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Boat Refugees, International Law and Australia's Commitment: An Analysis

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I
INTRODUCTION

Australia is an 'island continent,' surrounded by sea.[1] It has a massive marine jurisdiction, with an exclusive economic zone (EEZ) covering 8.2 million square kilometres, one of the largest in the world.[2] Australia's coastline covers approximately 34,000 kilometres (excluding all small offshore islands).[3] Refugees from Afghanistan, Iraq, Iran, Sri Lanka and South East Asia use sea routes to reach Australia because Australia is a democratic country and it has a sound economy.[4] Asylum seekers are desperate to save their lives. On many occasions, refugees use small boats, fishing trawlers or cargo ships for their perilous journey.[5] Often, refugees and mixed migration[6] boats cannot travel directly to their intended

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[1]Encyclopedia Britannica, Is Australia an Island? (2019), available at https://www.britannica.com/story/is-australia-an-island.

[2]Australia's maritime areas are the third largest in the world. Bill McCormick, Oceans (Parliament of Australia, 2020), available at https://www.aph.gov.au/ About_ Parliament/Parliamentary_Departments/Parliamentary_Library/pubs/BriefingBook44p/ Oceans

[3]Australian Government, Australia's Coasts and Estuaries, (2019), available at https://www.ga.gov.au/scientific -topics/marine/coasts-estuaries.

[4]Antje Missbach, Troubled Transit: Asylum Seekers Stuck in Indonesia (2015), at 6-7.

[5]Aditi Chatterjee, 'Non-traditional Maritime Security Threats in the Indian Ocean Region' (10) 2 Maritime Affairs (2014) 77, at 85.

[6]The UNHCR's definition of mixed migration (mixed movements or flows) is: 'a movement in which a number of people are travelling together, generally in an irregular

and final destination. Although they use various routes, however, Malaysia and Indonesia are used as 'migration corridors' on sea journeys to Australia as a final destination.[7]

However, even though Australia is a signatory State of international refugee law (1951 Refugee Convention and 1967 Protocol),[8] as a developed country with a unique geographically isolated position, Australia has established an 'immigration bureaucracy' to secure its borders, where seaborne refugees are controlled by effective orders.[9] Australia's law and policy with respect to boat refugees has three elements: interception of refugee boats, regional processing centres and mandatory detention centres.[10]

As a signatory State to the international refugee law with an isolated geographical location, on the one hand, Australia is bound by international law to protect the refugees; on the other hand, Australia has developed a strict mechanism to secure its maritime areas. Therefore, the question should be asked whether, as a signatory State of international refugee law, is Australia respecting its international commitment, and, accordingly, what model is Australia creating for the rest of the world?

With this background, this paper examines Australia's law and policy to boat refugees and finds the answer. In doing so, the authors will scrutinize and evaluate provisions of Australia's immigration law that are related to boat refugees, i.e., the *Migration Act 1958* (Cth); maritime law, i.e. the *Maritime Powers Act 2013*;

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manner, using the same routes and means of transport, but for different reasons.' People travelling as part of mixed movements have varying needs and profiles and may include asylum seekers, refugees, trafficked persons, unaccompanied/separated children, and migrants in an irregular situation: See, UNHCR, The 10-Point Action Plan in Action (December 2016), 1, at 291, available at https://www.refworld.org/pdfid/4d9430ea2.pdf.

[7]Graeme Hugo, George Tan and Caven Jonathan Napitupulu, 'Indonesia as A Transit Country in Irregular Migration to Australia' in Marie Mcauliffe and Khalid Koser (eds), A Long Way to Go: Irregular Migration Patterns, Processes, Drivers and Decision-making (2017) 167, at 167-169.

[8]UNHCR, States Parties to the 1951 Convention relating to the Status of Refugees and the 1967 Protocol. Australia signed the 1951 Refugee Convention on 22 January 1954 and the 1967 Protocol on 13 December 1973, available at https://www.unhcr.org/protect/PROTECTION/3b73b0d63.pdf.

[9]Hugo, Tan and Jonathan, supra note 7.

[10]Sara Dehm and Max Walden, 'Refugee Policy: A Cruel Bipartisanship' in Double Disillusion: The 2016 Australian Federal Election, Anika Gauja, Peter Chen, Jennifer Curtin and Juliet Pietsch (eds) (2018) at 593.

Australian policies towards boat refugees; Australia's bilateral agreements in relation to boat refugees; and related case law.

II
INTERNATIONAL REFUGEE LAW

The *Convention Relating to the Status of Refugees* (The 1951 Refugee Convention)[11] and the *1967 Protocol Relating to the Stratus of Refugees* (1967 Protocol)[12] are the only existing legally binding treaties in the universe that address refugee protection. The 1951 Refugee Convention provides that any person who fulfils the following criteria will be considered as a refugee.

> Article 1A (2) of the Refugee Convention States that the term 'refugee' shall apply to any person who:
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> > owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it.

According to the refugee definition, a 'well-founded fear of persecution' is an essential element of being a refugee. However, there is no universal definition of persecution.[13] But it is well established that threat to life or freedom on account of race, religion, nationality, political opinion or membership of a particular social group always amounts to persecution.[14] Violations of human rights also amount to persecution.[15] James Hathaway defines the word persecution in refugee law as 'the sustained or systematic

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[11]The 1951 Convention Relating to the Status of Refugees, 189 U.N.T.S. 137.

[12]The 1967 Protocol Relating to the Status of Refugees, 606 U.N.T.S. 267.

[13]UNHCR, Handbook on Procedures and Criteria for Determining Refugee Status and Guidelines on International Protection: Under the 1951 Convention and the 1967 Protocol Relating to the Status of Refugees (HCR/1P/4/ENG/REV. 4, Reissued, Geneva, February 2019) (UNHCR Handbook), at para 51.

[14]Ibid.

[15]Ibid.

violation of basic human rights demonstrative of a failure of State protection.'[16]

Originally, the 1951 Refugee Convention was adopted for the European victims of the Second World War.[17] Subsequently, the time and geographical limitations of the 1951 Refugee Convention were removed by the 1967 Protocol. The Preamble of the 1967 Protocol provides for ensuring the rights of 'all refugees' who were covered by the definition of the 1951 Refugee Convention. Particularly, Articles I(2) and I(3) of the 1967 Protocol remove the time and geographical restrictions of the 1951 Refugee Convention and the 1951 Refugee Convention thereby becomes an universal instrument for 'all refugees.'

The 1951 Refugee Convention ensures certain rights to refugees, including non-discrimination,[18] access to court,[19] wage-earning employment,[20] rations,[21] housing,[22] public education,[23]

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[16]James Hathaway, The Law of Refugee Status (1991), at 104-105.

[17]Article IB states: (I) For the purposes of this Convention, the words "events occurring before 1 January 1951" in article 1, section A, shall be understood to mean either: (a) "events occurring in Europe before 1 January 1951"; or (b) "events occurring in Europe or elsewhere before 1 January 1951", and each Contracting State shall make a declaration at the time of signature, ratification or accession, specifying which of these meanings it applies for the purpose of its obligations under this Convention.

[18]Article 3 states that the Contracting States shall not discriminate against the refugees in respect of race, religion or country of origin.

[19]Article 16(1) states that a refugee shall have free access to the courts of law in the territory of all Contracting States. Article 16(2) provides, 'A refugee shall enjoy in the Contracting State in which he has his habitual residence the same treatment as a national in matters pertaining to access to the Courts, including legal assistance and exemption from cautio judicatum solvi.'

[20]Article 17(1) ensures that the Contracting State shall accord to refugees lawfully staying in their territory the most favourable treatment accorded to nationals of a foreign country in the same circumstances, as regards the right to engage in wage-earning employment.

[21]Article 20 provides that where a rationing system exists, which applies to the population at large and regulates the general distribution of products in short supply, refugees shall be accorded the same treatment as nationals.

[22]Article 21 ensures that the Contracting States, in so far as the matter is regulated by laws or regulations or is subject to the control of public authorities, shall accord to refugees lawfully staying in their territory treatment as favourable as possible and, in any event, not less favourable than that accorded to aliens generally in the same circumstances.

[23]Article 22(1) prescribes that the Contracting States shall accord to refugees the same treatment as is accorded to nationals with respect to elementary education.

administrative assistance,[24] freedom of movement,[25] identity papers[26] and travel documents.[27] However, according to the Refugee Convention, the Convention provides guarantees on three particular issues: (i) the contracting States agree to permit unlawful entry of refugees (Article 31);[28] (ii) restriction of expulsion of lawfully present refugees (Article 32);[29] and (iii) prohibition of expulsion or return (refoulement) (Article 33)[30]—these commitments are the most important safeguards of refugee protection. In fact, the non-refoulement principle of the Refugee Convention is considered as the cornerstone of international refugee protection where a party of the Convention ensures not to, 'expel or return (refouler) a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened,' whether the entry was either lawful or unlawful.[31]

Nevertheless, the benefits of the 1951 Refugee Convention are not applicable to all refugees and persons. According to Articles

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[24]Article 25(1) states that the Contracting States in whose territory a refugee is residing, shall arrange administrative assistance.

[25]Article 26 provides that each Contracting State shall accord to refugees lawfully in its territory the right to choose their place of residence to move freely within its territory, subject to any regulations applicable to aliens generally in the same circumstances.

[26]Article 27 stipulates that the Contracting States shall issue identity papers to any refugee in their territory who does not possess a valid travel document.

[27]Article 28 states that the Contracting States shall issue to refugees lawfully staying in their territory travel documents for the purpose of travel outside their territory, unless there are issues of national security or public order.

[28]Article 31(1) provides that the Contracting States shall not impose penalties, on account of their illegal entry or presence, on refugees who, coming directly from a territory where their life or freedom was threatened in the sense of article 1, enter or are present in their territory without authorization, provided they present themselves without delay to the authorities and show good cause for their illegal entry or presence.

[29]Article 32(1) states that the Contracting States shall not expel a refugee lawfully in their territory save on grounds of national security or public order, except where compelling reasons of national security are required (Article 32(2)).

[30]Article 33(1) ensures that no Contracting State shall expel or return (refouler) a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion, except where there are reasonable grounds for regarding as a danger to the security of the country in which he/she is, or convicted by a final judgment of a particularly serious crime (Article 33(2)).

