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IN THE WAKE OF THE *TAMPA*: CONFLICTING VISIONS OF INTERNATIONAL REFUGEE LAW IN THE MANAGEMENT OF REFUGEE FLOWS

Mary Crock[†]

Abstract: The Australian Government's decision in August 2001 to close its doors to a maritime Good Samaritan, Norwegian Captain Rinnan, his crew, and 433 Afghan and Iraqi rescuees, provided a curious contrast to the image of humanity, generosity, and openness that Australia tried so hard to foster during the 2000 Olympic Games in Sydney. Victims or villains according to how the facts and the law are characterized, the *M/V Tampa* rescuees represented for lawyers the intersection of a variety of areas of law and a clash of legal principles. The ambiguities in both international and state law pertaining to asylum seekers and refugees give rise to questions of state responsibility.

The stand taken by Australia set a precedent that, if followed by other refugee receiving countries, could only worsen the already deplorable problems facing asylum seekers in the world today. The immediate Australian response to the *Tampa* Affair was a rash of legislative amendments to Australia's 1958 Migration Act that stifled appeals to federal courts and granted officers a broad range of power over rescuees within and outside of Australia's territorial jurisdiction. Australia has also responded with "Operation Relax" and the "Pacific Solution" which have not only been inadequate to address the needs of the rescuees, but have arguably violated both state and international law. The conflicting interpretations of the law—both domestic and international—that have emerged in the wake of the *Tampa* may be testament to the inadequacies of the legal framework for the protection of refugees.

I. POINTS OF DEPARTURE

The decision by the Australian Government to close its doors to sea-borne asylum seekers, or "boat people," in August 2001 took many people by surprise.¹ Perhaps it was the nature of the incident that led to the

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¹ Donald Rothwell provides the following account of the events that began the *Tampa* Affair:

precipitous change of policy: the refusal to allow a maritime Good Samaritan to off-load his distressed and weary “rescuees”² onto Australian soil made for fine drama. The implacable hardness of the Australian authorities and the shrill xenophobia of the Australian public throughout the *Tampa* Affair³ provided a curious contrast to the image of humanity, generosity, and openness that Australia tried so hard to foster during the 2000 Olympic Games in Sydney. Even as more serious events unfold to threaten global security, it is right that the *Tampa* Incident should continue to concern us. The stand taken by Australia in August 2001 set a precedent that, if followed by other refugee receiving countries, could only worsen the already deplorable problems facing asylum seekers in the world today. The incident is also a vivid reminder of how easy it is to sow seeds of fear and hate in a society, even in a country that prides itself on its respect for human rights and the rule of law.⁴

On 26 August 2001, the Australian Search and Rescue organization assisted in the coordination of a search and rescue operation in the Indian Ocean for the *Palapa 1*, an Indonesian flagged ship carrying 433 people. The Norwegian flagged roll on/roll off container ship, *M/V Tampa*, responded to this request and with the assistance of the Australian authorities was guided to the sinking vessel where it successfully carried out the rescue operation. Immediately following the rescue, the *Tampa* headed towards the Indonesian port of Merak, some 246 nautical miles to the north. However, approximately four hours into this voyage, the *Tampa* reversed course and began steaming south towards the Australian territory of Christmas Island, which had only been 75 nautical miles south of where the original rescue had taken place. Later that evening the master of the *Tampa*, Captain Rinnan, was asked by Australian authorities to change course for Indonesia and threatened that if he did enter Australia’s territorial sea with the intention of offloading the persons rescued from the *Palapa 1* that he would be subject to prosecution under the Migration Act 1958 (Cth) for people smuggling. This communication gave the first clear indication of the position the Australian Government was taking towards the *Tampa* and set the tone for the Australian Government’s legal and policy response over the course of the next week.

See Donald Rothwell, *The Law of the Sea and the M/V Tampa Incident: Reconciling Maritime Principles with Coastal State Sovereignty*, 13 PUB. L. REV. 118, 118 (2002). For another account, see James C. Hathaway, *Immigration Law is Not Refugee Law*, in U.S. COMMITTEE FOR REFUGEES, WORLD REFUGEE SURVEY 38-45 (2001).

² “Rescuees” is the term coined by Judge North in the Australian Federal Court in the litigation brought by public interest advocates in the *Tampa* Incident. See *Vadarlis v. Ruddock* (2001) 110 F.C.R. 452, 457, *overruled by Ruddock v. Vadarlis* (2001) 110 F.C.R. 491. Judge North explained his choice of word as an attempt to find a neutral (and non- emotive) term to describe the people at the heart of the incident. See *id.*

³ The “*Tampa* Incident” and the “*Tampa* Affair” refer to the same incident and are used interchangeably throughout this Article.

⁴ A great deal has now been written about the *Tampa* Affair and the way in which the Australian people responded to the abrupt change in the Government’s policies. See, e.g., PETER MARES, *BORDERLINE: AUSTRALIA’S RESPONSE TO REFUGEES AND ASYLUM SEEKERS IN THE WAKE OF THE TAMPA* (UNSW Press 2d ed. 2002) (2001); JAMES JUPP, *FROM WHITE AUSTRALIA TO WOOMERA: THE STORY OF AUSTRALIAN IMMIGRATION* (2002); Penelope Mathew, *Australian Refugee Protection in the Wakes of the Tampa*, 96 AM. J. INT’L L. 661 (2002) [hereinafter Mathew, *Australian Refugee Protection*]; Penelope

From the perspective of international refugee law, the *Tampa* Incident and its aftermath present a fascinating example of how the adoption of different perspectives can produce diametrically opposing visions of both the law and the justice of actions taken. Insofar as the various visions are capable of producing dramatically different outcomes, the incident also illustrates the limitations inherent in international refugee law where the mechanisms that exist to enforce particular outcomes are patently inadequate.

This Article examines the differing constructions of international law that have been introduced to either condemn or condone the actions taken by the Australian Government to prevent the off-loading of the *Tampa* rescuees on Australian territory. While allowing for differences that have emerged in the description of the factual events of the incident involving the *Tampa* in late August 2001, the applicable law is more remarkable for its ambiguities than for the light it sheds on the events in question. Part II of the Article briefly sketches the arguments made under international maritime law before turning to a consideration of international refugee law. The discussion of refugee law begins by looking at the significance of the status of the rescuees as asylum seekers who had yet to articulate claims to be refugees. After examining the issue of which country or countries had responsibility for the rescuees, Part II considers the nature of the different obligations imposed on States Parties to the Convention Relating to the Status of Refugees ("Refugee Convention") relative to the geographical situation of refugees.⁵

The *Tampa* Affair was followed by what the Australians dubbed "Operation Relex" and the "Pacific Solution." When Australia refused to land the *Tampa* rescuees, arrangements were made to divert these and other "boat people" interdicted en route to Australia back to Indonesia, to New Zealand, and to the Pacific islands of Nauru and Manus Island in Papua New Guinea ("PNG"). All persons taken in as part of the Pacific Solution have

Mathew, *Legal Issues Concerning Interception* (Oct. 25, 2002) (unpublished manuscript, on file with author) [hereinafter Mathew, *Legal Issues*]. For a discussion of the incident within the context of constitutional and human rights law, see 13 PUB. L. REV. (2002) (special issue devoted to the *Tampa* Affair).

⁵ The leading international instruments are the United Nations Convention relating to the Status of Refugees and its attendant Protocol. Convention Relating to the Status of Refugees, *opened for signature* July 28, 1951, 19 U.S.T. 6259, 189 U.N.T.S. 150, A.T.S. 1954/5 (entered into force Apr. 22, 1954) [hereinafter Refugee Convention]; United Nations Protocol to the Convention Relating to the Status of Refugees, *opened for signature* Jan. 31, 1967, 19 U.S.T. 6223, 6224(E), 6230(F), 606 U.N.T.S. 267, A.T.S. 1973/37 (entered into force Oct. 4, 1967) [hereinafter Protocol]. The Refugee Convention covers events causing a refugee problem before January 1, 1951, while the Protocol extends the definition to events occurring after that date.

had or are having their status as refugees determined. Processing of the *Tampa* rescuees and some other asylum seekers⁶ was undertaken by New Zealand, the United Nations High Commissioner for Refugees (“UNHCR”), and the International Office for Migration (“IOM”).⁷ The other asylum seekers who arrived on boats following the *Tampa* Affair had their refugee claims determined by Australian officials operating on Nauru and Manus Island. The asylum seekers detained on Nauru and Manus Island have not been given access to legal advice or other assistance. One rationale behind this scheme appears to be an attempt to reproduce, as closely as possible, the rudimentary processing regime used in UNHCR field operations in situations of refugee crises.⁸ Part III examines the different legal constructions that have been placed on these arrangements and challenges the Australian Government’s view that its “solution” represents a principled response to the management of “secondary refugee flows.”

The radically changed policy adopted by Australia in September 2001 is extraordinary within the context of international state practice, but it is not unique. In many respects, Australia modeled both its interdiction program and “offshore” arrangements to process the refugee claims of those taken into custody on the system of the United States. Part III explores the parallels between Australia and the United States in the immediate aftermath of the *Tampa* Incident, examining the way in which both countries have used the ambiguities of international law to assert the dominance of their domestic laws.

The final phase of the *Tampa* Incident is what might be described as the “durable solution” end of the story. In early April 2002, the UNHCR and Australia began releasing decisions on Nauru and Manus Island. As individuals come to gain recognition as refugees, questions arise about who will take the refugees and on what terms. Part IV of this Article, discusses who should have ultimate responsibility for the resettlement of those recognized as refugees on Nauru and Manus Island. Once again, the picture

⁶ The *Tampa* rescuees—most of whom were fleeing from Afghanistan and Iraq—were eventually taken on board an Australian troopship, the HMAS *Manoora*, and transferred to Nauru. See Tom Allard & Mark Metherell, *Australia Leans on Nauru to Process Latest Asylum Seekers*, SYDNEY MORNING HERALD, Sept. 10, 2001, <http://old.smh.com.au/news/0109/10/national/national1.html>. During the voyage to Nauru, the *Manoora* collected another group of asylum seekers, primarily Iraqis, from an Indonesian vessel called the *Aceng*. *Id.*

⁷ For a discussion of the role that the IOM has played in the resolution of the *Tampa* Affair, see *By Invitation Only: Australian Asylum Policy*, HUMAN RIGHTS WATCH, Dec. 2002, at 51-52, 71-73 [hereinafter *By Invitation Only*].

⁸ See *id.*; Minister for Immigration and Multicultural and Indigenous Affairs, *People Smuggling—Australia’s Experience and Policy Responses—A Background Paper*, http://www.minister.immi.gov.au/borders/detention/peoplesmugg_2.htm (last updated July 22, 2002) [hereinafter *People Smuggling Background Paper*].

that emerges is one of political considerations overriding any pure application of the rule of law.

II. DECONSTRUCTING THE *TAMPA* INCIDENT

A. *Tampa Politics: Playing Games with the Law or Constructing Different Legal Realities?*

The standoff between Captain Rinnan of the *Tampa* and the Australian Government in late August 2001 was first and foremost a human and political drama. The Norwegian captain responded to the humanitarian crisis of the sinking *Palapa I* both by bringing the rescuees on to his ship, and by acceding to their requests to proceed towards the Australian territory of Christmas Island rather than to Indonesia. He sailed unwittingly into a political storm when the Australian Government used the incident to take a stand against unauthorized boat arrivals.

The electoral popularity of the Australian Government's actions in refusing admission to the *Tampa* grew exponentially after the terrorist attacks in the United States on September 11, 2001. The confluence of this incident with the events in the United States spawned (at least) two legal dramas. The first was the litigation instituted by public interest lawyers in Melbourne in a vain attempt to force the Australian Government to "land" the rescuees and to permit them to lodge asylum claims.⁹ The second was the rash of legislation presented to Parliament and passed with barely half a day of debates on September 26, 2001.¹⁰ The outcomes in both instances reflected the overwhelming force of a panicked electorate led by a government prepared to run with, and even encourage, the fears of the populace—to its considerable political advantage. The *Tampa* Affair marked the beginning of a concerted and ultimately divisive campaign

⁹ See *Vadarlis v. Ruddock* (2001) 110 F.C.R. 452, *overruled by* *Ruddock v. Vadarlis* (2001) 110 F.C.R. 493. Although an appeal was instituted in the High Court, leave to appeal was denied on the basis that the distribution of the *Tampa* rescuees between New Zealand and Nauru had rendered the dispute moot, with the subjects of the litigation having passed beyond the control of the Australian courts. See *Vadarlis v. Ruddock*, High Court Transcript, No. M93 of 2001 (Nov. 27, 2001) (review denied by the Australian High Court).

¹⁰ See Border Protection (Validation and Enforcement Powers) Act, 2001 (Austl.); Migration Amendment (Excision from Migration Zone) (Consequential Provisions) Act, 2001 (Austl.); Migration Legislation Amendment Act, No. 1, 2001 (Austl.); Migration Legislation Amendment Act, No. 3, 2001 (Austl.); Migration Legislation Amendment Act, No. 5, 2001 (Austl.); Migration Legislation Amendment Act, No. 6, 2001 (Austl.); and Migration (Judicial Review) Act, 2001 (Austl.). These measures were opposed only by the Democrats, the Greens, and independent Senator Brian Harradine. For an account, see Mary Crock, *Echoes of the Old Countries or Brave New Worlds: Legal Responses to Refugees and Asylum Seekers in Australia and New Zealand*, 14 REV. QUÉBÉCOISE DROIT INT'L 55 (2001).

against asylum seekers generally and boat people in particular,¹¹ culminating in a federal election that saw the incumbent government returned with a handsome majority.¹²

If the politics of the *Tampa* help to explain the popular fixation on the events as they unfolded in 2001, the Incident has proved endlessly fascinating for aficionados of law and legal theory. The standoff between Australia's Special Armed Services and Captain Rinnan occurred at sea, within three nautical miles of Christmas Island. The rescuees were within Australia's maritime territory, but had not touched the soil defined in domestic legislation as Australia's "migration zone."¹³ The rescuees plainly wanted to claim asylum in Australia,¹⁴ but they had no papers to prove that they were refugees as defined under the Refugee Convention.¹⁵ Under international law of the sea, the rescuees could be characterized as victims. Under Australian domestic law, the absence of visas or other evidence of a right to enter rendered them villains.

Victims or villains according to how the facts and the law are characterized, the *Tampa* rescuees represented for lawyers the intersection of a variety of areas of law and a clash *par excellence* of legal principles. At the same time, the affair also represents a fascinating case study of how

¹¹ For a detailed account of Operation Relex, see *infra* Part III.

¹² The tactics threw the Opposition Labor Party into disarray. In the words of John Button:

The most profoundly disillusioning event in 2001 for those who believed in a humanitarian and compassionate Labor Party was its response to the *Tampa* incident and the engineered refugee crisis. People searched in vain for a sign of difference between the ALP and the Coalition . . . there was none. . . .

The Labor leadership had overlooked the fact that the potentially explosive issue of "boat people" had been on the public agenda since early in (2001). As a result they were left stunned and flat-footed. No alternative was suggested. It didn't seem to matter that the platform of the party, updated at the National Conference in August 2001, contained a clear and compassionate statement of principle in relation to asylum seekers and refugees

The ALP was caught in the headlights, frozen between the sentiment of the national platform and belief in compassionate, humane values on the one hand and opinion polls on the other. Labor's confusion was ruthlessly exploited by Howard and his henchmen Reith, Costello and Ruddock. Howard played two cards, one of which seemed suspiciously like racism, the other involving a spurious appeal to a bus-stop egalitarianism. This second card said: these people are not victims but selfish "queue jumpers" unprepared to wait for entry to the promised land. Australians, sometimes uncertain about their own motives, were provided with an alibi: I'm not a racist, just a fervent believer in queues.

