese asylum seekers in 1976, the Cambodians in 1989, the Afghans and Iraqis in 1999 and again in 2011, and finally the asylum seeker policy of today.

2 Australia’s Experience with Refugees prior to 1976

Australia has been generally welcoming of European refugees. Some of the first refugees to be accepted by Australia were the Jewish refugees fleeing Hitler’s regime. At the Evian Conference in 1938, Australia agreed to accept 15,000 Jewish refugees over a three-year period.\textsuperscript{77} It has been argued that Australia provided assistance to these refugees, not for the humanitarian reason of providing protection, but for Australia to grow the nation’s economy. This is so because Australia handpicked the refugees who would be accepted, choosing young, skilled workers, and avoiding the uneducated or those unable to work.\textsuperscript{78} This arrangement however ceased after a short time due to the war. Another large intake of refugees began in 1956, when Australia accepted 14,000 Hungarian refugees after the anti-Communist uprising, and in 1968 allowed around 6,000 refugees from Czechoslovakia to settle in Australia.\textsuperscript{79} These large intakes of refugees demonstrated that Australia was typically willing to accept particular refugees from European countries.

Australia has had a different experience with the movement and asylum of non-Europeans, as it appears that the White Australia policy continued to influence the refugee experience. In 1939, Australia admitted over 6,000 non-Europeans who were fleeing the Pacific War. Although the majority were voluntarily repatriated after the war, the government passed legislation to forcibly remove those who did not agree to return home.\textsuperscript{80} It was clear that Australia was not interested in offering permanent protection.


\textsuperscript{76} McMaster, ‘Insecurity of a Nation’, Above n 68, 279.

\textsuperscript{77} Hugo, Above n 6, 27.

\textsuperscript{78} Brennan, Above n 8, 2.


\textsuperscript{80} See War-time Refugees Removal Act 1949 (Cth) No 32 of 1949.
E  First Wave of Asylum Seekers

A very significant event occurred on 27 April 1976. A 17 metre fishing boat arrived in Darwin, carrying five Indochinese men who were seeking protection in Australia. 81 This marked the beginning of the first wave of boat arrivals. From 1976 to 1981, some 2,059 people arrived by boat seeking protection. 82 These asylum seekers were mostly Vietnamese who were fleeing the fall of Saigon and the perils of the communist government takeover. 83 Some of the asylum seekers feared being persecuted by the communist government as they had either worked for the South Vietnamese Government or assisted the Western Forces. 84 Adding to the turmoil in South East Asia, the Khmer Rouge incited conflict in Cambodia in 1979. 85 Because of this, more asylum seekers began fleeing to Australia.

As this was the first experience with asylum seekers arriving to Australia, there were no policy or procedures in place for handling claims of asylum. 86 Instead, the asylum seekers were processed as migrants through the standard migration stream. The administrative decision to grant protection was therefore left to the discretion of the Minister. Shortly after the first arrivals in 1980, the Government amended the Migration Act to provide a legal basis for the Minister’s discretion. The Immigration (Unauthorised Arrivals) Act 1980 (Cth) provided Commonwealth Officials with the power to arrest an unauthorised arrival and take them to a ‘prescribed authority’ who could order their detention. 87 If the Minister was satisfied that the person was a refugee, the Minister could grant the person an entry permit, as contained under section 6A(1)(c) of the Migration Act. If not found to be a refugee, the person could be deported. 88 All of the asylum seekers who arrived from 1976 to 1981 were found to be refugees and were granted permanent residency. 89 Manne suggests that the Fraser

82 Ibid.
84 Crock, Saul and Dastyari, Above n 71,36.
85 Ibid.
86 Motta, Above n 83, 13.
87 Immigration (Unauthorised Arrivals) Act 1980 (Cth) ss 12-14.
88 Ibid s 12(3)(c).
89 Crock, Saul and Dastyari, Above n 71, 29.
Government’s decision to grant protection may have been influenced by Australia’s involvement as a combatant in the Vietnam War, and as such, Australia felt a moral responsibility to help. For whatever reason, the Australian Government showed a certain generosity towards these refugees. The Australian Government was also mindful of the large number of Vietnamese who required assistance but who remained in Vietnam or neighbouring countries. In 1975 Australia accepted a total of 748 Vietnamese refugees from offshore settlement camps.

However, there was a complete lack of policy for the resettlement of these offshore refugees. Some of the refugees were brought to Australia under the normal immigration scheme, and were not assisted in any way. Others were assisted only for the first two weeks; hence they found considerable difficulty in integrating into the community. The Senate’s Standing Committee on Foreign Affairs and Defence recommended the urgent need for Australia to develop policy for refugee settlement that took into account the special needs of the refugees. While there was a lack of policy and a failure to provide settlement services for this wave of refugees, the procedures put into place for the arrival of the first wave of arrivals were in accordance with Australia’s human rights obligations. The response to the subsequent waves of arrivals was much more restrictive and presented a challenge to Australia’s sovereignty.

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92 Ibid 46.
93 Ibid.
94 Ibid.
95 Ibid rec 7.1 at 89.
III THE SHIFT FROM REFUGEE PROTECTION TO IMMIGRATION CONTROL

A Balancing Refugee Protection with State Sovereignty

Because States are prohibited from refouling refugees who are in their territories, the Refugee Convention conflicts with notions of state sovereignty. One of the fundamental principles of the United Nations is the recognition of state sovereignty, which is contained under Article 2(1) in the Charter of the United Nations. This principle provides that each member state is independent and is free to conduct its affairs without interference. An important element of sovereignty in international law is the right of states to control the entry, residence and expulsion of people in their territory. Indeed the right to control migration is legitimate and vitally important to self-preservation. There are many social, economic and political problems associated with untrammelled migration. Seglow highlights that some of the ‘dangers’ of overpopulation are social disorder, crime and terrorism, threats to cultural homogeneity, job losses and wage depression for the working population.

In Australia, the right to control migration is derived from the Constitution of Australia, which provides the legal foundation for the Migration Act. Therefore Australia has the right to control migration and restrict entry however it decides, free from interference.

International human rights law can operate to restrict state sovereignty. Hathaway provides that state sovereignty can be restricted by way of treaties imposing standards of conduct, and through international customary law, to which State Parties must adhere. Since Australia is a party to various human rights treaties, Australia is obliged by international law to ensure that people are able to enjoy their human

98 Babacan, Above n 54, 166.
101 This power is derived from the immigration and emigration power under Section 51(xxvii); the neutralization and aliens power under Section 51(xix); and the external affairs power under Section 51(xxix) of the Constitution.
103 Ibid.
rights and must avoid taking any action that may cause a breach of human rights.\footnote{Professor Gillian Triggs, ‘The Australian Human Rights Commission’ (Speech delivered at the Department of Immigration and Citizenship, Australia, 25 June 2013).} A consequence of acceding to the \textit{Refugee Convention} is that Australia does not have absolute control over who may enter its territory.\footnote{William Maley, ‘Asylum-seekers in Australia’s international Relations’ (2010) 57.1 \textit{Journal of International Affairs} 189.} This is because the \textit{Refugee Convention} provides the right to all people to enter and seek asylum without being penalised or refouled.\footnote{Crock, Saul and Dastyari, Above n 71, 23.}

The \textit{Refugee Convention} does little to limit a preference for sovereignty. As the \textit{Refugee Convention} does not prescribe an approach, States must decide how they will reconcile principles of state sovereignty with the obligations imposed by the \textit{Refugee Convention}. Goodwin-Gill highlights that this causes a struggle between competing interests: the humanitarian interest in providing protection under the \textit{Refugee Convention} and the national interest in maintaining state sovereignty and self-preservation.\footnote{See, eg, Goodwin-Gill, \textit{The Refugee in International Law}, Above n 38.} As understood by Hathaway, States including Australia have become less concerned with human rights violations and more focused on border security and migration control.\footnote{Hathaway, ‘Evolution of Refugee Status’, Above n 11, 349.} Rightly or wrongly, national interests have prevailed, to a point where many states have read down the humanitarian obligations and restricted the ways they provide protection.

While Australia had been content with accepting those who could be selected on the basis of race, ethnic origin and skills,\footnote{Brennan, Above n 8, 1.} it had little experience with the uninvited. When waves of asylum seekers began arriving to Australia’s shores, it was perceived to be a loss of state control and a challenge to sovereignty, borders and security.\footnote{Crock, Saul and Dastyari, Above n 71, 4.} With each wave of irregular arrivals, governments from both major political parties have responded with a more restrictive policy,\footnote{Brennan, Above n 8, 6.} consistently favouring sovereignty over human rights.

**B Second Wave: Cambodians between 1989 - 1992**

Starting to draw away from the generosity shown to the first wave of asylum seekers, the Government’s response to the second wave was handled with more resistance.
This wave of asylum seekers arrived between 1989 and 1992. The asylum seekers were Cambodians fleeing the ongoing conflict and violence incited by the Khmer Rouge regime. It was estimated that 1.7 million people were killed due to violence or died due to famine. Australia was less welcoming of the Cambodian asylum seekers, labelling them ‘economic migrants’, ‘queue jumpers’ and ‘forum shoppers’. This wave of arrivals triggered the Government to establish the policy of indefinite mandatory detention, which has been criticised widely for constituting arbitrary detention. Worsening the position of asylum seekers, the courts were reluctant to acknowledge any obligations under the Refugee Convention.

There had been a provision in Australia’s immigration policy since Federation that allowed for detention. The Government triggered this power in 1989 by way of the Migration Legislation Amendment Act 1989 (Cth). The amending act introduced a system of mandatory detention. Asylum seekers, being those who arrived in Australia without a visa or entry permit, were classed as ‘prohibited entrants’. The amending act provided that ‘prohibited entrants’ could be detained until they were either granted an entry permit or removed from Australia on the vessel they arrived on.

In practice, asylum seekers were detained under this provision for periods exceeding four years. For the purposes of the Migration Act, a person detained under this provision was considered not to have entered Australia. This meant that irregular arrivals were detained and denied the procedural safeguards that were afforded to

112 Phillips and Spinks, Above n 81.
114 Ibid.
115 Manne, Above n 90.
117 McMaster, ‘Insecurity of a Nation’, Above n 68, 284.
119 Migration Act 1958 (Cth) s 36.
120 Ibid s 88.
non-citizens whose visa had expired, but then claimed protection.\footnote{Motta, Above n 83, 15.} This provision was intended to apply to the small amount of stowaways arriving and those whose entry permit had expired. However, it soon became the basis of detaining all boat arrivals.\footnote{Ibid 14.}

1 Testing the detention of asylum seekers

The case of \textit{Chu Kheng Lim v Minister for Immigration Local Government & Ethnic Affairs (Chu Kheng Lim)}\footnote{(1992) 176 CLR 1; 110 (ALR) 97.} involved two groups of Cambodian asylum seekers, who arrived on 27 November 1989 and 31 March 1990. The asylum seekers claimed refugee status and were detained under the newly implemented section 88 of the \textit{Migration Act}. They were subsequently denied protection. These asylum seekers sought to challenge the Minister’s decision in the Federal Court, as allowable under section 15 of the \textit{Administrative Decisions (Judicial Review) Act 1997} (Cth). The applicants were to argue that their detention was unlawful, as it had no legal foundation. Before the case was heard, the Minister vacated his decisions and forwarded the case to be reassessed.

The applicants appealed to the High Court on the grounds that the Minister was exceeding his power in detaining the applicants under section 88, and owed the applicants a duty under the \textit{Refugee Convention} and the \textit{ICCPR}. They sought an injunction and a declaration against the Minister and the Commonwealth of Australia. The Government strongly contested this case.\footnote{McMaster, ‘Insecurity of a Nation’, Above n 68, 285.}

Two days before the hearing in the High Court, on May 5, Parliament rushed through the \textit{Migration Amendment Act 1992} (Cth) (\textit{May 5 Amendments}). The effect of this legislation was to retrospectively provide a legal basis for the detention of the applicants. This act inserted provisions into the \textit{Migration Act} to be the basis of the detention of irregular arrivals.\footnote{Migration Amendment Act 1992 (Cth) Division 4B, s49B.} Under the new provisions, a ‘designated person’ was required to be detained and could remain in detention for a period of up to 273 days.\footnote{Ibid ss 54L, 54N, 54P.} Under section 54P, the detainee could seek the Minister’s permission to be

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\footnotesize{\textit{122} Motta, Above n 83, 15.}  
\footnotesize{\textit{123} Ibid 14.}  
\footnotesize{\textit{124} (1992) 176 CLR 1; 110 (ALR) 97.}  
\footnotesize{\textit{125} McMaster, ‘Insecurity of a Nation’, Above n 68, 285.}  
\footnotesize{\textit{126} Migration Amendment Act 1992 (Cth) Division 4B, s49B.}  
\footnotesize{\textit{127} Ibid ss 54L, 54N, 54P.}
released and removed from Australia.\(^{128}\) Importantly, under section 54R, ‘a court is not to order the release from custody of a designated person’. This was the beginning of Parliament’s attempt to reduce the role of the courts in reviewing asylum seeker decisions.

The High Court agreed that the initial detention of the applicants was unlawful.\(^{129}\) However, the majority found in favour of the Commonwealth, concluding that the May 5 Amendments provided the legal basis for the applicant’s detention, and thus immigration detention was lawful.\(^{130}\) Had it not been for the May 5 Amendments, section 88 would not have provided a legal basis for the detention.\(^{131}\)

The applicant’s lawyers commenced a claim for compensation for the unlawful imprisonment prior to 5 May 1992.\(^{132}\) The Keating Government moved swiftly to amend the Migration Act by way of the Migration Reform Act 1992 (Cth) (1992 Reforms), which extinguished the right of the Cambodians to compensation and limited any other compensation to $1 per day of detention. The result for the asylum seekers in Chu Kheng Lim was that they, provided they agreed to return home for 12 months, were permitted to migrate to Australia.\(^{133}\)

(a) **Implications of the Chu Kheng Lim Decision**

The decision of the High Court in this case was fundamental in forming the boundaries of Australia’s immigration policy. Under the Constitution, Parliament has the power to make laws with respect to ‘aliens’.\(^{134}\) So as to link the May 5 Amendments to the ‘aliens’ power, the majority focused on the term ‘non-citizens’, which was used throughout the legislation. The High Court confirmed that the ‘aliens’ power enabled Parliament to legislate with respect to non-citizens concerning almost anything,\(^{135}\) thus the detention of non-citizens was found to be

\(^{128}\) Ibid s 54P.

