Refugee Law Is Not Immigration Law

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Globalism:
People, Profits and Progress

La mondialisation:
Les personnes, le profit et le progrès

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Refugee Law is Not Immigration Law

James C. Hathaway

1. Background

The spectacle of the governments of Australia, Indonesia, and Norway playing pass the parcel with 400 refugees, most of them Afghans, is not an edifying one... Yet the issues of responsibility, over which the three governments are arguing, are important ones which, left unsettled in this and other cases, could only worsen the prospects for all refugees in the longer run. For the truth is that when what agreement has been painfully achieved between nations on how to deal with refugees breaks down, the natural reaction is to erect even higher barriers than already exist.²

In the late days of August 2001, an extraordinary saga was played out in the Indian Ocean between Indonesia and Australia.³ A routine surveillance flight by Australia’s Coastwatch on August 25th detected a 20 meter wooden boat in distress some 140 kilometers northwest of Australia’s Christmas Island Territory. Because the vessel was within the Indonesian search and rescue zone, Australia alerted officials in Jakarta to the situation. The next day, another Coastwatch flight observed the fishing boat still in trouble, this time with the letters “SOS” marked on the roof of the craft’s

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1. Professor of Law and Director, Program in Refugee and Asylum Law, University of Michigan. The assistance of Aimee Mangan of the University of Michigan Law Library Reference Department and the comments on an earlier draft by Dr. Mary Crock of the University of Sydney are gratefully acknowledged.


3. The facts as stated here are primarily derived from the original decision of the Federal Court of Australia in Victorian Council for Civil Liberties Inc. v. Minister for Immigration and Multicultural Affairs, [2001] FCA 1297 (11 September 2001, per North J.) [hereafter Federal Court Decision], and from the opinions given in the subsequent judgment on appeal to the Full Federal Court of Australia in the same case, reported as Ruddock v. Vadarlis, [2001] FCA 1329 (18 September 2001, per Beaumont and French JJ., Black CJ dissenting) [hereafter Full Federal Court Decision].
cabin. Australian authorities decided to take matters into their own hands, and broadcast a call to merchant ships in the vicinity to render assistance to the sinking boat and the 80 persons believed to be onboard. A nearby Singapore-bound container ship of Norwegian registry, the *MV Tampa*, responded to the call. Arriving onsite at the incapacitated *KM Palapa 1*, the *Tampa*’s master, Captain Arne Rinnan, discovered that there were in fact five times as many passengers on the vessel as he had been told—some 433 persons, mostly from Afghanistan, but also smaller numbers from Iraq, Sri Lanka, and Pakistan. All were rescued by the crew of the *Tampa*. Captain Rinnan then inquired of the Australian authorities where the rescues should be taken. The Coastwatch responded that it did not know.  

Left to his own devices, the captain initially decided that because the *Palapa* was of Indonesian registry and had embarked from that country, he would take the rescues back to the Indonesian port of Merak. But after five men threatened to jump overboard if returned to Indonesia, he changed course toward Australia’s Christmas Island, the nearest harbour. As the *Tampa* approached Christmas Island, however, it was instructed by Australian officials to turn back toward Indonesia. Fearful of exposing his crew and the rescues to the dangers of a severely overloaded ship on the open ocean, Captain Rinnan disobeyed the Australian order and instead held his position some 13.5 nautical miles from the shore of Christmas Island—just outside Australia’s territorial seas, but still well within its contiguous zone.

The Australian government was adamant that the ship could proceed no further. Of the view that the rescues were properly the responsibility of either Norway, the *Tampa*’s flag state, or of Indonesia, their place of embarkation and in which the *Palapa* was registered, Australia threatened the *Tampa* with massive fines were it to proceed.  

4. “We took it for granted the Australian authorities would let us come to Christmas Island... since it was they who asked us for assistance...”: Patrick Barkham, “Havens closed to refugees at sea,” *The Guardian*, 28 August 2001, at 9, quoting the spokesman for the Norwegian owners of the *Tampa*.  

5. “Captain Rinnan said he had planned to take them to Indonesia but had been forced to change course after threats. ‘They flatly refused to go back to Indonesia and they were threatening to jump overboard,’ he said. ‘They were speaking in an excited, aggressive manner. It was a tense moment. When I decided to go to Christmas Island because that was the closest place, everything calmed down’”: Kirsten Lawson, “Stand-off at sea over boat people,” *The Canberra Times*, 28 August 2001, at A-1.  

6. “[Prime Minister John] Howard said the Indonesian boat had foundered in an Indonesian rescue area and the Norwegian ship had been under a clear obligation under international law to take those rescued to the nearest feasible port—in this case, Merak, in Indonesia.” The response of the Norwegian government was that “... the issue was one for Australia and Indonesia to solve. ‘We regard this as a very complicated matter and we cannot let the countries in the region shy away from their responsibilities,’ Norwegian Foreign Ministry spokesman Karsten Klepsvik said”: *ibid.*
approach Christmas Island. The government then ordered the closure of Flying Fish Cove, the port of Christmas Island. The Harbor Master signed an order prohibiting all boat movements into and out of the cove, and erected barriers at the end of the jetty. Captain Rinnan’s urgent pleas to send a boat from shore to collect the sickest people were ignored.\footnote{It was reported that “[a]n Australian military helicopter lowered temporary toilets, food and fresh medical supplies on to the deck [of the Tampa], but the government will not let aid agencies board the ship”: Patrick Barkham and Owen Bowcott, “Australia sends more troops to block ship,” \textit{The Guardian}, 31 August 2001, at 12.}

Two days later, Captain Rinnan, fearing imminent deaths onboard, took the \textit{Tampa} into Australian territorial waters, stopping 4 nautical miles from the shores of Christmas Island. Within 2 hours, 45 soldiers from the Australian Special Armed Services boarded the ship. While the soldiers’ purpose was ostensibly to provide medical assistance to the rescuees and to ensure the security of the ship’s crew, the Special Armed Services troops also relieved Captain Rinnan of control of the \textit{Tampa}. The next day, the Norwegian ambassador was allowed to visit the \textit{Tampa}. The rescuees made clear to him that they were seeking recognition of their refugee status, explicitly invoking their right to be protected under the 1951 Refugee Convention.\footnote{It is worth noting that Australia, in line with general international practice, has recognized a significant proportion of recent Afghan asylum seekers as genuine Convention refugees. “The world agrees that the Taliban are abominable. They oppress their own people, especially women. They have killed hundreds of minority Shi-ite Muslims. Yet when a few dozen desperate Afghans turn up in Australian waters, Prime Minister John Howard calls them ‘bogus refugees’ and queue-jumpers! If the Afghans are not genuine refugees, who is?”: Haroon Siddiqui, “Muslims also to blame for Afghan refugee mess,” \textit{Toronto Star}, 2 September 2001, at A-13. Indeed, shortly after the events of the \textit{Tampa}, the Federal Court of Australia held that young, able-bodied men genuinely at risk of forcible recruitment by the Taliban could qualify as Convention refugees: David McLennan, “Court rules Taliban conscripts refugees,” \textit{Canberra Times}, 9 October 2001, at A-4.}