See John Button, *Beyond Belief: What Future for Labor?*, 6 Q. ESSAY 1, 16-17 (2002).

¹³ Migration Act 1958, § 5 (Austl.).

¹⁴ This was made clear when the Norwegian ambassador to Australia boarded the *Tampa* and was handed a letter from the rescuees. See *Vadarlis* 110 F.C.R. at 459.

¹⁵ See *infra* Part II.C.

formalistic characterizations of the rule of law can be manipulated to achieve different outcomes.

B. The Tampa Incident, the Law of the Sea, and International Maritime Law

Legal issues arose under international maritime law for the simple reason that these were the frameworks that governed Captain Rinnan's immediate behavior when he first encountered the sinking *Palapa I*. As Rothwell and others have pointed out,¹⁶ Captain Rinnan's response in taking over 400 rescuees on board the *Tampa* exceeded his international legal obligations under the international law of the sea: the *Tampa* was only licensed to carry fifty people and equipped for fewer still. Christmas Island being the closest landfall from the point of rescue, there are also strong grounds for arguing that the law of the sea entitled him to unload the rescued persons there.¹⁷ Conversely, Australia's behavior in boarding and taking control of the *Tampa*, together with its closure of Flying Fish Cove are difficult to justify. Although the Norwegian captain was threatened with fines as a people smuggler, he clearly did not fit this description. Given the state of the rescuees and Captain Rinnan's belief that he would soon have deaths on board if medical assistance was not obtained, there are strong grounds for arguing that the legal principles of necessity and *force majeure* justified his insistence on pursuing landfall on Christmas Island.¹⁸

Australia's answer to these arguments was to assert that the usual practice in situations of maritime emergencies is for the vessel taking on rescued persons to continue on its planned route as nearly as possible, disembarking rescuees at a convenient port. In this instance, an Australian immigration official stated that Merak in Indonesia was appropriate.¹⁹ The port of Merak is situated in the same general direction as the *Tampa's* original planned route to Singapore and has a harbor rated to take a vessel

¹⁶ See Rothwell, *supra* note 1, at 120-21. For other accounts of the international law of the sea issues raised by the *Tampa* incident, see Jessica E. Tauman, Comment, *Rescued at Sea, but Nowhere to Go: The Cloudy Legal Waters of the Tampa Crisis*, 11 PAC. RIM L. & POL'Y J. 461, 477-78 (2002); Jean-Pierre Fonteyne, *All Adrift in a Sea of Illegitimacy: An International Law Perspective on the Tampa Affair*, 12 PUB. L. REV. 249 (2001). See generally Martin Davies, *Obligations and Implications for Ships Encountering Persons in Need of Assistance at Sea*, 12 PAC. RIM L. & POL'Y J. 109 (2003); and Frederick J. Kenney, Jr. & Vasilios Tasikas, *The Tampa Incident: IMO Perspectives and Responses on the Treatment of Persons Rescued at Sea*, 12 PAC. RIM L. & POL'Y J. 143 (2003).

¹⁷ See 2 D.P. O'CONNELL, *THE INTERNATIONAL LAW OF THE SEA* 855-57 (Ivan Searer ed. 1984).

¹⁸ See Rothwell, *supra* note 1, at 123-24.

¹⁹ Interview with Robert Illingworth, Deputy Secretary, Refugee Policy Branch, Department of Immigration, Multicultural and Indigenous Affairs [hereinafter DIMIA], in Sydney, Austl. (Apr. 2, 2002) [hereinafter April Interview with Robert Illingworth].

the size of the *Tampa*.²⁰ Australia's actions at each stage were defended as being consistent with its status as a sovereign nation whose national security is dependant on control of its borders.

C. *International Refugee Law, State Responsibility, and the "Right" to Seek Asylum*

The picture becomes more complex when the frame of reference is altered so as to view the events through the portal of international refugee law. It was apparent from very early in the standoff that the *Tampa* rescues wished to seek asylum in Australia on the basis that they were refugees.²¹ Throughout the initial crisis period their status as refugees had not been determined. At best they could be characterized as "asylum seekers." The basic problem facing refugee claimants is that the Refugee Convention does not provide a right to claim asylum. This point has been made forcefully by Justice Gummow:

First, it has long been recognized that, according to customary international law, the right of asylum is a right of States, not of the individual; no individual, including those seeking asylum, may assert a right to enter the territory of a State of which that individual is not a national The proposition that every State has competence to regulate the admission of aliens at will was applied in Australian municipal law from the earliest days of this Court. . . . However, from that proposition, two principles of customary international law have followed. One is that a State is free to admit anyone it chooses to admit, even at the risk of inviting the displeasure of another State; and the other is that, because no State is entitled to exercise corporeal control over its nationals on the territory of another State, such individuals are safe from further persecution unless the asylum State is prepared to surrender them. . . . A corollary is that, in the absence of an extradition treaty, the asylum State has no international obligation to surrender fugitives to the State from

²⁰ Flying Fish Cove on Christmas Island is not rated to dock a vessel with the dimensions of the *Tampa*. *Id.* Robert Illingworth, Deputy Secretary of DIMIA, asserted in April 2002 that *Tampa* Captain Arne Rinnan was obliged to keep the ship under power during the stand-off with the Australian authorities because of the inability to anchor the ship off Christmas Island. *Id.*

²¹ The Afghans on board the *Tampa* made their intentions clear to the Norwegian ambassador who visited the ship at its Christmas Island mooring. See Hathaway, *supra* note 1, at 39.

which they have fled. . . and the fugitives are protected against the exercise of jurisdiction by that State.²²

However, even if the *Tampa* rescuees had no *right* to seek asylum in Australia, the fact that their refugee status had not been determined at the time of their interception at sea did not mean that the Refugee Convention offered them no succor. Under the Refugee Convention, the status of refugee is not “created” by any determination process. People either are, or are not, refugees depending on the applicability of the definition of refugee at a particular point in time. Put another way, the obligations imposed by the Refugee Convention are not dependant on refugees having their status recognized.²³ The burning issue in the *Tampa* standoff, therefore, was not so much the status of each of the rescuees, or their right to claim asylum. Rather, it was the extent and nature of Australia’s obligations, *assuming* that the group included refugees (as defined in the Refugee Convention).²⁴ Given the fact that the *Tampa* rescuees were mainly from Afghanistan,²⁵ where the feared Taliban was still in power, such an assumption could hardly be described as far-fetched. This point was made by Justice North in the initial ruling in the *Tampa* litigation, stating:

It is notorious that a significant proportion of asylum seekers from Afghanistan processed through asylum status systems qualify as refugees under the Convention relating to the Status of Refugees 1951 done at Geneva on 28 July 1951 (the

²² See *Ruddock v. Ibrahim* (2000) 204 C.L.R. 1, 45-46 (footnotes omitted).

²³ See UNHCR, HANDBOOK ON PROCEDURES AND CRITERIA FOR DETERMINING REFUGEE STATUS UNDER THE 1951 CONVENTION AND THE 1967 PROTOCOL RELATING TO THE STATUS OF REFUGEES, HCR/IP/4/Eng/REV.1 (1979) [hereinafter UNHCR HANDBOOK]. The Handbook provides, at paragraph 28:

A person is a refugee within the meaning of the 1951 Convention as soon as he fulfils the criteria contained in the definition. This would necessarily occur prior to the time at which his refugee status is formally determined. Recognition of his refugee status does not therefore make him a refugee but declares him to be one. He does not become a refugee because of recognition, but is recognised because he is a refugee.

Id.

²⁴ See Hathaway, *supra* note 1, at 41.

²⁵ Many of the *Tampa* rescuees were Afghan nationals. *434 Boat People Rescued From Crippled Indonesian Ferry*, AAP NEWSFEED, Aug. 27, 2001, LEXIS, News Library, Australia Publications. Before the U.S. intervention in Afghanistan lead to the defeat of the ruling Taliban in late 2001, over 60% of Afghan asylum seekers in Australia were gaining recognition as refugees. *Trends in Asylum Decisions in 38 Countries, 1999-2000*, UNHCR, June 22, 2001, tbl. 9, at 18/46, <http://www.unhcr.ch> (last visited Jan. 10, 2003). Of the 130 *Tampa* asylum seekers accepted by New Zealand, all but one were recognised at first instance as refugees and offered permanent resettlement. Christopher Niesche, *Afghans Find Hope in NZ*, WEEKEND AUSTRALIAN, Feb. 2, 2002, LEXIS, News Library.

Refugees Convention). Once assessed as refugees, this means that they are recognized as persons fleeing from persecution in Afghanistan. While such people no doubt make decisions about their lives, those decisions should be seen against the background of the pressures generated by flight from persecution.²⁶

Arguments have raged over which country had primary responsibility for the *Tampa* asylum seekers, qua refugees. Australia asserts that Indonesia, as country of embarkation, should have agreed to take them back.²⁷ Although Indonesia is not a State Party to the Refugee Convention, the argument runs, the predominantly Muslim identity of the rescuees meant that in practical terms they would not face persecution in that country. In fact, Indonesia had been offering (and continues to offer) de facto protection to asylum seekers from Afghanistan and the Middle East. The problem with this argument is that the *Tampa* rescuees had never been lawfully present in Indonesia, and there was, therefore, no basis in international law or any other law for an obligation of any kind to re-admit individuals who had left its shores in such circumstances.

James Hathaway argues that Norway and Australia had primary responsibility for the *Tampa* rescuees: the former because it was the flag State of the rescue vessel, and the latter because of the presence of the rescuees in its territorial waters.²⁸ There is some evidence of state practice to support the first of these claims, but probably not enough to assert that customary international law has developed to the point of always ascribing such responsibility to flagship states. On this occasion, the *Tampa* was a Norwegian ship in the sense that it was sailing under a Norwegian flag. However, it was a commercial shipping liner and, as such, could not be characterized as a state vessel to which the full range of state responsibilities under international law might apply.²⁹ Moreover, as many acknowledge,³⁰

²⁶ See *Vadarlis v. Ruddock* (2001) 110 F.C.R. 452, 471, *overruled by* *Ruddock v. Vadarlis* (2001) 110 F.C.R. 491.

²⁷ April Interview with Robert Illingworth, *supra* note 19.

²⁸ See Hathaway, *supra* note 1, at 41, n.11.

²⁹ See R.R. CHURCHILL & A.V. LOWE, *THE LAW OF THE SEA* 257-63 (Juris Publishing 3d ed. 1999) (1983) (discussing the nationality of ships).

³⁰ See GUY S. GOODWIN-GILL, *THE REFUGEE IN INTERNATIONAL LAW* 158 (Oxford U. Press 2d ed. 1996) (1983). Professor Goodwin-Gill stresses the responsibility of the state of "first port of call," rather than asserting obligations in the flag states of rescue vessels. *Id.*; see also R.P. Schaeffer, *The Singular Plight of Sea-borne Refugees*, 8 *AUSTL. Y.B. INT'L L.* 213 (1978-80); and James Z. Pugash, Comment, *The Dilemma of the Sea Refugee: Rescue Without Refuge*, 18 *HARV. INT'L L.J.* 577 (1977). Both articles chronicle the arrangements made following the outflow of boat people from Vietnam after the fall of Saigon to the North Vietnamese. See also Tauman, *supra* note 16.

state practice has varied greatly at the height of refugee crises involving fugitives taking to boats in any numbers.³¹ If any precedent exists for flagship states taking responsibility for refugees rescued at sea, the countries involved have generally been geographically proximate to the scene of the rescue, and have been willing to participate in a management program.³²

Arguments that Australia had primary responsibility for the rescuees stress several factors in the Affair: the proximity of Christmas Island to the rescue site, the involvement of the Australian authorities in the initial search and rescue operation, and, ultimately, the presence of the *Tampa* within Australian territorial waters. Hathaway argues with some force that States Parties to the Refugee Convention cannot as a matter of law avoid their obligations by adopting “mechanistic” strategies to avoid the assumption of responsibility.³³ In this respect, Hathaway groups together both the physical expulsion of the *Tampa* and its human cargo, and the legislative measures taken to nominally remove Australian jurisdiction by excising Christmas Island and like external territories from Australia’s “migration zone.”³⁴

1. *The Non-Refoulement Obligation*

Arguments about who did and did not have jurisdiction over or responsibility for the *Tampa* rescuees are inevitably linked to questions about the rights of asylum seekers and the responsibilities owed to them. The problem facing sea-born asylum seekers is the limitations inherent in the rights regime contained in the Refugee Convention. While the Universal Declaration of Human Rights decreed that every person should have a right to seek and to enjoy asylum from persecution,³⁵ this right is conspicuously absent from the Refugee Convention. This is not to say, however, that the latter instrument offers no protection to asylum seekers.

In her discussion of Australia’s new interdiction regime,³⁶ Dr. Penelope Mathew takes issue with the view that Australia’s obligations

³¹ Tauman provides examples of some of the more egregious instances of humanitarian neglect, amongst them the tragedies of the *St. Louis*—which resulted in the ultimate death of 907 refugees from Nazi Germany; of the *Siruma*—where 769 Romanian Jews were left to drown; and of the Vietnamese boat people who were left by a United States naval vessel to die of starvation in the South China Seas. See Tauman, *supra* note 16, at 461-62, 492-93.

³² See Schaeffer, *supra* note 30; and Pugash, *supra* note 30.

³³ See Hathaway, *supra* note 1.

³⁴ *Id.* at 41. See also Migration Amendment (Excision from Migration Zone) Act, No. 127, 2001 (Austl.). For a discussion of the legislative changes “excising” certain off-shore territories from Australia’s migration zone, see *infra* note 132 and accompanying text; and Crock, *supra* note 10.

³⁵ Universal Declaration of Human Rights, (Dec. 10, 1948), G.A. Res. 217A(III), U.N. GAOR, 3d Sess., art. 14, at 71, U.N. Doc. A/810 (1948).

³⁶ See Mathew, *Legal Issues*, *supra* note 4.

under the Refugee Convention are only engaged when a refugee has “entered” the country.³⁷ She points out that while some parts of the Refugee Convention are predicated clearly on a refugee being physically present in the territory of a State Party, this is not true of all articles. Article 33(1) for example provides that:

No Contracting State shall expel or return (“refouler”) a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion.

This Article prohibits states from expelling or returning refugees to a place of persecution. While expulsion may imply prior entry into a country, the reference to return is broader and does not require a notion of physical presence in state territory. Mathew uses the words of Article 33 to argue that Australia’s obligations towards the *Tampa* rescuees were engaged as soon as these people came within the territorial waters and control, of Australia. She posits further that the obligation to ensure against *refoulement* extended beyond Australia’s immediate dealings with the rescuees to prohibit “chain” *refoulement*. She writes:

If this were not so, the parties to the Convention could simply avoid their obligations by sending an asylum-seeker to another country which was not party to the Refugee Convention and which would not observe the obligation of *non-refoulement*. In turn, this would make a mockery of the ordinary meaning of the words “return” and “in any manner whatsoever.” The obligation of *non-refoulement* is both an obligation of result and an obligation of conduct, and there is no break in the chain of causation when a State has failed to ensure that an asylum-seeker receives protection from *refoulement* elsewhere. Accordingly, the State will bear joint responsibility for the fate of the asylum-seeker as a matter of international law.³⁸

³⁷ This view is advanced in Ryszard Piotrowicz & Samuel K.N. Blay, *The Case of M/V Tampa: State and Refugee Rights Collide at Sea*, 76 AUSTL. L. J. 12, 15 (2002).