\(^{129}\) Motta, Above n 83, 15.

\(^{130}\) Chu Kheng Lim.

\(^{131}\) Motta, Above n 83, 15.

\(^{132}\) Manne, Above n 90.

\(^{133}\) Ibid.

\(^{134}\) Constitution of the Commonwealth of Australia s 51(xix): ‘aliens power’.

\(^{135}\) Chu Kheng Lim, 25-6 (Brennan, Deane, Dawson JJ).
constitutionally valid. The detention would have been unlawful had the applicants been Australian citizens.\textsuperscript{136}

Another influential point in this decision was the consideration of whether section 54R, excluding the courts from ordering the release of a person in all circumstances, was constitutionally valid. According to the Constitution, judicial power is exclusively vested in the courts.\textsuperscript{137} The High Court considered whether Parliament could legislate for the detention of a person without a court order. The majority found that section 54R, seeking to excluding the courts, was usurpation on judicial power as it sought to completely exclude the judicial review of detention.\textsuperscript{138} In leading judgment it was stated:

> A law of the Parliament which purports to direct, in unqualified terms, that no court, including this Court, shall order the release from custody of a person whom the Executive of the Commonwealth has imprisoned purports to derogate from that direct vesting of judicial power and to remove ultra vires acts of the Executive from the control of this Court. Such a law manifestly exceeds the legislative powers of the Commonwealth and is invalid.\textsuperscript{139}

Dissenting, Mason CJ, Toohey and McHugh JJ interpreted the relevant sections in such a way as to allow the courts to review detention where the detention is punitive and not lawful.\textsuperscript{140} The dissenting judges referred to the fact that a detainee could request to be released and removed from Australia under s 54P(1), and concluded that the detention was voluntary, and not punitive.\textsuperscript{141}

The reasoning of the High Court demonstrated a disregard for any obligations under the \textit{Refugee Convention}. The High Court did not acknowledge the possibility that the applicants were refugees under the \textit{Refugee Convention}.\textsuperscript{142} Furthermore, the High Court failed to consider that allowing a detainee to request to be removed from

\textsuperscript{137}Constitution of the Commonwealth of Australia s 71.
\textsuperscript{138}Chu Kheng Lim, 37 (Brennan, Deane and Dawson).
\textsuperscript{139}Ibid 38 (Brennan, Deane and Dawson).
\textsuperscript{140}Ibid 120-21.
\textsuperscript{141}Ibid 41 (McHugh J).
\textsuperscript{142}Mary Crock, ‘Climbing Jacob’s Ladder: The High Court and the Administrative Detention of Asylum Seekers in Australia’ (1993) 15 \textit{Sydney Law Review} 347.
Australia under section 54P could constitute refoulement.\textsuperscript{143} Crock argues that this judgment did not contemplate principles of international law, especially in relation to arbitrary detention.\textsuperscript{144} For example, the High Court failed to determine the legality of: continued detention for long periods of time, continued detention where the processing of claims had been suspended and whether the conditions of detention were unconstitutional.\textsuperscript{145} Effectively, the decision in \textit{Chu Kheng Lim} permitted a system of immigration detention that was mandatory and not judicially reviewable.\textsuperscript{146} It also signified the shift of the system from focusing on refugee protection to immigration control.\textsuperscript{147}

\section*{2 \textit{The Shift to Indefinite Mandatory Detention}}

Very importantly the \textit{1992 Reforms}, which came into force on 1 September 1994, made the detention of unlawful citizens mandatory and indefinite. Section 189 provides that a Commonwealth Officer must detain a person within the ‘migration zone’ if they know or reasonably suspect them to be an unlawful non-citizen. Detention was also mandatory for a person who could not provide documentation proving them to be a lawful non-citizen.\textsuperscript{148} The \textit{1992 Reforms} removed the 273-day limit to detention, making immigration detention indefinite. In a series of cases handed down in 2004, the High Court upheld the validity of mandatory detention, even where detention was indefinite.\textsuperscript{149}

As the High Court had cast doubt on section 54R, Parliament sought to narrow the grounds for the courts involvement. The \textit{1992 Reforms} inserted section 196(3) into the \textit{Migration Act}, which prohibited courts from ordering the release of a detainee, other than for the purposes of their removal, deportation or where they are granted a

\textsuperscript{143} Ibid 348.
\textsuperscript{144} Crock ‘You must be stronger than razor wire’, Above n 136, 51.
\textsuperscript{146} Susan Kneebone (ed), \textit{Refugees, Asylum Seekers and the Rule of Law: Comparative Perspectives} (Cambridge University Press, 2009) 188.
\textsuperscript{147} Don McMaster, \textit{Asylum Seekers: Australia’s Response to Refugees} (Melbourne University Publish, 2001) 89.
\textsuperscript{148} \textit{Migration Act 1958} (Cth) s 190.
\textsuperscript{149} Behrooz v Secretary of the Department of Immigration and Multicultural and Indigenous Affairs [2004] 78 ALJR 1056; Al-Ketab v Goodwin [2004] 78 ALJR 1096; Minister for Immigration and Multicultural and Indigenous Affairs v Al Khafaji [2004] ALJR 1156.
visa. Furthermore, the grounds under which the courts could review a decision were limited. The failure to observe the requirements of natural justice, for the most part, was no longer a ground for review.\footnote{Migration Act 1958 (Cth) s 476.}

The 1992 Reforms codified the statutory requirements for natural justice to be met and established the Refugee Review Tribunal who would review administrative decisions. This was an attempt to override procedural fairness under common law.\footnote{John McMillian, 'Judicial Restraint and Activism in Administrative Law' (2002) 30 Federal Law Review 348.} This was a likely response to a series of cases in which the courts ruled, contrary to earlier cases,\footnote{See, eg, \textit{R v Mackeller; Ex parte Ratu} (1977) 137 CLR 461.} that where the Minister failed to afford natural justice in deportation decisions, the decision is invalid.\footnote{See, eg, \textit{Kioa v West} (1985) 159 CLR 550; \textit{Haoucher v Minister for Immigration and Ethnic Affairs} (1990) 169 CLR 648.} However, following this amendment, the Federal Courts continued to review cases according to common law principles of natural justice.\footnote{McMillian, Above n 151, 349. As highlighted by the High Court in \textit{Minister for Immigration and Ethnic Affairs v Wu Shan Liang} (1996) 185 CLR 272; \textit{Minister for Ethnic Affairs v Guo} (1997) 191 CLR 559.}

\section{3 Human Rights Implications of Mandatory Detention}

Since 1992, Australia’s mandatory detention policy has remained a core mechanism of Australia’s asylum seeker policy and has been relatively unchanged under both major political parties. From the outset, the use of detention has been criticised widely.\footnote{See generally Australian Human Rights Commission ‘Those who have come across the seas’, Above n 116; Australian Human Rights Commission, ‘A Last Resort’, Above n 116.} The \textit{Refugee Convention} recognises that States have the capacity to detain non-citizens pending decisions about their status.\footnote{Goodwin-Gil, \textit{The Refugee in International Law}, Above n 38, 272.} According to the \textit{Refugee Convention}, the detention of asylum seekers is permitted only where necessary.\footnote{\textit{Refugee Convention} art 9, 31(2).} Article 9 allows States to take provisional measures while making a determination of refugee status if it is ‘essential to the national security in the case of a particular person’ and ‘necessary in his case in the interests of national security’.\footnote{Ibid art 9.} Further, article 31(2) allows States to restrict the movement of refugees while their status is being determined but again, the restrictions must be necessary.
The most fundamental rights that can be violated by immigration detention are the right to liberty and the right to be free from arbitrary detention. These rights are contained in the *ICCPR*,\(^{159}\) and the *Convention on the Rights of the Child*.\(^{160}\) Article 10 provides that anyone who is detained should be entitled to proceedings before a court to determine the lawfulness of the detention.\(^{161}\) The *ICCPR* further provides that detainees should be treated with humanity and respect for the dignity of the person.\(^{162}\) Where the conditions of detention are poor, the rights to be free from torture and cruel, inhumane or degrading treatment or punishment can become relevant.\(^{163}\)

Additional obligations arise with respect to the detention of children. The *Convention on the Rights of the Child* prescribes a similar right for children to be free from any unlawful or arbitrary deprivation of liberty. Article 37(b) commands that detention should be used as a measure of last resort and for the shortest appropriate period.\(^{164}\) For decisions relating to children, the best interests of the child should be a primary consideration.\(^{165}\) States must take appropriate measures to ensure that asylum seeker children receive appropriate protection and humanitarian assistance in the enjoyment of the rights under all treaties that State is a party to.\(^{166}\) Detention is undesirable for children, especially unaccompanied children, and other vulnerable groups including single women and those with medical or psychological needs.\(^{167}\) As at 31 March 2014, there were 895 children in immigration detention facilities.\(^{168}\)

It is clear that Australia’s mandatory detention policy does not meet standards of international law.\(^{169}\) Australia’s system of detention is beyond what is permissible; it

\(^{159}\) *ICCPR* art 9(1), 9(4).

\(^{160}\) *Convention on Rights of the Child* art 37(b). See also *Refugee Convention* art 31.3.

\(^{161}\) *ICCPR* art 9.4

\(^{162}\) Ibid art 10.

\(^{163}\) Ibid art 7.

\(^{164}\) *Convention on the Rights of the Child* art 37(b).

\(^{165}\) Ibid art 22.

\(^{166}\) Ibid art 22.

\(^{167}\) Australian Human Rights Commission ‘Those who have come across the seas’, Above n 116, rec R3.3.


\(^{169}\) See, eg, Executive Committee of the High Commissioner’s Program, *Detention of Refugees and Asylum Seekers*, Conclusion No 44 (XXXVII) 1986, UN GAOR, UN Doc 12A(A/41/12/Add.1).
Arbitrary detention typically refers to detention that is unlawful, but also extends to detention that is inappropriate, unjust and unpredictable. For the detention to be acceptable, it must be reasonable and necessary in the circumstances. Immigration detention should be a measure of last resort. There are three features of Australia’s immigration detention system that are symptomatic of the arbitrary nature of that detention.

Firstly, under the *Migration Act*, detention is mandatory. According to the UNHCR, detention must be necessary, reasonable in all the circumstances and proportionate to a legitimate purpose. Each case must be individually assessed in order to determine whether the detention is reasonable. Because asylum seekers are detained by operation of law, there is no avenue for consideration of the special circumstances of each person, which is arbitrary. This has led to many vulnerable groups being detained, such as children, the elderly and people with medical impairments.

Secondly, immigration detention under the *Migration Act* is indefinite and there is no maximum time limit on detention. The UNHCR recommends that domestic law should impose maximum periods of detention to protect against arbitrariness. Immigration detention in Australia is usually lengthy, rendering it disproportionate to its purpose and making it arbitrary. For asylum seekers, the uncertainty brought by spending an indefinite time in detention centres has affected their physical and

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170 Australian Human Rights Commission ‘Those who have come across the seas’, Above n 116, 50.
172 Ibid.
174 *Migration Act 1958* (Cth) s 189.
176 Ibid 15.
179 See *Migration Act 1958* (Cth) s 196.
mental health. Prolonged detention can therefore amount to cruel, inhumane or degrading treatment, thus breaching Australia’s international obligations.

Prolonged detention can also be a breach of the right to be treated humanely and with dignity while in detention, the right to the highest standard of health attainable, the right to education and the right to participate in cultural life.

Thirdly, according to international law, the decision to detain a person must be reviewable by the Courts. However, under the ‘privative clause’ section of the Migration Act, many of the decisions involving asylum seekers were prohibited from being reviewed. The UN Human Rights Committee has found the exclusion of the courts constitutes a breach of the right to be free from arbitrary detention. However, as a result of the decision in Plaintiff S157, the privative clause was rendered ineffective and the courts have maintained the jurisdiction to review decisions as fundamental rights are at stake. This significant decision will be further discussed below.

The UNHCR has also provided that immigration detention must serve a legitimate purpose. There are four grounds for which an asylum seeker can be detained: (i) to verify a person’s identity; (ii) to determine the elements of a claim; (iii) to deal with cases of missing or fraudulent identity documents and (iv) to protect national security or public order. The purpose of the detention cannot be to serve as a penalty, or to deter others from seeking asylum. It is clear that Australia’s mandatory detention policy is intended to be a deterrent.

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183 See ICCPR arts 7, 10(1). See also Convention on the Rights of the Child art 37(a).
184 See ICCPR art 10.
185 See ICESCR arts 12, 13, 15.
187 Migration Act 1958 (Cth) s 474.
189 UNHCR, ‘Detention Guidelines’, Above n 175, guideline 4.1.
190 Executive Committee of the High Commissioner’s Program, Detention of Refugees and Asylum Seekers, Conclusion No 44 (XXXVII) 1986, UN GAOR, UN Doc 12A(A/41/12/Add.1).
191 See Refugee Convention art 31.
There have been successive calls to end Australia’s system of indefinite mandatory detention by the UNHCR, the UN Human Rights Committee, Committee on the Rights of the Child, Committee Against Torture and the Committee on the Elimination of Discrimination Against Women. In addition, many government and non-government organisations have conducted inquiries. The Australian Human Rights Commission has long been critical of Australia’s detention system. In a report in 1998, the Commission concluded that Australia’s system of mandatory detention was arbitrary. Later in 2004 the Commission found that the detention of children was ‘fundamentally inconsistent’ with Australia’s obligations under the Convention on the Rights of the Child. Australia’s policy of mandatory immigration detention is blatantly arbitrary. Despite this it has remained a fundamental, politically uncontested element of asylum seeker policy over the last few decades. This demonstrates that state sovereignty and border control have prevailed over refugee protection and human rights.