[31]UNHCR, Advisory Opinion on the Extraterritorial Application of Non-Refoulement Obligations under the 1951 Convention relating to the Status of Refugees and its 1967 Protocol, (2007), 1 at 2[5]. https://www.refworld.org/docid/45f17a1a4.html

1D,[32] 1E[33] and 1F[34] of the 1951 Refugee Convention, certain peoples are ineligible to receive international protection. On the other hand, the Convention does not provide any procedural method for determination of refugee status; that determination remains within the discretion of a contracting State according to its constitutional and administrative system.[35]

James Hathaway and Michelle Foster suggest that, in order to claim the benefit of the Refugee Convention, the applicant must be physically present in the jurisdiction of a State which is party to the Convention. If an asylum seeker arrives in an international water zone or airspace, or arrives into a territory of a non-contracting State of the Convention, he/she is not legally entitled to claim the international protection.[36] However, Sir Elihu Lauterpacht and Daniel Bethlehem suggest that, although non-State counties are not 'formally bound' by the treaty, under customary international law all States have an obligation to protect the refugees.[37]

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[32]Article 1D of the 1951 Conventions states: 'This Convention shall not apply to persons who are at present receiving from organs or agencies of the United Nations other than the United Nations High Commissioner for Refugees protection or assistance.'

[33]Article 1E of the 1951 Convention provides: 'This Convention shall not apply to a person who is recognized by the competent authorities of the country in which he has taken residence as having the rights and obligations which are attached to the possession of the nationality of that country.'

[34]Article 1F of the 1951 Refugee Convention states: 'The provisions of this Convention shall not apply to any person with respect to whom there are serious reasons for considering that: (a) he has committed a crime against peace, a war crime, or a crime against humanity, as defined in the international instruments drawn up to make provision in respect of such crimes; (b) he has committed a serious non-political crime outside the country of refuge prior to his admission to that country as a refugee; (c) he has been guilty of acts contrary to the purposes and principles of the United Nations.

[35]UNHCR Handbook, supra note 13, at para 189.

[36]James Hathaway and Michelle Foster, The Law of Refugee Status (2014), at 27.

[37]Sir Elihu Lauterpacht and Daniel Bethlehem, The Scope and Content of the Principle of Non-Refoulement: Opinion, in E. Feller, V. Türk and F. Nicholson (eds), Refugee Protection in International Law. UNHCR's Global Consultations on International Protection, at 140 [194]. Cf, James Hathaway, Leveraging Asylum· 45(3) Tx. Int'l L. J. 503 (2010).

III
AUSTRALIAN POSITION ON INTERNATIONAL COMMITMENTS

Australia is a party to the 1951 Refugee Convention and the 1967 Protocol; however, international law has no direct effect in Australia unless it is incorporated into its domestic law.[38] The Senate Legal and Constitutional References Committee report on Australia's obligations under international refugee law and the principle of *non-refoulement* noted that that 'treaties have no direct legal effect within Australia unless they are incorporated into domestic law by an Act of the Australian Parliament.'[39]

Moreover, in *Minister of State for Immigration and Ethnic Affairs v Teoh*, which dealt with the endorsement of international treaties in the Australian context, the High Court of Australia, stated:

> It is well established that the provisions of an international treaty to which Australia is a party do not form part of Australian law unless those provisions have been validly incorporated into our municipal law by statute. This principle has its foundation in the proposition that in our constitutional system the making and ratification of treaties fall within the province of the Executive in the exercise of its prerogative power whereas the making and the alteration of the law fall within the province of Parliament, not the Executive. So, a treaty which has not been incorporated into our municipal law cannot operate as a direct source of individual rights and obligations under that law. [40]

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[38]NAGV and NAGW of 2002 v Minister for Immigration and Multicultural and Indigenous Affairs (2005) 222 CLR 161.

[39]Senate Legal and Constitutional References Committee, A Sanctuary Under Review: An Examination of Australia's Refugee and Humanitarian Determination Processes, Parliament of Australia (Commonwealth of Australia, June 2000) Chapter 2, at 40 [2.7], available at https://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Legal_and_Constitutional_Affairs/Completed_inquiries/1999-02/refugees/report/index.

[40]Minister of State for Immigration and Ethnic Affairs v Teoh (1995) 183 CLR 273, 286-287 (Teoh Case).

On the other hand, in the *Teoh* case, the High Court of Australia also expressed that even though a Convention is not ratified into Australia's municipal law and therefore not a part of its domestic law, it is a 'legitimate expectation' that as signatory State of a treaty, Australia would act in conformity with the treaty and agree to safeguard the best interest of the 'primary consideration' of the treaty.[41] The Court also stressed that, 'ratification of a convention is a positive statement by the executive government of this country to the world and to the Australian people that the executive government and its agencies will act in accordance with the Convention.'[42]

The Highest Court of Australia also stated that, '[i]n international law, Conventions are agreements between States. Australia's ratification of the Convention is a positive statement to other signatory nations that it intends to fulfil its obligations under that Convention.'[43]

Therefore, in theory, Australia is a contracting party of the international refugee law, but, in practice, the 1951 Refugee and the 1967 Protocol have no effect on its domestic jurisprudence as these international treaties have yet not been incorporated into its national law. However, because Australia internationally agreed to protect the refugees, accordingly it is expected that Australia would fulfil its international commitment.

IV
MIGRATION ACT 1958 (CTH)

The *Migration Act 1958* (Cth) is the primary legislation that deals with the refugee issue in Australia.[44] According to the

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[41]Ibid 274, 282.

[42]Ibid 291.

[43]Ibid 316.

[44]Migration Act 1958, No. 62 of 1958, as Amended, Date of Assent: 8 October 1958, Compilation No. 142, Compilation date: 29 December 2018, Includes Amendments up to: Act No. 162, 2018, Registered: 17 January 2019, Registered ID: C2019C00046, Vol. 1: ss 1-261K, 1-482; and Vol. 2: ss 262-507 including Schedule and Endnotes, 1-563; Source: Australian Government, Federal Register of Legislation, available at https://www.legislation.gov.au/Details/C2019C00046/Download. It is to be noted that the Migration Act 1958 since its endorsement has been amended on many

Preamble, the *Migration Act 1958* covers entry into, presence in, and deportation of aliens from, Australia. The *Migration Act* does not directly incorporate Australia's international obligations into domestic legislation.[45] In *Plaintiff M47/2012 v Director General of Security and Others,* the plaintiff was a Sri Lankan woman who arrived in Australia by boat without a visa and who applied for refugee protection. Her refugee application was rejected by the High Court of Australia. The Court (Gummow J) held that:

> The plaintiff's submissions misconceive the extent to which the [Refugee] Convention is drawn by the Act [*Migration Act 1958*] into domestic law. The scheme of the Act does not provide for the enactment of the various obligations respecting domestic status and entitlement which are found in the Convention.[46]

Rather, the Migration Act of Australia defines international obligations narrowly from the domestic legal point of view. For that reason, Australian domestic courts must apply domestic legislation due to the absence of direct endorsement of international obligations in domestic law.[47] The Migration Act does not ensure the rights that are guaranteed under the international Refugee Convention.[48] Moreover, the Act intentionally modifies certain terms in such a way that indicates Australia's negative view towards refugee protection.[49] The Australian government is concerned that the Convention's interpretation is too broad; thus to stop the refugee flows, the Australian authorities have limited the

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occasions. All the previous amendments are available at https://www.legislation.gov.au/Series/C1958A00062. Also, to be noted that the aim of this paper is not to analyse the details of the Migration Act. This paper only focuses on the sections that are relevant to the discussion of boat refugees in Australia.

[45]Peter Billings, Refugee Protection and State Security in Australia: Piecing Together Protective Regimes, 24(4) Aus. J. Admin. L. (2018) 222, at 224.

[46]Plaintiff M47/2012 v Director General of Security and Others (2012) 251 CLR 1 [123]. In the case, the High Court cited Plaintiff M70/2011 v Minister for Immigration (2011) 244 CLR 144 [217] [218].

[47]Savitri Taylor, Refugee Protection in Australia, 9 (Indian Society of International Law) ISILYearbook of International Humanitarian and Refugee Law (2009) 189, at 192-193.

[48]For instance, Access to Courts (Article 16); Wage-earning Employment (Article 17); Rationing Benefit (Article 20); Housing Benefit (Article 21). See footnotes above 19 to 27 with annotated text.

[49]Taylor, Refugee Protection in Australia, supra note 47, at 193.

eligibility criteria for being a refugee.[50] For instance, the Migration Act provides a definition of refugee in s 5H, which differs from the definition in Article 1A(2) of the Refugee Convention.

> Section 5H of the *Migration Act 1958* (Cth) provides:
> (1) For the purposes of the application of this Act and the regulations to a particular person in Australia, the person is a refugee if the person: (a) in a case where the person has a nationality—is outside the country of his or her nationality and, owing to a well-founded fear of persecution, is unable or unwilling to avail himself or herself of the protection of that country; or (b) in a case where the person does not have a nationality—is outside the country of his or her former habitual residence and owing to a well-founded fear of persecution, is unable or unwilling to return to it.

