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## Refugee Law Is Not Immigration Law

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## Refugee Law Is Not Immigration Law

James C. Hathaway, Professor of Law and Director of the Program in Refugee and Asylum Law at the University of Michigan, argues that the failure of Australia and other actors to agree on responsibility for examining asylum claims of boat refugees had less to do with gaps in international refugee law than with lack of consensus about responsibility sharing obligations.

by James C. Hathaway

*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.<sup>1</sup>*

In the late days of August 2001, an extraordinary saga was played out in the Indian Ocean between Indonesia and Australia.<sup>2</sup> A routine surveillance flight by Australia's Coastwatch on August 25 detected a 60-foot (20-m) wooden boat in distress 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 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, dis-

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covered 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* had embarked from Indonesia, 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 harbor. 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.

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, the *Palapa's* place of registry, Australia threatened the *Tampa* with massive fines were it to 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.

Two days later, Captain Rinnan, fearing imminent deaths onboard, took the *Tampa* into Australian territorial

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waters, stopping four nautical miles from the shores of Christmas Island. Within two hours, 45 soldiers from the Australian Special Armed Services boarded the ship. While the soldiers' purpose was ostensibly to provide medical assistance to the rescues and to ensure the security of the ship's crew, the Special Armed Services troops also relieved Captain Rinnan of control of the *Tampa*. The next day, the Norwegian ambassador was allowed to visit the *Tampa*. The rescues made clear to him that they were seeking recognition of their refugee status, explicitly invoking their right to be protected under the 1951 UN Refugee Convention.

### The Responses

In response to the standoff near Christmas Island, two legally absolutist strategies were advanced on the Australian mainland. On August 29, the same day that Australian troops took control of the *Tampa*, the Australian govern-

ment tabled the Border Protection Bill 2001. Passed in less than one hour by the House of Representatives, this bill purported retrospectively 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 onboard 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.<sup>3</sup>

A no-less-determined legal strategy was launched by refugee advocates on August 31. 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 rescues to Austr-



An unidentified Afghan man leans against the chain-link fence of a refugee camp after arriving with other asylum seekers on the island of Nauru in September 2001. Some 500 refugees were rescued from sinking boats north of Australia. Photo: AP/R. Rycroft

## U.S. COMMITTEE for REFUGEES

lia where they would be entitled to enter that country's refugee determination system. The applicants initially prevailed before Justice North, who issued a writ of *habeas corpus* on September 11, 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.

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 3, 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 onboard. 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 the New Zealand government to be genuine refugees to remain in its territory. The remaining two-thirds of the refugee claimants would be taken to the tiny and impoverished island nation of Nauru, where they would be temporarily admitted in exchange for a payment of about \$7 million (13 million Australian dollars) worth of fuel, about \$1.6 million (3 million Australian dollars) for new generators, the cancellation of about \$540,000 (1 million Australian dollars) 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, the asylum seekers would be housed in a makeshift camp under the guard of a private Australian security firm while their claims were assessed by the UN High Commissioner for Refugees (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 18—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 26, the *Manoora* carried an additional 237 (largely Iraqi) asylum seekers taken from another Indonesian fishing boat, the *Aceng*, which was intercepted before reaching Australian territory.



A young Iraqi asylum seeker in Bogor, Indonesia weeping after more than 350 persons, mostly Iraqis and Afghans, drowned off the Indonesian coast when their boat sank en route to Australia, August 2001. Photo: AP

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### 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 mechanically to 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 enact bluntly 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 *nonrefoulement*.<sup>4</sup> 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 so to 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 ever to inquire whether an individual seeking to invoke treaty rights qualifies as a refugee or not.

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 *de facto* circumstances, not the official validation of those circumstances, that gives rise to Convention refugee status,<sup>5</sup> genuine refugees could clearly be irreparably disadvantaged by the withholding of protection against *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.