While the Cambodian asylum seekers were met with some disdain, this was only to grow worse for the following wave of asylum seekers. This third wave of arrivals triggered the establishment of the Pacific Solution under which asylum seekers were sent to detention centres in countries with little refugee protection framework. Again

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195 Australian Human Rights Commission ‘Those who have come across the seas’, Above n 116.


197 Australian Human Rights Commission ‘Those who have come across the seas’, Above n 116, 50.
the courts were reluctant to consider the obligations under the *Refugee Convention*. The asylum seekers of this wave, arriving between 1999 and 2001, were predominantly from the Middle East, the majority from Iraq, Afghanistan, Iran, Sri Lanka and Pakistan.\(^{198}\) Many were Iraqi, fleeing the perils of Saddam Hussein’s dictatorship. Other asylum seekers were Afghans who were escaping the Taliban takeover of Kabul.\(^{199}\) The Taliban, being Sunni Muslims, had targeted the Hazara ethnics, who were Shia Muslims. The Taliban persecuted the Hazaras by committing massacre campaigns against civilians, suicide bombings and widespread violence and rape of women.\(^{200}\) The majority of the 12,000 arrivals from the Middle East were recognised as refugees.\(^{201}\) However, they were less than welcomed by Australia.

A major change to Australia’s asylum seeker policy was sparked in 2001 by what became known as the Tampa Affair. On 26 August a small boat carrying 433 asylum seekers began to sink on route to Australia. Australian Coastal Watch requested that a Norwegian cargo ship, called the MV Tampa, assist the vessel and take the asylum seekers to Indonesia. The Captain was reluctant, as there were 460 persons on board and only 40 lifejackets.\(^{202}\) The Captain sought permission to enter Australian waters. Allowing the asylum seekers to disembark on Christmas Island would trigger the rights under the *Migration Act*, and Australia would then be obliged to process and determine the asylum seekers’ claims for protection. Due to the spike in asylum seeker arrivals, the Government wanted to send a message that Australia would take a hard line with respect to boat arrivals. Australian authorities refused to allow the Tampa to enter its waters, and a three-day standoff ensued.

Since four passengers were unconscious and there was a shortage of food and water, the Captain issued a distress signal and entered Australia’s territorial waters. To prevent any asylum seekers from disembarking the ship and claiming protection, Australian SAS troops boarded and took control of the ship, planning to remove it from Australia’s territory.\(^{203}\) The Government attempted to push the *Border

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\(^{198}\) McMaster, ‘Insecurity of a Nation’, Above n 68, 286.

\(^{199}\) Hugo, Above n 6.


\(^{201}\) Crock, Saul and Dastyari, Above n 71, 37.

\(^{202}\) Brennan, Above n 8, 42.

\(^{203}\) Crock, Saul and Dastyari, Above n 71, 114.
Protection Bill 2001 through Parliament, which would retrospectively validate their actions. The Senate rejected the Bill.

1 VCCL v Minister for Immigration and Ethnic Affairs

On behalf of the asylum seekers on board the Tampa, Eric Vadarlis and the Victorian Council for Civil Liberties commenced an action in the Federal Court. The applicants argued that, if the Migration Act applied, the Minister had duties under the Migration Act to allow the asylum seekers to apply for protection and be brought ashore to make applications. In the alternative, it was argued that if the Migration Act did not apply, the applicants were being unlawfully detained by the SAS troops. In Chu Kheng Lim, the High Court had authorised the immigration detention of ‘aliens’, where it was justified by legislation. Because the asylum seekers had not entered the ‘migration zone’, the applicants argued that the Migration Act did not apply, and thus there was no legislative basis for their detention or the Commonwealth’s actions against the Tampa. The applicants sought habeas corpus, relief from unlawful detention and an injunction against the removal of the ship. A temporary injunction was granted.

It was clear that the Government did not want to accept responsibility for processing or settling the Tampa asylum seekers. Three days before the trial, the Government announced it had come to an agreement with Nauru and New Zealand: New Zealand was to process and settle 150 of the asylum seekers, while Australia would fund Nauru to process the remaining asylum seekers, and if found to be refugees, they would be resettled in Australia. The crux of this case was the determination of the extent to which Australia’s obligations under the Refugee Convention would apply. If Australia owed the asylum seekers the duty of non-refoulement, this duty could be contravened by sending them to Nauru, as Australia could not guarantee that Nauru would not refoul the asylum seekers. The Court lifted the temporary

204 VCCL v Minister for Immigration and Multicultural Affairs (2001) 110 FCR 452.
205 Ibid.
206 Ibid 10.
207 Ibid 12.
208 Ibid 14-40.
injunction, and the Government began to make arrangements to remove the asylum seekers.

On September 11, 2001, North J of the Federal Court delivered his judgement, finding that the asylum seekers had in fact been unlawfully detained and the proposed expulsion from Australian territory was unlawful. North J ordered that the asylum seekers be returned to Australia.\(^{211}\) It was clear from North J’s judgment that the Commonwealth were attempting to avoid their obligations under the *Refugee Convention*.

In this case, the evidence establishes that the respondents resolved that the situation would be handled so that the Act would not apply. That meant that the rescues would not be given the chance to make applications for protection visas within the migration zone.\(^ {212}\)

On the issue of unlawful detention, North J found that the asylum seekers had been detained, citing the troops control over the asylum seekers, directing them in what they were and were not allowed to do and the lack of communication and consultation.\(^ {213}\) On the issue of expulsion, the Minister had argued that the power to expel ‘aliens’ was part of a prerogative power of the Commonwealth.\(^ {214}\) However, North J found that the prerogative power did not apply to the expulsion of ‘aliens’ in this way, as the processes for expulsion had been clearly regulated by the *Migration Act*.\(^ {215}\)

That evening terrorists executed attacks on the Twin Towers in New York. The September 11 attacks roused serious concerns for national security and border protection. These of course were valid concerns and fundamental for the governance and self-preservation of a nation, but it was the disregard for human rights that was alarming. The majority of asylum seekers coming to Australia were from the Middle East. The attitude towards asylum seekers hardened. Asylum seekers were now viewed as ‘potential terrorists’ rather than victims.\(^ {216}\) The Government used both the

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\(^{211}\) *VCCL v Minister for Immigration and Multicultural Affairs* (2001) 110 FCR 452.
\(^{212}\) Ibid 75.
\(^{213}\) Ibid 81.
\(^{214}\) Ibid 110.
\(^{215}\) Ibid 120.
\(^{216}\) Crock, Saul and Dastyari, Above n 71, 116.
events of September 11 and the ‘War on Terror’ to its advantage, and began to handle asylum seeker policy as an issue of security and border protection, leaving little scope for human rights.

2  **Ruddock v Vadarlis**

Minister Ruddock appealed to the Full Federal Court, on the grounds that North J had erred in finding that: (i) the asylum seekers had been detained, and (ii) the executive power of the Commonwealth did not authorise the expulsion or detention of the asylum seekers. In the decision handed down on 18 September, the majority of the Full Federal Court overturned the original decision and held that the Minister’s actions were valid.

On the issue of the Commonwealth’s authority to detain and expel the asylum seekers, the majority found that the Commonwealth in fact had this authority. This authority is conferred by section 61 of the Constitution, which provides that the executive has the power to execute the laws of the Commonwealth. Section 61 is taken to also vest prerogative powers in the Crown. The power to expel non-citizens was found to be a prerogative power, as it is an implied part of national sovereignty. The majority found that this prerogative power could not be easily displaced by statute. As per French J:

> The greater the significance of a particular executive power to national sovereignty, the less likely it is that…the Parliament would have intended to extinguish the power.

On the facts of this case, the majority held that the executive’s power to exclude ‘aliens’ was too significant to be subjected to Parliament’s control. On the issue of unlawful detention, Court found North J had erred in finding that there was a total restraint on freedom, as he had focused on the Commonwealth’s control over the

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217 Hugo, Above n 6, 35.  
219 Ibid 3 (Black CJ).  
222 Ibid 185.
asylum seekers.\textsuperscript{223} The Court agreed that a public authority could act in a way that resulted in a person’s freedom being restricted where it is authorised by law.\textsuperscript{224}

The act of the Commonwealth in barring the landing of the rescues in any event could not, in my opinion, constitute a restraint on their liberty which was amenable to habeus corpus.\textsuperscript{225}

It was found that there was no detention and the actions of the Commonwealth were properly incidental in preventing the asylum seekers to come to Australia, ‘where they had no right to go’.\textsuperscript{226} The presence of the SAS troops on board, in combination with any other factors, did not constitute detention.\textsuperscript{227} Therefore, the actions of the Minister and the Commonwealth in detaining and expelling the asylum seekers were lawful as they were merely incidental to the executive power to exclude ‘aliens’ from entering Australia.\textsuperscript{228} Leave to appeal to the High Court was refused.

(a) \textit{Significance of the judgment}

According to Crock, when it came to asylum seekers, this decision demonstrated that the judiciary was willing to broaden the powers of the executive if it would protect Australia’s sovereignty.\textsuperscript{229} The Court recognised that the legislature could abrogate the powers of the executive,\textsuperscript{230} and that the \textit{Migration Act} intended to do so.\textsuperscript{231} However, the Court took a broad interpretation of the executive’s power to expel ‘aliens’, referring to the great importance of state sovereignty;

\begin{quote}
The power to determine who may come into Australia is so central to its sovereignty that it is not supposed that the Government of the nation would lack under the power conferred upon it by the Constitution, the ability to prevent people not part of the Australian community, from entering.\textsuperscript{232}
\end{quote}

\textsuperscript{223} Ibid 213.
\textsuperscript{224} Ibid 211.
\textsuperscript{225} Ibid 212.
\textsuperscript{226} Ibid 213.
\textsuperscript{227} Ibid.
\textsuperscript{228} Ibid 193-197.
\textsuperscript{229} Crock ‘You must be stronger than razor wire’, Above n 136, 52.
\textsuperscript{230} \textit{Ruddock v Vadarlis} (2001) 110 FCR 491, 181.
\textsuperscript{231} Ibid 165.
\textsuperscript{232} Ibid 193.
The Court held that if Parliament had intended to abrogate this executive power, there must have been express words to that effect and a clear intention to deprive the executive of this power, due to its importance.\textsuperscript{233}

Significant to this judgment was the way in which the Court interpreted Australia’s international obligations. It is generally accepted that provisions of an international treaty do not form part of Australia’s domestic law unless it has been expressly incorporated by statute.\textsuperscript{234} The \textit{Refugee Convention} has been ratified, but not expressly incorporated into domestic law, so it alone is not a direct source of rights. In \textit{Chu Kheng Lim}, the Court held that if the legislation is ambiguous, it should be constructed in a way that accords with Australia’s obligations under that convention.\textsuperscript{235}

The judgment in \textit{Ruddock v Vadarliss} indicated a disregard for the principles of the \textit{Refugee Convention} in domestic law.\textsuperscript{236} Beaumont J stated that ‘\textit{this is a municipal, and not an international court’}, and, while there is an obligation to rescue the Tampa asylum seekers under customary international law, there is no obligation to resettle them in Australia.\textsuperscript{237} Beaumont J had refused to consider the question as to whether the people rescued were refugees, or whether the expulsion of the asylum seekers would amount to \textit{refoulement}. The Court held that nothing the Commonwealth did would amount to a breach of the obligations under the \textit{Refugee Convention}.\textsuperscript{238}

Furthermore, French J provided:

\begin{quote}
It is questionable whether entry by the Executive into a convention thereby feters the executive power under the Constitution.\textsuperscript{239}
\end{quote}

Notably, as in \textit{Chu Kheng Lim}, the courts were willing to read down international law and play a passive role in adjudicating on human rights. The Court justified this approach by taking a broad interpretation of the powers conferred on the executive. The Court was not willing to let executive powers be fettered by provisions of

\textsuperscript{233} Ibid 185- 201.
\textsuperscript{234} See, eg, \textit{Kioa v West} (1985) 159 CLR 550; \textit{Dietrich v The Queen} (1992) 177 CLR 292.
\textsuperscript{235} \textit{Chu Kheng Lim} 38.
\textsuperscript{237} \textit{Ruddock v Vadarlis} (2001) 110 FCR 491,126.
\textsuperscript{238} Ibid 203.
\textsuperscript{239} Ibid 203.
domestic law and was certainly not willing to let it be abrogated by an unratified convention.

3  The Government’s Response: the ‘Pacific Solution’

After the Court’s decision, the Howard Government established the Pacific Solution: a new system for dealing with asylum seekers who arrived by boat. Under the Pacific Solution, the Commonwealth had the power to intercept boats and take asylum seekers to offshore processing centres on Nauru and Manus Island, Papua New Guinea (PNG), to determine their refugee status. The Pacific Solution marked the beginning of a repressive policy for asylum seekers, one that watered down the obligations under the Refugee Convention. The legislative basis for the Pacific Solution was established when Parliament hastily passed seven acts in one day. It was clear that Australia wanted no responsibility for the asylum seekers arriving to its shores. Three of these acts established the legal foundation for offshore processing under the Pacific Solution.

Firstly, certain areas were excised from Australia’s migration zone, by way of the Migration Amendment (Excision from Migration Zone) Act 2001 (Cth). Under this act, Christmas Island, Ashmore and Cartier Islands and Cocos (Keeling) Islands were defined as ‘offshore excised territories’. A person who arrived to these territories was prohibited from making an application for protection, unless permitted by the Minister at his discretion. Interestingly, Australia was prepared to reduce its territorial self in order to evade its obligations under the Refugee Convention. The constitutional validity of the excision of Australia’s territory was affirmed by the High Court in 2010.