According to the refugee definition in the 1951 Refugee Convention (Article 1A(2)), a refugee is a person who has a 'well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country.' However, as per s 5H of the *Migration Act 1958* (Cth), a refugee is a person who 'owing to a well-founded fear of persecution, is unable or unwilling to avail himself or herself of the protection of that country.' As a comparison, grounds of persecution (i.e. race, religion, nationality, membership of a particular social group or political opinion) are not mentioned in the definition in the *Migration Act 1958.*

Moreover, the term 'persecution' is defined narrowly in s 5J of the *Migration Act,* which is against the spirit of the 1951 Refugee Convention. Specifically, s 5J(3) provides that a person does not have a well-founded fear of persecution if the person could take reasonable steps to modify his or her behaviour so as to avoid a real chance of persecution in a receiving country that included altering his or her religious beliefs, concealing a physical, psychological or intellectual disability, concealing his or her true race, ethnicity,

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[50]Asher Hirsch, The Definition of Persecution: The Effect of s 91R of the Migration Act (2014), available at https://asherhirsch.com/2014/05/05/the-definition-of-persecution-the-effect-of-s-91r-of-the-migration-act/.

nationality or country of origin, and entering into or remaining in a marriage.[51]

In addition, if a refugee application was submitted in Australia on or after 16 December 2014, the definitions that are contained in the 1951 Refugee Convention do not apply, but follow the definitions in the *Migration Act*. Thus, these are the substitutes: 'well-founded fear of persecution' as in s 5J; 'membership of a particular social group' as in ss 5K and 5L;[52] 'effective protection measures' as in s 5LA; 'receiving country' as in s 5.[53] However, if a refugee application is rejected, the applicant may be considered under the 'complementary protection' grounds in s 36(2)(aa) of the *Migration Act 1958*.[54] But s 36(2)(aa) is not an absolute provision; during a refugee determination application, the security issue (whether the applicant is directly or indirectly a risk to Australian security) is a crucial factor.[55] An application for a protection visa could be rejected due to public interest criteria, that is, the 'character test.'[56]

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[51]The term 'persecution' is not defined in the Refugee Convention. The reason behind this is to ensure a broader view of interpretation: Paul Weis, The Refugee Convention, 1951:The Travaux Preparatoires Analysed With A Commentary, (1990), 1 at 8, available at https://www.refworld.org/docid/53e1dd114.html. See also, Taylor, Refugee Protection in Australia, supra note 47, at 193-196.

[52]As with the term 'persecution,' 'membership of a particular social group' was not defined either in the 1951 Convention or the 1967 Protocol. Case law defines it by consideration of the facts and circumstances of the case: Matter of Kasinga, 21 I&N 357 (BIA 1996); Matter of Acosta,19 I&N Dec. 211 (BIA 1985); Secretary of State for the Home Department v Savchenkov [1996] Imm. AR 28 (CA); Islam (A.P.) v Secretary of State for the Home Department; Regina v Immigration Appeal Tribunal and Another Ex Parte Shah (A.P.) [1999] (H.L.); Matter of C-A-, 23 I&N Dec. 951 (BIA 2006); Canada (Attorney General) v Ward [1993] 2 S.C.R. 689.

[53]Migration Act 1958 (Cth), available at https://www.legislation.gov.au/Details/C2019C00181.

[54]Section 36(2)(aa) stipulates that 'a criterion for a protection visa is that the applicant for the visa is a non-citizen in Australia in respect of whom the Minister is satisfied Australia has protection obligations because the Minister has substantial grounds for believing that, as a necessary and foreseeable consequence of the non-citizen being removed from Australia to a receiving country, there is a real risk that the non-citizen will suffer significant harm.'

[55]Sub-sections (2A), 2(B) and 2(C) of s 36, Migration Act 1958 (Cth).

[56]Section 501(1) of the Migration Act 1958 provides that 'The Minister may refuse to grant a visa to a person if the person does not satisfy the Minister that the person passes the character test.' Criteria of the character test are stated by s 501(6) and include whether a person has a substantial criminal record; there is a risk the person will harass,

Under international refugee law, the *non-refoulement* principle (Article 33) is treated as the cornerstone of the international protection of refugees under which '*No Contracting State shall expel or return (refouler) a refugee in any manner*.' Article 31 of the 1951 Refugee Convention safeguards that a refugee will not be penalised for illegal entry. Nonetheless, the *Migration Act 1958* does not mention the *non-refoulement* obligation (i.e. obligation of no return); rather, s 198 declares that an unlawful non-citizen must be removed as soon as reasonably practicable, which is against the basic principle made in the international commitment. Moreover, s 197C(2) of the stipulates *Migration Act 1958* that:

> An officer's duty to remove as soon as reasonably practicable an unlawful non-citizen under section 198 arises irrespective of whether there has been an assessment, according to law, of Australia's *non-refoulement* obligations in respect of the non-citizen.

Therefore, the provisions of the *Migration Act 1958* do not effectively guarantee the *non-refoulement* principle and the unlawful non-citizen is considered a problem under the Act.[57] Moreover, s 36(1B) of the Act states that a visa application will not be assessed by the Australian Security Intelligence Organisation if there is (either directly or indirectly) a risk to security. Most importantly, s 501 of the Act empowers the Minister to refuse to grant a visa or cancel a visa to a person if the person does not satisfy the 'character test.' The definition of the 'character test' and the reasons for failure to pass the 'character test' appear in sub-ss 6 and 7 of s 501.

In *Falzon v Minister for Immigration and Border Protection*[58] the ground of the 'character test' was considered by the High Court of Australia. In that case, Mr Falzon had been living in Australia for 61 years. He had arrived in 1956 at age 3, under a special type of permanent residency visa (Absorbed Person Visa). However, he was deported back to Malta due to drug-related criminal offences.

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molest, intimidate or stalk another person in Australia; or present a danger to the Australian community. In addition, s 36(2C) states that a non-citizen will not be protected if the non-citizen is a danger to Australia's security or community. See also s 65 (decision to grant or refuse to grant visa).

[57]Billings, supra note 45, at 227.

[58]Falzon v Minister for Immigration and Border Protection [2018] HCA 2.

It was accepted that the plaintiff had solid family ties to Australia and his exclusion would cause considerable 'emotional, psychological and practical hardship to his family,' and that, since the plaintiff had been absent from Malta for a long period, he might face 'social isolation and emotional hardship' in Malta. Nevertheless, it was found that the plaintiff presented 'an unacceptable risk of harm to the Australian community' and as a result his appeal was dismissed.[59]

In the past, Australia displayed generosity to boat refugees, especially to the Vietnamese boat people. However, after the 1990s, Australia charged its policy and adopted a restrictive view toward boat refugees.[60] This issue will be further examined in the next subparagraphs.

A. The Migration Act and Boat Refugees

Australia's geographic location is 'unique.' All people have to arrive by regular air or sea routes. Therefore, it is easy to control and monitor its airports and ports by a visa control system.[61] Section 42 of the *Migration Act 1958* (Cth) provides that 'a non-citizen must not travel to Australia without a visa that is in effect.' The Act specifically mentions the term 'travel,' not 'arrive' in or 'enter' Australia. Any person who travels to Australia without a valid visa is unlawful.[62] According to s 43, a visa holder must travel to and enter Australia by a port or 'pre-cleared flight.'[63] If a visa holder enters Australia in a way that breaches the condition then the visa will be cancelled.[64] Any non-citizens who are in the

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[59]Ibid.

[60]Claire Higgins, Asylum by Boat: Origins of Australia's Refugee Policy (2018); Refugee Council of Australia, A Short History of Australian Refugee Policy (2018), available at https://www.refugeecouncil.org.au/asylum-policies/4/.

[61]Asher Lazarus Hirsch, The Borders Beyond the Border: Australia's Extra-territorial Migration Controls, 36(3) Refugee Survey Quarterly (2017) 48, at 54-55.

[62]Ibid., at 56-57.

[63]Section 43, Migration Act 1958. Pre-clearance flight means that Australian Border Guards or the Immigration Authority checks and confirms that before boarding the carrier a traveler has a visa or appropriate travel documents. See Australian Border Force, Crossing the Border (Australian Government, 2020), available at https://www.abf.gov.au/entering-and-leaving-australia/crossing-the-border/passenger-movement/advance-passenger-processing#.

[64]Section 173 of the Migration Act 1958 states the grounds of cancellation.

migration zones of Australia without a valid visa must be detained.[65]

Therefore, if boat refugees arrive into Australian territory without valid documentation, they will not be protected, but will be prevented from arriving into Australia. This is arguably totally contradictory to the humanitarian spirit of international refugee law.[66] Thus, the relationship between the *Migration Act* and international refugee law is not only 'complex and fraught,'[67] but also challenging.[68]

Moreover, s 5 of the *Migration Act* 1958 (Cth) excises, (a) the Territory of Christmas Island, (b) the Territory of Ashmore and Cartier Islands, and (c) the Territory of Cocos (Keeling) Islands from the migration zones. As a consequence, any unauthorised non-citizen who attempts to enter Australia via one of these islands is not permitted to make an application for refugee status. This is a clear signal that unlawful refugee boats are not accepted in Australia.[69] Under the *Migration Act 1958* (Cth) a traveller to Australia must come via a specific airport or port route, so arrival through an unrecognised route is not acceptable and therefore an asylum seeker would not be able to apply for a protection visa. This law and policy contradict the terms of Article 31 of 1951 Refugee Convention, which ensures that a refugee will not be penalised for his/her illegal arrival.[70]

The *Migration Act 1958* also includes provisions on immigration detention.[71] In the case of an unauthorised maritime arrival, i.e. where a non-citizen arrives in the Australian migration zone by sea,[72] the Act also gives powers to a security officer to

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[65]Section 189 of the Migration Act is on the detention provision of unlawful non-citizens. Hirsch, The Borders Beyond the Border, supra note 61, at 56-57.

[66]Articles 31, 32 and 33, 1951 Refugee Convention.

[67]Billings, supra note 45, at 224.

[68]Ibid., at 232.

[69]Janet Phillips and Adrienne Millbank, Protecting Australia's Borders, Department of Parliament Library, Australia (2003), at 1, available at https://www.aph.gov.au/binaries/library/pubs/rn/2003-04/04rn22.pdf.

[70]See footnote 28 for the Article 31(1) of the 1951 Refugee Convention.

[71]Sections 5(1), 189, 192 and 250, Migration Act 1958.

[72]Section 5AA defines unauthorised maritime arrival. It states that a person is an unauthorised maritime arrival if: (a) the person entered Australia by sea: (i) at an excised

prevent certain persons from entering or landing in Australia.[73] In particular, s 249(1AA) states that, 'An officer may prevent a person from leaving a vessel on which the person arrived in Australia if the officer reasonably suspects that the person: (a) is seeking to enter the migration zone; and (b) would, if in the migration zone, be an unlawful non-citizen.'