³⁸ See Mathew, *Legal Issues*, *supra* note 4, at 8-9, citing James Crawford & Patricia Hyndman, *Three Heresies in the Application of the Refugee Convention*, 1 INT’L J. REFUGEE L. 155, 171 (1989); see also Théodor Meron, *Agora: The 1994 U.S. Action in Haiti: Extraterritoriality of Human Rights Treaties*, 89 AM. J. INT’L L. 78, 80-81 (1995); Carlos Manuel Vázquez, *The “Self-executing” Character of the Refugee Protocol’s Nonrefoulement Obligation*, 7 GEO. IMMIGR. L.J. 39 (1993).

Cutting across the debates that have raged about whether or not Australia's "protection obligations" were properly engaged, what was perhaps most striking throughout the whole *Tampa* Affair was the nature of Australia's actions in resolving the impasse that developed. Although going to great lengths to assert absence of jurisdiction, Australia did, in fact, take responsibility for the rescuees. Australian Special Armed Services officers took control of the *Tampa* and ultimately oversaw the transfer of the rescuees to an Australian naval vessel (the HMAS *Manoora*). Whatever the criticisms that can be made of Australia in the early stages of the *Tampa* Incident, it could not be said that Australia engaged in *refoulement* in the sense of sending people back to places where they would face persecution. The rescuees were taken to the Pacific island state of Nauru, to New Zealand, and later, some were taken to PNG's Manus Island. The involvement of the UNHCR and the IOM in the Nauruan operation ensured that all persons claiming to be refugees would have their refugee claims assessed. Australian officials undertook the refugee status processing of half of the *Tampa* rescuees, and were solely responsible for processing most of the asylum seekers intercepted after the incident as part of "Operation Relex."³⁹

Furthermore, Australia bankrolled the major actors (Nauru, PNG, and the U.N. agencies) and assumed some responsibility itself for determining the refugee claims of the rescuees. Australia still maintains tight control over the centers established in Nauru and PNG, even down to exercising a veto over applications for visas for outsiders to visit those places. Australia also appears to be exercising some control over the fate of both those recognized as refugees and over those whose claims are rejected.⁴⁰ It is difficult to characterize Australia's behavior as other than a *de facto* assumption of jurisdiction.⁴¹

³⁹ For a detailed account of Operation Relex, see *infra* Part III. The operation is described in the report prepared by Oxfam and Community Aid Abroad. See *Adrift in the Pacific: The Implications of Australia's Pacific Refugee Solution*, OXFAM, Feb. 2002, at app. 1, <http://www.caa.org.au/campaigns/submissions/pacificsolution/> (last visited Jan. 19, 2003) [hereinafter *Adrift in the Pacific*].

⁴⁰ Interview with Ellen Hansen, External Affairs Officer, UNHCR, in Canberra, Austl. (Aug. 2002) [hereinafter August Interview with Ellen Hansen].

⁴¹ The *de facto* care that was given to the asylum seekers who were apprehended underscores assertions made by the Australian Government about the lawfulness of its actions.

D. *U.S. Precedent, the Tampa Incident, and the Divide Between International and Domestic Law*

When Australia's Parliament met to pass legislation to ensure the retrospective legality of the Government's actions throughout the *Tampa Incident*⁴² some effort was made to convince Parliamentarians that Australia was not the only country adopting a tough stance against unauthorized boat arrivals. Briefing papers⁴³ were produced that detailed the high seas interdiction program run by the United States to prevent Cuban and Haitian asylum seekers from landing on U.S. soil,⁴⁴ culminating in the forced return of many thousands of boat people to Haiti in 1995.⁴⁵

If Australia's Government modeled its actions on those of the United States, similarities are also apparent in the manner in which the superior Australian and U.S. courts have handled the legal crises generated by interdiction in practice. Interesting parallels can be found between the way Australia's Full Federal Court responded to the *Tampa Incident* and the U.S. Supreme Court's treatment of the Haitian interdiction program. In both countries, public interest advocates came forward to challenge the policies and practices adopted and the judiciary ultimately declined to intervene.⁴⁶ In

⁴² See Border Protection (Validation and Enforcement Powers) Act, 2001 (Austl.).

⁴³ See *Bills Digest No. 62 2001-02: Border Protection (Validation and Enforcement Powers) Bill 2001*, Dept. of the Parliamentary Library, <http://www.aph.gov.au/library/pubs/bd/2001-02/02bd062.htm> (last reviewed Aug. 13, 2001) [hereinafter *Bills Digest No. 62 2001-02*]; see also Nathan Hancock, *Current Issues Brief 5 2001-02: Refugee Law Recent Legislative Developments*, Dept. of the Parliamentary Library, Sept. 18, 2001, <http://www.aph.gov.au/library/pubs/cib/2001-02/02cib05.htm> (last reviewed Sept. 27, 2001).

⁴⁴ Following is a selection of the many articles written on the interdiction program that has been employed in the United States since the early 1980s: Margaret A. Coon, *The Law of Interdiction: Time for Change*, 27 LA. BAR J. 223 (1980); Stanley Mailman, *Reagan's Policy on Haitian Refugees*, 186 N.Y. L.J. 1, col. 1 (Oct. 7, 1981); Louis B. Sohn, *Interdiction of Vessels on the High Seas*, 18 INT'L LAW. 411 (1984); and Bill Frelick, *Haitian Boat Interdiction and Return: First Asylum and First Principles of Refugee Protection*, 26 CORNELL INT'L L.J. 675 (1993) [hereinafter Frelick, *Haitian Boat Interdiction and Return*].

⁴⁵ See James R. Zink, *Race and Foreign Policy in Refugee Law: A Historical Perspective of the Haitian Refugee Crises*, 48 DEPAUL L. REV. 559 (1998); Frelick, *Haitian Boat Interdiction and Return*, *supra* note 44; Bill Frelick, *U.S. Refugee Policy in the Caribbean: No Bridge Over Troubled Waters*, 20 FLETCHER F. OF WORLD AFF. 67 (1996); Hiroshi Motomura, *Haitian Asylum Seekers: Interdiction and Immigrants' Rights*, 26 GEO. IMMIG. L.J. 695 (1993); Thomas David Jones, *A Human Rights Tragedy: The Cuban and Haitian Refugee Crises Revisited*, 9 GEO. IMMIG. L.J. 479 (1995); see also Thomas David Jones, *International Decision*, 90 AM. J. INT'L L. 477 (Judith Hippler Bello ed., 1996); and other articles in 7 GEO. IMMIG. L.J. (1993) (symposium edition).

⁴⁶ In the United States, various challenges were made to the Haitian interdiction program by the Haitian Centers Council, culminating in the Supreme Court case of *Sale v. Haitian Centers Council, Inc.*, 113 S. Ct. 2549 (1993). The *Tampa Incident* came to the Federal Court at the instigation of Eric Vadarlis, the Victorian Council for Civil Liberties, and the Human Rights and Equal Opportunity Commission. See *Vadarlis v. Ruddock* (2001) 110 F.C.R. 452, *overruled by Ruddock v. Vadarlis* (2001) 110 F.C.R. 491; *Vadarlis v. Ruddock*, High Court Transcript, No. M93 of 2001 (Nov. 27, 2001) (review denied by the Australian High Court).

both cases, the failure of the court actions was predicated on two factors: the supremacy of domestic law over international law and the “territoriality” principle—the notion that applicable international legal norms apply only to persons physically present in state territory.

In the United States, the action brought by the Haitian Centers Council resulted in a ruling by the Supreme Court that the interdiction program was legal.⁴⁷ The Court held that the prohibition on *refoulement* in U.S. law⁴⁸ did not operate with respect to actions taken outside U.S. territory—in this case on the high seas.⁴⁹ The Court also used selected passages from the *Travaux Préparatoires* of the Refugee Convention to assert that the Refugee Convention only applies to persons within the territories of States Parties.⁵⁰ As Mathew points out in her critique of this decision, however, such a reading of the historical documents relating to the Refugee Convention sits uneasily with basic principles governing the interpretation of international instruments.⁵¹

In Australia, challenges made to the Government’s actions in the *Tampa* Incident also failed in spite of an initial victory before a single judge of the Federal Court.⁵² The Government’s refusal to allow any access to the persons taken on board the *Tampa* meant that advocates in Australia were unable to gain instructions from the rescuees for the purpose of mounting a legal challenge under Australia’s Migration Act of 1958 (“Migration Act”). The applicants were acknowledged as having standing to bring an action for

⁴⁷ See *Sale v. Haitian Centers Council, Inc.*, 113 S. Ct. 2549. Again, many articles have been written on this decision. In addition to those cited in notes 42–43, *supra*, see Janice D. Villiers, *Closed Borders, Closed Ports: The Plight of Haitians Seeking Asylum in the United States*, 60 BROOK. L. REV. 841 (1994); Andrew G. Pizor, Note, *The Return of Haitian Refugees*, 17 FORDHAM INT’L L.J. 1062 (1994); and Kevin R. Johnson, *Judicial Acquiescence in the Executive Branch’s Pursuit of Foreign Policy and Domestic Agendas in Immigration Matters: The Case of the Haitian Asylum-Seekers*, 7 GEO. IMMIG. L.J. 1 (1993).

⁴⁸ See Immigration and Nationality Act § 241(b)(3), 8 U.S.C.A. § 1231(b)(3) (West 2000 & Supp. 2002). Section 208 of this Act confers discretion on the Attorney General to grant asylum to a person who is recognised to be a refugee. *Id.*; see generally KAREN MUSALO ET AL., *REFUGEE LAW AND POLICY: A COMPARATIVE AND INTERNATIONAL APPROACH* 1, 90–140 (Carolina Acad. Press 2d ed. 2002) (1997).

⁴⁹ For the dissenting argument by Justice Blackmun, see *Sale*, 113 S. Ct. at 2568. For further argument by Justice Blackmun, see Harry A. Blackmun, *The Supreme Court and the Law of Nations*, 104 YALE L.J. 39 (1994), wherein the Justice attacks the majority’s ruling in the context of international law.

⁵⁰ See *Sale*, 113 S. Ct. at 2565. Note that other passages from the *Travaux* can be cited to opposite effect. See Hathaway, *supra* note 1, at 41.

⁵¹ See Mathew, *Legal Issues*, *supra* note 4, at 7. See Vienna Convention on the Law of Treaties, May 23, 1969, 1155 U.N.T.S. 331, 8 I.L.M. 679 (1969). Article 31 of the Vienna Convention confirms that treaties should be interpreted according to the ordinary meaning of the words used, and Article 32 permits recourse to secondary source material only where the primary means of treaty interpretation have absurd or unreasonable results. *Id.*

⁵² The advocates succeeded at first before Justice North in the Federal Court, who held that the asylum seekers were being detained by the Australian authorities in circumstances where there was no basis in Australian law for the action being taken. See *Vadarlis v. Ruddock* (2001) 110 F.C.R. 452, *overruled by Ruddock v. Vadarlis* (2001) 110 F.C.R. 491.

orders in the nature of habeas corpus so as to seek the release of the *Tampa* rescuees,⁵³ but were held to have no right to mount any other kind of legal challenge. In particular, the Full Federal Court held that the applicants had no standing to seek a writ of mandamus to compel the Minister to act in accordance with the law.⁵⁴

The Applicants' substantive claim was based on an argument that the Migration Act operated to require the landing of the rescuees. Eric Vardarlis asserted that the status of the rescuees as unlawful non-citizens meant that they had to be taken into immigration detention within Australia pursuant to § 189 of the Migration Act.⁵⁵ In the alternative, the Victorian Council of Civil Liberties argued that § 245F required the Government to bring the rescuees to the mainland of Australia, where they would then be entitled to lodge formal claims for refugee status pursuant to § 36 of the Act.⁵⁶ Vardarlis also argued that the refusal to allow him access to the rescuees constituted a breach of his implied constitutional freedom of

⁵³ The Federal Court, both at first instance and on appeal, acknowledged the liberty of the person is a human right of such fundamental importance that any person has the right under the common law to challenge the legality of another's detention. See *Vadarlis*, 110 F.C.R. at 469 (Black, C.J., concluding that "there is no non-statutory Executive or prerogative authority for the detention of those rescued"). See also *Waters v. Commonwealth of Australia*, (1951) 82 C.L.R. 188, 190 (stating that subject to certain qualifications, any person may move any court of competent jurisdiction for habeas corpus with respect to any person alleged to be unlawfully detained).

⁵⁴ See *Vadarlis*, 110 F.C.R. at 529-30.

⁵⁵ *Id.*

⁵⁶ Chief Justice Black provides the following description of the § 245F provisions in the Migration Act 1958:

Section 245F confers on officers the power to board ships. Section 245F(1) provides:

This section applies to a ship that is outside the territorial sea of a foreign country if:

- (a) a request to board the ship has been made under section 245B;
- (b) the ship is a foreign ship described in subsection 245C(3) (which allows foreign ships on the high seas to be chased); or
- (c) the ship is an Australian ship.

For the purposes of this section, "officer" is defined by § 5 but also includes any person who is in command of the Commonwealth ship, or is a member of the crew, or is a member of the Australian Defence Force (§ 245F(18)). He or she may not only board a ship, but may also search and take copies of any document, and interrogate persons aboard. Such a person may make arrests without warrant if (amongst other things) he or she suspects that a person has committed an offence against the Act (§ 245F(1)). In doing so, such force is as is necessary and reasonable in the exercise of a power under this section may be used (§ 245F(12) and (13)). The officer may then detain the ship and "bring it, or cause it to be brought, to a port or other place that he or she considers appropriate" if the officer reasonably suspects that the ship is or has been involved in a contravention of the Act, either in or outside Australia (§ 245F(8)). Importantly for present purposes, the officer may also detain any person who is found on the ship and bring the person, or cause the person to be brought, to the migration zone (§ 245F(9)).

See *Vadarlis*, 110 F.C.R. at 506-07.

communication.⁵⁷ He sought an injunction and mandamus to allow him to give legal advice to the rescuees.⁵⁸

Even though the applicants had standing to question the detention of the rescuees, it did not follow automatically that the writ of habeas corpus would run. The remedy was dependent on the applicants demonstrating that the rescuees were being detained and that their custody was unlawful. In the Full Federal Court, the majority held against the applicants on both these counts. Justice French, with whom Justice Beaumont agreed, relied on the reasoning of the High Court in an earlier case involving an attempt to challenge the lawfulness of the mandated detention of asylum seekers within Australia.⁵⁹ Somewhat counter-intuitively, he held that the rescuees were not being "detained" at law because they were free to travel anywhere they wished (except to Australia).⁶⁰ Both Justice North at first instance and Chief Justice Black on appeal disagreed strongly with this characterization of events. In a persuasive dissent, Chief Justice Black examined the manner in which the European Court of Human Rights treated the same issue in *Amuur v. France*.⁶¹ That case involved four Somali asylum seekers who were kept for twenty days in the transit zone of Paris-Orly airport, and the argument was made that the asylum seekers were not detained because they could have left at any time by agreeing to return to Syria, from whence they had traveled to France.⁶² The Court in that case said:

The mere fact that it is possible for asylum seekers to leave voluntarily the country where they wish to take refuge cannot exclude a restriction on liberty . . . Furthermore, this possibility becomes theoretical if no other country offering protection comparable to the protection they expect to find in the country where they are seeking asylum is inclined or prepared to take them in.⁶³

Having found that the *Tampa* rescuees were not being detained, Justice French also ruled that the Government's actions were not rendered unlawful

⁵⁷ *Id.* at 530.