2. The Responses

In response to the standoff near Christmas Island, two legally absolutist strategies were being advanced on the Australian mainland. On August 29, the same day that Australian troops took control of the \textit{Tampa}, the Australian government tabled the \textit{Border Protection Bill 2001}. Passed in less than one hour by the House of Representatives, this bill purported retroactively to authorize the use of “reasonable force” against any ship just inside the Australian territorial sea to force that ship outside the territorial sea. Australian officers were given “absolute discretion” to implement the law. Critically, the bill provided that no person on board a ship
subject to removal would have any remedy against Australia, and moreover that no such person could seek recognition of his or her refugee status. This bill—which was to have operated “in spite of any other law”—was, however, defeated in the Australian Senate in the early hours of the next morning.9

A no less determined legal strategy was launched by refugee advocates on August 31st.10 On the basis of the alleged unlawfulness of the detention by Australia of the asylum seekers aboard the *Tampa*, the Federal Court of Australia was asked to issue writs of *habeas corpus* and *mandamus* to require the government to bring the rescuees to Australia where they would be entitled to enter that country’s refugee determination system.11 The applicants initially prevailed before Mr. Justice North, who issued a writ of *habeas corpus* on September 11th, requiring all the asylum seekers to be brought to the Australian mainland. A week later, however, a majority of the Full Federal Court reversed his order, affirming the prerogative power of the Australian government to act outside the scope of its own immigration laws where necessary to prevent the unauthorized entry of non-citizens.12


10. The applications were brought by the Victorian Council for Civil Liberties and by a Melbourne solicitor, Mr. Eric Vadarlis, who wished to provide *pro bono* legal assistance to the refugee claimants. Both Amnesty International and the Australian Human Rights and Equal Opportunities Commission sought and were granted permission to intervene in support of the applications. Sadly, the United Nations High Commissioner for Refugees, the organization entrusted by the Refugee Convention to ensure respect by state parties with the refugee treaty, did not intervene. The latter fact may explain the relative marginality of the salient international law arguments in the proceedings at first instance, and on appeal to the Full Federal Court of Australia.

11. The Australian refugee coordinator for Amnesty International was quoted as saying, “If they are asylum-seekers, then they should be given asylum”: Emma MacDonald, “ALP backing exposes lack of moral leadership: Amnesty,” *The Canberra Times*, 29 August 2001, at A-1. Accord Jean-Pierre Fonteyne, “Asylum-seekers afloat in uncertainty,” *The Canberra Times*, 30 August 2001, at 11: “Assuming, as is statistically highly likely, that at least some of the people on board the *Tampa* may have a valid claim to refugee status under the 1951 Geneva Convention on the Status of Refugees, there is a clear obligation upon Australia to allow them access to our refugee determination procedures. That obligation exists unless and until a determination has been made that a potential claimant is in fact not a refugee.”

12. “In my opinion, the executive power of the Commonwealth, absent statutory extinguishment or abridgement, would extend to a power to prevent the entry of non-
Even as these court proceedings were unfolding, the Australian government proceeded to negotiate an interstate arrangement whereby the asylum seekers would be taken to other countries. On September 3rd, all those who had been rescued from the Palapa were transferred from the Tampa to the HMAS Manoora, an Australian amphibious troop ship with extensive medical facilities on board. The original plan was to sail to Port Moresby in Papua New Guinea, from whence about one-third of the asylum seekers (primarily family groups) would be flown to New Zealand, which had agreed to allow all persons determined by it to be genuine refugees to remain in its territory. The remaining two-thirds of the refugee claimants would be flown to the tiny and impoverished island nation of Nauru, where they would be temporarily admitted in exchange for a payment of $A10 million worth of fuel, $A3 million for new generators, the cancellation of $A1 million worth of hospital bills run up by Nauruans in Australia, refurbishment of the island’s sports oval, and the provision of sporting and educational scholarships for Nauruans to come to Australia. In Nauru, they would be housed in a makeshift camp under the guard of a private Australian security firm while their claims to be refugees were assessed by UNHCR. Those found to be entitled to protection would be admitted to Australia, or resettled to other countries, including Norway, Sweden, and Canada.

While the Full Federal Court of Australia was deliberating whether to reverse Justice North’s original order, the Manoora was already carrying the asylum seekers away from Australia. Instead of proceeding to Papua New Guinea as originally planned, the Manoora sailed directly to Nauru, where it arrived on September 18th—the very day on which the Full Federal Court issued its decision to vacate the writ of habeas corpus. In addition to the refugee claimants rescued on August 26th, the Manoora carried an additional 237 (largely Iraqi) asylum seekers taken from another

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Indonesian fishing boat, the *Aceng*, which was intercepted before reaching Australian territory.\(^{14}\)

3. **How Should the Situation have been Resolved under International Refugee Law?**

In my view, there is no basis in international refugee law to justify the Australian government’s efforts to mechanistically avoid responsibility by forcing the refugee claimants away from its territorial waters, whether by the issuance of orders to Captain Rinnan or by the effort to bluntly enact exclusionary legislation. But neither is there a basis in international refugee law for the assertion of refugee advocates that those rescued had a right to come to the Australian mainland in order to enter that country’s asylum system. Both these positions are unduly absolutist, and fail to respect the careful compromise between the duty of protection and the continued sovereignty of states that is at the core of the Refugee Convention.

The point of departure for legal analysis of this saga is the Refugee Convention’s duty of non-refoulement.\(^{15}\) This duty not to return refugees directly or indirectly to the risk of being persecuted inheres prior to the formal verification of refugee status, and continues until and unless those who claim to be refugees are fairly and finally determined not to so qualify. As a simple matter of logic, this must be so. Otherwise, it would be open to a state party to avoid its freely assumed duties under the Refugee Convention by the simple expedient of refusing to ever inquire

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14. In stark contrast to the Australian response, the Afghan refugees were greeted in Nauru with music and dancers, and broad smiles all around. When asked by foreign media for their reaction to the arrival of the refugees, Pastor Tui Nalatu responded, “I’ve spoken to my congregation and we are prepared to go out into boats and fish for them.” Perhaps most poignantly, another Nauruan said, “We would do the same... If we were at war, we’d get in canoes and paddle for Fiji or Christmas Island”. Patrick Barkham, “Migrants step ashore to flowers and fences,” *The Guardian*, 20 September 2001, at 17.