Boat refugee cases are considered under a 'fast track' process due to being unauthorised maritime arrivals.[74] Under the fast track procedure, any review application of a boat arrival case is not considered by the normal Administrative Appeals Tribunals (AAT) but by a distinct Immigration Assessment Authority (IAA).[75] The fast track process raises two critical issues: first, applicants have no right to an oral hearing by the IAA,[76] and second, there is no mandatory requirement on the part of the reviewer to consider fresh information from the applicant.[77] The main purpose of the IAA is to ensure an 'efficient' and 'quick' mechanism from Australia's point of view.[78] However, the quick process and the limitation of fresh information in the procedure for review of a refugee

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offshore place at any time after the excision time for that place; or (ii) at any other place at any time on or after the commencement of this section; and (b) the person became an unlawful non-citizen because of that entry; and (c) the person is not an excluded maritime arrival.

[73]Section 249, Migration Act 1958.

[74]Section 5(1), Migration Act 1958 (Fast Track Applicant).

[75]An explanatory note of s 500 of the Migration Act 1958 (Cth) states: 'Decisions to refuse to grant a protection visa to fast track applicants are generally not reviewable by the Administrative Appeals Tribunal.'

[76]Section 473BB of the Migration Act 1958 stipulates: 'The Immigration Assessment Authority does not hold hearings and is required to review decisions on the papers that are provided to it when decisions are referred to it. However, in exceptional circumstances the Immigration Assessment Authority may consider new material and may invite referred applicants to provide, or comment on, new information at an interview or in writing.'

[77]Section 473DC(2) prescribes: 'The Immigration Assessment Authority does not have a duty to get, request or accept, any new information whether the Authority is requested to do so by a referred applicant or by any other person, or in any other circumstances.'

[78]According to s 473FA(1) of the Migration Act: 'The Immigration Assessment Authority, in carrying out its functions under this Act, is to pursue the objective of providing a mechanism of limited review that is efficient, quick, free of bias and consistent with Division 3 (conduct of review) [of the Migration Act].' Further, sub-s 2 of s 473FA lays down that 'The Immigration Assessment Authority, in reviewing a decision, is not bound by technicalities, legal forms or rules of evidence.'

application is arguably contrary to natural justice.[79] The UNHCR notes that refugee status determination procedures should be based on fair standards and consistency in decision making, with domestic laws and policies framed fairly and non-arbitrarily to ensure the rule of law.[80] Not surprisingly, Australia's 'fast track' process has led to criticism that it is unfair.[81]

B. Unauthorised Maritime Arrival and the Maritime Powers Act

Australia has a large maritime jurisdiction, and as a coastal State it has exclusive jurisdiction not only over its land territory but also over its territorial sea, contiguous zone and exclusive economic zone (EEZ) according to UNCLOS III.[82] Accordingly, unauthorised or illegal maritime arrivals are considered a threat to the State.[83] If boat refugees arrive in Australian territory and are allowed to disembark then they undergo a comprehensive and detailed assessment process, including security and health checks.[84] Unprocessed boat arrivals may be a risk to national security. If they do not go through the refugee determination process, they may be excluded on the grounds of involvement in crime or disease. They may also cause socio-economic problems, tensions between migrants and locals, encouragement of smuggling-related organised crime, labour exploitation and sexual crime.[85]

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[79]Although s 422B(3) of the Migration Act 1958 provides that 'the Tribunal must act in a way that is fair and just.'

[80]UNHCR, Note on International Protection (EC/66/SC/CRP.10, 8 June 2015).

[81]Emily Mcdonald and Maria O'Sullivan, Protecting Vulnerable Refugees: Procedural Fairness in the Australian Fast Track Regime, 41(3) UNSW Law Journal (2018) 1003, at 1005-1006, 1011, 1041-1042; Linda Kirk, Accelerated Asylum Procedures in the United Kingdom and Australia: "Fast Track" to Refoulement? in Maria O'Sullivan and Dallal Stevens (eds), States, the Law and Access to Refugee Protection: Fortresses and Fairness (2017) 243, at 268.

[82]Australia ratified UNCLOS III on 5 October 1994. See also Michael William White, Australia's Offshore Legal Jurisdiction: Current Situation, 25(1) Australian and New Zealand Maritime Law Journal (2011) 19.

[83]Philip Ruddock, Refugee Claims and Australian Migration Law: A Ministerial Perspective, 23(3) UNSW Law Journal (2000) 1, at 3.

[84]Janet Phillips, Asylum Seekers and Refugees: What are the Facts? (Parliamentary Library, Parliament of Australia, 2015) 1, at 8.

[85]Clive Williams, The National Security Implications of Refugees, The Sydney Morning Herald (online, 9 September 2015), available at https://www.smh.com.au/opinion/refugees-and-national-security-20150909-gjicq1.html.

To regulate the unauthorised maritime arrivals more strictly, the Maritime Powers Act 2013 (Cth) was adopted for the administration and enforcement of Australian laws in maritime areas.[86] Application of the Act extends to every external territory.[87] The provisions of the Maritime Powers Act are in addition to any other law of the Commonwealth.[88] An officer may exercise his powers 'in the contiguous zone of Australia to investigate a contravention of a customs, fiscal, immigration or sanitary law prescribed by the regulations that occurred in Australia; or prevent a contravention of such a law occurring in Australia.'[89] The Act also empowers monitoring of compliance issues of foreign vessels, or persons on foreign vessels.[90] The exercise of power includes, a nationality check of a vessel; seizure of border-controlled drugs or plants; ensuring maritime safety of all; and investigation of a contravention of a customs, fiscal, immigration or sanitary law.[91] In addition, s 50 of the Maritime Powers Act permits maritime powers to be exercised in relation to, (a) boarding and entry; (b) information-gathering; (c) search; (d) to seize and retain things; (e) to detain vessels and aircraft; (f) to place, detain, move and arrest persons; (g) and to require persons to cease conduct that contravenes Australian law.[92] Under s 69, a maritime officer may detain a vessel or aircraft.[93] Under ss 69, 71 and 72 of the Act a maritime officer may detain a person and take the person to a place

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[86]Maritime Powers Act, No. 15, 2013. The Act received Royal Assent on 27 March 2013 (Maritime Powers 2013).

[87]Sections 4 and 8, Maritime Powers Act 2013.

[88]Section 6, Maritime Powers Act 2013.

[89]Section 41(1)(c), Maritime Powers Act 2013. According to ss 7 and 104, maritime officers means members of the Australian Defence Force; Customs officers (within the meaning of the Customs Act 1901); members or special member of the Australian Federal Police and other persons appointed by the Minister.

[90]Section 41(1)(d), Maritime Powers Act 2013.

[91]Section 41, Maritime Powers Act 2013.

[92]See also ss 52, 53, 54 and 61, Maritime Powers Act 2013 for boarding vessels and additional powers.

[93]Section 69 of the Maritime Powers Act 2013 states that: '(1) A maritime officer may detain a vessel or aircraft. (2) The officer may: (a) take the vessel or aircraft, or cause the vessel or aircraft to be taken, to a port, airport or other place that the officer considers appropriate; and (b) remain in control of the vessel or aircraft, or require the person in charge of the vessel or aircraft to remain in control of the vessel or aircraft, at that place until the vessel is released or disposed of.'

in the migration zone, or to a place outside the migration zone, including a place outside Australia for unauthorised arrivals.[94]

After analysing the provisions of the Maritime Powers Act 2013, it is revealed that the Act confers extensive authority on maritime officers in relation to unauthorised maritime arrivals. This Act is especially targeted to stop boat people and to authorise the interception of refugee boats. The Act contains a single legislative arrangement for all maritime powers.[95] Nicholas Gaskell rightly points out that:

> The Act tries to make full use of the rights given to a coastal State by UNCLOS 1982, not only in territorial waters, but also in the contiguous zone, while somewhat skirting around humanitarian obligations including that of *non-refoulement* set out in the *Convention Relating to the Status of Refugees 1951*.[96]

Another study noted that:

> The Maritime Powers Act is an unusual piece of legislation because it confers power upon officers of the Australian government to intercept and detain foreigners outside Australian territory. To our knowledge, there is no equivalent domestic statute in the world which authorises detention of foreign persons in the contiguous zone and on high seas in the way that the Maritime Powers Act does.[97]

This research has found that the *Maritime Powers Act* empowers maritime officers to enact maritime interception and turn back refugee boats to outside the Australian territory. In addition, a maritime officer may detain and arrest any person if the officer thinks it is necessary. This is contrary to the humanitarian spirit of

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[94]Section 69 of the Maritime Powers Act 2013 is on detention on vessels and aircraft; s 71 is on placing the vessel to any particular place and s 72 is on persons on detained vessels and aircraft.

[95]Nicholas Gaskell, Developments in Australian Maritime Law 2013-2014, 46 J. Mar. L. & Com. 311, at 312 (2015).

[96]Ibid.

[97]Maria O'Sullivan and Patrick Emerton, Inquiry into the Migration and Maritime Powers Legislation Amendment (Resolving the Asylum Legacy Caseload) Bill 2014, Submission to the Senate Legal and Constitutional Affairs Committee, Australia (Castan Centre for Human Rights Law), 1, at 2, available at https://www.monash.edu/__data/assets/pdf_file/0018/138033/sub-maritime-powers.pdf.

international refugee law,[98] given that Article 31 of the Refugee Convention 1951 protects illegal arrival and Article 33(1) guarantees *non-refoulement.*

V
AUSTRALIA'S POLICY ON BOAT REFUGEES

The 'boat people issue' is not a new phenomenon in Australia; according to an Australian Parliamentary Library research paper, the first boat people arrived in April 1976—five Indochinese men during the Vietnam War—and it is since that time that the term 'boat people' has been used and entered into the Australian vernacular.[99] The Vietnamese boat people enjoyed public sympathy. However, during the federal election of 1977 the boat people issue became political for the first time because of increasing unemployment.[100] Consequently, when the refugee boat arrivals increased over the next few years, the media and political parties labelled them an 'invasion' and a 'flood.'[101] Since that 1977 election, 'boat people' have been at the centre of Australian politics.[102]

In the last few decades Australia has amended its immigration laws on numerous occasions and adopted several policies to stop the refugee boats by branding them as illegal migrants. It has adopted both a mandatory visa system and a pre-checking system before arrival into its territory, as well as various deterrent policies, such as the interdiction of asylum seeker boats at sea, and sending

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[98]Sections 73 and 76, Maritime Powers Act 2013. However, s 95 provides that a person arrested, detained or otherwise held under this Act must be treated with humanity and respect for human dignity, and must not be subject to cruel, inhuman or degrading treatment. And under s 96 a maritime officer, as soon as practicable, must take action to: (i) protect human life, animal life or the environment; or (ii) aid a vessel in distress; or (iii) obtain medical assistance for any person.