⁵⁸ *Id.*

⁵⁹ See *Chu Kheng Lim v. Minister for Immigration and Ethnic Affairs*, (1992) 176 C.L.R. 1. For an account of this case, see Mary Crock, *Climbing Jacob's Ladder: The High Court and the Administrative Detention of Asylum Seekers in Australia*, 15 SYDNEY L. REV. 338 (1993).

⁶⁰ *Vadarlis*, 110 F.C.R. at 548.

⁶¹ 22 Eur. Ct. H.R. at 533 (1996).

⁶² *Id.*

⁶³ *Id.* at 558. See *Vadarlis*, 110 F.C.R. at 510.

by the fact that there was no legislative basis for them.⁶⁴ Justice French suggested that the nature of the executive power conferred on the Government under the Australian Constitution was such that legislation was not needed to render lawful any actions taken to protect Australia's borders.⁶⁵

Amidst the flurry of legislative change on September 26, 2001, Justice French's comments did not go unnoticed by government drafters. The Migration Act amendments included a new § 7A, which confirms the power of the Executive to act outside of any legislative authority.⁶⁶ The new section reads:

The existence of a statutory power under this Act does not prevent the exercise of any executive power of the Commonwealth to protect Australia's borders, including, where necessary, by ejecting persons who have crossed those borders.⁶⁷

In referring to "persons," the Act makes no distinction between citizens and foreigners.

In his judgment, Justice Beaumont held that the action had to fail because there was no "relevant substantive cause of action (that is, a legal right) recognized by law and enforceable by [the] [sic] court." He held that the Federal Court had no inherent jurisdiction to issue a writ of *habeas corpus*⁶⁸ and that, in any event, a writ to force release from detention could not be used to compel the Government to admit an individual into Australian territory. Justice Beaumont held that the executive alone had the power to authorize such an entry.

Taken to its logical conclusion, this last aspect of Justice Beaumont's ruling sits curiously with the long tradition of judicial review of immigration applications in Australia. Prior to the introduction of the current regulatory

⁶⁴ *Vadarlis*, 110 F.C.R. at 543-44.

⁶⁵ *Id.* Given Justice French's findings on the detention point, these comments probably constitute obiter dicta.

⁶⁶ See Migration Act 1958, § 7A (Austl.).

⁶⁷ *Id.*

⁶⁸ Justice Beaumont cited *Re Officer in Charge of Cells*, ACT Supreme Court, Ex parte Eastman, where the High Court held that *habeas corpus* could not be used as a means of collaterally impeaching the correctness of orders made by a court of competent jurisdiction that had not been shown to be a nullity. *Vadarlis*, 110 F.C.R. at 517, citing *Re Officer in Charge of Cells*, ACT Supreme Court, Ex parte Eastman, (1994) 123 A.L.R. 478. In that case, the High Court also held that the High Court's jurisdiction to entertain this writ could only arise as an incident of an action brought within the Court's original or appellate jurisdiction. See *Re Officer in Charge of Cells*, ACT Supreme Court, Ex parte Eastman, 123 A.L.R. 478, at paras. 102-03.

scheme in immigration, no applicant for a visa or entry permit could lay claim to a “right” to enter the country. However, this fact did not prevent the Australian courts from entertaining any number of challenges to visa refusals, from persons both outside Australia and within the country. This point was made forcefully by Chief Justice Black in his dissent, which stated:

As in *Chin Yow*, so too here, the fact that the rescued people did not have any “right” to enter Australian waters does not answer the question whether they have been detained. Nor does it deprive them of the ability to seek redress from this Court by way of habeas corpus. As Brennan, Deane and Dawson JJ said in *Lim* at 19, citing, amongst other cases, *Lo Pak* and *Kioa v. West* (1985) 159 CLR 550 at 631 (emphasis added):

Under the common law of Australia . . . an alien who is within this country, **whether lawfully or unlawfully**, is not an outlaw. Neither public official nor private person can lawfully detain him or her or deal with his or her property except under and in accordance with some positive authority conferred by the law (emphasis added).

See also per McHugh J at 63.

The House of Lords similarly held that illegal entrants were entitled to seek redress by means of habeas corpus in *R v. Home Secretary; Ex parte Khawaja* [1984] AC 74, with Lord Scarman stating (at 111) that:

There is no distinction between British nationals and others. He who is subject to English law is entitled to its protection. This principle has been in the law at least since Lord Mansfield freed “the black” in *Sommersett* [(1772) 20 How St Tr 2] . . .

It is, therefore, important to focus not on the lack of any right of the rescued people to enter Australia, but on whether the

rescued people were, in a real and practical sense, detained by the Commonwealth.⁶⁹

Leaving aside questions about the correctness of his reasoning, Justice Beaumont's judgment in the *Tampa* case is interesting in the wider context of the incident. The judgment is replete with a sense of urgency, if not moral panic. The judge underscores passages and words. His conclusion—that an alien has no **right** to enter Australia—is placed quite literally in bold print. The effect is to emphasize and re-emphasize the *outsider* status of the rescuees. The word “alien” appears no less than twenty-seven times in the thirty paragraphs of his judgment.

None of the judges in the appeal court mentions the tumultuous events that occurred in the United States on September 11th, the day Justice North handed down his ruling. As the world came to learn about Osama Bin Laden, Al Qaeda, and the Taliban in Afghanistan, it was no time at all before Australia's politicians were warning a frightened public that the Afghan and Middle Eastern boat people “could be terrorists.”⁷⁰ One is left to wonder whether Justice Beaumont would have been quite as vehement absent the events of September 11th.

The tonal change between the primary judgment and the appeal rulings could not be more marked. Of the four Federal Court judges, Justice North at first instance is the only one to spend much time describing the rescuees, identifying them as fugitives from Afghanistan who “it is probable . . . are people genuinely fearing persecution.”⁷¹ Dissenting in the Full Court, Chief Justice Black agreed with the substance of Justice North's rulings. However, his carefully reasoned judgment sticks closely to legal principle, assiduously avoiding any emotive descriptions of the people behind the action.⁷² Justice Beaumont's postscript does acknowledge the potential that the rescuees could be refugees, but his addendum underscores (again, quite literally), the international nature of the legal obligation not to *refoule* refugees. Justice Beaumont draws attention to the fact that what became known as the “Pacific Solution” did not involve the *refoulement* of

⁶⁹ *Vadarlis*, 110 F.C.R. at 511. The reference to *Chin Yow's* case is to *Chin Yow v. United States*, 208 U.S. 8 (1908).

⁷⁰ See, for example, comments attributed to the former Minister for Defence as reported in Robert Manne, *Australia's New Course*, AGE (Nov. 12, 2002).

⁷¹ *Vadarlis v. Ruddock* (2001) 110 F.C.R. 452, 471, *overruled by* *Ruddock v. Vadarlis* (2001) 110 F.C.R. 491.

⁷² *Vadarlis*, 110 F.C.R. 491.

the rescuees: they would simply all have their asylum claims assessed outside of Australia.⁷³

The emphasis on Australia's domestic immigration laws in the *Tampa* litigation in the Federal Court⁷⁴ highlights the relative disregard for international law in Australia's reactions throughout the incident. Australia adheres to a dualist approach to international law. Accordingly, obligations assumed by the Executive upon signature and ratification of an international instrument do not become binding at a domestic level unless translated through Parliament into legislation.⁷⁵ Australia has chosen not to enact the terms of the Refugee Convention and has no Bill of Rights or other overriding standard operating to protect human rights. Unlike Britain and the countries of the European Union, there is no forum outside of the country to which an appeal might be made invoking principles of international law.

In the U.S. litigation concerning the return of fugitives from Haiti, the Supreme Court did at least examine to the issue of refugee status and to the principle of *non-refoulement*. In ruling, however, the Supreme Court was at least as inward looking as Australia's Full Federal Court. The victims of the U.S. Government's actions in returning the Haitians to Haiti were even more devoid of remedy than the *Tampa* rescuees. At least in the case of the *Tampa* rescuees, the end result was deflection to third countries, where the individuals involved have been permitted to lodge refugee claims. At the height of the Haitian exodus, even the cursory attempts by the United States Coast Guard to scrutinize boat people for possible refugee claims were abandoned. To the extent that any of the thousands of fugitives were political refugees, the U.S. action amounted to *refoulement* within the meaning of Article 33 of the Refugee Convention.⁷⁶

The absence of adequate accountability mechanisms at law emerges just as forcefully in the second stage of the *Tampa* Affair. There are aspects of the so-called "Operation Relex" that are ripe for criticism—not least in

⁷³ *Id.* at 521.

⁷⁴ Note that an application was made for leave to appeal to the High Court of Australia. However, leave was denied on the basis that the dispersal of the rescuees between Nauru and New Zealand had removed the parties from the care and control of the Australian Government, thus rendering moot any orders that might be made by the Court. See *Vadarlis v. Minister for Immigration and Multicultural Affairs*, High Court Transcript, No. M93 of 2001 (Nov. 27, 2001) (review denied by the Australian High Court).

⁷⁵ See, e.g., Dietrich v. The Queen, (1992) 177 C.L.R. 292, 305; R. Higgins, *The Role of National Courts in the International Legal Process*, in PROBLEMS AND PROCESS: INTERNATIONAL LAW AND HOW WE USE IT 205 (1994); and SENATE LEGAL AND CONSTITUTIONAL REFERENCES COMMITTEE, TRICK OR TREATY? COMMONWEALTH POWER TO MAKE AND IMPLEMENT TREATIES 86 (1995).

⁷⁶ See Harold Hongju Koh, *The Haitian Centers Council Case: Reflections on Refoulement and Haitian Centers Council*, 35 HARV. INT'L L.J. 1 (1994).

the apparent disregard for basic human rights standards. However, from the perspective of refugee law, once again it is difficult to assert categorically that the initiatives taken were and are in breach of international law.

III. AFTER *TAMPA*: LEGISLATIVE CHANGE AND OPERATION RELEX

The *Tampa* Affair was the impetus for a rash of legislative amendments to the Migration Act. Although the first Border Protection Bill was defeated in Parliament,⁷⁷ the Labor Party ultimately combined with the Government to pass no less than seven Acts.⁷⁸ The Border Protection (Validation and Enforcement Powers) Act of 2001 retrospectively validated all actions taken by the Commonwealth in relation to the *Tampa*, a second intercepted vessel named the *Aceng*, and other ships stopped between August 27, 2001 and the date of Royal Assent to the Act. By preventing the commencement *or continuance* of any civil or criminal proceedings challenging actions covered by the legislation, this legislation stifled appeals from the Federal Court. The Act also conferred extraordinary powers on “officers” to search, detain, and move persons aboard ships that had been pursued, boarded, and detained by Australian authorities. Unlike the earlier Bill, there is no requirement that officers boarding a ship act in good faith. Moreover, the legislation is not limited to actions taken within Australia’s territorial sea, nor is any deference given to the constraints on extra-territorial operations imposed by the U.N. Convention on the Law of the Sea (“UNCLOS”).⁷⁹

To prevent the use of Christmas Island and nearby reefs as delivery points for asylum seekers traveling from Indonesia,⁸⁰ the Australian

⁷⁷ See *Bills Digest No. 62 2001-02*, *supra* note 43; Hancock, *supra* note 43.

⁷⁸ See Border Protection (Validation and Enforcement Powers) Act, 2001 (Austl.); Migration Amendment (Excision from Migration Zone) (Consequential Provisions) Act, 2001 (Austl.); Migration Legislation Amendment Act, No. 1, 2001 (Austl.); Migration Legislation Amendment Act, No. 3, 2001 (Austl.); Migration Legislation Amendment Act, No. 5, 2001 (Austl.); Migration Legislation Amendment Act, No. 6, 2001; and Migration (Judicial Review) Act, 2001 (Austl.). These measures were opposed only by the minor parties of the Australian Democrats, the Greens and independent Senator Brian Harradine. See Australian Parliamentary Debates, DAILY HANSARD, Senate, at 27689 (Sept. 24, 2001); Australian Parliamentary Debates, DAILY HANSARD, Senate, at 27814 (Sept. 25, 2001); Australian Parliamentary Debates, DAILY HANSARD, Senate, at 27908-946 (Sept. 26, 2001).

⁷⁹ United Nations Convention on the Law of the Sea, *opened for signature* Dec. 10, 1982, U.N. Doc. A/CONF.62/122 (1982), 1833 U.N.T.S. 397, *reprinted in* 21 I.L.M. 1261 and 6 ERASTUS C. BENEDICT, BENEDICT ON ADMIRALTY, Doc. No. 10-6, (Frank L. Wiswall ed., 7th rev. ed. 2001). See *generally* O’CONNELL, *supra* note 17.

⁸⁰ Australia has experienced the arrival of boats carrying asylum seekers on a number of occasions over the last thirty years. See Andreas Schloenhardt, *Australia and the Boat People: 25 years of Unauthorised Arrivals*, 23 U. NEW S. WALES L.J. 33 (2000). While earlier episodes saw boats arriving from Vietnam, Cambodia, and the Peoples’ Republic of China, in the late 1990s people smugglers

Parliament empowered the Prime Minister to declare parts of Australia's territory to be outside the "migration zone." Under the Migration Amendment (Excision from Migration Zone) Act of 2001, people coming ashore at Ashmore Reef, the Keeling or Cocos Islands, or Christmas Island are now deemed *not* to have entered Australia's migration zone. This legislation introduced the concepts of "excised offshore places" and "offshore entry persons" and operates to prevent people arriving on these territories from accessing Australia's refugee protection regime. Other amendments to the Migration Act reinforced the Government's policy of zero tolerance for refugees who "asylum shop."⁸¹ The asylum seekers making their way to Australia via Indonesia, it is argued, are individuals who have secured safety from persecution in a third country, but who come to Australia using the services of people smugglers so as to achieve an "immigration outcome."⁸² As well as extending the reach of "safe third country" provisions to limit protection for asylum seekers in Australia,⁸³ this Act limits the ability of refugees anywhere to access Australian protection if they could find "effective protection" in another country.⁸⁴ The legislative changes increased the powers of the executive at the expense of the judiciary,⁸⁵ raised the bar for refugee claimants in Australia,⁸⁶ and

operating through Indonesia made that country an important point of transit for asylum seekers wishing to come to Australia. *Id.* The other major change in the pattern of arrivals in recent years relates to the countries of origin of the asylum seekers. *Id.* The most recent arrivals have been nationals of Iraq, Iran, and Afghanistan, with a sprinkling from other refugee producing countries. *Id.*

⁸¹ DIMIA describes the most recent cohort of asylum seekers who transit through Indonesia on their way to Australia as individuals who have obtained or who could obtain protection from persecution, but who seek to come to Australia to achieve "an immigration outcome." *See, e.g., People Smuggling Background Paper, supra* note 8. The Minister's view is that U.N. processes are undermined if refugees are allowed to take matters into their own hands by seeking out countries where they will receive most favorable treatment and outcomes. *Id.* Such people are said to be jumping the "queue" of persons recognized by the U.N. as refugees and ear-marked for resettlement in third countries. *Id.* This characterization of the refugees is underscored by the Australian Government by removing one place in Australia's overseas "humanitarian" intake for every asylum seeker recognized as a refugee within Australia. *Id.*

⁸² *Id.*

⁸³ The previous safe third country provisions are contained in the Migration Act 1958, §§ 91A-91H (Austl.). *See* Schloenhardt, *supra* note 80, at 50-51; and Savitri Taylor, *Australia's "Safe Third Country" Provisions: Their Impact on Australia's Fulfillment of its Non-Refoulement Obligations*, 15 U. TASMANIA L. REV. 196 (1996). These provisions were extended by the Migration Amendment (Excision from Migration Zone) (Consequential Provisions) Act, 2001 (Austl.).