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240 McMaster, ‘Insecurity of a Nation’, Above n 68, 288.  
241 Migration Amendment (Excision from Migration Zone) Act 2001 (Cth), Migration Amendment (Excision from Migration Zone Consequential Provisions) Act 2001 (Cth), Border Protection (Validation and Enforcement Powers) Act 2001 (Cth), Migration Legislation Amendment (Judicial Review) Act 2001 (Cth), Migration Legislation Amendment Act (No. 1) 2001 (Cth), Migration Legislation Amendment Act (No. 5) 2001 (Cth), Migration Legislation Amendment Act (No. 6) 2001 (Cth).  
242 Crock, Saul and Dastyari, Above n 71, 6.  
243 Migration Act 1958 (Cth) s 5.  
244 Ibid s 46A(2).  
The second act that was key to establishing the Pacific Solution was the *Migration Amendment (Excision from Migration Zone (Consequential Provisions) Act 2001* (Cth). Under this act, asylum seekers who arrived at an ‘offshore excised territory’ could be detained and transferred to a ‘declared country’ for their claims to be processed. The Minister could declare a country if that country ‘meets the relevant human rights standards’ in providing protection. The Minister declared Nauru and Manus Island in PNG to be ‘declared’ countries and soon after signed a Memorandum of Understanding with each.

Thirdly, the Government made provisions to validate the actions it took in relation to the Tampa Affair, by way of the *Border Protection (Validation and Enforcement Powers) Act 2001* (Cth). This Act allowed new protection powers of interdiction, providing that a ship or aircraft carrying asylum seekers could be detained and brought to ‘another place’. It also gave the Commonwealth powers to eject persons who had crossed the borders. This allowed Commonwealth officials to intercept boats en route to Australia and either return them to Indonesia or transfer them to Nauru or Manus Island.

### 4 Section 474: The Privative Clause

As a part of the Pacific Solution legislation, the Government passed the *Migration Legislation Amendment (Judicial Review) Act 2001* (Cth). The amending act inserted a privative clause into the *Migration Act* under section 474. This conflicts with the High Court’s original jurisdiction under section 75(v) of the Constitution, to review decisions of the executive. Section 474 prohibits the courts from reviewing a ‘privative clause decision’, which, by way of its extensive definition, applied to most immigration cases. This includes the decisions to grant, suspend or cancel a visa, imposing a restriction or condition, or ‘doing or refusing to do any other act or thing’. According to Brennan, this left no avenue for genuine refugees who had been given unfavourable decisions. Under sections 477 and 486A, there was a 35-day time limit for applicants to bring cases to the Federal Court and High Court respectively.

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247 *Migration Act 1958* (Cth) 198A(3).
248 Ibid s 254F(8).
249 Ibid s 7.
250 Ibid ss 474(3)(a), (d), (g).
251 Brennan, Above n 8, 145.
One of the most significant judgments on the interpretation of the privative clause was handed down in *Plaintiff S157/2002 v Commonwealth of Australia*.\(^{252}\) The court had to consider the constitutional legality of the privative clause of section 474 and the time limit under section 486A.\(^{253}\) The court upheld the provision but in order to avoid it from infringing section 75(v) of the Constitution, interpreted section 474 narrowly so that in practice, it is effectively redundant.\(^{254}\) The judgment in *Plaintiff S157* was a marked shift from earlier jurisprudence. The High Court took an approach that emphasised the protection of the fundamental rights of individuals. Rather than disregarding international obligations, the High Court now emphasised them. Gleeson CJ held that the rights of individuals and international obligations must be considered when interpreting the *Migration Act*:

> …The provisions of the Act concerning protection visas…are only part of a wider, and more detailed, pattern of legislation which, in a variety of respects, affects fundamental human rights and involves Australia’s international obligations.\(^{255}\)

The High Court recognised that decisions concerning refugee status are so significant to the individual that a high level of protection is needed. Traditionally privative clauses would protect a decision if it adhered to the Hickman principles however; Gleeson CJ sought to set a higher standard:

> People whose fundamental rights are at stake are ordinarily entitled to expect more than good faith. They are ordinarily entitled to expect fairness.\(^{256}\)

In this judgment, the Court acknowledged its responsibility to protect the fundamental rights of individuals and to uphold the rule of law. The joint majority judgment provided that the jurisdiction conferred by section 75(v) of the Constitution

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\(^{252}\) [2003] HCA 2 (*Plaintiff S157*).

\(^{253}\) Section 75(v) vests the court with the jurisdiction in all matters in which a writ of mandamus or prohibition or injunction is sought against an officer of the Commonwealth.


\(^{255}\) *Plaintiff S157*, 27 (Gleeson CJ).

\(^{256}\) Ibid.
is highly important as it is:

[a] means of assuring to all people affected that officers of the Commonwealth obey the law and neither exceed nor neglect any jurisdiction which the law confers on them.\(^{257}\)

5 Implications of Offshore Processing for the Refugee Convention

(a) Refoulement within Australia’s offshore processing arrangements

The most significant right that can be violated by regional processing arrangements is \textit{non-refoulement}. Australia has an obligation under the \textit{Refugee Convention} to ensure that people within its territory who meet the definition of refugee are not \textit{refouled}.\(^ {258}\) The obligation of \textit{non-refoulement} does not only apply to sending an asylum seeker back to their country of origin but also applies to the transferring of asylum seekers to third countries.\(^ {259}\)

Australia is not relieved of its obligations by simply sending asylum seekers to third countries. Essentially, according to principles of state responsibility, Australia is bound to ensure that asylum seekers are having their human rights recognised in any regional arrangement.\(^ {260}\) Australia will remain totally or partially responsible for the actions that occur after transferring asylum seekers to Nauru and PNG.\(^ {261}\) Therefore Australia must establish that the asylum seeker will: be treated in accordance with accepted international standards, have effective protection against \textit{refoulement}, and

\(^{257}\) Ibid 104 (Gaudron, McHugh, Gummow, Kirby and Hayne JJ).

\(^{258}\) \textit{Refugee Convention} art 33.


\(^{261}\) See \textit{Banković v Belgium and others} (European Court of Human Rights, Grand Chamber, Case No 52207/99, 12 December 2001); \textit{Al-Skeini v United Kingdom} (European Court of Human Rights, Grand Chamber, Case No 55721/07, 7 July 2011).

Firstly, the situation in the third country itself could pose a risk of persecution to the asylum seeker.\footnote{Ibid.} Australia must be able to ensure that the third countries involved in offshore processing arrangements have adequate protections in place and will not generate in asylum seekers a fear of persecution. The Australian Human Rights Commission has expressed concern over the quality of protection in both Nauru and PNG.\footnote{Australian Human Rights Commission, ‘Transfer of Asylum Seekers to Third Countries’, Above n 259, 8.} According to the UNHCR, the safe third country must be a party to the \textit{Refugee Convention}. When the Government first established the processing of asylum seeker claims in Nauru in 2001, Nauru was not a party to the \textit{Refugee Convention}. Nauru and PNG are now both signatories to the \textit{Refugee Convention}. However, PNG has made a number of reservations to several important articles of the \textit{Refugee Convention}.\footnote{Ibid.} Furthermore, the UNHCR provides that a third country must comply with refugee law in practice.\footnote{See Note on International Protection, UN GAOR, 50\textsuperscript{th} sess, UN Doc A/AC.96/914 (7 July 1999).}

arrangements. It is clear that the quality of protection is of concern. Given the well-known shortcomings in the human rights framework, it is difficult and almost impossible for Australia to guarantee that the asylum seekers who are sent to Nauru and PNG are being protected from refoulement.

Secondly, the third country may send an asylum seeker to another place where there is a risk of persecution. An asylum seeker can be at risk of refoulement where a third country fails to correctly identify refugees. The principle of non-refoulement requires states to provide asylum seekers with access to fair and effective procedures for determining status and protection needs. Because the consequences of a genuine refugee being refouled can be very serious, it is fundamental that claims are properly assessed. The UNHCR has expressed concerns about the adequacy of the determination procedures provided in Nauru and PNG. Nauru and PNG do not make individualised assessments on each asylum seekers need for detention. In addition, the immigration officers determining the claims have little training or experience. It is clear from these shortfalls that there is a real likelihood of refugees being refouled by Nauru and PNG.

(b) Other Rights at stake under Offshore Processing Arrangements

All asylum seekers transferred to Nauru and PNG have been subjected to mandatory detention. In Nauru and PNG, there have been delays in processing protection claims, which has led to prolonged detention. The mandatory and prolonged nature

272 Houston Report 80.
of the detention will constitute arbitrary detention.\textsuperscript{279} Australia is in breach of the obligations under the \textit{ICCPR} and the \textit{Convention Against Torture} to ensure that people are not returned to a country where there is a risk of harm through arbitrary detention or torture.\textsuperscript{280}

The Human Rights Commission has found the conditions in the detention centres to be extremely poor.\textsuperscript{281} This may breach the obligations under the \textit{ICCPR} to ensure that people in detention are not subjected to degrading treatment, and are treated humanely and with dignity.\textsuperscript{282} The UNHCR has found the conditions in Nauru to be ‘harsh and unsatisfactory’,\textsuperscript{283} and the centres in PNG were described as extremely hot and overcrowded.\textsuperscript{284} These poor conditions have been deemed to have a detrimental impact on the mental and physical health of asylum seekers.\textsuperscript{285} Studies have found high incidences of depression, anxiety and post-traumatic stress disorder.\textsuperscript{286} This could constitute a violation of the right to health under the \textit{ICESCR},\textsuperscript{287} and the prohibition against degrading treatment under the \textit{ICCPR}.\textsuperscript{288} In addition, the detention of children at these facilities is prolonged and mandatory. This has breached obligations under the \textit{Convention on the Rights of the Child} such as to detain a child as a measure of last resort.\textsuperscript{289}

\textbf{(c) The Current Status of Offshore Processing}

It must be noted that the flow of boats was significantly reduced after the Pacific Solution was established in 2001.\textsuperscript{290} Numbers of arrivals remained low for the ensuing years. However, in 2008 the ALP, who was concerned with the humanitarian

\textsuperscript{279} Australian Human Rights Commission ‘Those who have come across the seas’, Above n 116, 50.
\textsuperscript{280} Houston Report 81.
\textsuperscript{281} For discussion see: Australian Human Rights Commission, ‘Human Rights Issues Raised by the Third Country Processing Regime’, Above n 259.
\textsuperscript{282} The rights are contained under \textit{ICCPR} arts 7, 10.
\textsuperscript{283} UNHCR, ‘Mission to the Republic of Nauru’, Above n 268.
\textsuperscript{284} UNHCR, ‘Visit to Manus Island’, Above n 268.
\textsuperscript{286} Bem et al, Above n 194, 3.4.
\textsuperscript{287} \textit{ICESCR} art 12.
\textsuperscript{288} \textit{ICCPR} art 7.
\textsuperscript{290} After the enactment of the Pacific Solution, there was one boat arrival. See Phillips and Spinks, Above n 81, Appendix A: Boat arrivals since 1976 by Calendar Year, 22.
issues, dismantled the Pacific Solution.\textsuperscript{291} The number of asylum seekers came to an unprecedented rise in 2012: Australia received 15,800 applications that year.\textsuperscript{292} Under pressure to come to a solution, the Government commissioned the Houston Report. The rhetoric of the Houston Report was compassionate and humanitarian.\textsuperscript{293} However, in practice it encouraged a return to the harsh elements of the Liberal Government’s policy. Billings suggests that the Houston Report was commissioned to provide a cover for the ALP’s policy retreat.\textsuperscript{294} The ALP’s acceptance of the Houston Report signalled that asylum seeker policy had become bipartisan. Recommendations 8 and 9 suggested to re-establish offshore processing centres in Nauru and PNG respectively. The government was quick to give these recommendations effect.\textsuperscript{295} Asylum seekers began to be transferred to these centres in September 2012 and this has continued since,\textsuperscript{296} despite the well-known human rights costs of these offshore processing arrangements.

\textbf{D Fourth Wave: The Malaysia Solution in 2011}

Amidst another wave of asylum seeker arrivals, the ALP attempted to strike a deal with Malaysia. This deal would put Australia in serious breach of the obligation of non-refoulement. It was established on a similar basis as the arrangements with Nauru and PNG. However, this time a High Court challenge rendered it invalid.\textsuperscript{297}

\begin{flushright}
\textsuperscript{291} Mary Crock and Mary Anne Kenny, 'Rethinking the guardianship of refugee children after the Malaysian solution' (2012) 34 \textit{Sydney Law Review} 438.
\textsuperscript{293} For example it referred to the ‘appalling reality of the loss of many lives at sea’, and stated that ‘the prospect of further losses of life at sea is one that demands urgent and decisive action on the part of the Australian Parliament’.
\textsuperscript{295} Migration Legislation Amendment (Regional Processing and Other Measures) Act 2012 (Cth) was introduced. To facilitate this, the Government issued the Instrument of Designation of the Republic of Nauru as a Regional processing Country under subsection 198AB(1) of the Migration Act 1968, Commonwealth of Australia (September 2012) and the Instrument of Designation of the Independent State of Papua New Guinea as a Regional Processing Country under subsection 198AB(1) of the Migration Act 1958, Commonwealth of Australia (October 2012).
\textsuperscript{297} Plaintiff M70/2011 v Minister for Immigration and Citizenship; Plaintiff M106/2011 v Minister for Immigration and Citizenship (2011) 244 CLR 144 (Plaintiffs M70/M106)\end{flushright}
This was a turning point in asylum seeker jurisprudence, with the High Court now willing to uphold the obligation of non-refoulement in domestic law.