15. It is sometimes claimed that the refugee-specific duty of non-refoulement is a matter of customary international law. Such assertions confuse the elements of *opinio juris* and genuinely conforming state practice, particularly by mistaken reliance on various affirmations by states as evidence of practice. *See eg.* E. Lauterpacht and D. Bethlehem, “The Scope and Content of the Principle of Non-Refoulement,” 20 June 2001, at paras. 211-213 and 218, available at www.unhcr.ch. (a paper commissioned in the context of the UNHCR’s Global Consultations on International Protection). Sadly, there is in fact regular evidence of state practice of refoulement: *see eg.* U.S. Committee, World Refugee Survey, an annual publication which vividly recounts continued examples of refoulement around the world. In the result, the duty not to expose refugees to refoulement remains at present a matter of treaty-based law.
whether an individual seeking to invoke treaty rights qualifies as a refugee or not.\textsuperscript{16} It is of course true that the rights set by the Refugee Convention are those only of genuine Convention refugees, not of every person who claims to be a refugee. But because it is one's \textit{de facto} circumstances, not the official validation of those circumstances, that gives rise to Convention refugee status,\textsuperscript{17} genuine refugees could clearly be irreparably disadvantaged by the withholding of protection against \textit{refoulement} pending status assessment. Unless status assessment is virtually immediate, the adjudicating state may therefore be unable to meet its duty to implement the Refugee Convention in good faith unless it grants at least the most basic Convention rights to refugees on a strictly provisional basis.\textsuperscript{18}

Not only does the right to protection against \textit{refoulement} inhere before status determination, but it applies as soon as a refugee comes under the \textit{de jure} or \textit{de facto} jurisdiction of a state party. In contrast to those rights which are available only to refugees who are physically present inside a state's territory, the Refugee Convention grants Art. 33 protection to "refugees" without any qualification based

\begin{itemize}
\item \textsuperscript{16} "Every refugee is, initially, also an asylum seeker; therefore, to protect refugees, asylum-seekers must be treated on the assumption that they may be refugees until their status has been determined. Otherwise, the principle of \textit{non-refoulement} would not provide effective protection for refugees, because applicants might be rejected at borders or otherwise returned to persecution on the grounds that their claim has not been established": UNHCR, "Note on International Protection," U.N. Doc. A/AC.96/815, at para. 11 (1993)
\item \textsuperscript{17} \textit{Accord} UNHCR, \textit{Handbook on Procedures and Criteria for Determining Refugee Status} (1979, re-edited 1988), at para. 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 recognized because he is a refugee." It is therefore of some concern that French J. felt it relevant to observe that "[t]he question whether all or any of the rescuees are refugees has not been determined" in the context of his consideration of whether Australia had met its legal duty of \textit{non-refoulement}: Full Federal Court Decision, \textit{supra} note 1, per French J., at para. 203.
\item \textsuperscript{18} "The principle of good faith underlies the most fundamental of all norms of treaty law—namely, the rule \textit{pacta sunt servanda}... Where a third party is called upon to interpret the treaty, his obligation is to draw inspiration from the good faith that should animate the parties if they were themselves called upon to seek the meaning of the text which they have drawn up": I. Sinclair, \textit{The Vienna Convention on the Law of Treaties} 119-120 (1984).
\end{itemize}
on the level of attachment to the asylum state. This approach to refugee law coincides neatly with the more general view that there is no principled reason to release states which act extraterritorially from legal obligations that would otherwise circumscribe the scope of their authority. According to Professor Meron,

In view of the purposes and objects of human rights treaties, there is no a priori reason to limit a state's obligation to respect human rights to its national territory. Where agents of the state, whether military or civilian, exercise power and authority (jurisdiction, or de facto jurisdiction) over persons outside national territory, the presumption should be that the state's obligations to respect the pertinent human rights continues. That presumption could be rebutted only when the nature and content of a particular right or treaty language suggest otherwise.

Finally, the substance of the duty of non-refoulement prescribes a pushing away from state territory, just as much as an ejection from that territory after entry. As the American representative to the committee which drafted Art. 33 clearly observed,

Whether it was a question of closing the frontier to a refugee who asked admittance, or of turning him back after he had crossed the frontier, or even of expelling him after he had been admitted to residence in the territory, the problem was more or less the same. Whatever the case might be, whether or not the refugee was in a regular position, he must not be turned back to a country where his life or freedom could be threatened.

Indeed, the Belgian co-sponsor of the text adopted emphasized that the duty had been expanded to an undertaking “not to expel or in any way [return] refugees...” precisely to ensure that it was understood that the article “… referred to various

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21. Statement of Mr. Henkin of the United States, U.N. Doc. E/AC.32/SR.20, 1 February 1950, at 11-12. Accord Mr. Robinson of Israel, id. at 12-13: “The article must, in fact, apply to all refugees, whether or not they were admitted to residence; it must deal with both expulsion and non-admittance...”
22. U.N. Doc. E/AC.32/L.25, 2 February 1950, at 1. In the draft convention finalized by the Working Group, the undertaking was rephrased to require states not to “... expel or return, in any manner whatsoever, a refugee to the frontiers of territories where his life or freedom would be threatened...”: U.N. Doc. E/AC.32/L.32, 9 February 1950, at 12.
methods by which refugees could be expelled, refused admittance or removed. Thus, as discussed in more detail below, the duty of non-refoulement imposed critical obligations on both Norway and Australia, which neither state appears fully to have recognized.

The initial responsibility to rescue the passengers of the Palapa was primarily that of Indonesia. While both Australia and Indonesia are parties to the Convention on the Law of the Sea, which imposes a duty in principle on all state parties to cooperate in search and rescue missions on the high seas, the Palapa foundered outside the rescue zone assigned to Australia under the auspices of the International Convention on Maritime Search and Rescue. While not a party to that treaty, Indonesia has filed a search and rescue plan with the International Maritime Organization, under which it agreed to be responsible for search and rescue operations in the zone where the Palapa was sinking. The sighting and issuance of the distress call by Australia, then, were life-saving actions taken by it notwithstanding Australia’s formal legal entitlement to have devoted no resources whatsoever to surveillance in that part of the Indian Ocean. In any event, neither Indonesia’s responsibility to provide search

24. See text infra at notes 31-35 and 43-47.
26. (1986) A.T.S. 29, done 27 April 1979, entered into force 22 June 1985 [hereafter Convention on Maritime Search and Rescue]. Australia, though not Indonesia, is a party to this treaty which requires state parties to make provision for “adequate search and rescue services for persons in distress at sea round [its] coasts” and specifically to “take urgent steps to provide the most appropriate assistance available”: Annex, Chs. 2.1.1 and 2.1.9. This duty inheres “regardless of the nationality or status of such a person or the circumstances in which that person is found”: Annex, Ch. 2.1.10.
28. That Australia would take an interest beyond the area of its formal search and rescue responsibility is particularly noteworthy in view of the magnitude of its formal responsibilities. “Australia has accepted responsibility for search and rescue for an area of 47,000,000 square kilometers. This represents approximately 11 per cent (or one ninth) of the earth’s surface”: Australia, Department of the Parliamentary Library, “Bills Digest No. 8, 1997-98.”
and rescue in the area in question nor Australia’s practical assumption of such responsibilities engages legal duties under the Refugee Convention. This is because the coordination of search and rescue efforts does not give rise to formal or de facto jurisdiction in the area concerned, the minimum condition for the attribution of responsibilities under refugee law. The territory patrolled remains in every sense a part of the high seas, and hence (absent an illegal assertion of national authority in such an area) outside of national jurisdiction.