⁸⁴ The amendments provide that Australia is "taken not to have protection obligations" to any non-citizen who "has not taken all possible steps to avail himself or herself of a right to enter and reside in, whether temporarily or permanently and however that right arose or is expressed, any country apart from Australia, including countries of which the non-citizen is a national." *See* Migration Act 1958, § 36(3) (Austl.).

⁸⁵ These changes are set out in the amended Part 8 of the Migration Act 1958, and purport to: remove the right to judicial review of all migration and refugee decisions in all but exceptional circumstances; ban class or representative actions in migration cases; and impose mandatory, non-

introduced mandatory prison terms of eight to ten years for persons convicted of people smuggling.⁸⁷

Some commentators assert that the new laws are in breach of Australia's international legal obligations because they authorize Australian "officers" to operate outside of Australia's territorial jurisdiction.⁸⁸ The legislation certainly goes beyond what has been proposed by the United Nations to combat people smuggling. The Draft Protocol against the Smuggling of Migrants by Land, Air and Sea (supplementing the Draft Convention against Transnational Organized Crime) encourages states to exercise their jurisdiction fully to combat people smuggling.⁸⁹ However, it does not advise states to exceed their jurisdiction. Nor are there any moves to expand the maritime jurisdiction of states under international law.

If Australia can claim, with some justification, that it has not refoiled the *Tampa* (and *Aceng*) refugees, the same cannot be said of all of its actions following the *Tampa* Affair. The passage of the legislation in September 2001 coincided with the institution of a full-scale interdiction and disruption program involving various Australian authorities⁹⁰ and Indonesian officials.

extendable time limits on applications to the High Court. See Simon Evans, *Protection Visas and Privative Clause Decisions: Hickman and the Migration Act 1958*, 9 AUSTR. J. ADMIN. L. 49 (2002) (discussing changes to the Migration Act 1958).

⁸⁶ The amendments:

- 1) expanded the range of temporary visas granted to persons recognised as refugees, with visas allowing for stays of between 3 and 5 years;
- 2) barred access to protection to any person convicted of "detention related offences" such as escaping from detention or rioting; and
- 3) tightened refugee processing provisions and redefined the definition of refugee for the purposes of Australian law – in particular, it:
 - a) provided that families cannot comprise a particular social group—that each family member must meet the definition of refugee on their own account (unless included on the one application); and
 - b) introduced new provisions allowing evidence provided by asylum seekers at initial interviews to be taken down and used against them should they later change their story.

See Migration Amendment (Excision from Migration Zone) (Consequential Provisions) Act, 2001 (Austl.); and Migration Legislation Amendment Act, No. 6, 2001 (Austl.).

⁸⁷ See Border Protection (Validation and Enforcement Powers) Act, 2001, sched. 2 (Austl.).

⁸⁸ See generally Hancock, *supra* note 43. See Ivan Shearer, *Public International Law: An Australian Perspective*, in SAM BLAY ET AL., PUBLIC INTERNATIONAL LAW: AN AUSTRALIAN PERSPECTIVE 162-64 (1997) (discussing the extent and nature of Australia's powers at sea).

⁸⁹ Draft Protocol Against the Smuggling of Migrants by Land, Air and Sea, May 13, 1999, A/AC.254/4/Add.1/Rev.1. See Andreas Schloenhardt, *Trafficking in Migrants: Illegal Migration and Organized Crime in Australia and the Asia Pacific Region*, 29 INT'L J. SOC. L. 331 (2001).

⁹⁰ The Australian National Audit Office lists the following agencies as being involved in a four-part strategy to reduce unauthorized migration to Australia: Department of Immigration and Multicultural and Indigenous Affairs ("DIMIA"), Australian Customs Service, the Australian Federal Police, the Australian Quarantine and Inspection Service, the Department of Foreign Affairs and Trade, Coastwatch, the

The program brought an abrupt halt to the arrival in Australian territory of boats from Indonesia, carrying asylum seekers without visas.⁹¹ The Secretary of the Department of Immigration and Multicultural and Indigenous Affairs reported in 2002:

An active program of bilateral engagement was undertaken, designed to bring about the return of unauthorized arrivals to their country of origin or to a country where they previously enjoyed effective protection. Return to a country of nationality and readmission of Third Country nationals to a country of first asylum are strong deterrents to unauthorized movement as they deny those travelling illegally the migration outcome they sought.

There was a positive level of cooperation with Indonesia. Over 1,200 illegal migrants, many of them potential unauthorized arrivals in Australia, were intercepted and detained in Indonesia. The department supported Indonesia in engaging the International Organisation for Migration (IOM) to manage the groups detained and return some members who volunteered to return home. The Office of the United Nations High Commissioner for Refugees (UNHCR) undertook the role of assessing the claims of those who sought asylum and finding durable solutions for those found to need protection.⁹²

Department of Defence, the Department of Prime Minister and Cabinet, and the Attorney General's Department. See AUSTRALIAN NATIONAL AUDIT OFFICE, AUDIT REPORT NO. 57 2001-02: MANAGEMENT FRAMEWORK FOR PREVENTING UNLAWFUL ENTRY INTO AUSTRALIAN TERRITORY 30 (2002), [http://www.anao.gov.au/WebSite.nsf/Publications/4A256AE90015F69BCA256BD600802CBE/\\$file/Audit+Report+57.pdf](http://www.anao.gov.au/WebSite.nsf/Publications/4A256AE90015F69BCA256BD600802CBE/$file/Audit+Report+57.pdf) [hereinafter ANAO]. It may be inferred that Australia's security and intelligence agencies are also involved. *Id.* The four-part strategy has the following elements:

- **prevention** of the problem by **minimising** outflows from countries of origin and secondary outflows from countries of origin;
- working with other countries to **disrupt** people smugglers and **intercept** their clients en-route to Australia;
- **minimising incentives** to travel illegally to Australia; and
- **international cooperation** aimed at strengthening the international system of protection and disrupting people smuggling and refugee forum shopping.

Id.

⁹¹ No boat carrying asylum seekers has made it to Australian territory since August 22, 2001. See Department of Immigration and Multicultural and Indigenous Affairs, *Fact Sheet 74a: Boat Arrival Details*, http://www.immi.gov.au/facts/74a_boatarrivals.htm (last visited Jan. 19, 2003) [hereinafter *Fact Sheet 74a*].

⁹² See Department of Immigration and Multicultural and Indigenous Affairs, *Annual Report 2000-01*, http://www.immi.gov.au/annual_report/annrep01/report4.htm (last visited Jan. 15, 2003). See also Minister

The Annual Report does not detail in full the “disruption” operations in which the Australian authorities engaged to prevent the departure of what the Australian authorities describe as “secondary flow” or “secondary movement” asylum seekers.⁹³ Although the Australian National Audit Office (“ANAO”) Report provides more information—including an interesting flow chart⁹⁴—not much is known about the practical application of the laws and policy adopted following the *Tampa* Incident in what was code-named “Operation Relex.” However, accounts have emerged of Australia interdicting vessels carrying asylum seekers outside of its territorial waters as well as in the immediate proximity of its newly “excised” territories, and of those vessels being towed or escorted back to Indonesia.⁹⁵

As boats continued to arrive, the Australian authorities operating on the high seas off Indonesia simply refused to allow boats past into Australian waters. The intercepted vessels—referred to as “Suspected Illegal Entry Vessels” or SIEVs—included the now infamous SIEV 4. In early October 2001, the media carried accounts of asylum seekers on this vessel, wearing life jackets, jumping and throwing their children overboard in the hope that the Australians would rescue them. Later reports suggested that the boat had been fired upon by Australian naval authorities prior to the boat being boarded by the Australians.⁹⁶ Still later reports and a video emerged suggesting that the whole story was false. After the federal election in November 2001 returned the Howard Government to power, the Opposition and minor parties in the Senate instituted a broad ranging inquiry into the affair. The Senate Select Committee reported in 2002 that the Government had misused photographs of the sinking SIEV 4 to its political advantage, promoting the impression that the rescued asylum seekers were manipulative and abusive.⁹⁷

for Immigration and Multicultural and Indigenous Affairs, *Background Paper on Unauthorised Arrivals Strategy: Minister's International Engagements*, http://www.minister.immi.gov.au/media_releases/media01/r01131_engagements.htm (last updated July 22, 2002).

⁹³ See *supra* note 81 and accompanying text.

⁹⁴ See ANAO, *supra* note 90, fig. 1.4, at 33 (Conceptual Map of Detection and Prevention Measures).

⁹⁵ See, e.g., *To Deter and To Deny* (ABC Four Corners, ABC television broadcast, Mar. 2002); *By Invitation Only*, *supra* note 7.

⁹⁶ See John Ferguson, *Navy Photos Show Children Overboard; Water Torture*, HERALD SUN (Melbourne), Oct. 11, 2001, at 3. Reports indicate that the boat was fired on no less than four times before the Australians boarded it. *Id.*

⁹⁷ See *Majority Report: A Certain Maritime Incident Before the Senate Select Committee*, at ch. 6, http://www.aph.gov.au/senate/committee/maritime_incident_ctte/maritime/report/contents.htm

The Senate inquiry into the “children overboard” affair and the work of investigative journalists⁹⁸ brought out evidence of Australian involvement in incidents at sea resulting in two confirmed deaths and three suspected deaths by drowning. Overshadowing these incidents was the sinking in October 2001 of SIEV X, a boat crammed with mainly Afghan and Iraqi asylum seekers embarking from Indonesia. Over 350 lives were lost—making the incident the worst peacetime maritime disaster in Australia’s region. Allegations have emerged of Indonesian officials forcing asylum seekers onto the doomed and overloaded vessel at gunpoint, and of Australian surveillance operations being aware that the vessel had left, but doing nothing to track its passage or to come to the assistance of the asylum seekers in a timely fashion.⁹⁹

The Government strongly disputes suggestions that Australia is in any way accountable for these events, arguing that such tragic occurrences simply underscore the hazards of using people smugglers in an attempt to circumvent regular immigration procedures. While defenses may be found to each dreadful incident, the plain truth is that without Australia’s harsh policies and attitudes, the probabilities are that these lives would not have been lost.

The Government’s interpretation various episodes involving the interception of boats headed for Australia in late 2001 was one of the more controversial—and shameful—aspects of Australian politics leading up to the federal election on November 10, 2001. There can be few doubts that the Government fanned concerns about the boat people both through the rhetoric of its Ministers and by allowing the dissemination of false or misleading information.¹⁰⁰

Of equal concern are reports that the Australian Federal Police (“AFP”) engaged in clandestine “disruption” activities in Indonesia to stop asylum seekers from making their way to Australia. One investigative journalist elicited assertions by an AFP “operative” that he had taken money from would-be boat people for proposed voyages to Australia, splitting the proceeds with Indonesian officials who acted to ensure that the boats in

(last reviewed Oct. 23, 2002) (investigatory report).

⁹⁸ *Id.*

⁹⁹ See Margo Kingston, *SIEV-X: Another Bombshell*, SYDNEY MORNING HERALD, Sept. 20, 2002, <http://www.smh.com.au/articles/2002/09/20/1032054962047.html>. See also Andrew Clenell, *Failure to Act on Smuggler Blamed for 350 Boat Deaths*, SYDNEY MORNING HERALD, Feb. 25, 2002, <http://old.smh.com.au/news/0202/25/national/national13.html>.

¹⁰⁰ See PATRICK WELLER, DON’T TELL THE PRIME MINISTER (2002). The culture of self-harm that developed within the immigration detention centers within Australia was used as further evidence of “un-Australian” behavior. *Id.*

question never reached their destination.¹⁰¹ While there is no evidence of a link between this individual and those responsible for sinking the SIEV X, the AFP has confirmed that the individual named was employed by them and that he was authorized to engage in disruption activities.¹⁰²

Although the Government vehemently disputes this view, Operation Relex breaches the *non-refoulement* obligation in the Refugee Convention, as well as more general international legal obligations. Indonesia is not a State Party to the Refugee Convention. It is true that asylum seekers brought to Indonesia during the late 1990s by people smugglers were tolerated by the Indonesian Government. Furthermore, through agreements brokered by the Australian Government, the Indonesian government did agree to let the UNHCR and the IOM establish refugee status determination centers across Indonesia.¹⁰³ However, the SIEV X incident provides a basis for doubting whether the protection offered to Muslim asylum seekers in that country is “effective” in the sense of providing some form of tenure or sanctuary. The obligation not to *refoule* refugees to a place where they face persecution extends to *indirect* as well as direct return.¹⁰⁴

Hathaway has argued that Australia’s deflection of the *Tampa* asylum seekers, and of subsequent boat people, in the course of Operation Relex constituted behavior that penalized the asylum seekers involved because of

¹⁰¹ See Kevin John Enniss: *The AFP Cover Up* (Sunday Program, SIEV X television broadcast, Aug. 27, 2003), http://www.sievx.com/archives/2002_08-09/20020827.shtml (transcript of program) [hereinafter *The AFP Cover Up*].

¹⁰² *Id.*

¹⁰³ DIMIA provides the following account of these arrangements:

Australia has supported the establishment of cooperative arrangements between the UNHCR and the IOM and the Governments of Indonesia and Cambodia to intercept irregular migrants within their territories. The arrangements have resulted in:

- the interception of over 2,700 irregular migrants. Of that number approximately 990 are still in detention across Indonesia (mainly Iraqi and Afghan nationals). This number comprises people awaiting refugee determination as well as those who have been found not to be in need of protection;
- the UNHCR assessing 480 third country nationals to be refugees. The UNHCR is currently negotiating with donor countries for the resettlement of these people; and
- the removal by IOM of 180 third country nationals from Indonesia.

Detainees are accommodated in a number of transmigration centres or hotels across the Indonesian archipelago, which are not secure and a number have therefore left these arrangements.

See Minister for Immigration and Multicultural and Indigenous Affairs, *Background Paper on Unauthorised Arrivals Strategy*, http://www.minister.immi.gov.au/media_releases/media01/r01131_bgpaper.htm (last updated July 22, 2002).

¹⁰⁴ See Mathew, *Australian Refugee Protection*, *supra* note 4, at 672.

the alleged illegal mode of their entry. Article 31(1) of the Refugee Convention specifically prohibits States Parties from engaging in this kind of behavior—that is, imposing penalties on refugees on account of their illegal entry.

Australia's treatment of both the Pacific Solution asylum seekers and those processed on-shore¹⁰⁵ is arguably punitive in nature. Australia argues, however, that whether it is technically in breach of Article 31 is a moot point. On its face, Article 31(1) applies to frontline refugee-receiving States. The refugees to whom the no-penalty provisions apply are those "coming directly from a territory where their life or freedom was threatened in the sense of Article 1." The Australian Government argues that the boat people intercepted en route to Australia do not meet this description. Indeed, as noted earlier, the official Australian line is that the arrivals represent "secondary refugee flows." Furthermore, Article 31(1), on its face, also seems to apply to refugees within a State's territory. Its application to refugees outside the country is less clear-cut.

Arguments about the legality of Operation Relex are not limited to fine interpretations of Article 31 of the Refugee Convention. Where the interdiction operation has led to death, injury, and the inordinate suffering of asylum seekers, Australia's actions arguably place it in breach not only of Article 33 of the Refugee Convention, but also of a range of international human rights instruments. These include the International Covenant on Civil and Political Rights ("ICCPR"),¹⁰⁶ the Convention against Torture and All Forms of Cruel, Inhuman and Degrading Treatment ("Torture Convention"),¹⁰⁷ and—given the high number of children amongst the asylum seekers intercepted—the Convention on the Rights of the Child.¹⁰⁸ The material uncovered by U.S.-based Human Rights Watch in interviewing

¹⁰⁵ See *infra* Part IV.