Not only does the right to protection against *refoulement* inhere before status determination, but it applies as soon as a refugee comes under the *de jure* or *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 Article 33 protection to "refugees" without any qualification based on level of attachment to the asylum state.<sup>6</sup> 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 international human rights expert Theodor 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.*<sup>7</sup>

Finally, the substance of the duty of *nonrefoulement* proscribes 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.*<sup>8</sup>

Indeed, the Belgian co-sponsor of the adopted text emphasized that the duty had been expanded to an undertaking "not to expel or in any way [return] refugees..."<sup>9</sup> precisely to ensure that it was understood that the article "... referred to various methods by which refugees could be expelled, refused admittance or removed."<sup>10</sup>

Because of the comprehensive and consequence-oriented nature of the duty of *nonrefoulement*, both Norway and Australia were under legal obligations to protect the rescuees, duties that neither state appears fully to have recognized. Specifically, when Captain Rinnan took the refugees aboard the *Tampa*, the rescuees clearly were 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 *nonrefoulement*—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.<sup>11</sup>

And even though Australia seems to have believed that ordering Captain Rinnan not to enter its territorial sea—which forced him to remain 13.5 nautical miles offshore for two days—somehow insulated Australia from responsibility to protect the refugees, this may not have been so. A

sound case can 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."

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 *nonrefoulement*. 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 onboard conditions, entered Australia's territorial seas, clearly a part of Australian territory for purposes of international law. Under international law, the entry of the refugees into Australia's territory expanded their range of provisional entitlements to include rights to religious freedom, access to rationing and primary educational systems, to receive identity documents, and to exemption from penalization for illegal entry.

Perhaps most significantly, Australia was also at this point prohibited from imposing limits on the freedom of movement of the refugee claimants unless able to justify the restrictions. 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. 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.<sup>12</sup> 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.

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 reception. It is only barred from doing so mechanically, or without scrupulous regard for the simultaneously applicable duty of *nonrefoulement*.<sup>13</sup>

This understanding of the Refugee Convention is not universally shared. Bill Frelick of the U.S. Committee for Refugees 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.<sup>14</sup>

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."<sup>15</sup> This is 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 interpretation is not only consistent with the human rights context and objects and purposes of the Refugee Convention itself,<sup>16</sup> but allows Art. 1(A)(2) to be read in consonance with the

*“Sadly, the international community seems determined to reinvent the wheel each time a major refugee crisis emerges, resorting to ad hoc arrangements which may or may not work in time to ensure that refugees are not left unprotected or worse.”*

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.<sup>17</sup>

Assuming, then, 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 rescuees from the *Tampa* onward to New Zealand: there were clear guarantees made of admission to that country's highly regarded 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 government 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—are unlikely to be deemed sufficiently egregious to have effectively forced away any of the rescuees who in fact were to leave Nauru.<sup>18</sup>

The more vexing question is whether Australia breached international law by effectively divesting the refugees of the ability to assert rights under the 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 to the Convention.

While they had acquired only a minimal set of refugee rights in Australia, even those entitlements disappeared upon arrival in Nauru.<sup>19</sup> 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 Convention. But on balance, the flexibility which inheres in states by virtue of the limited applicability of Art. 32 of the 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.

### What More General Lessons Should Be Learned?

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 *nonrefoulement*, it is really only when refugees are located on the high seas that they may 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.

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. Yet sadly, the international community seems determined to reinvent the wheel each time a major refugee crisis emerges, resorting to *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 waver 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 *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 *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 responsibly to issue a distress call which saved the lives of the passengers of the *Palapa*? More generally, why should Australia, as one of the very few state parties to the Refugee 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? And even if Australia's greater wealth and stability are said to justify a special responsibility, was it really fair that Norway—an equally pros-

perous 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?

But on the other hand, why should Norway have been 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? And what 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 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? But 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 honor 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 dependable and visibly fair system under which burdens and responsibilities are shared 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 to their most basic interests. There are clear and workable proposals on the table to achieve precisely these ends,<sup>20</sup> but that is exactly where they have remained.<sup>21</sup> Ironically, much creative thinking has been devoted to learning the lessons from 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 process of collectivized protection, we invite criticism of refugee law itself, rather than of its implementation mechanisms. 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<sup>22</sup> 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-derogable international legal definition of a “refugee.” The risk of failing to take principled action to stave off such defensive measures, or at least clearly to de-legitimize 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.