When Captain Rinnan responded to the search and rescue call, he was acting in accordance with long-standing customary international law, now codified in Art. 98(2) of the Convention on the Law of the Sea. Norway, as a state party to that treaty, is moreover obliged to “... require the master of a ship flying its flag... to proceed with all possible speed to the rescue of persons in distress, if informed of their need for assistance...” Having complied with these obligations, the rescuees onboard the Tampa were clearly under the jurisdiction of the ship’s flag state, Norway. In what may seem a cruel irony, the minimum condition for the imposition on Norway of the duty to respect the principle of non-refoulement—that is, jurisdiction—was satisfied. As soon as the Tampa’s master could reasonably have become aware that his involuntary passengers were in flight from the risk of being persecuted, Norway’s obligations under refugee law were engaged.

This analysis is confirmed by state practice during the exodus by boat of Vietnamese refugees during the 1970s and 1980s. In that context, UNHCR’s Executive Committee authorized special responsibility-sharing initiatives, all predicated on flag state responsibility for refugees rescued. The “DISERO

29. Discussion of Indonesia’s duties under refugee law is in my view entirely hypothetical, as Indonesia is not a party to the Refugee Convention or Protocol. The assertion of liability is possible only if one accepts the highly questionable notion that the duty of non-refoulement is a matter of customary international law. See note 14 supra.

30. See e.g. Loizidou v. Turkey, (1995) 310 Eur. Ct. H.R. (Series A), in which the Turkey was found liable for infringement of the European Convention on Human Rights for acts committed by its armed forces in Cyprus. The essence of the relevant holding was that unauthorized military action abroad amounts to jurisdiction sufficient to engage responsibility under human rights law.


33. In a note to its Sub-Committee of the Whole on International Protection, UNHCR struck a careful balance, writing that “[i]t is, of course, correct that by boarding a vessel, the refugee comes under the jurisdiction of the flag State which is considered to exercise jurisdiction over the ship on the high seas. There is, however, no valid legal basis for
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Scheme" was established to provide for the resettlement of refugees rescued at sea by ships flying flags of convenience or registered in "... countries which for special reasons are unable to guarantee permanent admission to refugees," while the "RASRO Scheme" established an international pool of resettlement places "... designed to alleviate the burden on flag States" of protecting all refugees brought onboard their ships. These initiatives sought to define creative ways to share-out responsibilities that would otherwise have fallen to the rescuing vessel's flag state alone, thus affirming the legal presumption of flag state initial responsibility to honour Refugee Convention duties. Given Indonesia's less-than-admirable record of human rights protection and the fact that it has shown no commitment to honour refugee law in practice, Captain Rinnan's decision to head for Australian territory was perhaps a fortunate one from the perspective of ensuring Norway's compliance with its duty of non-refoulement.

considering that by boarding a vessel a refugee has entered the territory of the State exercising jurisdiction over the ship. Moreover, even if physical presence on the ship were regarded as tantamount to presence in the territory, this would not in the present [state] of international law constitute an obligation for the flag State to grant durable asylum": UNHCR, "Problems Related to the Rescue of Asylum-Seekers in Distress at Sea," U.N. Doc. EC/SCP/18, 26 August 1981, at para. 23. For purposes of Arts. 33 of the Refugee Convention, however, no more than de facto or de jure jurisdiction is required for responsibility to arise. Accord Jon L. Jacobson, "At-Sea Interception of Alien Migrants: International Law Issues," (1992) 28 Willamette Law Review 811, at 814: "My approach is to suggest that whenever and wherever a state exercises jurisdiction—territorial or otherwise—over alien migrants, the state's refugee and non-return duties under international law are engaged..." See also James Z. Pugash, "The Dilemma of the Sea Refugee: Rescue Without Refuge," (1977) 18(3) Harvard International Law Journal 577, at 592.


35. "Indonesia's Department of Foreign Affairs... was reported as saying, 'If Australian authorities refused because they don't have proper documents, we don't see any reason to let them in'": Kirsten Lawson, "Stand-off at sea over boat people," The Canberra Times, 28 August 2001, at A-1. More generally, "Indonesia, struggling to cope with more than 1 million of its own citizens fleeing civil unrest, does not want the refugees": "Australia again spurns refugees on ship," The Washington Post, 30 August 2001, at A-23.

36. As a matter of international refugee law, particular caution would be warranted as neither Indonesia nor Singapore is a party to the Refugee Convention. Indeed, even when the proposed transferee state is a party to the Convention, there can be no presumption that a state's non-refoulement obligations are validly transferable. Because the duty to avoid the return of refugees directly or indirectly requires a focus on the actual practice of states, not simply on their formal commitments, Norway would have been obliged to make all
Australia’s order to Captain Rinnan not to enter Australia’s territorial sea—which forced him to remain 13.5 miles offshore for two days—was likely in contravention of the international legal duty of coastal states to allow ships in distress to enter their waters.\textsuperscript{37} Once notified by the master of the \textit{Tampa} of not only its overloading,\textsuperscript{38} but more particularly of the medical emergencies and insufficiency of food and water onboard,\textsuperscript{39} Australia also had a duty to render effective assistance. Under the Convention on Maritime Search and Rescue, “[p]arties shall ensure that necessary arrangements are made for the provision of adequate search and rescue services for persons in distress at sea round their coasts (emphasis added).”\textsuperscript{40} A reasonable inquiries, logically including by consultation with UNHCR, to ensure that it would not in fact be exposing the rescuees to the risk of \textit{refoulement} by discharging them onto the territory of any other state.

37. Under the customary international legal doctrine of entry in distress “... reconfirmed in Article 18 of the Law of the Sea Convention... a vessel that finds itself in difficulty at sea [enjoys] an unqualified right to enter foreign waters, stopping and anchoring there as necessary. A similar right... applies to a vessel where entry in the coastal state’s territorial waters is the result of \textit{force majeure}...”. Jean Pierre Fonteyne, “Skulduggery on the high seas,” \textit{The Canberra Times}, 11 September 2001, at A-9.

38. It was reported that “[t]he Norwegian Maritime Safety Board, responsible under international law for the seaworthiness certification of Norwegian vessels... informed [Captain Rinnan] that he was not allowed to sail his vessel any further with the asylum-seekers on board. This was due to the fact that the \textit{Tampa} was not equipped with the internationally mandated minimum safety equipment for more than a maximum of 50 passengers”: \textit{ibid}.

39. The response of the Australian prime minister was that “... the Royal Flying Doctor Service had been in contact via radio and concluded one illness had been feigned and another three very mild... ‘Every situation has stories of hunger strikes, every situation has the threat of people doing self damage, of jumping overboard, even suggestions of throwing children overboard,’ [Howard] said. ‘All of those things are talked about in a situation like this, but on the other hand I have to worry... about a situation where we appear to be losing control of the flow of people coming into this country. We have decided in relation to this particular vessel to take a stand’”: Kirsten Lawson, “Refugee stalemate: Troops mass on Christmas Island, U.N. urges resolution,” \textit{The Canberra Times}, 29 August 2001, at A-1. On the other hand, the Norwegian ambassador who visited the \textit{Tampa} observed that “... the boat was running out of drinking water and there were three seriously ill people aboard”: Lincoln Wright, “UN plans to end \textit{Tampa} crisis,” \textit{The Canberra Times}, 1 September 2001, at A-1.