¹⁰⁶ See International Covenant on Civil and Political Rights, U.N. Doc. A/6316 (1966), 999 U.N.T.S. 171, Dec. 16, 1966 [hereinafter ICCPR]. Article 6 of that instrument enshrines the right to life, and Article 7 enshrines the right not to be subjected to cruel, inhuman or degrading treatment or punishment. *Id.* Article 10(1) of the ICCPR requires that "[a]ll persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person." *Id.*

¹⁰⁷ See Convention Against Torture and All Forms of Cruel, Inhuman and Degrading Treatment, G.A. Res. 39/46, U.N. GAOR, 3d Comm., 39th Sess., 93d mtg. at 197, U.N. Doc. A/39/51, 1465 U.N.T.S. 85 (1984). See, in particular, the *non-refoulement* obligation in Article 3. *Id.*

¹⁰⁸ See Convention on the Rights of the Child, U.N. GAOR, 3d Comm., 44th Sess., 61st mtg. at 166, U.N. Doc. A/RES/44/25 (1989). Note that Article 22 of this instrument makes no distinction between children asylum seekers and children who have been determined formally to meet the U.N. definition of refugee. *Id.* art. 22. For an account of the rights enshrined in this instrument relevant to asylum seeker children, see Mary Crock, *You Have to be Stronger than Razor Wire: Legal Issues Relating to the Detention of Refugees and Asylum Seekers*, 10 AUSTL. J. ADMIN. L. 33, 37-38 (2002) [hereinafter Crock, *Stronger than Razor Wire*].

asylum seekers caught up in Operation Relex reinforces the view that the operation involved Australian behavior that violated these international legal instruments.¹⁰⁹

While the official Australian accounts interpret narrowly and selectively the “hard” principles of refugee law such as the *non-refoulement* and no-penalization obligations, little attention has been paid to the manner in which the official U.N. agencies would like states to interpret the relevant international instruments. These agencies have developed a variety of authoritative standards reflecting the U.N.’s preferred interpretation of the international instruments. For the Refugee Convention, there are the conclusions of the Executive Committee of the UNHCR,¹¹⁰ a body made up of representatives of States Parties to the Refugee Convention. The ICCPR has its own complaints and guidelines arrangements.¹¹¹ To the extent that the principles enunciated by these bodies do not reflect international treaty obligations or customary international law, they do not have the status of binding law. At best, the various guidelines and statements of principle are “soft” law, policy, or indicia of the way the various U.N. authorities would like states to act or to interpret relevant international laws. To complicate matters further, the unofficial standing of the various policies can also vary according to the status of the issuing body and the extent to which the U.N. General Assembly has given its imprimatur to the outcome of a particular process.¹¹²

In spite of the tendency of the Australian Government to dismiss as irrelevant this body of “soft” international law, it is worth noting that bodies such as the Executive Committee of the UNHCR have consistently exhorted States Parties to the Refugee Convention not to behave as Australia did in late 2001. The Background Note on the Protection of Asylum Seekers and Refugees Rescued at Sea—prepared by the UNHCR in March 2002—includes an Annex setting out no less than seventeen resolutions by its

¹⁰⁹ See *By Invitation Only*, *supra* note 7.

¹¹⁰ For a collection of the conclusions relevant to this issue, see GUY S. GOODWIN-GILL, ARTICLE 31 OF THE 1951 CONVENTION RELATING TO THE STATUS OF REFUGEES: NON-PENALIZATION, DETENTION AND PROTECTION, 61 (UNHCR Global Consultations 2001), <http://www.unhcr.ch> (last visited Jan. 19, 2003) (prepared at the request of the Department of International Protection for the UNHCR Global Consultations).

¹¹¹ Pursuant to an optional Protocol, the Human Rights Committee is empowered to make rulings on complaints made by individuals alleging a breach of the ICCPR. See Hilary Charlesworth, *Australia's Accession to the First Optional Protocol to the International Covenant on Civil and Political Rights*, 18 MELBOURNE U. L. REV. 428 (1991). This Committee has also produced both general comments and rules on specific clauses of the ICCPR. *Id.*

¹¹² Note, for example, that while the UNHCR HANDBOOK, *supra* note 23, was placed before the U.N. General Assembly for approval, the various guidelines produced by the UNHCR in and after 1999 have not yet been through this process.

Executive Committee over the years.¹¹³ All express the concern of the Committee about the tendency of States Parties to close their frontiers to, and otherwise to fail to respond to the needs of distressed refugees and asylum seekers traveling by boat.¹¹⁴

The fine arguments made by the Australian Government to justify Operation Relex in the name of national sovereignty and border control have little to commend them from a moral standpoint. In late 2001, the vast majority of fugitives from Iraq and Afghanistan clearly met the international legal definition of refugee as most of them had fled persecution by Saddam Hussein in Iraq or the Taliban in Afghanistan.¹¹⁵ Indeed, uncomfortable parallels can be found between Australia's behavior in repelling these boat people and the actions of many Western countries in *refouling* Jewish refugees before World War II.¹¹⁶ However, in the harsh world of politics, and in a climate of fear generated by the uncertainties of globalized terrorist campaigns, it would appear that a majority of Australians strongly supported and, at time of writing, still support the Government's policies. There also appears to be very little public concern about the methods employed by the Government to achieve its objectives, even when those methods may have involved breaches of Australian criminal law.¹¹⁷

IV. ISLAND REFUGEE OR CAST AWAY? THE "PACIFIC SOLUTION"

A. *The Pacific Solution as Commodified Burden Sharing: Resonance in U.S. Theory and Practice*

The immediate sequel to the *Tampa* Incident was a negotiated settlement in the form of a Memorandum of Understanding between Australia, the UNHCR, the IOM, and a range of Pacific island countries that saw the majority of the asylum seekers from the *Tampa* and the *Aceng* delivered to Nauru. New Zealand agreed to take 131 asylum seekers,

¹¹³ See UNHCR, BACKGROUND NOTE ON THE PROTECTION OF ASYLUM SEEKERS AND REFUGEES AT SEA (2002), http://heiwww.unige.ch/conf/psio_230502/files/unhcr.pdf (last visited Jan. 19, 2003) (content as discussed at the expert roundtable *Rescue-at-Sea: Specific Aspects Relating to the Protection of Asylum-Seekers and Refugees*, held in Lisbon, Portugal on Mar. 25-36, 2002).

¹¹⁴ *Id.*; see also *Problems Related to the Rescue of Asylum-Seekers in Distress at Sea*, UNHCR Dept. of Int'l Protection, EC/SCP/30, available at www.unhcr.ch (last visited Nov. 22, 2002); and Mathew, *Legal Issues*, *supra* note 4, at 17-18.

¹¹⁵ Within Australia's on-shore refugee determination system, an overwhelming majority of asylum seekers from these countries had their claims accepted between 1999 and 2001. See August Interview with Ellen Hansen, *supra* note 40. Almost all of the Iraqi (97%) and Afghan (92%) arrivals in the year ending June 30, 1999 were recognized as refugees and allowed to remain in Australia. *Id.*

¹¹⁶ See IRVING ABELLA & HAROLD TROPER, NONE IS TOO MANY (1982).

¹¹⁷ See *The AFP Cover Up*, *supra* note 101.

consisting of family groups, from the *Tampa*. Initially housed at the Mangere detention facility, these asylum seekers were given full access to New Zealand's refugee determination system and had their asylum claims determined within weeks.¹¹⁸ By January 2002, all but one had been accepted as refugees and granted permanent residence in New Zealand.¹¹⁹

The UNHCR agreed to process half of the refugee claims of the *Tampa* and *Aceng* asylum seekers on Nauru, while Australia undertook the processing of the balance of the cases. With the interception of other boats, and the transfer of asylum seekers from Christmas Island, arrangements were made with PNG to establish a detention center and processing facilities on Manus Island.¹²⁰ Australia has had sole responsibility for determining the refugee claims of asylum seekers at this facility. By September 2002, New Zealand had agreed to resettle a further 182 boat people from the centers at Nauru and Manus Island found to be refugees.¹²¹

While some of the *Tampa* rescues achieved a happy outcome at the end of 2002, the same was not true for many of the asylum seekers sent to Nauru and Manus Island. The secrecy of the processing centers in these places makes it difficult to ascertain with accuracy what has occurred. However, from the information available, aspects of the arrangements raise legal and humanitarian concerns and questions about the political wisdom of the policies underlying the program.

The problems with the Pacific Solution are also noteworthy to the extent that the arrangements reflect proposals that have been made in the past by one leading U.S. academic as a more general solution to the global refugee "problem." Refining and extending calls by James Hathaway and others¹²² to find mechanisms to force states to share the refugee burden more equitably, Professor Peter Schuck¹²³ has argued for the introduction of a quota system whereby non-refugee producing states would be allocated a certain number of refugees for care or resettlement each year. This quota would be determined after establishing a global figure of the number of

¹¹⁸ See *Adrift in the Pacific*, *supra* note 39.

¹¹⁹ Interview with Ellen Hansen, External Affairs Officer, UNHCR, in Canberra, Austl. (July 2002) [hereinafter July Interview with Ellen Hansen].

¹²⁰ See *Papua New Guinea Asylum Deal Done with 30 Minutes to Spare*, FIN. TIMES LTD., May 28, 2002, <http://www.unhcr.ch> (last visited Jan. 19, 2003).

¹²¹ See *Another 16 Refugees from Nauru Arrive in Australia*, AGENCE FRANCE PRESSE, Sept. 4, 2002, www.unhcr.ch (last visited Jan. 19, 2003).

¹²² See James C. Hathaway & R. Alexander Neve, *Making International Refugee Law Relevant Again: A Proposal for Collectivized and Solution-Oriented Protection*, 10 HARV. HUM. RTS. J. 115 (1997).

¹²³ See Peter Schuck, *Refugee Burden-Sharing: A Modest Proposal*, 22 YALE J. INT'L L. 243 (1997) [hereinafter Schuck, *Refugee Burden-Sharing*]. See also PETER H. SCHUCK, *CITIZENS, STRANGERS AND IN-BETWEENS: ESSAYS ON IMMIGRATION AND CITIZENSHIP* 282-325 (1998).

refugees in need of protection each year, and would be allocated in a manner proportionate to the wealth and carrying capacity of a nation. The essence of Schuck's proposal is that developed states¹²⁴ should then be able to elect either to take in their allocation of refugees or pay other states to take in or care for the specified number. Put another way, Shuck proposes that a state should be able to subrogate its liability by approaching other states to accept its refugee quota in exchange for cash, and/or other incentives such as "credit, commodities, development assistance, technical advice, weapons and political support."¹²⁵

Schuck argues that this approach would allow for a more principled and controlled handling of the refugee problem. He points out that the current refugee protection system depends more on the political landscape of the receiving state than on the terms of the Refugee Convention.¹²⁶ He posits that refugees are only taken in and accepted by states when the social, economic, and political climate is favorable and after national security and foreign policy interests are taken into consideration. Schuck's vision is that the UNHCR would become the central coordinating body for the care and distribution of refugees, but that it should be given a secure funding base so as to make the agency less susceptible to political and fiscal pressures from States Parties to the Refugee Convention.¹²⁷

To the extent that Australia is bankrolling the Pacific Solution, it could be argued that the arrangements are an example of Australia "buying out" its protection obligations for refugees in its region. Neither Nauru nor PNG are actively involved in assessing the refugee claims of the asylum seekers in question. However, these two countries have provided the physical amenities necessary for the operation. The assistance has been given in exchange for monetary compensation. In the case of Nauru, Australia paid more than AUD 30 million, a figure that is greater than all of

¹²⁴ Schuck, *Refugee Burden-Sharing*, *supra* note 123, at 281. Countries excluded from the allocation scheme would be those ascertained to be too poor, and states "that engage in systematic violations of human rights." *Id.*

¹²⁵ *Id.* at 284. Note the non-proliferation provisos made with regard to the trade of refugees for weapons. *Id.*

¹²⁶ *Id.* at 252.

¹²⁷ On the role of the UNHCR, see *Statute of the Office of the United Nations High Commissioner for Refugees*, G.A. Res. 428(V), U.N. GAOR, 5th Sess., Supp. No. 20, at 46, U.N. Doc. A/1775 (1950). At present, the UNHCR is funded through the contribution of member states rather than directly through the U.N. General Assembly. *Id.* This arrangement creates major problems for the agency when States Parties try to use their fiscal power to influence UNHCR policy. See Schuck, *Refugee Burden-Sharing*, *supra* note 123, at 253. For statistical data and an explanation of the UNHCR's financial requirements, see UNHCR, *Revised UNHCR Financial Requirements for 2002*, Nov. 6, 2002, <http://www.unhcr.ch/cgi-bin/texis/vtx/home/opedoc.pdf?tbl=PARTNERS&id=3cd164764&page=partners> (last visited Jan. 19, 2003).

the aid provided to Nauru between 1993 and 2001.¹²⁸ PNG also received generous aid for its assistance.¹²⁹ It is also worth noting that Pacific Island nations that were approached by the Australian Government, but declined involvement in the program, were excluded from Australia's foreign aid program in 2001.¹³⁰ Put another way, the monetary rewards paid to Nauru and PNG could be seen as a way of commodifying the asylum seekers in question in a manner reminiscent of Schuck's proposal—although some critics of the scheme have used more derogatory terms to describe the commercial exchange.¹³¹

While it is difficult to imagine the United States “excising” parts of its offshore territories as Australia has done, as noted earlier, there are many aspects of the Pacific Solution that find resonance in U.S. policy and practice (as well as academic theory).¹³² For example, the United States has established detention centers and holding camps in some of its “trust” territories and protectorates. An intrinsic part of the Haitian interdiction program was the establishment of offshore processing centers for determining whether boat people had colorable claims for refugee status.

¹²⁸ See *Adrift in the Pacific*, *supra* note 39, at 13; and *infra* note 151. Note that Nauru is a former Australian protectorate, which gained its independence after being effectively stripped of the natural resources through a prolonged operation to mine the tiny island for phosphate. See *Adrift in the Pacific*, *supra* note 39. The island has remained reliant on Australia because of its inability to restore the mined land for agricultural or other purposes. *Id.*

¹²⁹ See Kalinga Seneviratne, *Rights: Australia Set to Back Down on Refugee Policy*, INTER PRESS SERV., Dec. 12, 2001, at 1–2, available at www.oneworld.net/cgi_bin/index.cgi?root=129&url=http%3A%2F%2Fwww%2Eoneworld%2Eorg2Fips%2Fdec01%2F07%5F55%5F008%2Ehtml (last visited Apr. 23, 2002); see also James Ridgeway, *Shame Down Under*, MONDO WASH., Feb. 13-19, 2002, <http://www.villagevoice.com/issues/0207/ridgeway.php>.

¹³⁰ States that declined offers from Australia included Palau, Tuvalu, Fiji and East Timor. See *Adrift in the Pacific*, *supra* note 39.

¹³¹ See *Adrift in the Pacific*, *supra* note 39, at app. 2. The report quotes an Independent member of Nauru's Parliament, Anthony Audoa, MP, who said:

I don't know what is behind the mentality of the Australian leaders, but I don't think it is right. A country that is so desperate with its economy, and you try to dangle a carrot in front of them, of course, just like a prostitute . . . if you dangle money in front of her, you think she will not accept it. Of course she will, because she's desperate.

Id.; see also Mark Metherell & Michelle Grattan, *Pacific Solution “Treats Nations Like Prostitutes”*, SYDNEY MORNING HERALD, Feb. 4, 2002, at 2.