1 The Arrangement

The Government entered into an arrangement with Malaysia on 25 July 2011.298 Under the ‘Arrangement between the Government of Australia and the Government of Malaysia on Transfer and Resettlement’ (the Arrangement),299 Australia would transfer 800 asylum seekers who arrived by boat to Malaysia, in return for resettling 1,000 refugees per year who were living in Malaysia, for up to four years. Because of the absence of protection framework in Malaysia, the Arrangement provided that the claims of asylum seekers would be assessed by the UNHCR.

The legislative basis for the Arrangement was by way of sections 198(2) and 198A of the Migration Act. Essentially, these sections gave power to an officer of the Commonwealth to remove an unlawful non-citizen from Australia and transfer them to a declared country.300 Under section 198A(3) the Minister could declare a country as an offshore processing country if it: (i) provides asylum seekers with access to effective procedures for assessing their claim, (ii) provides protection for asylum seekers while their claim is determined, (iii) provides protection to persons who are determined to be refugees, and (iv) meets relevant human rights standards in providing that protection.301

Importantly, Malaysia is not a signatory to the Refugee Convention and does not have a legislative framework for refugee matters.302 Since refugees and asylum seekers are not recognised, they are often subject to the same penalties as non-citizens. Significantly, this includes the possibility of deportation,303 which in the case of a refugee, amounts to refoulement. Malaysia also faces issues of sexual-based violence and child abuse and has retained the death penalty. 304 Despite the obvious

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300 Migration Act 1958 (Cth) ss 198(2), 198A(1).
301 Migration Act 1958 (Cth) s 189A(3).
303 Ibid.
304 Ibid 269.
lack of protection in Malaysia, the Minister issued an Instrument of Declaration, making Malaysia a ‘declared’ country.

2 Challenging the legality of the Malaysia Arrangement

On 4 August 2011, a boat carrying 42 asylum seekers arrived at Christmas Island. These were to be the first group of asylum seekers to be sent to Malaysia under the Arrangement. On the 7 August 2011, proceedings were commenced in the High Court on behalf of the asylum seekers, who were due to be transferred to Malaysia the following day. The proceedings involved two separate applications: plaintiff M70 who was an adult, and plaintiff M106 who was an unaccompanied minor. Both plaintiffs sought an injunction against their removal to Malaysia. Justice Hayes granted interlocutory relief the following day.306

The plaintiffs argued that the Minister’s declaration of Malaysia as a ‘declared country’ was not valid as the requirements of section 198A(3) did not exist, or as the Minister could not be satisfied that the criteria were met. They cited the well-known shortcomings in Malaysia’s human rights protection framework; given that Malaysia was not a party to the Refugee Convention, the ICCPR, the ICESCR and the Convention on the Rights of the Child. The plaintiffs therefore argued that the applicants could not be removed to Malaysia. In addition, the plaintiffs argued that the pending removal would violate non-refoulement under the Refugee Convention.

With respect to plaintiff M106, there was an additional ground argued for the Minister’s decision being invalid. The plaintiff was an unaccompanied minor. According to the Immigration (Guardianship of Children) Act 1946 (Cth) (the IGOC Act), the Minister is the legal guardian of non-citizen children upon their arrival in Australia, until they leave Australia permanently, which includes being removed under section 198 of the Migration Act.307 A non-citizen child cannot leave Australia, unless with the written consent of the Minister, who must consider whether allowing the child to leave would be prejudicial to the best interests of the child.308 As the legal guardian of M106, the Minister should have considered whether it was in the

305 Instrument of Declaration of Malaysia as a Declared Country under subsection 198(3) of the Migration Act 1958, Commonwealth of Australia, Declared by Chris Bowen, Minister for Immigration and Citizenship (25 July 2011).
306 Taken from Plaintiffs M70/M106.
307 Immigration (Guardianship of Children) Act 1946 (Cth) s 6.
308 Ibid s 6A.
child’s interests to leave Australia, or to allow the child to apply for a visa under section 46 of the *Migration Act*.

**(a) A Turning Point in Asylum Seeker Jurisprudence**

On 31 August 2011, the High Court handed down a decision for both applicants in *Plaintiffs M70/M106*. Significantly, the High Court ruled by a clear majority of 6:1 that the removal of the asylum seekers to Malaysia was invalid. In a joint judgment handed down by Gummow, Hayne, Crennan and Bell JJ, it was found that the Minister’s declaration of Malaysia as a declared country was invalid, as it was affected by a jurisdictional error. The Minister could not establish the jurisdictional facts for the following reasons. Firstly, Malaysia does not have any provisions for refugees or asylum seekers domestically under the *Immigration Act 1959* (Malaysia). Nor had Malaysia undertaken any activities in receiving, processing or determining the claims of asylum seekers. Secondly, Malaysia is not a party to the *Refugee Convention* or its *Optional Protocol*. Finally, the Arrangement did not impose any legally binding responsibilities or obligations on Malaysia that would ensure that they accorded the appropriate protections required by the *Refugee Convention*. Therefore, the Minister’s declaration of Malaysia as a declared country was invalid and could not authorise the removal of the plaintiffs. With respect to the plaintiff M106, the Minister failed to give consent in writing, and had not given any consideration to the child’s best interests. The effect of the High Court’s decision was that the Arrangement with Malaysia was invalid.

**(b) Impact of the Plaintiffs M70/M106 Decision**

This High Court decision was significant in two ways. Firstly, it demonstrated a willingness of the courts to impose international obligations under the *Refugee Convention* into domestic law and to protect fundamental rights. The High Court had first signalled the significance of Australia’s international obligations in *Plaintiff S157*. Despite the fact that this was primarily a case turning on statutory interpretation, Wood and McAdam illustrate that the Court was willing to consider

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309 *Plaintiffs M70/M106*, 30, 135.
310 Ibid 135.
311 Ibid 103, 135.
312 Ibid 136.
313 Ibid 142.
obligations under the *Refugee Convention*. The joint majority judgment began with a discussion of Australia’s obligations under the *Refugee Convention*, especially with regard to *non-refoulement*. The obligation of *non-refoulement* was interpreted in a much broader way, as set out in the joint majority judgment:

Accordingly, for Australia to remove a person from its territory, whether to the person's country of nationality or to some third country willing to receive the person, without Australia first having decided whether the person concerned has a well-founded fear of persecution for a Convention reason may put Australia in breach of the obligations… in particular the *non-refoulement* obligation.  

With respect to section 198A, the High Court favoured an interpretation that was consistent with the *Refugee Convention*, as indicated by Kiefel J:

This construction of s 198A(3)(a) most closely accords with the fulfillment of Australia's Convention obligations and it is to be preferred to one which does not.

The High Court held that the terms used in section 198A, such as ‘provides access’ and ‘provides protection’ reflect the intent that the determination procedures in the declared country must to be compliant with the *Refugee Convention*.

Secondly, this decision was important for the relationship between Parliament and the courts. The Government had confidence in the Arrangement, as a similar arrangement between Australia and both Nauru and PNG had been tested and accepted by the High Court.

The Commonwealth argued on similar grounds, but this time without success. The High Court disregarded the fact that section 198A was used as the foundation of asylum seeker processing in Nauru.  

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315 Plaintiffs M70/M106, 94.
316 Ibid 246.
317 Ibid 125.
319 Plaintiffs M70/M106, 13.
distinguished this case from the agreement with Nauru:

…[E]ven assuming them to be in some way relevant, the arrangements made with Nauru were very different from those that are now in issue. Not least is that so because Australia, not Nauru as the receiving country, was to provide or secure the provision of the assessment and other steps that had to be taken, as well as the maintenance in the meantime of those who claimed to be seeking protection. Thus it was Australia, not the receiving country that was to provide the access and protections in question.\textsuperscript{320}

The decision of the High Court was criticised by the Government, for restricting the power of Parliament to deal with boat arrivals.\textsuperscript{321} However, Crock and Kenny highlight that when the Court previously accepted a similar policy, other factors were at play, such as war and terrorism.\textsuperscript{322} Therefore, the same outcome could not be expected a decade later, in comparatively calmer circumstances.\textsuperscript{323}

After this judgment was handed down, the Government persisted with the Arrangement. A Bill was introduced to Parliament on 22 September 2011 that sought to give the Minister the power to declare any state to be an offshore processing state if the Minister deemed it to be in the national interest to do so.\textsuperscript{324} The Bill also sought to circumvent the Minister’s obligations under the \textit{IGOC Act}, as it held that nothing should affect the Minister from exercising his power under the \textit{Migration Act} to remove a non-citizen child from Australia to an offshore processing country.\textsuperscript{325} However, with dwindling support for the Bill and much criticism from the Liberal party, the Government announced it would not be pursued.\textsuperscript{326}

The attempt to make this Arrangement with Malaysia demonstrated Australia’s willingness to violate its obligations under the \textit{Refugee Convention}, especially in relation to non-refoulement. The inadequacy of Malaysia’s refugee protection framework is blatantly apparent and even after the High Court ruled that it would be

\begin{footnotesize}
\begin{itemize}
  \item \textsuperscript{320} Ibid 128.
  \item \textsuperscript{321} Crock and Kenny, Above n 291, 461.
  \item \textsuperscript{322} Ibid 439.
  \item \textsuperscript{323} Ibid.
  \item \textsuperscript{324} \textit{Migration Legislation Amendment (Offshore Processing and Other Measures) Bill 2011} (Cth) ss 198AB(1)-(2).
  \item \textsuperscript{325} Ibid sch 2, item 8.
\end{itemize}
\end{footnotesize}
in breach of non-refoulement, the Government persisted. This is a clear example of the great lengths Australia will go to, in order to circumvent its obligations. It has been demonstrated that with each wave of asylum seekers, Australia has departed further and further from its obligations. The following chapter will seek to examine why Australia has shown such reluctance.

IV THE PROBLEMS AND FUTURE OF THE REFUGEE CONVENTION

A The Limitations of the Refugee Convention

By virtue of the prohibition against refoulement, when an asylum seeker arrives within a State’s territory, that State must allow the asylum seeker to enter and must decide whether or not that asylum seeker is a refugee. Until the 1980’s, the Refugee Convention was a relatively effective instrument in providing this protection to refugees. However, substantial numbers of people began fleeing their homes and notions of asylum became highly politicised. In the last few decades, States have been critical of the Refugee Convention and shown an increasing reluctance to provide protection. In practice, the Refugee Convention is not being honoured and does not attract the same significance it once did. This led to the proposition that the Refugee Convention is no longer relevant, and should be abandoned.

Crock has divided the criticisms of the Refugee Convention as viewed from three different standpoints: from the perspective of asylum seekers, from a universal perspective, and from Australia’s position. For asylum seekers and refugee advocates, the definition of refugee is too narrow and excludes certain people who should be protected as their life and security is under threat. From a universal

328 Ibid 1.
329 Note on International Protection, UN GAOR, 50th sess, UN Doc A/AC.96/914 (7 July 1999).
perspective, the Refugee Convention has been criticised for being inequitable to camp refugees and for its failure to provide a standard framework for implementing the obligations. The major criticisms from States such as Australia are the high financial cost of the determination procedures and the concern with ‘economic migrants’ making false claims under the Refugee Convention. These factors have caused Australia, as well as other States, to adopt a range of harsh and deterrent measures in order to restrict their obligations under the Refugee Convention. To assert its continuing significance, the criticisms of the Refugee Convention need to be addressed.

1 The Definition of Refugee

From the perspective of asylum seekers and refugee advocates, the definition of refugee under the Refugee Convention is too narrow. The definition of refugee is found in Article 1A of the Refugee Convention. It defines a refugee as a person who is outside their country of nationality and is unable or unwilling to return, owing to a well-founded fear of being persecuted on account of their race, religion, nationality, political opinion or membership of a particular social group (hereafter referred to as a ‘Convention reason’).

States then owe a duty not to refoul a person who comes within this definition of refugee. States are concerned with restricting the number of people entering their territory under the Refugee Convention. To that end, many States have adopted a narrow interpretation of the refugee definition, so that the obligation of non-refoulement is not as far reaching.

Owing to the concern of the Nazi’s persecution of the Jews, the refugee definition is focused on notions of individual persecution. To be recognised as a refugee under the Refugee Convention, asylum seekers must establish that they, as an individual, have a well-founded fear of persecution and that this persecution is for a Convention reason. The Refugee Convention therefore imposes on States the duty not to refoul:

334 Refugee Convention art 1A(2).
but not for all those in need, nor for all those fearing persecution.\(^{337}\) Upon a strict interpretation, the definition of refugee excludes people who are fleeing: (i) poverty and natural disasters, and (ii) war, generalised violence and grave human rights abuses.\(^{338}\) Crock, Saul and Dastyari assert that people who are threatened by poverty, natural disasters, war and generalised violence do not fall within the *Refugee Convention* definition of refugee, as it necessitates proof of individual persecution.\(^{339}\) As highlighted by Fontaine, this has led some to conclude that the definition is ‘disproportionally concerned with the issue of persecution’ and ‘out of step with our times’.\(^{340}\) What makes this application of the *Refugee Convention* controversial is that natural disasters and generalised threats can, just as persecution for a *Convention reason*, pose a threat to a person’s life and security.\(^{341}\)

Because States are trying to restrict their obligations under the *Refugee Convention* by adopting a narrow definition, Walker believes it is timely to defend the definition.\(^{342}\) Walker engages in a discussion as to whether a narrow construction of the definition of refugee can be justified. Walker essentially questions whether it is valid to exclude people who are fleeing their home country due to hardships such as natural disasters or generalised violence from the protection of the *Refugee Convention*.