40. \textit{Supra} note 25, at Annex, Ch. 2.1.1. The International Convention for the Safety of Life at Sea, 1974, done Nov. 1, 1974, entered into force 25 May 1990, Ch. V, Reg. 15, is to similar effect; this convention entered into force for both Australia and Norway on Feb. 3, 2000. “Both Australia and Norway are parties to the SOLAS Convention... Australia is now requesting the vessel to breach rules which Australia has accepted as an international
situation of distress is defined as one "... where there is a reasonable certainty that a vessel or a person is threatened by grave and imminent danger and requires immediate assistance (emphasis added)." Deference was due to Captain Rinnan’s assessment that this standard was met, in particular given the consequential risk to the physical security of the Captain and his crew.

A sound case can also be made that even though at this point the Tampa was still outside Australian territorial waters, primary legal responsibility to protect the refugees onboard nonetheless passed from Norway to Australia. At 13.5 miles off the coast of Christmas Island, the Tampa was inside Australia’s self-declared "contiguous zone." If a state party opts to establish a contiguous zone, refugees present within the area of expanded jurisdiction may be able to claim the benefit of the same rights that apply to refugees in or within the state’s territory. Particularly...
where the nature of the claim to extended legal competence includes the right to regulate the movement of persons, the reciprocal nature of rights and obligations argues strongly for the extension of legal responsibility to cover actions within the contiguous zone. Having asserted the international right to enforce its immigration laws within this zone extending 24 miles from its coastline, Australia’s authority to exercise jurisdiction should logically be understood to be subject to its general international legal obligations, including those under the Refugee Convention. While no refugee within the contiguous zone is “inside” Australia (which would give rise to additional entitlements under international refugee law), jurisdiction alone is, for reasons previously discussed, sufficient to engage the duty of non-refoulement. Thus, the determined effort to keep the *Tampa* outside Australian territorial waters, while perhaps important to avoid engaging a broader range of Australian domestic legal obligations, should in principle be deemed insufficient to escape international legal responsibility.

The issue of the international legal significance of entry into Australia’s contiguous zone, however, became moot once the *Tampa*, fearing the serious deterioration of on-board conditions, entered Australia’s territorial seas, clearly a part of Australian territory for purposes of international law. Under international law, December 1992, in the case of *McNary v. Haitian Centers Council Inc.* In the result, however, the majority of the United States Supreme Court determined that Art. 33 of the Refugee Convention was not intended to apply extraterritorially, in particular on the high seas: *Sale, Acting Commissioner, Immigration and Naturalization Service, et al, Petitioners v. Haitian Centers Council, Inc., et al*, 113 S. Ct 2549 (1993).

47. “Responsibility is the necessary corollary of a right. All rights of an international character involve international responsibility. If the obligation in question is not met, responsibility entails the duty to make reparation”: *Spanish Zone of Morocco Claims*, 6 R.I.A.A. 615, at 641, per Huber J. See also text *supra* at notes 18-19, and 29. A similar approach is evident in the classical approach of the common law. As observed by Lord Scarman in *R. v. Home Secretary, ex parte Khawaja*, [1984] AC 74, at 111, “There is no distinction between British nationals and others. He who is subject to English law is entitled to its protection. The principle has been in the law at least since Lord Mansfield freed ‘the black’ in *Sommersett’s Case...”*

48. It is difficult to conceive a principled rationale for the contrary view that a state should be deemed legally entitled to treat the contiguous zone as an area within which it is entitled to enforce its immigration laws free from the legal constraints that would apply within territory clearly under its sovereign authority.

49. “The sovereignty of a coastal State extends, beyond its land territory and internal waters... to an adjacent belt of sea, described as the territorial sea. The sovereignty extends to the air space over the territorial sea as well as to its bed and subsoil. The sovereignty over the territorial sea is exercised subject to the Convention and to other
law, the entry of the refugees into Australia's territory expanded their range of provisional entitlements to include the rights to religious freedom, access to rationing and primary educational systems, the right to receive identity documents, and exemption from penalization for illegal entry. Perhaps most significantly, Australia was also at this point prohibited from imposing restrictions on the freedom of movement of the refugee claimants unless able to justify them. Under Art. 31(2) of the Refugee Convention, authorities are allowed to detain refugees only for reasons generally agreed to be justified, including the need to satisfy themselves of an asylum seeker's identity, or to determine whether or not he or she presents a security risk to the asylum state. This critical international legal limitation on the right of states to detain refugees appears not even to have been considered in adjudicating the application for habeas corpus in the Federal Court.

50. The threat by Australia to penalize the captain of the Tampa for unauthorized entry into Australian waters does not, perhaps regretfully, run afoul of Art. 31 of the Refugee Convention. The drafters considered, but ultimately rejected, a proposal to exempt also organizations assisting refugees from penalties. But they nonetheless encouraged governments as a matter of sound policy to exercise discretion in this regard. See Statement of Mr. Juvigny of France, U.N. Doc. E/AC.32/SR.40, 22 August 1950, at 9. Accord Statement of Mr. Henkin, id. at 8; and Statement of the Chairman, Mr. Larsen of Denmark, id. at 9. The refugees themselves, however, were immune from penalization for their illegal entry, as they made their intention to seek refugee status known immediately and indicated their preparedness to cooperate in full in the processing of their claims.

51. The refugee must, of course, submit to all necessary investigations of his or her claim to protection, and file whatever documentation or statements are reasonably required to verify the claim to refugee status. But once any such prerequisite obligations have been discharged, the refugee's presence has been regularized in the receiving state, and refugee-specific restrictions on freedom of movement must come to an end. If the asylum country elects not to expel the refugee, but instead provisionally to allow him or her to remain in its territory (for example, while undergoing refugee status determination), Article 26 becomes the applicable standard for restrictions on internal movement.

52. The fact of Australian accession to the Refugee Convention is surely a valid constraint on whatever prerogative power to exclude remains in force in Australia, and ought logically to have defined the legality of any detention predicated on the exercise of the executive prerogative. This general question was raised by French J. in the Full Federal Court, but not answered. "It is questionable whether entry by the Executive into a convention thereby fetters the executive power under the Constitution, albeit there may be consequences in relation to the processes to be applied in the exercise of that power or relevant statutory powers... In this case, in my opinion, the question is moot because nothing done by the Executive on the face of it amounts to a breach of Australia's
However, the legality of Australia’s decision to force the refugees to leave its territorial sea aboard the *Manoora*, rather than admitting them to its refugee status determination system, turns on a more subtle question. This is because no refugee has the right to be granted “asylum,” understood in the sense of access to a permanent or durable status in the state to which his or her protection request is addressed. Until and unless a refugee meets the requirements for protection against expulsion under Art. 32—namely, that he or she is “lawfully in [the state party’s] territory”—the governing provisions are Arts. 31 and 33 of the Refugee Convention. Under the combination of these provisions, a state party is not precluded from expelling a refugee claimant from its territory during the earliest phases of refugee obligations in respect of *non-refoulement* under the Refugee Convention”: Full Federal Court Decision, *supra* note 2, per French J., at para. 203. The outline of a contrary position is clear in the dissent of Chief Justice Black, who observed that “... the national interest, as contemplated by the provisions of the [Migration] Act, includes recognition of Australia’s protection obligations under the Convention...”; and most critically, that “... if the detainee has a claim for refugee status, a range of rights derive from Australia’s domestic conferral of rights pursuant to the Refugee Convention...”: *id.* at paras. 44, 61.