¹³² Note that the “excision” from Australia's “migration zone” does no more than remove the ability of non-citizens to lodge a refugee claim or make a valid application for a visa. See Migration Act 1958, § 46A (Austl.), together with § 5 (defining “excised off-shore places”); Minister for Immigration and Multicultural and Indigenous Affairs, *Border Protection: Australia's Excised Offshore Places—Q & A*, <http://www.minister.immi.gov.au/borders/arrivals/excise.htm> (last updated Aug. 2, 2002) (defining “excised off-shore places” in the Migration Act 1958) [hereinafter *Border Protection Q&A*]. The changes do not affect the nationality or entitlements of Australian citizens living on the islands. See Migration Act 1958, §§ 46A, 5; *Border Protection Q&A*.

The most well-known of these centers was established at Guantanamo Bay, a U.S. trust territory on the Island of Cuba.¹³³

The U.S. arrangements have other features that are echoed in the Pacific Solution—among them the denial of access to U.S. refugee status determination procedures and to the U.S. judicial system.¹³⁴ The United States has enacted different legal regimes for persons detained away from its mainland territories.¹³⁵ One notable feature of the U.S. legislation is that there are provisions reducing or removing altogether the right of non-citizens apprehended in this way to access U.S. administrative law systems.¹³⁶ A key aspect of the Pacific Solution was to replicate this situation in Australia by removing the right of refugee claimants to appeal adverse decisions to an administrative tribunal, thus removing access to both lawyers and judicial review.¹³⁷

¹³³ This facility became known as Camp X-Ray in late 2001, after being converted into a holding facility for persons taken prison in Afghanistan during the early stages of the U.S. "War Against Terrorism." GlobalSecurity.Org, *Guantanamo Bay—Camp X-Ray*, http://www.globalsecurity.org/military/facility/guantanamo-bay_x-ray.htm (last modified Dec. 30, 2002).

¹³⁴ See, e.g., The Lowenstein International Human Rights Clinic, *Aliens and the Duty of Nonrefoulement: Haitian Centers Council v. McNary*, 6 HARV. HUM. RTS. J. 1 (1993).

¹³⁵ See MUSALO ET AL., *supra* note 48.

¹³⁶ See Refugee Act of 1980, Pub. L. No. 96-212, 94 Stat. 102 (1980), Immigration and Nationality Act § 243(h), 8 U.S.C.A. § 1253(h) (1988), *amending* Immigration and Nationality Act, 8 U.S.C.A. § 243(h). Section 243(h) is the predecessor to what the 1996 Act redesignated as § 241(b)(3). T.A. ALEINIKOFF ET AL., IMMIGRATION AND CITIZENSHIP PROCESS AND POLICY 1033 (4th ed. 1998). Immigration and Nationality Act § 208(b)(1), 8 U.S.C.A. § 1158(b)(1) (West 2000 & Supp. 2001) ("The Attorney General may grant asylum to an alien who has applied for asylum in accordance with the requirements and procedures established by the Attorney General under this section if the Attorney General determines that such alien is a refugee within the meaning of section 101(a)(42)(A), [definition of a refugee]."). *Matter of Salim*, 18 I. & N. Dec. 311, 315 (BIA 1982). In *Matter of Salim*, the Board explained the relationship between the asylum provision, § 208, and the withholding provision, then § 243(h) (redesignated as § 241(b)(3) in 1996):

Section 243(h) relief is "country specific" and accordingly, the applicant here would be presently protected from deportation to Afghanistan pursuant to § 243(h). But that section would not prevent his exclusion and deportation to Pakistan or any other hospitable country . . . if that country will accept him. In contrast, asylum is a greater form of relief. When granted asylum, the alien may be eligible to apply for adjustment of status to that of a lawful permanent resident pursuant to § 209 of the Act, after residing here one year, subject to numerical limitations and the applicable regulations.

Id. Note that moves were also made to restrict the access of illegal entrants to appeal and judicial review mechanisms. See Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, 110 Stat. 3009-546 (1996), 8 U.S.C. 1225, (Supp. II 1997); and Karen Musalo et al., *The Expedited Removal Study: Report On The First Three Years Of Implementation Of Expedited Removal*, 15 NOTRE DAME J.L. ETHICS & PUB. POL'Y 130-45 (2001).

¹³⁷ See Department of Immigration and Multicultural and Indigenous Affairs, Offshore Processing Arrangements, *Fact Sheet 76: Offshore Processing Arrangements*, http://www.immi.gov.au/facts/76_offshore.htm (last updated Oct. 15, 2002).

B. *The Pacific Solution as a Tool for the Principled Management of Refugee Flows*

Before criticizing the scheme, it is worth reflecting briefly on the rationales put forward by the Australian Government for its policy shift in late 2001. Australia's primary justification for these arrangements again lies in the argument that if the boat people seeking to find refuge in Australia can meet the U.N. definition of refugee at all, they are "secondary flow" refugees.¹³⁸ Their action in using the people smugglers to seek refuge in Australia is described as either "forum shopping"—whereby the refugee seeks out the country most likely to acknowledge her or his status as a refugee—or as the search for a preferred "migration outcome."¹³⁹

The Australian Government argues that "secondary flow" refugees should not be allowed to gain a procedural advantage by their forum shopping activities. Minister Ruddock has drawn attention to the inequity implicit in the fact that asylum seekers who access Australia's refugee determination processes are many times more likely to gain recognition as refugees than are those processed by the UNHCR in its front line field operations. As well as being unfair to those "screened out" by the UNHCR, the elaborate systems of countries like Australia are decried as magnets that encourage asylum seekers to by-pass the "regular" refugee management processes.¹⁴⁰ By the same token, it is argued that the international regime for the protection of refugees should not be "corrupted" by allowing persons who have protection in a safe country to use the asylum procedures of a wealthy country to gain an immigration outcome.¹⁴¹

Put another way, the Australian Government seems to be arguing that the best way to make the refugee determination mechanisms "principled" in global terms, is to establish regimes that operate in a manner that reproduces the field operations of the UNHCR in countries of first asylum. In practical terms for the asylum seekers on Nauru and Manus Island, this has meant a refugee determination regime markedly inferior to that operating on mainland Australia.

¹³⁸ See *People Smuggling Background Paper*, *supra* note 8.

¹³⁹ See Migration Act 1958, § 5 (Austl.) (migration zone defined); Minister for Immigration and Multicultural and Indigenous Affairs, *Ruddock Announces Tough New Initiatives*, http://www.minister.immi.gov.au/media_releases/media99/r99143.htm (last updated July 22, 2002).

¹⁴⁰ *Id.*

¹⁴¹ See, e.g., Alison Croweller & Megan Saunders, *Refugees' Plight a 'Lifestyle Choice'*, AUSTRALIAN, Jan. 8, 2002, LEXIS, News Library (reporting that Phillip Ruddock, Immigration Minister, claimed that asylum seekers travelling through Indonesia were "choosing to leave situations of safety and security.").

C. *A Legal Critique of the Pacific Solution*

After publishing his “modest proposal,” Shuck met with pointed criticisms from fellow academics Deborah Anker, Joan Fitzpatrick, and Andrew Schaknové.¹⁴² The three argue that the Shuck model would degrade the Refugee Convention as a human rights instrument. By turning the plight of refugees into an economic bargaining tool, wealthy states would be able to take advantage of poorer states, forcing them to shoulder the burden of caring for refugees in circumstances where they are likely to suffer in both the short and long terms. The authors argue that “by emphasizing the temporary nature of physical asylum and conferring it through voluntary coalitions of states, the economic and social rights of refugees under the Refugee Convention and Protocol will be de-emphasized.”¹⁴³

These criticisms of the Shuck proposal are borne out in the experiences of asylum seekers in Nauru and on Manus Island in PNG. In both places, asylum seekers have been held in detention with few rights to communicate with anyone outside the camps.¹⁴⁴ All have been interviewed by the UNHCR or by Australian officials with the aid of interpreters. Although permitted to “appeal” adverse decisions by way of rehearing by the same officials, the asylum seekers have been refused any form of legal assistance. Attempts by public interest advocates to gain access to the camps have proved futile, with Nauru refusing to grant visas to enter the country, and PNG refusing access to Manus Island.¹⁴⁵

The involvement of the UNHCR and the IOM in the Pacific Solution gives credence to Australia’s formalistic assertions that the scheme is a tool for the principled management of “secondary flow” refugees. Whether the UNHCR and the IOM are content with the situation to which they are party, however, is quite another question. My discussions with the UNHCR in Canberra lead me to believe that the UNHCR would have been happy to allow the *Tampa* asylum seekers access to legal advice and that it was

¹⁴² See Deborah Anker et al., *Response: Crisis and Cure: A Reply to Hathaway/Neve and Schuck*, 11 HARV. HUM. RTS. J. 295 (1998); see also Harvey Gee, *The Refugee Burden: A Closer Look at the Refugee Act of 1980*, 26 N.C. J. INT’L L. & COM. REG. 559 (2001).

¹⁴³ See Anker et al., *supra* note 142, at 303.

¹⁴⁴ For one account, see Julian Burnside, *Hypocrisy and Human Rights*, at <http://www.julianburnside.com> (last visited Jan. 19, 2003) (Deakin University Law School Oration 2002).

¹⁴⁵ See *id.*

Australia's opposition that led to the closure of the facilities to refugee advocates.¹⁴⁶

While the *Tampa* rescuees taken in by New Zealand fared well, the arrangements on Nauru and Manus Island raise a variety of issues about compliance with the rule of law—and arguably create more problems than they solved. From the perspective of the Refugee Convention, the arrangements on Nauru and Manus Island arguably constitute a penalty on refugees contrary to Article 31 of the Refugee Convention. It is worth noting in this context that Nauru is not a party to the Refugee Convention and while PNG has signed, it has also made a number of reservations.¹⁴⁷ From the perspective of the domestic laws of both Nauru and PNG, the establishment of the detention facilities and the indefinite incarceration of the asylum seekers without judicial oversight are questionable. Both Nauru and PNG are countries with Bills of Rights that prohibit arbitrary detention.¹⁴⁸ Put simply, the financial inducements of the Australian Government have resulted in the establishment of facilities that, at the very least, sit uneasily with the human rights laws of the host governments.

The Australian Government has played word games when speaking of the Pacific Solution arrangements. As Senior Judge Frank Brennan notes:

The Minister's first defence is to claim that the facilities in those places (Nauru and Manus Island) are not detention centres despite the Migration Legislation Amendment (Transitional Movement) Act 2002 speaking of "the detention of the person in a country in respect of which a declaration is in force (s. 198D(3)(c))." And the bills digest for the Migration Legislation Amendment (Transitional Movement) Bill 2002 speaks of the removal of persons "to a place such as a 'Pacific Solution' detention facility on Nauru or Papua New Guinea." Even Senator George Brandis and Mr John Hodges in the Senate Select Committee on a certain Maritime Incident have referred to the "detention centres" in those places and the

¹⁴⁶ Telephone Interview with Ellen Hansen, External Affairs Officer, UNHCR (Mar. 2002) [hereinafter March Interview with Ellen Hansen].

¹⁴⁷ Papua New Guinea does not accept the following Refugee Convention obligations: paid employment (art. 17); housing (art. 21); public education (art. 22); freedom of movement (art. 26); non-discrimination against refugees who enter illegally (art. 31); expulsion (art. 32); and naturalization (art. 34).

¹⁴⁸ See NAURU CONST., art. 3, http://www.vanuatu.usp.ac.fj/paclawmat/Nauru_legislation/Nauru_Constitution.html (preamble) (last visited Jan. 19, 2003); PAPUA N.G. CONST., pmbil. & art. 42 (Liberty of the Person), http://www.vanuatu.usp.ac.fj/paclawmat/PNG_legislation/Constitution.htm (last visited Jan. 19, 2003).

“detainees” kept therein. In his evidence on 1 May 2002, Mr Hodges said, “Nauru is by far the worst of the detention centres.”¹⁴⁹

The Australian Government has done its best to distance itself from criticisms of the way the camps are being run and of the conditions in the camps. Interestingly, these efforts do not appear to have succeeded in deflecting criticisms of the Nauru and PNG facilities as manifestations of Australian policy.

Aside from the extent to which the Pacific Solution represents a breach of international law, the costs of the exercise to Australia in financial terms have been considerable. According to the Minister’s press releases, four year funding for the operation costs of offshore processing has been estimated at AUD 129.3 million for 2002-03, with an additional AUD 270 million allocated for construction and operating costs for facilities on Christmas and Cocos-Keeling islands.¹⁵⁰ As the Refugee Council of Australia has noted,¹⁵¹ the budget allocations of AUD 2.8 billion over four years represent expenditure in the vicinity of AUD 700,000 for each of a nominal 4000 asylum seekers who may come to Australia by boat during that period.

The Nauruan Government has been paid or pledged AUD 30 million for the financial year of 2001-02.¹⁵² The arrangements in PNG are reported to have cost in excess of AUD 24 million, with the number of asylum seekers a mere 446.¹⁵³ In practical terms, Australia used the interdicted asylum seekers as barter for massive increases in aid payments to both countries. In the case of PNG, the decision to trade refugees for Australian aid has not gained popular support. Indeed, some have suggested that the policy contributed to the dramatic decline in the fortunes of the governing Peoples’ Democratic Movement party, perhaps leading to the decision of Prime Minister Sir Mekere Morauta to resign before the completion of the elections in August 2002. Australia, some would argue, has emerged from

¹⁴⁹ See Frank Brennan, *Developing Just Refugee Policies in Australia: Local, National and International Concerns* 13 (Aug. 7, 2002) (unpublished manuscript, U. of Sydney) (on file with author).

¹⁵⁰ See Minister for Immigration and Multicultural and Indigenous Affairs, *Ministerial Press Release No. 33 of 2002: Offshore Processing Developments and Related Savings*, http://www.minister.immi.gov.au/media_releases/index.htm (last updated May 14, 2002).

¹⁵¹ See Refugee Council of Australia, *Reflections on the 2002-2003 Federal Budget*, May 2002, http://www.refugeecouncil.org.au/html/position_papers/FEDERAL_BUDGET.html (last visited Jan. 19, 2003).

¹⁵² For a description of how this money is to be spent, see *Adrift in the Pacific*, *supra* note 39, at 13.

¹⁵³ See *Locals Question Benefits of Adopting “Pacific Solution”* (ABC radio broadcast, Asia Pacific Program, Nov. 2001); *Adrift in the Pacific*, *supra* note 39, at 10.

the affair as a regional bully, using its financial muscle to force struggling countries to do its dirty work.¹⁵⁴

As the refugee claims of the asylum seekers on Nauru and Manus Island are processed, interesting issues emerge when the processing data released by the UNHCR and by DIMIA are compared. The official statistics released by the UNHCR on July 31, 2002, with respect to its Nauru determinations, suggest that Iraqi asylum seekers on Nauru have been accepted at the rate of about 84%.¹⁵⁵ The data released by DIMIA in May 2002 for Iraqis on Nauru shows Australia's approval of about 53%. The recognition rates for Iraqis on Manus Island on May 20, 2002 were about 76%. As DIMIA has not released statistics with the same breakdown as the UNHCR, it is difficult to follow exactly what is going on. However, the available data suggests that the UNHCR processing is more generous than that of the Australian authorities on Nauru and PNG. Indeed, on the face of things, the UNHCR processing appears to be more in line with the processing of Iraqis in Australia (including appeals to the Refugee Review Tribunal), which results in approvals of Iraqi claimants at well over 80%. As noted earlier,¹⁵⁶ one of the stated rationales of the Pacific Solution is that the Australian on-shore processing system is too generous relative to standards set by the UNHCR. Minister Ruddock's claim in late 2001 was that an Iraqi asylum seeker was "six times more likely" to gain recognition in Australia than through UNHCR processes. In the case of asylum seekers on Nauru and Manus Island, the statistics supplied by the UNHCR—although not those emanating from the Government—suggest that processing by the UNHCR was, in fact, more likely to result in the recognition of claims than offshore processing by the Australian authorities.