Walker accepts that there is a moral obligation to help people in dire need, by drawing on Singer and Singer’s principle of mutual aid. Singer and Singer argue that if a State can provide assistance to a person in dire need, with little cost, there is a moral obligation to provide that assistance.\(^{343}\) The obligation will arise, whether the dire need is caused by poverty and famine, or war and generalised violence. This is because natural disasters and generalised threats can also pose a threat to a person’s life and security.\(^{344}\) It is indeed the moral proposition to help vulnerable people in need that informed the *Refugee Convention*. For Shacknove the focus on persecution

\(^{337}\) Ibid 584.

\(^{338}\) Shacknove, Above n 332, 276.

\(^{339}\) Crock, Saul and Dastyari, Above n 71, 22.


\(^{341}\) Shacknove, Above n 332, 277.

\(^{342}\) Walker, Above n 336, 586.


\(^{344}\) Shacknove, Above n 332, 277.
is unfounded and cannot be justified. Shacknove argues that the definition of refugee has drawn a line between people whose needs are morally equivalent. The author argues that what characterises a person as a refugee is that their State has failed to protect their basic needs: to be protected from threats to their life, security and welfare. And where the state fails to protect these basic needs, we should owe the same duty as we owe to those who are being persecuted for a Convention reason.

Walker contends that there is a ‘plausible argument’ for justifying why the Refugee Convention does not extend to people affected by other hardships. According to Walker, there is a stronger moral obligation to help those people who are persecuted for a Convention reason ahead of others. Walker’s argument is based on the position that, because the person’s ties with their country of nationality have not been broken, they do not need to be afforded the protection of non-refoulement. Walker provides two reasons for this. Firstly, there is no human agent responsible for natural disasters or famine, at least in the way that the threat is not posed by an oppressive government or state persecutor, and therefore the moral obligation to help is not as strong. However, Shacknove contends that natural disasters are in fact often complicated by human actions. For example, a State might fail to take actions to mitigate the human consequences of a minor natural disaster, bringing an element of responsibility.

Secondly for Walker, people affected by natural disasters have different needs to people affected by persecution for a Convention reason. Accordingly a different response is required, one which does not require the Refugee Convention. Rather the type of assistance required would be in the form of the provision of humanitarian aid and rebuilding infrastructure, for which people can look to their own state for protection.

Shacknove does not accept this proposition. Shacknove highlights that States might lack the resources to provide assistance in natural disasters. Even if the State has the

345 Ibid 276-7.
346 Ibid 281.
347 Walker, Above n 336, 598.
348 Ibid 600.
349 Ibid 599.
350 Shacknove, Above n 332, 279.
351 Ibid.
352 Walker, Above n 336, 598.
353 Ibid 600.
resources to assist, they might lack: (i) the technology required to process the resources, (ii) the sufficient infrastructure or (iii) the methods for distribution.\textsuperscript{354} These latter three conditions are within human control. Shacknove also considers that often States will be unwilling to provide assistance. For example, a corrupt government might withhold supplies or misappropriate humanitarian aid.\textsuperscript{355} According to Shacknove, this leaves no choice but to seek protection internationally.\textsuperscript{356}

Following on from this, many commentators such as Gunning,\textsuperscript{357} Shacknove,\textsuperscript{358} Dummet,\textsuperscript{359} Bagaric and Dimopoulos\textsuperscript{360} have argued for the definition of refugee to be expanded to reflect the current causes of displacement.\textsuperscript{361} However, expanding the scope of an already struggling regime would have little success. It should be noted that other refugee advocates, such as Frelick and Saul, do not want the definition of refugee to be opened for debate, as they fear that if the definition of refugee were to be amended, it would result in being more restrictive than it currently is.\textsuperscript{362} Indeed, Carens warns:

\begin{quote}
In seeking to advance the interests of refugees and other needy people we should be careful not to undermine the legitimacy of one of the few institutions that offer them any sort of protection and hope.\textsuperscript{363}
\end{quote}

Whether it is agreeable that the definition of a refugee is too narrow, it must be considered that the \textit{Refugee Convention}, as an international instrument, must be an

\begin{itemize}
\item Shacknove, Above n 332, 281.
\item Ibid 280.
\item Ibid 282.
\item Shacknove, Above n 332.
\item Gunning, Above n 357.
\item Bagaric and Dimopoulos, Above n 357.
\item Joseph Carens, ‘Refugees and the Limits of Obligations’ (1992) 6 \textit{Public Affairs Quarterly} 42.
\end{itemize}
instrument of compromise. The *Refugee Convention* was drafted with the goal of providing assistance to vulnerable refugees. \(^{364}\) While States agreed with the humanitarian principles of the *Refugee Convention*, they expressed concern or reluctance to sign on if States would be obliged to protect a broad range of people. \(^{365}\) States did not want to be responsible to all those in need, such as those fleeing natural disasters and poverty, nor to all those fleeing any type of persecution, for example as those subjected to war and generalised violence. There are vast numbers of people threatened by these hardships, and States had the genuine concern that, had the *Refugee Convention* applied in this way, States would become extremely overburdened. Accordingly, this produced a limited definition of refugee. \(^{366}\) This concern was evident at the drafting of the *Refugee Convention* and is just as strongly present today. As Walker suggests:

> Many states are concerned that uncontrolled immigration will result in a flood of immigrants, which will overly tax the resources of the receiving state. \(^{367}\)

Certainly this theme continues to colour the application of the *Refugee Convention* today. All the same, it is clear that to *refoul* an asylum seeker fleeing such hardships would be to return them to a potentially dangerous future, in just the same way as expelling a person fleeing persecution for a *Convention reason*.

### 2 Failure to Consider Rights of Camp Refugees

A universally held complaint about the *Refugee Convention* is that it is inequitable as it favours those who are mobile and wealthy. The regular channel for asylum seekers is, having left their country of origin, to register at a UNHCR Office in countries of first asylum. The UNHCR undertakes the ‘recording, verifying and updating of information’ on people of concern. \(^{368}\) The asylum seekers are hosted in camps, which are located in host countries such as Pakistan and the Congo. It is there they wait to be resettled by participating countries. Over the last five decades, Australia has

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\(^{364}\) Walker, Above n 336, 592.  
\(^{365}\) See, eg, *Conference of Plenipotentiaries on the Status of Refugees and Stateless Persons: Summary Record of Nineteenth Meeting*, UN GAOR, 19th mtg, UN Doc A/Conf.2/SR.19 (1951) (Speech by Mr Rochefort, France).  
\(^{366}\) Walker, Above n 336, 585.  
\(^{367}\) Ibid 583.  

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resettled around 600,000 people from refugee camps.\textsuperscript{369} The UNHCR typically resettles asylum seekers with the highest needs, but for the most part, the focus is on repatriation.

The \textit{Refugee Convention} does not confer any rights on asylum seekers who pursue regular channels. It contains rights and obligations relating only to those people who enter a State’s jurisdiction. Therefore, Crock, Saul and Dastyari argue that it favours those who are able to get to a country of asylum.\textsuperscript{370} This has created a channel for irregular movement, as asylum seekers are motivated to travel to another country, as their chance of resettlement is far greater. By failing to consider the rights of camp refugees, the \textit{Refugee Convention} has encouraged the irregular movement of asylum seekers, which poses a threat to the sovereignty and border control of States.

In addition, the failure to consider the rights of camp refugees has created a moral predicament for States. States have a limited capacity to provide protection, so must decide whether to provide protection to the UNHCR recognised refugees waiting patiently in camps, or to the asylum seekers who are able to make the sea voyage. As Brennan highlights, there is a stronger desire to help the asylum seekers who arrive to Australia than to help the refugees waiting in a camp overseas.\textsuperscript{371} The \textit{Refugee Convention} does not provide a way to reconcile the rights of camp refugees with those of Convention refugees.\textsuperscript{372} It creates obligations to asylum seekers who are present, and does not give priority to those with the greatest need. Milbank argues that this renders it unfair to camp refugees and those people who are unable to get to a safe third country.\textsuperscript{373}

3 The Failure to Provide A Practical Framework

Another universal complaint about the \textit{Refugee Convention} is the failure of the \textit{Refugee Convention} to provide an approach when implementing the obligations in a practical sense.\textsuperscript{374} For the most part, the \textit{Refugee Convention} is aimed at establishing the rights to be afforded to those who have been determined to be refugees. It


\textsuperscript{370} Crock, Saul and Dastyari, Above n 71, 22.

\textsuperscript{371} Brennan, Above n 8, 19.

\textsuperscript{372} See Millbank, ‘Problem with the 1951 Refugee Convention’, Above n 369; Crock, Saul and Dastyari, Above n 71, 22.

\textsuperscript{373} Millbank, ‘Problem with the 1951 Refugee Convention’, Above n 369.

\textsuperscript{374} Goodwin-Gill, 'Introductory Note', Above n 21.
provides an impetus for States to establish a systematic refugee program. However, the most contentious issues arise when States receive asylum seekers in their territories and must make a refugee status determination, for which the *Refugee Convention* provides little framework.\(^\text{375}\) The reason the *Refugee Convention* does not provide a practical framework is because the obligations under the *Refugee Convention* must be reconciled with state sovereignty. For sovereign states, no outside rule or law can influence what happens within its territory.\(^\text{376}\) Therefore, the decision on how to implement the obligations is to be decided by State Parties.\(^\text{377}\)

With no real limitations on a preference for state sovereignty, the absence of a practical framework has left room for States to formulate policies that are not compliant with the *Refugee Convention*, producing great inconsistencies in how the *Refugee Convention* is interpreted and applied from one State to another.

Interestingly, the *Refugee Convention* does not include an obligation on States to examine claims; this obligation arises through the operation of the *non-refoulement* principle. Implicitly, States must receive, process and determine the claims of asylum seekers who arrive in their territory, in order to ensure that a refugee is not being returned to a place where they fear persecution. However, the *Refugee Convention* fails to provide any framework for doing so. It is up to Australia to decide how to process and determine asylum seekers. This has had significant consequences for asylum seekers, and especially with respect to *non-refoulement*. Asylum seekers who arrive within Australia’s territory are sent to PNG and Nauru. It is clear from the human rights framework in Nauru and PNG, asylum seekers sent there by Australia are at risk of *refoulement*.\(^\text{378}\) However, the *Refugee Convention* does not prohibit offshore processing arrangements, nor provide any guidelines or limitations on it, allowing the arrangements to continue unrestrained by international obligations.

There is no requisite procedure on how States should decide claims for protection.\(^\text{379}\) The effective determination of claims is paramount. If claims are not assessed properly, a bona fide refugee may be denied protection, thereby constituting


retoulement. While the UNHCR and the Executive Committee have provided some
direction on how to determine claims, these are not binding. Under Australia’s
offshore processing arrangements, the claims of asylum seekers are being determined
in Nauru and PNG. It is clear that there are major shortcomings in the assessment of
claims, as immigration officers are untrained and inexperienced, indicating the
likely failure of Australia to uphold the duty not to refoul refugees.

The Refugee Convention does not prescribe measures States should take while the
claims for protection are being processed. Feller argues that, if states are going to
have a system of immigration detention, there should be some limitations on it, such
as it should only be resorted to where necessary, and should not be mandatory or
‘unduly prolonged’. After receiving the Cambodian asylum seekers in 1992, the
government decided that all asylum seekers would be held in immigration detention
while their claims were being determined. With few rules relating to immigration
detention, Australia decided to detain asylum seekers, including children, for
prolonged periods of time, amounting to arbitrary detention.

It is clear from Australia’s policies that, the absence of a set framework has led to
States being able to emphasise sovereignty at the expense of fulfilling the protection
obligations under the Refugee Convention. Although it is recognised that if the
Refugee Convention included a standards, it would be unlikely that States would
agree to a specific regime. Given the vast differences in the economy and social,
political and legal framework among the signatories, a model that is too specific
would not be appropriate or effective for every State Party, and States would have
been reluctant to sign on.

There is no central authority to adjudicate on any violations of the Refugee
Convention. The UNHCR oversees the implementation of the Refugee Convention.
When States accede to the Refugee Convention, they undertake to co-operate with
the UNHCR. The UNHCR is premised on co-operation and as such there is no

under the 1951 Convention and the 1967 Protocol Relating to the Status of Refugees,
HCR/IP/4/ENG/REV. 3 (December 2011).
381 Australian Human Rights Commission, ‘Transfer of Asylum Seekers to Third Countries’,
Above n 259, 8.
382 Feller, Above n 335, 596.
383 1992 Reforms ss 189, 190.
384 Refugee Convention art 35.
enforcement mechanism. If a State does not comply with the obligations under the *Refugee Convention*, the UNHCR can express its concern but this does little to redress the situation. For example, the UNHCR has expressed concern for Australia’s system of immigration detention since its inception, but it has remained a core feature of asylum policy. That said it is not expected that a democratic nation such as Australia should hand over sovereignty to the unelected members of the UNHCR. However it is clear that the absence of any mechanism to hold States accountable for breaching their obligations fosters non-compliance.

4 The Financial Cost of Receiving Asylum Seekers

More specific to the problems faced by Australia is the financial cost of the determination of asylum seeker claims. The *Refugee Convention* obliges countries to receive asylum seekers, determine their claims for protection and resettle where they are found to be refugees. In reality the *Refugee Convention* places a significant burden on receiving countries. Crock, Saul and Dastyari highlight that the financial cost involved with receiving and hosting asylum seekers and the determination procedure is significant. For Australia, a key component of the determination process is mandatory detention in offshore processing centres. In the 2013-2014 Federal Budget, the total cost of immigration detention and offshore management increased to $2.97 billion. The high financial cost of determining claims is also reflected in other Western countries, with many spending ten times more on determination procedures than they contribute to the UNHCR.

There are other financial burdens involved in providing assistance and services to asylum seekers and refugees. The 2014-15 Federal Budget has allocated $27.8 million to assisting asylum seekers while their status is being resolved. For those asylum seekers who are recognised as refugees, the Government will provide $574.1

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386 Crock, Saul and Dastyari, Above n 71, 22.
388 Crock, Saul and Dastyari, Above n 71, 22.
million in support services over a five-year period.\textsuperscript{390} With such a high financial cost involved with asylum seekers, it is apparent why States are trying to restrict the number of people they owe obligations to.