53. Bill Frelick has recently made an eloquent case that while the Refugee Convention “does not... explicitly promise asylum,” an effective duty to assimilate persons determined to be refugees may nonetheless be asserted based on “... the suasive power of non-binding language” in Art. 34 of the Refugee Convention: Bill Frelick, “Secure and Durable Asylum: Article 34 of the Refugee Convention,” [2001] World Refugee Survey 42, at 42, 45. I am attracted to Frelick’s point that the placement of Art. 34 immediately after the duty of *non-refoulement* stipulated in Art. 33 affirms the logic of assimilating refugees who cannot safely be returned to their country of origin, but this logical symmetry is not a source of legal obligation. But Frelick errs in suggesting that there is an “... unmistakable emphasis [in] the Convention... on a refugee’s willingness to return. The Convention... does not limit its protection only to persons for whom objective conditions make it impossible to return; instead, it specifically directs states to recognize a refugee’s willingness or unwillingness to return based on his or her fear, as its guide”: *id.* at 48. This not so: the notion of a “well-founded fear of being persecuted” is not an invitation to treat asylum seekers differently based upon their level of trepidation or subjective apprehension, but is rather a direction to evaluate the objective soundness of their forward-looking apprehension of risk. This approach is not only consistent with the human rights context and objects and purposes of the Refugee Convention itself (see James C. Hathaway, *The Law of Refugee Status* (1991), at 66-70), but allows Art. 1(A)(2) to be read in consonance with the Convention’s clauses on cessation of refugee status due to (objective) change of circumstances. Frelick’s analysis pointedly ignores Arts. 1(C)(5) and 1(C)(6) which allow states to withdraw refugee status on the basis of a purely objective assessment of present risk without reference to subjective apprehension or voluntariness.
reception. It is only barred from doing so mechanistically, or without scrupulous regard for the simultaneously applicable duty of non-refoulement.\(^{54}\)

The authors of a recent report for the Australian Parliamentary Library suggest that notwithstanding special “migration zone” legislation—under which non-citizens are deemed not to have entered Australia unless they enter a part of Australia within the domestically defined “migration zone,” which does not include its territorial sea\(^{55}\)—the refugees aboard the *Tampa* were not only “present” in Australia, but were also “legally present” there.\(^{56}\) This is a critical distinction. If it is correct that domestic Australian law, like that of many states, expressly authorizes refugees in

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54. The Refugee Convention is completely silent on procedural concerns, and does not even require the establishment of a formal system to verify refugee status. It rather grants state parties tremendous flexibility to administer refugee law as they wish, but subjects that discretion to a duty rigorously to respect the substantive protection requirements of the treaty.

55. Australia’s “migration zone” includes land above the low watermark and sea within the limits of a port in a State or Territory but does not include the sea within a State or Territory or the ‘territorial sea’ of Australia: *Migration Act 1958*, as amended, ss.5(1) and 7. While Australia has attempted to escape much legal responsibility in its territorial seas, such efforts are of no value as matters of international law. “The provision in the *Migration Act* which in effect excludes territorial waters from Australia’s domestically created ‘Migration Zone’ is internationally incapable of excluding [the duty of non-refoulement]... As the 1969 Vienna Convention on the Law of Treaties *Article 27*) expressly indicates, domestic legislation cannot be used to escape treaty obligations...”:


56. “With respect to the *Tampa* incident, these obligations seem to have a peculiar operation. Under the *Migration Act 1958* it is an offence to ‘enter Australia’ without a valid visa. Under the Act to ‘enter Australia’ is to ‘enter the Migration Zone.’ The ‘Migration Zone’ only includes the physical territory of Australia and seas within a State or Territory port. However, under the Act, a criterion for a protection visa is that ‘the applicant for the visa is a non-citizen in Australia to whom Australia has protection obligations under the Refugees Convention as amended by the Refugees Protocol’. The *Migration Act 1958* does not define ‘in Australia’ but it expressly provides that the expression ‘enter Australia’ is not intended to confine the ordinary meaning of ‘in Australia’. Under the *Interpretation Act 1901* ‘Australia’ is taken to mean ‘the Commonwealth of Australia and, when used in a geographical sense, includes the Territory of Christmas Island’. References to Australia include the ‘coastal sea’ of Australia and ‘coastal sea’ includes the ‘territorial sea’. Thus, arguably, a person within the territorial sea is ‘lawfully’ in Australia, in the sense that ‘Australia’ is defined under domestic law. As such, the person is a person to whom Australia owes protection obligations ‘under the Refugees Convention as amended by the Refugees Protocol’*: Australian Parliamentary Library, “Bills Digest No. 41 2001-02: Border Protection Bill 2001*” (2001), archived at www.aph.gov.au/library/pubs/bd/2001-02/02bd041.htm.
flight from persecution to be granted an entry visa on that basis, this legislative authorization is a basis for arguing that persons seeking refugee protection are “lawfully in” its territory and entitled to benefit from Article 32's constraints on expulsion. This means that Australia would have had to invoke national security or public order grounds to expel the refugees, and that any valid decision to expel would have to be reached on the basis of a procedurally fair inquiry—a requirement clearly not adhered to in the case of the *Tampa* refugees, who received no hearing of any kind.

The contrary position is that the provision of the Australian *Migration Act* 1958 which requires an applicant for a (refugee) protection visa to be inside its territory does not amount to an authorization for persons to come into its territory to apply for such a visa, but merely excludes those not inside its territory from seeking protection. That is, the provision is intended to act as a bar, not as an implied affirmation of entitlement. Under this reading, the failure to include all of the territorial sea as part of the domestically enforced “migration zone” in which unauthorized entry is subject to penalization is not a basis to assert that a refugee's presence is legal. At most, it would mean that the refugee's presence is “not unlawful,” a notion that falls short of the affirmative content of true “lawful presence.” Without doubt, this understanding is easier to square to the general approach of Australian migration law, which has in recent years shown no propensity to exempt refugees from a rigorously exclusionist vision.

If one assumes that the *Tampa* refugees were present, but not “lawfully present,” in Australian territory by virtue of their entry into the territorial waters around Christmas Island, refugee law posed no impediment to Australia sending the rescues from the *Tampa* onward to New Zealand: there were clear guarantees made of admission to that country's highly regarded refugee status determination system, and no practice there that would suggest a risk of *refoulement*. However, the sending of refugees to Nauru, a non-state party with no history of refugee reception and no governmental structures in place to oversee refugee protection, was less obviously a legally responsible act. It nonetheless appears in fact that the refugees sent to Nauru were not thereby subjected by Australia to the risk of indirect *refoulement*. Not only is it difficult to imagine how the refugees would leave Nauru in practical terms, but the conditions there—while not ideal—57—are unlikely to be deemed sufficiently egregious to have effectively forced away any of the rescuees who in fact were to leave Nauru.