[99]Janet Phillips and Harriet Spinks, Boat Arrivals in Australia Since 1976 (Parliamentary Library, Parliament of Australia, 2013) 1, available at https://www.aph.gov.au/binaries/library/pubs/bn/sp/boatarrivals.pdf.

[100]Ibid., 6.

[101]Ibid.

[102]Klaus Neumann, "Queue Jumpers" and "Boat People": The Way we Talk about Refugees Began in 1977, The Guardian (online, 5 June 2015), available at https://www.theguardian.com/commentisfree/2015/jun/05/queue-jumpers-and-boat-people-the-way-we-talk-about-refugees-began-in-1977.

the boat people to remote locations.[103] According to the policy, all asylum seekers who arrive by boat are detained and transferred to Christmas Island, primarily to investigate their reason of arrival by boat.[104]

Moreover, Australia implements various extraterritorial mechanisms as offshore barriers to stop the entry of illegal migrants into the country.[105] These include visa requirements, carrier sanctions,[106] the Airline Liaison Officers' network (ALO)[107] and the Advance Passenger Processing (APP) system.[108] Regarding

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[103]Mary Crock and Daniel Ghezelbash, Due Process and Rule of Law as Human Rights: The High Court and the "offshore" Processing of Asylum Seekers, 18(2) Aus. J. Admin. L. 101, at 102 (2011).

[104]Janet Phillips and Harriet Spinks, Immigration Detention in Australia: Background Note (Parliamentary Library, Parliament of Australia, 2013) 1, available at https://parlinfo.aph.gov.au/parlInfo/download/library/prspub/1311498/upload_binary/1311498.pdf;fileType=application/pdf. However, the Christmas Island is known as a 'notorious prison' because of the detention centre that is established there. Helen Davidson, Inside Christmas Island: The Australian detention centre with four asylum seekers and a $26m price tag, The Guardian (online, 26 January 2020), available at https://www.theguardian.com/australia-news/2020/jan/26/inside-christmas-island-the-australian-detention-centre-with-four-asylum-seekers-and-a-26m-price-tag.

[105]Savitri Taylor, Offshore Barriers to Asylum Seeker Movement: The Exercise of Power without Responsibility? in Jane McAdam (ed), Forced Migration, Human Rights and Security: Forced Migration, Human Rights and Security (2008) 93, at 94-103.

[106]Section 299 of the Migration Act 1958 stipulates that if a master, owner, agent, charterer and operator of a vessel carries a non-citizen to Australia without documentation they will commit an offence and be liable for conviction and fine under Criminal Code.

[107]Under the Airline Liaison Officers' program, Australia establishes international immigration hubs. The main functions of the ALO are to examine travel documents and to assist the immigration and airport authorities. According to the Annual Report (2017-2018), Department of Home Affairs, Australian Government: 'The Airline Liaison Officer (ALO) program is an integral part of the ABF's layered approach to border management. The ALO network comprises 28 positions located at 19 key international airports in Africa, Asia, the Middle East and the Pacific regions. ALOs operate ahead of the border, working collaboratively with airlines, airport security groups and host government authorities in a dual role to facilitate genuine traveler movements and to identify and manage threats and risks before they reach the Australian border.' 1, at 44, available at https://www.homeaffairs. gov.au/reports-and-pubs/Annualreports/2017-18/01-annual-report-2017-18.pdf.

[108]The Advance Passenger Processing system was introduced in 2005. Under the system, when a traveler checks in at an international airport for any flight to Australia, airline staff must provide certain information to the Australian Immigration Authority about the passenger: i.e. whether the passenger holds a valid Australian visa. Taylor, Offshore Barriers to Asylum Seeker Movement, supra note 105, at 94-101; Hirsch, The Borders Beyond the Border, supra note 61, at 59-63.

Australia's extraterritorial mechanisms, Savitri Taylor observes that, '[i]n fact, the territorial border is becoming less and less important as a site of immigration control because most of the real action in that respect is occurring offshore.'[109]

In addition, asylum seekers who try to arrive in Australia by boat are described in a negative way in media coverage: they are called 'queue jumpers' or 'economic migrants.' Moreover, the media voice concern about potential threats to national security and border protection in line with public sentiment. This leads the government to adopt hostile rhetoric and policies to deter the boat people.[110]

It is also worth noting that the *Commonwealth of Australia Constitution Act 1900* (*Australian Constitution*) is the supreme law of Australia.[111] In fact, Australia is a federation of states where each state has its own constitution, government and laws. The *Australian Constitution* was created as a settlement under which the previous colonies came together as states in a federation.[112] However, Part V of the Constitution empowers the Parliament to pass legislation. Section 51 provides details of the legislative powers of the Parliament, declaring that the Parliament has power to make laws for the peace, order and good government of the Commonwealth with respect to the naval and military defence of the Commonwealth,[113] naturalisation and aliens,[114] immigration and emigration[115] and in respect of external affairs.[116] Section 52 also confers exclusive powers on the Parliament to make any law for peace and order. Further, s 61 of the Constitution creates the executive power. Section 61 provides that:

> The executive power of the Commonwealth is vested in the Queen and is exercisable by the Governor-General as the Queen's

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[109]Taylor, Offshore Barriers to Asylum Seeker Movement, supra note 105, at 93.

[110]Andreas Schloenhardt and Colin Craig, Turning Back the Boats: Australia's Interdiction of Irregular Migrants at Sea, 27(4) Int'l J. Refugee L. 536, at 537 (2015).

[111]Article 6, Constitution of the Commonwealth of Australia (Australian Constitution 1900) (Imp), Chapter 12: 63 and 64 Vict., Royal assent: 9 July 1900, Commencement: 1 January 1901.

[112]Section 5, Australian Constitution 1900.

[113]Section 51(vi).

[114]Section 51(xix).

[115]Section 51(xxvii).

[116]Section 51(xxix).

representative, and extends to the execution and maintenance of this Constitution, and of the laws of the Commonwealth.

The scope of the executive power has never been defined under the Constitution.[117] The executive power is described as the 'inherent power'[118] and the 'nationhood power.'[119] Peta Stephenson notes that, '[t]he meaning of s 61 can only be properly understood if it is considered in the light of British constitutional history, conventions and the common law.'[120] In fact, the executive enjoys a vast power to perform all the actions of government.[121] In *Victoria v Commonwealth and Hayden* (*AAP Case*),[122] the nature of the executive power was examined. Mason J opined that executive power of government means 'a capacity to engage in enterprises and activities peculiarly adapted to the government of a nation and which cannot otherwise be carried on for the benefit of the nation.'[123]

Accordingly, refugee issues are a federal concern that has come to dominate the political agenda in Australia, with the government adopting restrictive policy to manage the issues. The study now turns to Australia's boat refugee policy and will examine how the federal government has dealt with boat refugees in practice.

A. 1976–2001: Detention Policy on Boat Refugees

According to the report of the Parliamentary Library of Australia, the arrival of refugee boats in Australia is divided into three waves.[124] The first wave of boat people was during 1976-1981; the second wave during 1989-1998 and the third wave during 1999-2013.[125] In the first wave, 2,059 Vietnamese boats arrived in

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[117]Davis v The Commonwealth (1988) 166 CLR 79, 92-93.

[118]Leslie Zines, The Inherent Executive Power of the Commonwealth, 16 Pub. L. Rev. 279 (2005).

[119]George Winterton, Parliament, the Executive and the Governor-General: A Constitutional Analysis (1983), at 40-44.

[120]Peta Stephenson, Nationhood and Section 61 of the Constitution, 43(2) Univ. W. Aus. L. Rev. 149, at 150 (2018).

[121]Cameron Moore, Crown and Sword: Executive Power and the Use of Force by the Australian Defence Force (2017), at 7.

[122]Victoria v Commonwealth and Hayden (AAP Case) (1975) 134 CLR 338.

[123]Ibid., 397.

[124]Phillips and Spinks, Boat Arrivals in Australia Since 1976, supra note 99, at 1.

[125]Ibid.

Australia.[126] In the second wave 6,845 boat refugees arrived, mainly from Cambodia, Vietnam and Southern China.[127] And in the third wave 56,136 boat refugees landed in Australia, mostly from the Middle East with the assistance of 'people smugglers.'[128] In 1989 the UNHCR initiated an international agreement—the Comprehensive Plan of Action (CPA), which aimed to solve the Vietnamese boat refugee crisis by either resettling the Indochinese boat refugees in a third country or repatriating them to the country of origin.[129] According to the CPA, Australia accepted 16,800 Vietnamese boat people through the 'offshore' humanitarian program, with the last Vietnamese boat arriving in Australia in August 1981.[130]

However, during the second wave of boat people, especially those who arrived from Cambodia, it was discovered that not all the boat people were 'bona fide' refugees—many of them were 'economic refugees.'[131] As a consequence, in 1992 the Keating government adopted the policy of mandatory immigration detention for unlawful arrivals of boat people, which was made law by the Migration Amendment Act 1992.[132] Prior to 1992, detention decisions in respect of unauthorised boat influxes were on a discretionary basis under the Migration Act 1958 (s 38).[133] According to the Refugee Council of Australia, it is estimated that almost all (2,011) boat refugees were given refugee status between 1976 and1981;[134] and between January 1976 and June 2015 it is estimated that 30,400 boat refugees were given protection.[135]

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[126]Janet Phillips, Boat Arrivals and Boat "Turnbacks" in Australia since 1976: A Quick Guide to the Statistics, (Parliamentary Library, Parliament of Australia, 2017), 1 at 2.

[127]Ibid, and see also, Phillips and Spinks, Boat Arrivals in Australia since 1976, supra note 99, at 1, available at https://parlinfo.aph.gov.au/parlInfo/download/library/prspub/4068239/upload_binary/4068239.pdf;fileType=application/pdf.

[128]Ibid.