While Western countries are concerned with the genuinely significant financial cost of determining claims for protection, developing countries are struggling with the human responsibility. The majority of the refugee burden lies with the poorest countries of the Middle East, Asia, Africa and Eastern Europe that have the majority of the refugee burden.\textsuperscript{391} Hathaway highlights that the less developed countries, such as Chad and Syria, are hosting around 90\% of the world’s refugees and have far fewer resources to do so.\textsuperscript{392} In these camps, the conditions are so poor that they are ‘generally rights-abusive and often literally life threatening’.\textsuperscript{393} At the same time, Western countries are spending significant amounts of money on the comparatively minor numbers of refugees they receive.\textsuperscript{394} It is therefore argued that the burden and responsibilities of refugee protection must be reallocated.\textsuperscript{395}

The \textit{Refugee Convention} emphasises the need for burden sharing between States and international co-operation. The Preamble of the \textit{Refugee Convention} suggests that the drafters were mindful of the burden imposed by its obligations:

\begin{quote}
\ldots the grant of asylum may place unduly heavy burdens on certain countries.
\end{quote}

However, the \textit{Refugee Convention} fails to provide any framework for States to re-distribute the asylum burden. In addition to this, the \textit{Refugee Convention} does not make responsibility sharing mandatory.\textsuperscript{396} This has resulted in the burdens and responsibilities of protecting refugees being hugely disproportionate.\textsuperscript{397} Indeed it is generally agreed that a more even distribution of the burden and responsibilities for asylum seekers would improve the political climate of asylum and ultimately

\begin{footnotes}
\footnote{390}{Ibid.}
\footnote{391}{Millbank, ‘Problem with the 1951 Refugee Convention’, Above n 369, 5.}
\footnote{392}{James C. Hathaway, ‘Why Refugee Law Still Matters’ (2007) Feature: \textit{Melbourne Journal of International Law} 6. Note that this has shifted and it is likely that Turkey is currently hosting the refugees who were in the camp in Syria.}
\footnote{393}{Ibid 89.}
\footnote{394}{Ibid 93.}
\footnote{395}{Ibid 92.}
\footnote{396}{Millbank, ‘Problem with the 1951 Refugee Convention’, Above n 369, ii.}
\footnote{397}{Hathaway, ‘Why Refugee Law Still Matters’, Above n 392, 92.}
\end{footnotes}
facilitate the protection of refugees. However, it is not clear how a reallocation would operate in practice.

It would make sense for Western countries who spend a large amount of funds on determination procedures to instead contribute to economic development, humanitarian assistance and resettlement in developing countries. However, Aleinikoff contends that this is not realistic, nor durable. For Hathaway, if burden sharing is to be effective, the re-allocation of the burden and responsibilities must be more significant and binding. Hathaway continues that transferring resources to an overburdened host state must be underlined by respect for refugee law. Without respect for our obligations, Hathaway asserts that:

we seem content to throw money at the less developed world as a sop to our consciences for the harsh treatment of refugees in our midst, even as we know that such resources do not dependably accrue to the real benefit of promoting the goals of refugee safety, autonomy, and self-reliance at the heart of the Refugee Convention.

Linderstrom echoes this idea, agreeing that while the political will is lacking, strategies will be ‘regarded as paying mere lip service to fashionable calls for partnership and sustained development’. This can be highlighted in the Australian context. The Australian Government’s regional arrangements with PNG and Nauru cannot be described as a bona fide burden sharing arrangement. It is known that these countries do not have adequate standards, nor do they adhere to the obligations under the Refugee Convention. These arrangements are not a genuine re-allocation, rather a diversion of asylum seekers from Australia on the ground that they will be protected by other countries.

398 Feller, Above n 335, 593.
400 Ibid 622.
402 Ibid 94.
403 Ibid 94.
For Hathaway, a burden sharing arrangement should not be unilateral, that is, instigated by a wealthy country to serve its own interests. Hathaway and Neve propose a model of burden sharing, called a model of ‘common but differentiated responsibility’. Under this model, States would form ‘interest convergence groups’ who would share the financial cost and responsibility for refugees. The groups would agree, prior to a mass refugee movement, on what each State would contribute, which would be based on their ‘strengths’. Every State would play a meaningful, but different role in the sharing of financial burdens, and also in assuming responsibility for protecting refugees. According to Hathaway and Neve, States would be more open to receiving refugees if the responsibility and cost were shared.

However, Anker, Fitzpatrick and Shacknove contend that Hathaway and Neve’s model is not feasible or politically viable. The authors argue that it is highly unlikely that Western nations would use any money saved on determination procedures to provide financial assistance to struggling host countries. Indeed, the authors question whether states would save any money at all. It is further argued that states will not be able to come to agreements within their ‘interest convergence group’. Under the current regime of refugee protection, this is not realistic. Indeed, the concern of Australia is the high financial cost of receiving and determining claims. In a burden sharing mechanism such as the model discussed, Australia would not be adequately relieved of this financial burden. This undoubtedly underlies the reluctance of Australia to submit to an alternative to the current regime under the Refugee Convention.

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407 Ibid 145.
409 Hathaway and Neve, Above n 406, 101.
411 Ibid.
412 Aleinikoff, Above n 399, 622.
5 Concern with Misuse of the Refugee Convention

Another factor leading to Australia’s reluctance to provide protection under the Refugee Convention is the concern that ‘economic migrants’ are using it to make false claims in order to start new lives in Western countries.\(^{413}\) It is difficult to determine whether a person is fleeing persecution for a Refugee Convention reason, or whether they are seeking economic advancement. Importantly as Millbank highlights, often there is no distinction between political persecution and economic hardships as they are often deeply intertwined.\(^{414}\)

Most asylum seekers however come from countries where economic failure and political instability and persecution and poverty are inextricably mixed. And despite the either/or nature of determinations, distinctions between individual asylum seekers can rarely be established with any degree of certainty.\(^{415}\)

This is because many who are experiencing poverty will also experience generalised violence and persecution.\(^{416}\) Therefore the causes of displacement may be so intertwined that they are not discernible in the first instance. Take for instance the current situation in Somalia. Somalia is experiencing ongoing armed conflict and the very real threat of further terrorist attacks in the capital, Mogadishu.\(^{417}\) At the same time, Somalia is experiencing severe poverty, famine and a health epidemic, with the outbreak of poliovirus.\(^{418}\) This is but one example of the many countries where people may be simultaneously threatened by both persecution for a Convention reason and economic disadvantage.

As States are reluctant to provide protection to such a large number of people, it is easier for them to define people as ‘stowaways, boat people, economic migrants,

\(^{413}\) Klaus Neumann, ‘Whatever happened to the Right of Asylum’ (Speech delivered at the Law and History Conference, Melbourne, December 13 2010).
\(^{414}\) Millbank, ‘Problem with the 1951 Refugee Convention’, Above n 369, 10.
\(^{415}\) Ibid.
\(^{416}\) Ibid 15.
\(^{418}\) Somalia: Our work in Somalia (December 2013) International Medical Corps UK < http://www.internationalmedicalcorps.org.uk/where-we-work/africa/somalia/?gclid=CjgKEAjwzZucBRD77aiiq_v4xnASJABkAg8JhHgtOKFA7NF OXQEPb7sLYWGAg6Fl6LiyZ1qPrh7ZY_D_BwE>.
displaced persons, illegal aliens, or people who have been firmly resettled elsewhere’ in order to evade their obligations under the *Refugee Convention*.\(^{419}\) For example, the current Minister for Immigration, Scott Morrison stated that many people flee their country of nationality due to famine, poverty, health epidemics and financial collapse.\(^{420}\) Other causes of displacement include climate change and natural disasters such as floods.\(^{421}\) People fleeing these types of hardships do not come within the scope of the definition of refugee, as they are generally not facing persecution on account of their race, religion, nationality, political opinion or membership of a particular social group. They are referred to as ‘economic refugees’ and are perceived as illegitimate.

While these causes of displacement are by no means new, several factors have arisen that have motivated people to take advantage of the opportunity to move to a country that would provide a better life.\(^{422}\) Firstly, the disparity between rich countries and poor countries is widening. Due to the increase in technology, the spread of information, particularly via the Internet, is faster and more efficient.\(^{423}\) This has made people increasingly aware that their living conditions are inferior to those in developed countries.\(^{424}\) Secondly, there have been advancements in technology, which make international travel and the engagement of people smugglers easier.\(^{425}\) Therefore, more people are able to leave their country of nationality. Accordingly, they are drawn to Western countries for their economic opportunities, social welfare arrangements and political stability.\(^{426}\)

As ‘economic migrants’ do not come within the scope of the refugee definition, there is a genuine concern that people are making false claims of persecution under the *Refugee Convention*.\(^{427}\) This is especially so as there is a lack of alternative

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\(^{420}\) Scott Morrison, ‘A Real Solution: An international, regional and domestic approach to asylum policy’, (Speech delivered at the Lowey Institute, Sydney, 30 November 2010).

\(^{421}\) Ibid.

\(^{422}\) Brennan, Above n 8, 20.


\(^{424}\) Millbank, ‘Problem with the 1951 Refugee Convention’, Above n 369, 10.

\(^{425}\) UNHCR, ‘Fact Sheet 20’, Above n 423.

\(^{426}\) Millbank, ‘Problem with the 1951 Refugee Convention’, Above n 369, 10.

\(^{427}\) Neumann, Above n 413.
instruments to deal with these causes of displacement. Both ‘economic migrants’ and refugees might engage people smugglers. In addition both may have fraudulent or no documentation; although ‘economic migrants’ might destroy their documentation to deceive countries of asylum, while refugees might be unable to obtain documents from an oppressive government. The UNHCR has called for States to develop more efficient determination procedures to detect fraudulent claims. However, this would require States like Australia to allocate further resources into refugee determination, further increasing the financial burden of processing claims.

B The Continuing Need for the Refugee Convention

Indeed, it is little wonder that States such as Australia have dwindling support for their obligations under the Refugee Convention. For Australia, the main difficulties are the high financial cost of receiving asylum seekers and the concern that ‘economic migrants’ are misusing the Refugee Convention. These, in addition to a clear preference for sovereignty, are the strongest reasons Australia is reluctant to honour its obligations. However, Crock argues that it is not the inadequacies of the Refugee Convention that cause these complications. For Crock, the problems can be attributed to Australia’s policies. Saul echoes this view, stating that the Refugee Convention is not hindered by its scope or its interpretation; but by our politics. Australia is not unique in its concerns with the Refugee Convention. The financial cost of determining claims for protection is also experienced in many other Western countries. Nor is Australia the only State facing the prospect of ‘economic migrants’ misusing the Refugee Convention. Many people who may be ‘economic migrants’ are drawn to other Western countries for their economic opportunities, social welfare arrangements and political stability. What sets it apart, according to Crock, is the extent to which Australia has gone to avoid its obligation to not refoul refugees. The duty of non-refoulement is the very foundation of the Refugee Convention. Since it has attained the status of jus cogens, no derogation is

428 Morrison, Above n 420.
429 Millbank, ‘Problem with the 1951 Refugee Convention’, Above n 369, 15.
430 Crock, ‘The Refugee Convention at 50’, Above n 331, 53.
431 Saul, Above n 362.
432 Crock, Saul and Dastyari, Above n 71, 22.
433 Millbank, ‘Problem with the 1951 Refugee Convention’, Above n 369, 10.
permitted. However, it is evident through asylum seeker policies that Australia is willing to completely undermine this fundamental duty.

1 Australia and Non-refoulement

Under the \textit{Refugee Convention}, States are prohibited from \textit{refouling} a refugee in ‘any manner whatsoever’. The duty not to \textit{refoul} requires States to ensure that a refugee is not sent back to a place they fear persecution. \textit{Non-refoulement} clearly applies to sending asylum seekers to a third country. Since 2001, Australia has been sending asylum seekers to Nauru and PNG for processing. Australia is required to ensure that the asylum seekers transferred will: be treated in accordance with accepted international standards, have effective protection against \textit{refoulement}, and have the possibility to seek and enjoy asylum.

There are no real legislative safeguards for ensuring that an offshore processing country will protect asylum seekers from \textit{non-refoulement}. Under the current legislation, the Minister is permitted to declare an offshore processing country if it is considered to be in the national interest to do so. This is a broad notion with no regard for obligations under the \textit{Refugee Convention}. However, the Minister is required to obtain assurances from the third country that (i) asylum seekers who are transferred will not be \textit{refouled}, and (ii) that the country will make an assessments as to whether the asylum seekers are refugees under the \textit{Refugee Convention}. Despite this, section 198AB(4) provides that the assurances do not need to be legally binding. Significantly, an offshore processing country does not need to be a party to the \textit{Refugee Convention} or any other human rights treaties. In practice, these reforms have failed to impose any human rights safeguards. It is well known that Nauru and PNG both have an inadequate protection framework and for refugees in those places,

\begin{footnotes}
434 Allain, Above n 37, 533.
435 \textit{Refugee Convention} art 33.
437 Note the offshore processing arrangements were dismantled in 2008, but were re-established in 2012.
439 See \textit{Migration Act 1958} (Cth) s 198AB(2) which provides the Minister may declare a country as an offshore processing country if it is in the national interest to do so.
440 \textit{Migration Act 1958} (Cth) s 198AB(2).
441 Ibid ss 198AB(3)(a)(i), (ii).
442 Ibid s 198AA(d).
\end{footnotes}
conditions amount to *refoulement*. However, Australia has retained offshore processing as a key element of asylum seeker policy, demonstrating a disregard for *non-refoulement*.

The obligation of *non-refoulement* extends to the rejection of asylum seekers at the frontiers. This is because all asylum seekers must be treated as if they are refugees until a determination is made. The Australian Government has made concerted efforts to prohibit asylum seekers from accessing protection in Australia through interdiction and the excision of its territories.