57. “Under the tin roofs of the camp huts, the temperature easily hits 40C, and coupled with tropical humidity is almost unbearable. But conditions back home are even more dire after two decades of civil war [and] the worst drought in memory”: “100 Afghans welcomed to tiny island,” *Toronto Star*, 20 September 2001, at A-18.
The more vexing question is whether Australia breached international law by effectively divesting the refugees of the ability to assert rights under the Refugee Convention which they had by virtue of their former presence in areas under the jurisdiction of (and subsequently, within the territory of) a state party. While they had acquired only a minimalist set of refugee rights in Australia, even those entitlements disappeared upon arrival in Nauru. Whatever protection they enjoy *de facto* in Nauru is entirely vulnerable to the exercise of political discretion in a way that would not be true in a state party to the Refugee Convention. But on balance, the flexibility which inheres in states by virtue of the limited applicability of Art. 32 of the Refugee Convention suggests that there is no clear legal basis to contest the Australian reallocation scheme. If the refugees were never lawfully present on Australian territory (including in its territorial waters), sending them onward to a non-state party is within the bounds of the Refugee Convention so long as there is no foreseeable risk of direct or indirect *refoulement*. The gap between refugee law and immigration law is thus perhaps all too clear for many refugee advocates.

4. What More General Lessons Should be Learned?

Standing back from the specifics of the legal analysis, I wish to focus here briefly on a few critical points which to my mind inform the larger question of what must be done to ensure a future for refugee protection.

The most basic lesson, of course, is that the existing legal rules of refugee protection can, in most cases—assuming both state accession and good faith application—ensure that the most basic interests of refugees are met in a way that is non-absolutist, yet comprehensive. So long as jurisdiction is understood to be a sufficient connection to engage the duty of *non-refoulement*, it is really only when refugees are located on the high seas that they fall outside the purview of the existing refugee law regime. And even on the high seas, as analysis of this case shows, refugee law responsibilities will follow automatically when actions are taken in line with international legal duties to establish search and rescue zones, and to respond to distress calls by rescuing refugees at risk on the high seas.

Moreover, if rather than being shipped to Nauru the refugees had been allowed to remain in Australia for a period of “temporary” protection (even if denied access to the formal status determination procedure), the refugees would thereby have gone on to acquire additional rights under the Refugee Convention, namely to engage in self-employment, enjoy internal freedom of movement, and to be protected against expulsion. This is a very practical concern, as the *Tampa* refugees admitted to Nauru have been denied the right to engage in any constructive work, remunerated or not, and are forced to live in a fenced compound under constant guard: Patrick Barkham, “Paradise lost awaits asylum seekers,” *The Guardian*, 11 September 2001, at 3.
My point is not that this is a fail-safe protection system—refugees at risk do go undetected on the high seas, and even on land state participation in the Refugee Convention is less than universal. But the much more frustrating problem—precisely because it is so much more readily remediable—is the absence of a shared understanding of the ways in which existing rules play out in particular factual contexts, and of a concomitant determination by the international supervisory authority, UNHCR, to bring those rules to bear rather than simply encouraging states to “resolve the impasse” among themselves.\(^{59}\) Yet sadly, the international community seems determined to re-invent the wheel each time a major refugee crisis emerges, resorting to \textit{ad hoc} arrangements which may or may not work in time to ensure that refugees are not left unprotected or worse.

But even if we can reach a consensus that rules of international refugee law do matter; even if we can agree on the ways in which those rules are to be applied in practice; and even if the UNHCR can be convinced that it must never waiver from the promotion of refugee law as the irreducible minimum foundation for the resolution of protection challenges; we are still left with a fundamental dilemma. The fact that a state party which has jurisdiction over a refugee automatically owes that person respect for a core set of essential rights, including to protection against \textit{refoulement}, is a critical strength of refugee law: for the reasons described above, it ensures that few refugees fall through the cracks of the protection regime. Yet precisely because jurisdiction alone is sufficient to assign full legal responsibility for the refugee to a single state, the existing mechanisms of international protection appear absolutist in a way that is both unprincipled and unsustainable.

The saga of the \textit{Tampa} illustrates neatly some of the unresolved inequities in the application of legal rules to protect refugees. After all, Australia only became involved because it had been willing to patrol an area of the high seas which the state with true responsibility, Indonesia, had negligently failed to oversee. Why should Australia be penalized because it took steps beyond its formal duties to issue a distress call which saved the lives of the passengers of the \textit{Palapa}? More generally, why should Australia—as one of the very few state parties to the Refugee

\(^{59}\) Kirsten Lawson, “Refugee stalemate: Troops mass on Christmas Island, U.N. urges resolution,” \textit{supra} note 39. Even as Australian troops boarded and took control of the \textit{Tampa} inside Australian territorial waters, “[t]he U.N. High Commissioner for Refugees said it was ‘very concerned’ about the refugees and was trying to bring the representatives for Norway, Australia and Indonesia together in Geneva to negotiate a solution”: “Australia Again Spurns Refugees on Ship,” \textit{The Washington Post}, 30 August 2001, at A-23. UNHCR did subsequently oppose several Australian legislative initiatives and refused to be indefinitely involved in the offshore processing of interdicted refugees, but its reluctance or unpreparedness immediately to affirm the applicability of key international legal norms is disquieting.
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Convention in the region—be put in the position of needing to pick up responsibilities more logically understood to be regional, or indeed global, in nature? What is the logic of seeing Australia as having given up its right to share-out protection responsibilities if its laws are understood to authorize refugees to seek its protection? Even if Australia’s greater wealth and stability are said to justify a special responsibility, was it really fair that Norway—an equally prosperous and stable state, but much farther from most refugee-producing regions—was able to escape its duties by the act of its captain taking his ship into Australian waters without that country’s authorization?

On the other hand, why should Norway be saddled with sole responsibility for the welfare of the refugees just because a ship flying its flag happened to be nearest to the site of the tragedy? What would the consequences have been if the captain of that ship had not been a person of sufficient courage to take onboard many more drowning passengers than his vessel could safely accommodate; or if the owners of the ship had pressured the captain to exercise his discretion negatively so as to avoid what became in fact very serious delays in the delivery of its $20 million cargo?

Perhaps most fundamental of all, why should the refugees have been forced to trek halfway around the world in order to present their refugee claims to a country from which they believed meaningful protection would be forthcoming? And once

60. Once at the scene of the sinking fishing boat, Captain Rinnan might in an extreme circumstance have declined to effect the rescue of all those at risk. If bringing aboard the 433 persons actually in distress—not just the 80 persons suggested by the original Australian rescue call—would in fact have jeopardized the seaworthiness or essential safety of his ship, the duty to rescue does not apply. The Convention on the Law of the Sea, supra note 22, at Art. 98(1) stipulates that the duty of the master of a ship to rescue persons in distress inheres only “... in so far as he can do so without serious danger to the ship, the crew or the passengers...” It is not inconceivable that this case might have been made: the Tampa was licensed to carry only 50 persons, yet after the rescue had more than eight times that number aboard.