[129]Adrienne Millbank, The Detention of Boat People. (Department of the Parliamentary Library, Australia 27 February 2001) 1, at 2, available at https://www.aph.gov.au/binaries/library/pubs/cib/2000-01/01cib08.pdf.

[130]Ibid.

[131]Ibid.

[132]Ibid., at 3-4.

[133]Ibid.

[134]Refugee Council of Australia, Economic Migrants or Refugees? Analysis of Refugee Recognition Rates for Boat Arrivals, 1976-2015 (2016) 1, available at https://www.refugeecouncil.org.au/wp-content/uploads/2018/12/Boat-arrival-recognition-1976-2015.pdf.

[135]Ibid., at 2.

B. Operation Relex

'Operation Relex' was introduced after the Tampa affair[136] of 2001. At that time, the Howard government implemented a number of policies and mechanisms regarding irregular migrants. These are known as the 'Pacific Solution.' The Operation Relex policy was introduced under the Pacific Solution.[137]

As part of the changes the Border Protection (Validation and Enforcement Powers) Act 2001 was adopted.[138] The purpose of the Act is to safeguard the domestic legal actions that are taken in relation to foreign vessels within the territorial sea of Australia.[139]

The Act has ex post facto effect. According to its Preamble, the aim of the Act is to validate the actions of the Commonwealth and others in relation to the MV Tampa and other vessels, and to increase the ability to protect Australia's borders. The operation of the Act was the responsibility of the Australian Defence Force (ADF) under 'Operation Relex.' It was an interdiction program, initiated on 28 August 2001 as part of the Pacific Solution.

Operation Relex greatly changed Australia's asylum policy in relation to unauthorised boat arrivals. The policy extended the government's deterrence action up to the high seas.[140] Earlier, the Australian Navy only intercepted unauthorised boats that were 'inside' Australian waters and guided them to Australian harbors.[141]

Under Operation Relex, the Royal Navy would issue a warning to an incoming unauthorised migrant boat to sail back from the Australian maritime zone, and then redirect the vessel. However, if

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[136]Ernst Willheim, MV Tampa: The Australian Response, (2003) 15(2) Int'l. J. Refugee L. 159.

[137]Schloenhardt and Craig, supra note 110, at 536; Peter D. Fox, International Asylum and Boat People: The Tampa Affair and Australia's "Pacific Solution", 25(1) Md. J. Int'l L. 356 (2010).

[138]Border Protection (Validation and Enforcement Powers) Act, No. 126, 2001. Assented on 27 September 2001.

[139]Parliament of Australia, Border Protection Bill 2001, Bills Digest No. 41 2001-02, available at https://www.aph.gov.au/Parliamentary_Business/Bills_Legislation/bd/bd0102/02bd041.

[140]Jane McAdam and Kate Purcell, Refugee Protection in the Howard Years: Obstructing the Right to Seek Asylum, 27 Australian Year Book of International Law (2008) 87, at 97.

[141]Joyce Chia, Jane McAdam and Kate Purcell, Asylum in Australia: "Operation Sovereign Borders" and International Law' 34 Australian Year Book of International Law (2014) 33, at 34.

the boat ignored the warning, the vessel would be towed to international waters,[142] and the asylum applications were not considered.[143]

Operation Relex commenced on 3 September 2001.[144] Its strategic goal was border protection: to prevent unauthorised vessels from entering into Australian waters when their target was to arrive on Australian land. Under this policy, the Australian Navy intercepted suspected illegal entry vessels (SIEVs). Its aim was to prevent unauthorised vessels from crossing into Australia's so-called 'contiguous zone.'[145] The objective of Operation Relex was a deterrence strategy.[146] Its goal was that 'at no stage . . . unauthorised arrivals . . . have access to the Australian migration zone.'[147]

Operation Relex faced serious criticisms from academics[148] and news media.[149] According to the Parliamentary Report - A Certain Maritime Incident, several vessels (SIEV 4, 6, 10 and X) sank during the duration of the policy, with many asylum seekers dying at sea.[150] The Senate Committee report stated that the policy ignored human rights and the value of human rights, which is a direct conflict with Australia's obligations under the International

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[142]McAdam and Purcell, supra note 140, at 97.

[143]Chia, McAdam and Purcell, supra note 141, at 34–35. See also Report—Select Committee for An Inquiry, A Certain Maritime Incident, (Parliament of Australia, 2002), Chapter 2, paras. [2.62]–[2.72], available at https://www.aph.gov.au/Parliamentary_Business/Committees/%20Senate/Former_Committees/maritimeincident/report/index.

[144]Ibid., Select Committee for An Inquiry, A Certain Maritime Incident, Chapter 2, 17 [2.21].

[145]Ibid., at 14 [2.7].

[146]Ibid., Chapter 2, at 13-14 [2.5–2.7].

[147]Ibid., Chapter 3, at 32 [3.7]; McAdam and Purcell, supra note 140, at 97.

[148]Jessica Howard, To Deter and Deny: Australia and the Interdiction of Asylum Seekers, 21(4) Refuge (2003) 35.

[149]'Sad Facts of the SIEV X Sinking,' The Australian (online, 21 October 2006), available at https://www.theaustralian.com.au/news/inquirer/sad-facts-of-the-siev-x-sinking/news-story/67b4a73c08a1ab61445faa5c3ec6f2d2; 353 Dead: This Could be our Watergate, The Age (online, 10 May 2002), available at https://www.theage.com.au/national/353-dead-this-could-be-our-watergate-20020510-gdu702.html; Timeline: Asylum Seeker Boat Tragedies, SBS News (online, 26 August 2013), available at https://www.sbs.com.au/news/timeline-asylum-seeker-boat-tragedies; Marg Hutton, SIEV X: 10 Years on the Questions Remain, ABC News (online, 17 October 2011), available at https://www.abc.net.au/news/2011-10-17/ hutton-sievx-ten-years-on-the-questions-remain/3574870.

[150]Select Committee for An Inquiry, A Certain Maritime Incident, supra note 143, at 445.

Convention for the Safety of Life at Sea 1974 (SOLAS Convention).[151]

In particular, in October 2001 the 'children overboard' incident drew more controversy to the Operation Relex policy. Media footage showed HMAS Adelaide intercepting a wooden Indonesian fishing vessel, called SIEV 4. During the interception process, SIEV 4 sank and drowning asylum seekers from the boat made a desperate attempt to save themselves. In doing so it was claimed that they threw their children off the boat and into the sea.[152] According to the Senate Committee Report, a total of 353 boat people died during the SIEV 4 disaster, including 65 men, 142 women and 146 children.[153]

As a consequence, Operation Relex ended on 13 March 2002.[154] During its operation it intercepted 12 asylum boats. Four boats were towed back to Indonesia despite the protests of the asylum seekers.[155] Thereafter, Operation Relex II was launched and continued until 17 July 2006.[156] According to the Parliamentary Library report, only five boats were turned back between 2001 and 2003 during Operation Relex II.[157] And one boat, SIEV 14, was turned back to Indonesia during the operation's five and half years duration.[158]

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[151]Ibid., at 445–446; and also at 27.

[152]Select Committee for An Inquiry, A Certain Maritime Incident, supra note 143, Chapter 3 (The 'Children Overboard' Incident: Events and Initial Report), at 31-50 and Chapter 4 (The Report of Children Overboard: Dissemination and Early Doubts), at 51-77; Debi McLachlan, A Certain Maritime Incident' 3(1) Counterpoints (The Flinders University Online Journal) (2003) 89; David Marr, Burnt hands, Children Overboard, it all Seems the Same to Peter Reith, The Guardian (online 11 February 2014), available at https://www.theguardian.com/commentisfree/2014/feb/11/peter-reith-abc-children-overboard-david-marr.

[153]Select Committee for An Inquiry, A Certain Maritime Incident, supra note 143, at 466.

[154]Andrew and Renata Kaldor Centre for International Refugee Law, Turning Back Boats, (2018) 1 at 2, available at https://www.kaldorcentre.unsw.edu.au/sites/default/files/Research%20Brief_Turning%20back% 20boats_final.pdf.

[155]Schloenhardt and Craig, supra note 110, at 538-544. Under the Operation Relex policy, SIEV 5, SIEV 7, SIEV 11 and SIEV 12 were interdicted and returned to Indonesia between 12 October 2001 and 16 December 2001.

[156]Chia, McAdam and Purcell, supra note 141, at 35.

[157]Harriet Spinks, Boat "Turnbacks" in Australia: A Quick Guide to the Statistics Since 2001, (Parliamentary Library, Parliament of Australia, 2018), Table 2, at 2, available at https://parlinfo.aph.gov.au/parlInfo/download/library/prspub/5351070/upload_binary/5351070.pdf.

[158]Schloenhardt and Craig, supra note 110, at 544.

C. Operation Sovereign Borders

During the 2013 federal election campaign, Operation Sovereign Borders was the top agenda item of the Coalition government (a political alliance of the Liberal-National Party coalition).[159] During the campaign the Coalition government stated that since 2007 the Labor government had failed to maintain border protection and national sovereignty. As a result, the Coalition adopted a strong policy on border protection. As a key point of the campaign it said that 'if elected, a Coalition government will establish a military-led response to combat people smuggling and to protect our borders—Operation Sovereign Borders.'[160] The commitment was to 'stop the boats.'[161] Earlier in 2001 during an election campaign launch in Sydney, Prime Minister John Howard had declared that 'we will decide who comes to this country and the circumstances in which they come.'[162] When the Coalition won government at a later election and Tony Abbott became Prime Minister, the government implemented the 'Operation Sovereign Borders' commitment on 18 September 2013.[163]

Operation Sovereign Borders is an armed-forces-led border security program; its aim was to protect Australian borders from maritime arrivals.[164] According to the Department of Home Affairs of Australia:

> Anyone who attempts an unauthorised boat voyage to Australia will be turned back to their point of departure, returned to their home country or transferred to another country. No-one who travels illegally to Australia by boat will be allowed to remain in Australia.

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[159]Chia, McAdam and Purcell, supra note 141, 35.

[160]Liberal Party of Australia, The Coalition's Operation Sovereign Borders Policy, (2013) 1–4, available at https://parlinfo.aph.gov.au/parlInfo/download/library/partypol/2616180/upload_binary/2616180.pdf;fileType=application%2Fpdf#search=%22library/partypol/2616180%22.