¹⁵⁴ See Duncan Kerr, *True Believers Will Reject Wedge Politics*, NEWCASTLE HERALD, Feb. 13, 2002, LEXIS, News Library.

¹⁵⁵ See Table 1, *infra*.

¹⁵⁶ See discussion, *supra* Part IV.B.

Table 1. UNHCR Refugee Status Determinations for Nauru as of July 31, 2002¹⁵⁷

Nationality	Total No. Persons	Accept 1st Instance	Rejected 1st Instance	Accept Appeal	Reject Appeal	Pending	Voluntary Repatriation	Acceptance Rate ^b
Iraqi	201	126	75	36	31	8		84%
Palestinian	27	14	13	10	3			89%
Afghan	292 ^a	32	244			239	5	12%
Pakistani	3						3	0%
Sri Lankan	6		5	2	3		1	40%
Total	529	172	339	46	37	247	9	43%

Resettlement: 59 departed to New Zealand; 5 departed to Australia; and 9 accepted by Sweden, not yet departed.

^a Fourteen Afghans were resettled to New Zealand without receiving a determination. Two Afghans chose to repatriate without receiving a determination.

^b Acceptance rate is calculated as a percentage of decisions (not counting pending cases & voluntary repatriation without determination). This is of particular note in the large number of pending decisions for the Afghan caseload.

Table 2. Australian Government Refugee Determinations: Decisions Handed Down on Nauru, MPS 41/2002, May 30, 2002¹⁵⁸

	Iraqi		Other Nationalities		Total
	Approved	Refused	Approved	Refused	
Decisions handed down during the week commencing May 27, 2002	10	49	3	0	62
Decisions previously handed down					
Australia	60	12	0	7	79
UNHCR	126	75	21	22	244
Total	196	136	24	29	385

Table 3. Australian Government Refugee Determinations: Decisions Handed Down on Manus Island, MPS 39/2002, May 23, 2002¹⁵⁹

	Iraqi		Other Nationalities		Total
	Approved	Refused	Approved	Refused	
Decisions handed down during the week commencing May 20, 2002	115	56	7	11	189
Decisions previously handed down	101	12	3	0	116
Total	216	68	10	11	305

¹⁵⁷ Statistical data supplied by Ellen Hansen, External Affairs Officer, UNHCR, Canberra, Austl. Note that this statistical data does not include the 131 Afghans from the *Tampa* that were sent to New Zealand for asylum processing. All but one of these asylum seekers was accepted by New Zealand. See *supra* Part IV.A.

¹⁵⁸ *Id.*

¹⁵⁹ *Id.*

In fairness to Professor Shuck, it must be acknowledged that there are many aspects of the Pacific Solution that depart from what he proposed. Even so, it is interesting to note that within one year of its inception, the Australian Government seems ready to draw a line under the Pacific Solution. In truth, the arrangements on Nauru and Manus Island are not sustainable. Indeed, every indication is that the measures were taken as a short-term solution to the panic surrounding the *Tampa* Incident and its aftermath. The IOM and the UNHCR pointedly declined to take on the processing of any more boat people apprehended in the Pacific region en route for Australia after the *Tampa* and *Aceng*. Other Pacific Islands also refused to take on processing for Australia.¹⁶⁰ If there is a future for the Pacific Solution, it lies in the detention facility planned for Christmas Island; this, it would appear, is to be Australia's Guantanamo Bay.¹⁶¹

V. LANDFALL AT LAST? THE PLIGHT OF "UNAUTHORIZED" REFUGEES AND "TRANSITIONAL MOVEMENT" PERSONS IN AUSTRALIA

As processing on Nauru and Manus Island nears completion, the issue of who is to take those recognized as refugees presents a problem. The tiny island of Nauru has made it plain from the outset that it will not accept any of the *Tampa* or *Aceng* refugees for permanent resettlement. PNG is also not well placed to take refugees for resettlement. New Zealand and Sweden have accepted some, but Australia has been reluctant to follow suit. Although it has accepted forty-two refugees from Manus Island, as of July 1, 2002, Australia had only taken one refugee from Nauru. This is in spite of the fact that half of the refugees first recognized by the UNHCR on Nauru are reputed to have relatives of some sort in Australia.¹⁶²

The dilemma facing the Pacific Solution refugees highlights once again the limits of the international protection regime on the one hand and the iniquity of Australia's policies, on the other. The bottom line is that the UNHCR cannot force countries to accept refugees. Its Executive Committee has examined the problems associated with the dislocation of refugees' families. In the Executive Committee's Conclusion No. 24 ("ExComm 24"),

¹⁶⁰ A variety of Pacific Island States were approached by Australia in 2001, among them Tuvalu and Kiribati. See *Adrift in the Pacific*, *supra* note 39.

¹⁶¹ Funding for the establishment of a permanent detention facility was allocated in the Federal Budget of May 2002. See Department of Immigration and Multicultural and Indigenous Affairs, *Contract Signed for Christmas Island Detention Facility*, Jun. 17, 2002, http://www.immi.gov.au/media_releases/media02/d02037.htm.

¹⁶² See March Interview with Ellen Hansen, *supra* note 146.

the UNHCR has called upon States Parties to the Refugee Convention to make the reunification of refugee families a first priority.¹⁶³ In Australia, the public response of at least one senior Departmental official has been to reject ExComm 24 as “not relevant” to the issue of Australia’s legal obligations.¹⁶⁴

There is a special irony in Australia’s unwillingness to take the Pacific Solution refugees. Absent changes to Australian laws in 1999, it is arguable that many of the refugees on Nauru and Manus Island would never have had to resort to the people smugglers and their boats to seek safe haven in the first place.

Until 1999, when Australia’s first Border Protection Act was passed, all non-citizens recognized as refugees in Australia were treated in the same way. All received permanent residence, with all the entitlements flowing from that status. In that year, changes to the Migration Regulations meant that boat people and other unauthorized arrivals would no longer gain access to permanent residence or to the attendant rights to (legal) family reunification. These provisions were introduced in spite of, or perhaps because of the fact that more boat people were gaining recognition as refugees in 1999 than in any other time in Australian history. The almost immediate result of the amendment was to change the usual pattern of migration.

Previously, the common practice was to send the male (head) of the family by boat to find safe haven, using the people smugglers. That way the father would suffer the rigors and perils of the sea voyage and the women and children would follow in due course using the regular immigration mechanisms. Since the amendment, the inability to sponsor family has forced refugee families away from the regular migration channel and into the arms of the people smugglers. If families do not use the people smugglers, the present system in Australia means that they could well face permanent separation. This change is reflected in the composition of the detention center population.¹⁶⁵ In 1999, the number of children in custody leapt from 5% to 34% in the space of a month.¹⁶⁶

¹⁶³ See *Conclusion on the International Protection of Refugees, No. 24 (XXXII): 1981 Family Reunification*, UNHCR Executive Comm., 32d Sess., reprinted in GOODWIN-GILL, *supra* note 30, at 475; also available at <http://www.unhcr.ch>.

¹⁶⁴ April Interview with Robert Illingworth, *supra* note 19.

¹⁶⁵ Australia is one of very few countries that detains all asylum seekers who enter the country without a visa, with very few exceptions. See Anthony M. North & Peace Declé, *Courts and Immigration Detention: “Once a Jolly Swagman Camped by a Billabong,”* 10 AUSTL. J. ADMIN. L. 1 (2002); and Crock, *Stronger than Razor Wire*, *supra* note 108 (discussing Australian laws).

¹⁶⁶ This statement derives from tallying the number of children and adults arriving on boats, as recorded by Department of Immigration and Multicultural and Indigenous Affairs. See *Fact Sheet 74a*, *supra* note 91.

With the passage of the Migration Legislation Amendment (Transitional Movement) Act in 2002, the Government has attempted to cement its vision of refugee processing with legislation that allows people processed offshore to be brought to Australia without gaining any rights to apply for a visa or to challenge their detention. For most purposes, individuals brought to Australia under this legislation are treated as though they are not legally present in the country. For those who have family in Australia, this represents particular problems.

Although nominally processed outside Australian law, asylum seekers on Nauru and Manus Island are technically subject to the same refugee law standards as those used for refugee claimants within Australia. Although Australia has never moved to enact the U.N. definition into its migration laws, on September 26, 2001 the Migration Act was amended so as to “clarify”—or, rather, constrain—the way Australian decision makers are supposed to read the U.N. definition of refugee.¹⁶⁷ The amended legislation directs that families cannot be regarded as a “particular social group” for the purposes of the definition. Put simply, it is no longer permissible to take into account persecution suffered by one family member when determining the claim of another in the family: each applicant must meet the definition in her or his own right. For women and children, the changes mean that their refugee claims will fail unless they have a political profile of their own or they are with their husbands or fathers at the time of applying.

At the end of 2002, there remained women and children in Woomera detention center with husbands on the outside who had come on earlier boats and who had gained recognition as refugees. Where the women’s claims are rejected, the only solution seems to be for the refugee husbands to go to the Minister personally to get permission to lodge another refugee application, this time including the wives and children. In the meantime, the women and children face possible removal as they languish in detention.

For those outside of Australia, however, even this is not an option. The husbands and fathers recognized as refugees in Australia cannot lodge fresh refugee applications that include their family on one form. Moreover, if rejected, the family offshore cannot be helped, even if they are brought to Australia in transit under the Transitional Movement provisions. In these cases, the refugee fathers and husbands have two options. They will either have to abandon their attempt to find safe haven, returning with their families to face persecution. Or, they will be forced to stand by and watch

¹⁶⁷ See Migration Legislation Amendment Act, No. 6, 2001 (Austl.), inserting § 91S into the Migration Act 1958 (Austl.).

as their families are returned without them. As “voluntary” returnees, Australia could avoid the direct charge of *refouling* the refugee fathers and husbands. Whether this scenario is in keeping with the spirit, rather than the letter, of the Refugee Convention is questionable.

VI. CONCLUSION

As the *Tampa* Incident begins to fade into history, questions remain about what exactly caused Australia to react as it did in August 2001. Conspiracy theories that assert the whole affair was orchestrated for political ends cannot provide the whole answer. Assertions that Australia is a racist society, locked in a protectionist and alarmist mindset by its refusal to face the ghosts of its white supremacist past also tend to result in caricature rather than characterization. However, the way the government of the day played events undoubtedly did contribute to its victory at the polls in the election of 2001.

The *Tampa* Incident *did* have its roots deep in Australian culture—a culture that includes fear, isolationism, and xenophobia. However, it was also an event—or series of events—carved out at a particularly fraught moment in human history. It should be recalled that the first instance decision of Justice North in the *Tampa* litigation was handed down only hours before the first plane hit the World Trade Center in New York on September 11th. While the complexity of the causative factors may not exonerate Australia, nor excuse the on-going defects in its refugee policies, it must be acknowledged that the Incident cannot be adequately explained in the two-minute sound-bites favored by the modern media.

First, there is something about boat people that excites extraordinary reactions in people. In this, Australia is far from unique. Perhaps it is a primordial fear of invading hordes. Perhaps it is that water borders are more obvious than land borders, making territorial incursions from the sea more keenly felt. Certainly, the constant talk of numbers cannot help, including statements such as “twenty million of concern to UNHCR,” or “more on the move than in any other time of human history.” Mention has been made of the United States’ Haitian interdiction program, and of the extreme lengths to which the United States has gone to prevent seafaring asylum seekers from landing on its territory. Less extreme examples of countries reacting to the arrival or threatened arrival of boat people abound. In many instances the responses are quite disproportionate to the threats posed by the unwanted arrivals. For example, in 1999 rumors that a boat may be making its way to

New Zealand led to the enactment of immigration detention laws.¹⁶⁸ Even compassionate Canada has responded with unusual defensiveness when faced with the arrival of boats carrying asylum seekers.¹⁶⁹

Putting to one side the invasion fears, the second complicating factor is the complexity of the people smuggling story. The asylum seekers who arrive by boat in Australia, as in other parts of the world, do so using people smugglers. As well as implicating the fugitives in criminal and often highly exploitative activities, the people smugglers help to blur the line between asylum seeker and economic migrant. As the Australian Government is quick to emphasize, the boat people arriving in Australia are very rarely coming directly from the country in which they fear persecution. In most cases, they have traveled through several other countries. Sometimes they have tried to find refuge in the countries they passed through; sometimes their voyage has been more or less direct. There is often a grain of truth in even the most alarmist rhetoric in those seeking to vilify the asylum seeker.

The use of leaky boats as the vehicle for conveying refugees to Australia must be a matter of concern, and something to discourage—if only to ensure no more tragedies like the one that saw 353 people lose their lives off the Indonesian coast in late October 2001. However, it is equally clear that the Pacific Solution is no solution to people smuggling. While there are families striving to be reunited, while there are people caught in limbo yearning for a safe haven, the refugees will continue to batter at Australia's door. It is no solution to decry the refugee's efforts to save themselves and their families or to vilify the victims who take the initiative to struggle against the oppression in their lives. It is no solution to adopt policies that perpetuate and exacerbate suffering in the name of "control" and deterrence.

The injustice of the *Tampa* Incident, Operation Relex, and the Pacific Solution resonate in the silence that has surrounded the refugees and asylum seekers on Nauru and Manus Island. The conflicting interpretations of the law—both domestic and international—that have emerged in the wake of the *Tampa* may be testament to the inadequacies of the legal framework for the protection of refugees. Another view may be that the legal sophistry surrounding the Incident and its aftermath says more about the meanness of the human spirit than it does about the law. It is fitting to recall that the

¹⁶⁸ See Immigration Act of 1987, § 128(13B) (N.Z.), and the discussion in Roger Haines, *An Overview of Refugee Law in New Zealand: Background and Current Issues*, Mar. 10, 2000, <http://www.refugee.org.nz/IARLJ3-00Haines.html> (paper presented to Inaugural Meeting of International Association of Refugee Law Judges).

¹⁶⁹ See Judith Kumin, *Between Sympathy and Anger: How Open Will Canada's Door Be?*, in U.S. COMMITTEE FOR REFUGEES, *WORLD REFUGEE SURVEY* (2000), available at http://www.refugees.org/world/articles/wrs00_sympathy.htm (last visited Jan. 18, 2003).

essence of refugee protection is the recognition of common humanity on the one hand, and the showing of mercy on the other. In the words of the *Tampa* refugees—as refugees they were in August 2001:

You know well about the long time war [in Afghanistan] and its tragic human consequences and you know about the genocide and massacres going on in our country and thousands of us innocent men, women and children were put in public graveyards, and we hope that you understand that keeping view of above mentioned reasons we have no way but to run out of our dear homeland and to seek a peaceful asylum . . . We do not know why we have not been regarded as refugees and deprived from rights of refugees according to International Convention (1951).

We request from Australian authorities and people, at first not to deprive us from the rights that all refugees enjoy in your country. In the case of rejection due to not having anywhere to live on the earth and every moment death is threatening us. We request you to take mercy on the life of 438 men, women and children.¹⁷⁰

¹⁷⁰ *Vadarlis v. Ruddock* (2001) 110 F.C.R. 452, 459, *overruled by* *Ruddock v. Vadarlis* (2001) 110 F.C.R. 491.