61. While not ignoring the fact that refugees and economic migrants are often part of the same human flows, and that it is a much bigger project to create the conditions which will attenuate risk-taking by those in search of better opportunities rather than of protection, my point here is that we should nonetheless commit ourselves to the more practicable project of making local options available to genuine refugees. “Clutching black plastic bin-bags filled with clothes, some of the asylum seekers also held a banner thanking the Nauru government... [M]any of the asylum seekers said they still wanted to start new lives in Australia. But at least one had accepted defeat. ‘We wanted to go. Unfortunately, Australia closed the door for us,’ he said”: Patrick Barkham, “Migrants step ashore to flowers and fences,” The Guardian, 20 September 2001, at 17. Many of the Iraqis who arrived at the same time, however, refused to leave the Manoora: id. That any of the refugees would accept their fate, much less thank Nauruans for what can only be described as less than ideal conditions of asylum suggests that many would willingly
having found a way to enter Australian jurisdiction, why should the refugees effectively lose their acquired refugee rights by virtue of an arguably legal transfer of responsibility for them to the government of Nauru, a state which is not a party to the Refugee Convention? On the other hand, should these refugees—who blackmailed Captain Rinnan by threats of suicide to head for Australia—be entitled to benefit from their threats? And why should this small group of Afghans be the subject of special concern? At least on Nauru their basic safety is assured, in contrast to that of the many long-suffering Afghan refugees who could not afford to travel to Australia or were otherwise unable to flee their own region.

The seeming arbitrariness of the way in which refugee law would have apportioned duties and granted rights in the case of the Palapa refugees is in critical ways linked to the complaints traditionally voiced by the countries of South and Southeast Asia (among others) through which the Afghans of the Palapa, as well as the Iraqis of the Aceng, likely passed. Given their geographical position in a part of the world exposed to seemingly endemic flows of large numbers of genuine refugees, why would they sign on to the Refugee Convention, thereby exposing themselves to sole legal responsibility to honour the rights of whatever refugees show up at their frontiers? Why should these countries be expected to rely on vague promises of voluntary assistance from UNHCR or other states—which usually arrives late, if at all? Without real guarantees of support, would it not be irresponsible for them to assure their own populations that acceding to the Refugee Convention will not, in practice, result in the sorts of serious chaos faced by other states (such as Tanzania, Democratic Republic of Congo, and Pakistan) which attempted to play by the rules of international refugee law?

Thus it is that refugee protection—in both the less developed and in the developed worlds—is in serious trouble, not because of any fundamental flaw in the actual rules of international law which in principle govern the treatment of refugees, but because of the failure of the international community to commit itself to a clearly

have accepted protection—had it been available in any meaningful sense—much closer to home.

62. “But, in any event, in order to persuade a court to grant any form of discretionary relief, the occupants would need to confront the principle... that it is wrong that a person should rely on his or her own unlawful act (here, in practically compelling MV Tampa to divert from Indonesia to Christmas Island) to secure an advantage which could not have been obtained if the person had acted lawfully...”: Full Federal Court Decision, supra note 2, per Beaumont J., at para. 107. On the other hand, Justice North had earlier taken a different view of this issue. “While such persons no doubt make decisions about their lives, those decisions should be seen against the background of the pressures generated by flight from persecution. The totality of the circumstances of the rescuees is to be considered and it is not adequately described as ‘self-inflicted’ in relation to a significant number of the rescuees”: Federal Court Decision, supra note 2, at paras. 67-68.
dependable and visibly fair system under which burdens and responsibilities are shared-out within the bounds of those legal commitments. This is not a call for new rules, but rather for new structures of implementation within which the rules will be understood by states to be reconcilable with their most basic interests. There are clear and workable proposals to achieve precisely these ends on the table, but that is precisely where they have remained. Ironically, much creative thinking has strive to learn the lessons from precisely the experiences of sharing initiated in southeast Asia during the crisis of the boat people more than 20 years ago, fine-tuned in mechanisms later employed in Africa and Latin America.

If we fail to systematize a system of collectivized protection, we invite criticism of refugee law itself, rather than of its mechanisms of implementation. Worse still, we invite de facto withdrawal from refugee law. For example, in the wake of the Palapa events, Australia has enacted several new pieces of legislation which inter alia purport to excise Christmas Island and a number of other remote territories from Australia for refugee law purposes; radically reduce access to the courts by refugees; and redefine by legislative fiat core portions of the supposedly non-


64. The issues of burden and responsibility sharing considered in the context of the UNHCR’s Global Consultations on International Protection are restricted to situations of mass influx, clearly an insufficiently broad inquiry to deal with situations of the kind faced by the refugees of the Palapa and the Aceng: U.N. Doc. EC/GC/01/Rev.2, 9 May 2001. It is also regrettable that UNHCR opted to exclude resources which it did not author from its list of research resources relevant to debate on this issue: U.N. Doc. EC/GC/01/2, 12 February 2001, at fn. 1.


67. “The courts are now prohibited from overturning refugee and other visa-related decisions unless the decision-maker was not acting in good faith in making the decision; or the decision is not reasonably capable of reference to the decision-making power given to the decision-maker; or the decision does not relate to the subject matter of the legislation; or the decision exceeded the limits set out in the Commonwealth Constitution”: Migration Act 1958, as amended with effect from Oct. 2, 2001: www.immi.gov.au/legislation/lc1001_3.htm, visited 22 October 2001.
derogable international legal definition of a “refugee.” The risk of failing to take principled action to stave off such defensive actions, or at least clearly to de-legitimate the rhetoric of unfairness which accompanies them, is thus all too real. We simply cannot afford to persist in the usual pattern of vague understandings of legal duties coupled with *ad hocery* in its implementation.

68. In particular, the government purports to exclude refugee claims based on family membership from the scope of claims based on “membership of a particular social group,” and asserts that the “for reasons of” (nexus) clause of the Convention is not satisfied unless the Convention ground is “the essential and significant reason for the persecution”: *Migration Legislation Amendment Act (No. 6) 2001*, with effect from 1 October 2001. While both amendments contradict dominant international practice, the government of Australia nonetheless asserted that the goal of the amendments was to “restore the application of the Refugees Convention to its proper interpretation”: www.immi.gov.au/legislation/lc1001_l.htm, visited 22 October 2001.

69. While a more objective observer might see Australia’s refugee contributions as decidedly modest in relation to its resources, the predominant domestic perception is very different. Many Australians see themselves (together with New Zealand) as geo-politically exposed to refugees in way that other developed states are not: they are virtually alone in guaranteeing any semblance of due process to refugees in the region, and know that their stable political and economic circumstances are a beacon to oppressed persons in many neighbouring states, and beyond. Whatever the objective reality, the current system of individuated state responsibility for refugee protection, under which each state has full responsibility to protect any and all refugees who arrive at its territory, is difficult to reconcile to the Australian sense of vulnerability. Nor is the Australian concern unique: it was voiced by Germany during the exodus from Bosnia, and at present by the United Kingdom which fears the consequences of the failure of some of its key European partners fully to implement their refugee protection responsibilities.