## Endnotes

- 1 *The Guardian*, Aug. 30, 2001, at 19.
- 2 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 (Sept. 11, 2001, per North J.), 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 (Sept. 18, 2001, per Beaumont and French JJ., Black CJ dissenting).
- 3 Under the subsequently passed Border Protection (Validation and Enforcement Powers) Bill 2001, however, the official opposition supported the government's effort to validate the actions taken in respect of the *Tampa*.
- 4 It is sometimes claimed that the refugee-specific duty of *nonrefoulement* is a matter of customary international law: see e.g. “San Remo Declaration on the Principle of *Non-Refoulement*,” Sept. 2001. Such assertions tend to misstate the nature of the state practice requirement, e.g. by suggesting that the International Court of Justice's holding that “per-

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- fect practice” is not required is met when there is pervasive nonconforming practice not explicitly predicated on the right to violate the norm in question.
- 5 Accord UNHCR, *Handbook on Procedures and Criteria for Determining Refugee Status* (1979, reedited 1988), at para. 28.
  - 6 See generally James C. Hathaway and Anne K. Cusick, “Refugee Rights Are Not Negotiable,” (2000) 14(2) *Georgetown Immigration Law Journal* 481, at 491-493.
  - 7 T. Meron, “Extraterritoriality of Human Rights Treaties”, (1995) 89(1) *American Journal of International Law* 78, at 80-81.
  - 8 Statement of Mr. Henkin of the United States, U.N. Doc. E/AC.32/SR.20, Feb. 1, 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...”
  - 9 U.N. Doc. E/AC.32/L.25, Feb. 2, 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, Feb. 9, 1950, at 12.
  - 10 Statement of Mr. Cuvelier of Belgium, U.N. Doc. E/AC.32/SR.22, Feb. 2, 1950, at 20.
  - 11 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.
  - 12 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.
  - 13 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.
  - 14 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
  - 15 *Id.*, at 48.
  - 16 See James C. Hathaway, *The Law of Refugee Status* (1991) [hereafter “Hathaway”], at 66-70.
  - 17 “The Convention shall cease to apply to any person... if... [h]e can no longer, because the circumstances in connexion with which he has been recognized as a refugee have ceased to exist, continue to refuge to avail himself of the protection of the country of his nationality...”: Refugee Convention, Art. 1(C)(5). Art. 1(C)(6) is to similar effect, but refers to the situation of a stateless refugee. Subjective reasons to resist return may only be invoked by refugees protected under pre-1951 refugee agreements, a decision reached to ensure that future refugees would be subject to cessation on purely objective grounds. See Hathaway, *supra* note 16, at 203-205.
  - 18 In contrast, in late October the Australian naval ship *Arunta* intercepted asylum seekers in international waters and forced them back to within a few miles of the Indonesian island of Roti: “Navy turns back 224 on boat,” *The Advertiser*, Oct. 31, 2001. Because Indonesia had previously indicated its unwillingness to receive and protect refugees, such action exhibited sufficient willful blindness to amount to indirect *refoulement*. “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*, Aug. 28, 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*, Aug. 30, 2001, at A-23.
  - 19 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.
  - 20 James C. Hathaway and R. Alexander Neve, “Making International Refugee Law Relevant Again: A Proposal for Collectivized and Solution-Oriented Protection,” (1997) 10 *Harvard Human Rights Journal* 115-211. The social science background studies upon which the reform model is predicated are collected in James C. Hathaway, *Reconceiving International Refugee Law* (1997). The scholarly commentary on this and other reform proposal is helpfully summarized and assessed in Colin J. Harvey, “Talking About Refugee Law,” (1999) 12(2) *Journal of Refugee Studies* 101.
  - 21 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, May 9, 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, Feb. 12, 2001, at fn. 1.
  - 22 See generally the *Border Protection (Validation and Enforcement Powers)* Act 2001, enacted with retrospective effect from September 27, 2001.