[161]Ibid., at 14.

[162]John Howard, Federal Election Campaign Launch Speech (2001), available at https://electionspeeches.moadoph.gov.au/speeches/2001-john-howard.

[163]Oliver Laughland, Operation Sovereign Borders begins on Wednesday, The Guardian (online, 16 September 2013), available at https://www.theguardian.com/world/2013/sep/16/operation-sovereign-borders-begins-Wednesday.

[164]Department of Home Affairs, Australian Government, Operation Sovereign Borders (2020), available at https://osb.homeaffairs.gov.au/.

> Australia's tough border protection policies are designed to protect Australia's borders.[165]

The Operation Sovereign Borders policy ensures increased security of Australian borders. This is achieved through a policy of strong deterrence. The key message is to create 'panic' for irregular immigrants who try to arrive in Australia by boat—they will never be resettled in Australia.[166]

Although Operation Sovereign Borders is similar to its predecessor 'Operation Relex,' it is unique in two aspects: primarily, it ensures the safety of life at sea but also the strict return of irregular migrants (a number of lifeboats were added to the operation); and additionally, the policy extends to return vessels to places such as Sri Lanka.[167] Under the policy, the terms 'turnbacks,' 'take-backs,' 'turnarounds' and 'push backs' are used interchangeably.[168] According to the Parliamentary Library report, from December 2013 to June 2018, 33 boats arrived in Australian waters and were turned back and pushed back under the policy.[169] Accordingly, the Operation Sovereign Borders is an effective policy from Australia's point of view in three ways: first, it is a policy which denies entry of irregular migrant boats into Australia; second, it is a deterrence policy as the irregular boats are turned back out of Australian maritime zones and pushed into international water zones and therefore, Australian avoids its international responsibility on refugees; and finally, the Australian government claims that the stopping and turning back of boats saves the lives of the unauthorised migrants who would otherwise drown. On the other hand, it has been reported that between 1998

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[165]Department of Home Affairs, Australian Government, Australia's Borders are Closed to Illegal Maritime Migration (2020), available at https://osb.homeaffairs.gov.au/outside-australia.

[166]Patrick van Berlo, Australia's Operation Sovereign Borders: Discourse, Power, and Policy from a Crimmigration Perspective, 34(4) Refugee Survey Quarterly (2015) 75, at 75-77.

[167]Schloenhardt and Craig, supra note 110, at 548.

[168]The Abbott government explained 'turnbacks' as 'the safe removal of vessels from Australian waters, with passengers and crew returned to their countries of departure'; 'take-backs' means a transfer (often at sea) of passengers from one sovereign authority to another 'where Australia works with a country of departure in order to see the safe return of passengers and crew': Spinks, Boat "Turnbacks" in Australia, supra note 153, at 3-4.

[169]Ibid.

and 2013 approximately 1,550 people died during unauthorised voyages to Australia.[170]

Therefore, according to the above investigation, this paper suggests that even though Australia is a party to the 1951 Refugee Convention and the 1967 Protocol, its domestic legislation, the Migration Act 1958 (Cth), does not ensures the the rights of the refugees; rather the Act provides a narrow definition of refugee where the conventional grounds of persecution are ignored. Under the 'character test' threshold, a refugee application may be rejected and the applicant deported to the country of origin, which is against the norm of non-refoulement (Article 33) that also directs Australia's negative sign to refugees. Moreover, the Migration Act 1958 (Cth) seeks to stop the boat refugees where the refugee boats are stopped and sent back to sea, and the boat refugees have no to chance to settle in Australia. Between 1976 and 2001 Australia displayed a more moderate treatment towards the boat refugees; however, Australia shifted its position to the boat refugees by 'Operation Relax.' At that time the 'boat refugees issue' became a hot topic in the election campaign designed to attract votes. Later in 2013, 'Operation Sovereign Borders' was introduced and the practice of turning the refugee boats back to sea continued in which the aim was to stop unauthorised maritime arrival, thereby sending a clear message to the world that boat refugees would not be allowed to set foot in Australia.

The following parts of this paper examine further Australia's treatment of boat refugees.

VI
AUSTRALIA'S REGIONAL ARRANGEMENTS FOR INTERCEPTING BOAT REFUGEES

The Pacific Solution, Tampa Case and Australian Policy on Boat Refugees

In 2001, especially after the Tampa affair, the number of boat arrivals increased in Australia. As a consequence, the Howard

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[170]Marg Hutton, Drownings on the Public Record of People Attempting to Enter Australia Irregularly by Boat since 1998, SIEV (2014), available at http://www.sievx.com/articles/background/DrowningsTable.pdf. See also Schloenhardt and Craig, supra note 110, at 562.

government announced the 'Pacific Solution.' The Pacific Solution policy was also known as the 'Pacific Plan' or 'Pacific Strategy.'[171] It is the Tampa affair that 'gave birth to the infamous "Pacific Solution."'[172]

Before examining the Pacific Solution policy, we will provide some details concerning the Tampa affair. It is an important academic subject regarding boat refugees[173] because it exemplifies the treatment given by the Australian government to boat refugees in distress at sea, where Australia made a great effort to decline the rights of entry of the boat refugees into its territory. The Tampa incident reveals how the Australian government refused the boat refugees, despite its humanitarian commitments under international law including refugee law and international maritime law. The Tampa incident brought together international law, human rights, executive powers and court decisions. The facts of the case are as follows.[174]

On 22 August 2001, the MV Tampa, a Norwegian-flagged container ship, was on a voyage from Western Australia to Singapore via the Indian Ocean under the command of Captain Arne Rinnan; the ship was permitted to carry 50 persons. When the ship was travelling between Christmas Island and Indonesia, it received a distress call from the Australian Canberra Rescue and Coordination Centre (AusSAR) that reported that a vessel with around 80 passengers on board was sinking and issued a request to render assistance to the distressed vessel. In response, the MV Tampa changed its direction and travelled to rescue the boat. On Sunday, 26 August 2001, the master found a 20-metre wooden, overloaded and unseaworthy Indonesian fishing boat, the Palapa, with 433 'boat people' on board (including 26 females, three of whom were pregnant, and 43 children). Most of the passengers

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[171]Susan Kneebone, The Pacific Plan: The Provision of 'Effective Protection?, 18(3-4) Int'l. J. of Refugee L. 696 (2006).

[172]Gwenda Tavan, Issues that Swung Elections: Tampa and the National Security Election of 2001, The Conversation (online, 3 May 2019), available at https://theconversation.com/issues-that-swung-elections-tampa-and-the-national-security-election-of-2001-115143.

[173]Francine Feld Tampa case: Seeking Refuge in Domestic Law, 8(1) Aus. J. Human Rights 157 (2002); Penelope Mathew, The Tampa Issue, 13(2) Pub. L. Rev. 375 (2002); Willheim, supra note 136, at 159-191; Penelope Mathew, Australian Refugee Protection in the Wake of the Tampa, 96 Am. J. Int'l L. 661 (2002).

[174]Michael White, M/V Tampa Incident and Australia's Obligations—August 2001, 122 Maritime Studies 7 (2002).

were Afghan asylum seekers, and when the boat was located they were around 158 miles from Indonesia and 85 miles from Australia's Christmas Island. The distressed persons were loaded aboard the Tampa. However, the actual location of the rescue area was within the Indonesian search and rescue zone.

The ship's Master asked the Australian Coast Guard where to sail with the boat refugees, but did not receive any clear answer, rather he received a 'don't know' from the Coast Guard. As a result, the Tampa's captain, Arne Rinnan, decided to navigate to Merak, the closest port of Indonesia which had facilities to dock the large vessel. Some of the rescued persons threatened to commit suicide if they were reverted to Indonesia; others moved onto the ship's bridge and demanded to sail to Christmas Island. The captain notified the Australian Coordination Centre of the situation and changed to the Australian territory (Christmas Island) under duress. When the Tampa was close to the destination, the Australian authorities refused to allow the ship into the port and ordered it to stop outside Australian territorial waters (12 nautical miles, off the coast of Christmas Island), and later directed the captain to travel to Merak (Indonesia) with the asylum seekers. The captain was threatened that if he did not follow the instructions he could be charged with a criminal offence.

On 27 August, the Australian government closed the port of Christmas Island to prevent disembarkation from the boat. However, the captain of the Tampa notified the Australian authorities about a shortage of food and water and sick persons on board. He repeated the request for food and medical assistance to the Australian authorities. The requests were acknowledged, but there was no reply. In the meantime, some of the asylum seekers became very sick and unconscious. The rescued boat people informed the shipmaster that they would start jumping overboard if no medical assistance was being provided.

The shipmaster noticed that the 'situation was getting out of hand.' So, with no other alternative, on 29 August the captain sent a distress message and sailed into Australian territorial waters, stopping around four nautical miles from Christmas Island (Flying Fish Cove). Immediately thereafter, within two hours, Australian Special Armed Services Troops (Australian Defence Force) took control over the ship and informed the shipmaster that he breached the Australian law because the passengers of the ship had no valid visa to enter Australian territory. After the primary investigation it was decided that none of the passengers needed emergency medical

assistant and the ship was ordered to leave Australian waters with the asylum seekers.

Thereafter, the Norway and Australian governments were involved in an argument about the Tampa affair. Norway claimed that the ship was unfit for international voyage and that Australian's actions towards the asylum seekers were inhumane and violated international law. In response the Australian Prime Minister said that the Norwegian authorities were responsible for receiving the boat refugees as the ship was registered in Norway, the shipmaster was from Norway, and the owner of the ship was a Norwegian company.

On the evening of 29 August, the Australian government took further action to refuse the asylum seekers. Very swiftly, Prime Minister Howard introduced the Border Protection Bill 2001 into Parliament. The Bill empowered the government to remove any foreign ship in Australian territorial waters with retrospective authority and immediate effect. The Bill was especially targeted to removing the Tampa. But on 30 August the Bill was criticised and rejected by the Senate. On the same day, the Norwegian Ambassador went to see the rescued persons and they collectively applied for asylum status in Australia.