One of the most alarming barriers Australia has employed is the interdiction of boats carrying asylum seekers. That is, physically intercepting boats carrying people seeking protection and towing them out of Australia’s territory. The current interdiction policy, beginning in September 2013 is dubbed ‘Operation Sovereign Borders’. It is a co-operative arrangement with Indonesia, which allows for the military to intercept boats carrying asylum seekers. Under this policy, asylum seekers can be towed back to Indonesia or taken to Christmas Island. Either way they are prevented from arriving in Australia. The UNHCR has ruled the interdiction of boats can constitute *non-refoulement*. It has warned that treatment in Indonesia may expose an asylum seeker to a threat, due to Indonesia’s inadequate refugee determination procedures. In addition, Indonesia could arbitrarily send the asylum seekers to another country where they may be persecuted. ‘Operation Sovereign Borders’ is highly likely to violate Australia’s *non-refoulement* obligations.

Indonesia is not a signatory to the *Refugee Convention* and the protective framework

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445 *Migration Amendment (Excision from Migration Zone) Act 2001* (Cth).
446 The Howard Government first introduced a policy of interdiction in September 2001 under the name ‘Operation Reflex’.
448 Ibid.
for refugees is inadequate. Any person present in Indonesia without
documentation is detained in extremely poor conditions and is likely to be
deported. The ramifications of this for the 1,106 asylum seekers intercepted since
September 2013 is not hopeful.

Yet another example of Australia taking extreme lengths to avoid the duty of non-refoulement to asylum seekers is the excision of its territory. In 2001 Parliament had
passed the Migration Amendment (Excision from Migration Zone) Act 2001 (Cth) which excised certain areas from Australia’s migration zone. This enabled asylum seekers who arrived to these ‘offshore excised territories’ to be transferred to an offshore processing centre, rather than have their claims heard in Australia. If this wasn’t enough, in 2013 Parliament passed legislation upon the recommendation of the Houston Report, which excised the whole of Australian mainland from the migration zone. From 16 May 2013, an asylum seeker who arrives by boat anywhere in Australian territory is prevented from making a protection claim in Australia and will be processed offshore. The UNHCR expressed concerns about this, stating that the excision of territory does not discharge Australia of its obligations under the Refugee Convention. Accordingly, the UNHCR held that Australia remains responsible for the asylum seekers it transfers. As discussed above, sending asylum seekers to Nauru and PNG has been found to constitute a breach of non-refoulement. In addition to non-refoulement, this legislation is arguably in violation of the principle of non-discrimination under the Refugee Convention, as it creates different treatment for asylum seekers who arrive by boat from those who arrive by air. It could also amount to penalisation, which is

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452 Ibid.


454 Migration Act 1958 (Cth) s 5.

455 Migration Amendment (Unauthorised Maritime Arrivals and Other Measures) Act 2013.

456 UNHCR, ‘New Excision Law’, Above n 269.

457 Ibid.

prohibited under the *Refugee Convention*, as the treatment of boat arrivals is less favourable than that of air arrivals.

Indeed, the disregard for the obligation of *non-refoulement* can be exemplified by the Australian Government’s actions in relation to the Tampa Affair. The situation on board the MV Tampa was clearly dire, with several passengers unconscious and a shortage of food and water. However, the Government, adamant to avoid protection obligations, refused to allow the MV Tampa to enter Australian territories and an embarrassing three-day standoff ensued. These measures to prevent asylum seekers from seeking protection undermine the elements of the *Refugee Convention* that are ‘both timeless and universal’.\(^{459}\) It is clear that Australia is willing to go to great lengths to prevent vulnerable people from seeking protection, which is far removed from the very reason the *Refugee Convention* was established.

### 2 Inconsistency with the Object of the Refugee Convention

The *Refugee Convention* was established by the coming together of States at a time where they were genuinely horrified at the human rights abuses of WWII.\(^{460}\) It was developed in a humanitarian spirit, at a time where there was a genuine desire to assist and realise basic human rights.\(^{461}\) The object of the *Refugee Convention* is to ensure that refugees, and all human beings, ‘shall enjoy fundamental rights and freedoms without discrimination’.\(^{462}\) The values the *Refugee Convention* represents are timeless. Goodwin-Gill asserts that it is based on a strong conception of human worth and the individual’s entitlement to respect for their dignity and integrity as a human being.\(^{463}\) The *Refugee Convention* seeks to emphasise humanity and the freedom from fear.

The fundamental duty, at the very heart of the *Refugee Convention*, is the obligation of *non-refoulement*. It is a very powerful idea: the notion that no country can turn its back on vulnerable victims escaping persecution. The principle of *non-refoulement* is the strongest purpose of the *Refugee Convention*. Saul asserts that the principle of *non-refoulement* underpinning the *Refugee Convention* has enduring relevance:

\(^{459}\) Crock, ‘The Refugee Convention at 50’, Above n 331, 54.
\(^{460}\) Ibid 56.
\(^{461}\) Jackson, Above n 2, 403.
\(^{462}\) *Refugee Convention* Preamble.
\(^{463}\) Goodwin-Gill, ‘International Protection of Refugees’, Above n 327, 3.
The convention's essential principles remain eternally valid, and precious, including that governments must not return anyone to persecution. Any retreat by Australia from that principle would have catastrophic consequences for human safety. It would also signal to other countries that refugee protection is no longer an important global value.\textsuperscript{464}

Fitzpatrick provides that \textit{non-refoulement} is thus the most enduring obligation under the \textit{Refugee Convention}.\textsuperscript{465} It was mandated in light of the reluctance of States to protect refugees of WWII. This principle is particularly important for the protection of asylum seekers, and Fontaine argues that it is the closest thing that accords to the right to seek asylum.\textsuperscript{466} \textit{Non-refoulement} is so central to refugee protection, that commentators who argue that the \textit{Refugee Convention} should be abandoned submit that it is unarguable.\textsuperscript{467}

The principle of \textit{non-refoulement} is further reinforced by other international treaties, under which it is unqualified and absolute. According to Article 3 of the \textit{Convention Against Torture}, States must not expel or return a person to another State if there are reasonable grounds for believing that they may be subjected to torture.\textsuperscript{468} The \textit{Convention on the Rights of the Child} also contains a right to be free from torture in Article 37, which is mirrored in Article 7 of the \textit{ICCPR}. Also reinforcing the importance of \textit{non-refoulement}, Article 13 of the \textit{ICCPR} provides that States cannot expel an ‘alien’ lawfully in its territory, without due process. The presence of this principle in other international treaties reflects its importance in international human rights law.

Indeed, the principle of \textit{non-refoulement} is of such importance that it has gained the status of \textit{jus cogens}, that is, a norm of international law.\textsuperscript{469} This demonstrates the recognition, on an international level, of the enduring importance of this principle. Furthermore, no derogation from this principle is permitted.\textsuperscript{470} As a result, the principle of \textit{non-refoulement} applies globally to all States regardless as to whether a

\begin{itemize}
\item \textsuperscript{464} Saul, Above n 362.
\item \textsuperscript{465} Fitzpatrick, Above n 24, 237.
\item \textsuperscript{466} Fontaine, Above n 340, 79.
\item \textsuperscript{467} Millbank, ‘Problem with the 1951 Refugee Convention’, Above n 369.
\item \textsuperscript{468} \textit{Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment}, opened for signature 10 December 1984, 1465 UNTS 85 (entered into force 26 June 1987) art 3. See also art 16.
\item \textsuperscript{469} Allain, Above n 37, 533.
\item \textsuperscript{470} Ibid 533.
\end{itemize}
state has acceded to the *Refugee Convention*.\textsuperscript{471} In this way, some principles of the *Refugee Convention* have the ability to transcend borders and governments.\textsuperscript{472} Aside from the principle of non-refoulement, other obligations and individual rights under the *Refugee Convention* are of vital importance.\textsuperscript{473} For the protection of asylum seekers, the *Refugee Convention* importantly provides the right to seek asylum,\textsuperscript{474} and to do so without being penalised.\textsuperscript{475} It also obliges governments to ensure that people can make an application for asylum and have their status determined. The *Refugee Convention* includes the principle of non-discrimination, which is well-supported in other international treaties. It also ensures that refugees are afforded a range of basic rights such as the right to work and the right to education. The *Refugee Convention* therefore encapsulates an important range of fundamental rights. It is the only global instrument of its kind and has been widely indorsed and ratified.\textsuperscript{476} The *Refugee Convention* forms the very foundation of the protection of refugees.

The *Refugee Convention* cannot be expected to be without flaws, due to its very character as an international instrument.\textsuperscript{477} However, some commentators, such as Millbank, argue that the *Refugee Convention* is deeply flawed and should be abandoned.\textsuperscript{478} For Millbank, the operation of the *Refugee Convention* is no longer adequate. The author argued that the *Refugee Convention* ‘causes more harm than good’ and suggests:

> It is time that Australia and other signatory countries renounce [the *Refugee Convention*] and committed themselves to a genuinely humanitarian refugee policy.\textsuperscript{479}

However, if the *Refugee Convention* was abandoned, the practical likelihood of it being replaced by a more protective instrument is limited. Indeed, many commentators are deeply concerned with the outcome if States attempted to replace

\textsuperscript{471} Fontaine, Above n 340, 71.
\textsuperscript{472} Babacan, Above n 54, 161.
\textsuperscript{473} Goodwin-Gill, ‘International Protection of Refugees’, Above n 327, 3.
\textsuperscript{474} This is derived from *Universal Declaration of Human Rights* art 14.
\textsuperscript{475} *Refugee Convention* art 31.
\textsuperscript{477} Fontaine, Above n 340, 79.
\textsuperscript{478} Millbank, ‘The Elephant on the Boat’, Above n 330, 41.
\textsuperscript{479} Ibid.
the *Refugee Convention* with a ‘genuinely humanitarian’ regime, as Millbank suggests. Feller provides that:

> If this instrument is lost, the likelihood of it being replaced by anything approaching its value is remote.\(^{480}\)

The *Refugee Convention* is an instrument of compromise.\(^{481}\) Under the current regime, States are already reluctant to provide protection. In the last few decades the scope of the refugee situation has expanded and become more complex.\(^{482}\) With growing disparity between nations, it is unlikely that an international consensus on an alternative regime could be achieved. Even if a consensus could be reached, Fontaine provides that if the *Refugee Convention* were to be replaced, there is no guarantee that an alternative would have fewer problems, or be more generous.\(^{483}\) Therefore, many commentators strongly disagree with abandoning the *Refugee Convention*. Dastyari asserts that if we withdraw from the *Refugee Convention*, we are turning our backs on vulnerable people seeking protection, which is undermining the very core of the *Refugee Convention*. To emphasise this, Dastyari argued:

> If Australia was to attempt to water down its obligations under the convention or withdraw from it entirely, it would set an embarrassing precedent that will be extremely damaging to the international protection regime and leave many vulnerable individuals in danger of being left without protection.\(^{484}\)

The *Refugee Convention* is the only instrument that attempts to govern State’s responses to asylum seekers and refugees. While the *Refugee Convention* is flawed, if there were no regime of international obligations, the political and administrative pressures would undoubtedly weigh even more heavily against refugees.\(^{485}\) It is therefore essential to maintain a protection mechanism, even if it has only persuasive

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\(^{480}\) Feller, Above n 335, 593.

\(^{481}\) Fontaine, Above n 340, 79.

\(^{482}\) *Note on International Protection*, UN GAOR, 50\(^{th}\) sess, UN Doc A/AC.96/914 (7 July 1999).

\(^{483}\) Fontaine, Above n 340, 79.


\(^{485}\) Crock, ‘The Refugee Convention at 50’, Above n 331, 56.
force. It is fundamental that non-refoulement continues to be the driving principle in refugee law.  

V  CONCLUSION

Australia was historically committed to the Refugee Convention, especially with respect to resettling refugees from UNHCR camps. Australia had been content with accepting those who could be selected on the basis of race, ethnic origin and skills, but the response to asylum seekers arriving to its shores has been remarkably different. Waves of asylum seeker arrivals have challenged Australia’s commitment to the Refugee Convention. The most significant obligation of the Refugee Convention is the principle of non-refoulement; that is, not to return a vulnerable person to a place where their life or security is threatened. This key obligation is in line with the very spirit of the Refugee Convention, to protect individuals who are escaping persecution.

However, since it was established, several issues have emerged, which have caused an increasing reluctance of States to provide protection under the Refugee Convention. The Refugee Convention has been criticised on several levels but the most significant problems affecting Australia is the high financial cost of determining claims and the potential of ‘economic migrants’ to misuse the Refugee Convention. As a result, Australia has shown a complete disregard for its protection obligations, especially for non-refoulement.

After the Tampa Affair, the government legislated for all asylum seekers to be taken to Nauru or PNG to be processed. The protection framework and conditions in these countries are very likely to put Australia in breach of non-refoulement, however this has remained a key feature of Australia’s asylum seeker policy. The government attempted to strike a similar arrangement with Malaysia, but this was struck down by the High Court for essentially breaching Australia’s non-refoulement obligations. Australia has also undertaken to directly exclude asylum seekers from reaching its

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487 Brennan, Above n 8, 1.
488 Note on International Protection, UN GAOR, 50th sess, UN Doc A/AC.96/914 (7 July 1999).
territory, by intercepting and towing back boats, which is highly inconsistent with
*non-refoulement*. The human and fiscal costs of these policies are undisputed. With
the criticisms of the *Refugee Convention* aside, it is Australia’s willingness to breach
the most fundamental principle of the *Refugee Convention* that is the most alarming.

With little chance of States making any progressive reforms to the *Refugee
Convention*, it is paramount to refugee protection that we retain it as the only
instrument that offers the protection of *non-refoulement*, otherwise the scales will
weigh even more heavily against refugees.
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