In fact, the Tampa incident involved some complex issues of both international law and Australian domestic law. International maritime law provides the obligation to rescue at sea (UNCLOS III, Article 98(1);[175] SOLAS Convention, Chapter V, Regulation 33(1)); and States are under an obligation to protect refugees under the non-refoulement principle (Article 33(1) of Refugee Convention). Under the modern law of the sea, a coastal State has authority to refuse entry of a vessel if it carries illegal immigrants or violates domestic laws (Article 25 of UNCLOS III).[176] Furthermore, a State has the right to expel or return refugees

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[175]Article 98(1) of the UN Convention of the Law of the Sea 1982 provides that: Every State shall require the master of a ship flying its flag, in so far as he can do so without serious danger to the ship, the crew or the passengers … to render assistance to any person found at sea in danger of being lost ... to proceed with all possible speed to the rescue of persons in distress, if informed of their need of assistance, in so far as such action may reasonably be expected of him.

[176]Article 25(1) of UNCLOS III provides that a coastal State may take necessary steps in its territorial sea against non-innocent passage. Article 25(2) prescribes the right to take necessary action against a ship, if the ship proceeds to internal waters or a call at a port facility outside internal waters; the coastal State also has the right to take necessary steps to prevent any breach of conditions of admission into its internal waters.

(refouler) and in particular a 'mass of influx persons' on the grounds of national security (Article 33(2) of the 1951 Refugee Convention).[177]

Whether the 433 asylum seekers of the Tampa would be considered a 'mass flux or large scale of influx' is not clear under international law.[178] Moreover, under Australian constitutional law, the executive enjoys vast powers and can deny unauthorised refugee boats access to its ports.[179] The question of domestic implementation of the international treaty (1951 Refugee Convention) in Australia indicates a gap of enforcement of international law.[180] In addition, even though international law imposes an obligation on a shipmaster to rescue distressed persons at sea, there is no obligation of a coastal State to accept the asylum seekers. In the Tampa situation, Australia took advantage of those gaps in international law. It argued that Norway was responsible to protect the boat refugees as the flag State of the Tampa, and Indonesia was responsible for disembarkation of the rescued persons as the 'nearest feasible port.'[181]

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[177]Article 33(2) of the 1951 Refugee Convention provides: The benefit of the present provision may not, however, be claimed by a refugee whom there are reasonable grounds for regarding as a danger to the security of the country in which he is, or who, having been convicted by a final judgment of a particularly serious crime, constitutes a danger to the community of that country.

[178]Chantal Marie-Jeanne Bostock, The International Legal Obligations owed to the Asylum Seekers on the MV Tampa, 14(2-3) Int'l. J. Refugee L. 279, at 292 (2002).

[179]Article 61 of Constitution of Australia 1900. Also see, Peter Gerangelos, The Executive Power of the Commonwealth of Australia: Section 61 of the Commonwealth Constitution, 'Nationhood' and the Future of the Prerogative, 12(1) Oxford Univ. Commonwealth L. J. 97 (2012).

[180]Teoh case (Minister of State for Immigration and Ethnic Affairs v Teoh (1995) 183 CLR 273).

[181]Savitri Taylor, The Pacific Solution or A Pacific Nightmare? The Difference Between Burden Shifting and Responsibility Sharing, 6(1) Asian-Pac. L. & Pol. J. 1, at 5 (2005).

On 31 August, human rights groups filed a writ case under habeas corpus[182] in the Federal Court of Australia.[183] On 1 September, the Australian government made an ad hoc decision, ignoring the international law, and also tried to solve the Tampa crisis with the help of neighbouring countries. In this context, Australia rashly reached agreements with Nauru and New Zealand under which the asylum seekers of the Tampa would be transferred there. New Zealand agreed to receive 150 asylum seekers and the rest of the rescued asylum seekers would be removed to Nauru. After an assessment, if there were valid claims of asylum, the asylum seekers would be moved to Australia from Nauru or shifted to other countries for settlement. Australia agreed to bear the full cost of Nauru's participation in this arrangement.[184] Thus, with these bilateral agreements, Australia's initial objective—'no asylum seeker aboard the Tampa was to set foot on Australian soil'—was fulfilled.[185]

On 3 September the boat people were transferred from the Tampa to HMAS Manoora and then started on their voyage to Nauru. Following this the Tampa was permitted to return to its original commercial journey.

On 11 September, after several days hearing the case, Justice North, the trial judge in the Federal Court, issued a judgment in favour of the boat refugees. He held that the Australian government had illegally detained the rescued people from the Tampa and ordered their release. In the verdict the court concluded that

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[182]At common law, access to the court and judicial review is available to ensure certain rights. The writ of habeas corpus demands that a person incarcerated be brought before the court to determine whether there is lawful authority to detain the person. See, Australian Government, Australian Law Reform Commission, A Common Law Principle (2016), available at https://www.alrc.gov.au/publication/traditional-rights-and-freedoms-encroachments-by-commonwealth-laws-alrc-report-129/15-judicial-review/a-common-law-principle-13/.

[183]Victorian Council for Civil Liberties Incorporated v Minister for Immigration and Multicultural Affairs [2001] FCA 1297 (11 September 2001) (Tampa case).

[184]Prime Minister of Australia, MV Tampa—Unauthorised Arrivals, (2001) available at https://parlinfo.aph.gov.au/parlInfo/download/media/pressrel/MFU46/upload_binary/mfu461.pdf;fileType=application%2Fpdf#search=%22media/pressrel/MFU46%22.

[185]Select Committee for An Inquiry, A Certain Maritime Incident, supra note 143, Chapter 1, 3 [1.11].

'rescuees are entitled to be released by the respondents and brought to the Australian mainland.'[186]

Thereafter, the Australian government filed an appeal against the Tampa decision on an urgent basis to the Full Court of the Federal Court. The date of the appeal hearing was 13 September 2001 and the date of judgment was 18 September 2001. The Federal Court in Ruddock v Vadarlis[187] overturned the decision of Justice North within days of his decision. The key issues on this appeal were (French J):

> (1) Whether the executive power of the Commonwealth authorised and supported the expulsion of the rescuees and their detention for that purpose; and,
> (2) If there was no such executive power, whether the rescuees were subject to a restraint attributable to the Commonwealth and amenable to habeas corpus.[188]

The Court was divided on the decision. The majority, Beaumont J and French J, concluded that the Commonwealth acted according to s 61 of the Constitution and there was no violation of law. French J (Beaumont J concurred) deliberated that 'the executive power can be abrogated, modified or regulated by laws of the Commonwealth.'[189] The executive power was expressed in a written Constitution.[190] The executive power covered 'a wide range of matters, some of greater importance than others.' It is connected with national sovereignty.[191] French J further expressed that 'the power to determine who may come into Australia is so central to its sovereignty.'[192] A State has authority to remove aliens from its territory; and 'the way in which the right to expel or to refuse entry is exercised, whether by legislative or executive means, may vary according to the constitutional mechanisms of particular States.'[193]

French J also expressed his view on international refugee law. His Honour opined that Australia has obligations under in-

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[186]Victorian Council for Civil Liberties v Minister for Immigration, supra note 183, para 169.

[187]Ruddock v Vadarlis [2001] FCA 1329.

[188]Ibid., [162].

[189]Ibid., [181].

[190]Ibid., [183].

[191]Ibid., [185].

[192]Ibid., [193].

[193]Ibid., [186].

ternational law by virtue of the 1951 Refugee Convention and the 1967 Protocol. Those treaties were entered into by the executive on behalf of the nation. But they are not part of the domestic law of Australia. His Honour propounded that '[i]n 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 obligations in respect of non-refoulement under the Refugee Convention.'[194]

Chief Justice Black delivered the dissenting verdict in the judgment.[195] In his view, 'as a general principle of law, there is no executive authority, apart from that conferred by statute, to subject anyone in Australia, citizen or noncitizen, to detention.'[196] Black CJ further opined that the executive cannot eject a person from Australia without statutory power. It is doubtful whether that norm applies to unlawful non-citizens.[197] He further asserted that during peacetime, the entry of unlawful non-citizens only originates from statute.[198] In the conclusion of the view of the prerogative power, Black CJ further declared that it is doubtful and uncertain in modern common law whether the executive has the prerogative power to exclude the non-citizens as 'there are no previous modern instances of its exercise.'[199] He further submitted his opinion that even if it was doubtful, if is accepted that executive power may exclude aliens in time of peace, but the question arises as to 'whether s 61 of the Constitution provides some larger source of such a power.'[200] He further observed that the Parliament would decide who would be welcomed and denied in Australia. It would be a 'strange intention' if the executive enjoys a parallel unregulated system.[201] Exclusion, entry and expulsion of aliens should be operated by the Act of Parliament, not by executive power.[202]

Chief Justice Black also opined that under the Refugee Convention, Australia has an obligation to refugees.[203] However,

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[194]Ibid., [203].
[195]Ibid., [90-94].
[196]Ibid., [5].
[197]Ibid., [6].
[198]Ibid., [7].
[199]Ibid., [29].
[200]Ibid., [30].
[201]Ibid., [61].
[202]Ibid., [64].
[203]Ibid., [44].

by the amendment of the *Migration Act 1958*, Australia extends its control to sea borders as the long title of the amendment is 'the entry into, and presence in, Australia of aliens, and the departure or deportation from Australia of aliens.'[204] Moreover, the Nauru/New Zealand arrangements were a 'continuation of control or custody' of the rescued persons by the executive order.[205] Thus, the question arises whether the rescued people are free to go anywhere or whether they are detained.[206] And finally Black CJ supported the trial judge's view and held that the rescued persons were detained by the appellants (executive) and the detention was unlawful.[207]

However, after the ad hoc solution of the *Tampa* incident, the Australian government quickly moved to a 'comprehensive new border protection regime.'[208] On 26 and 27 September, the Australian Parliament passed seven bills (entitled 'Migration Amendment,' 'Migration Legislation Amendment' and 'Border Protection')[209] that created a new statutory framework for controlling asylum seekers, known as the 'Pacific Solution.'[210] Pursuant to the Pacific Solution policy, unauthorised asylum seeker boats or irregular maritime arrivals (IMAs) were intercepted (generally by the Australian Navy) and transferred to offshore processing centres on Nauru and Manus Island in Papua New Guinea.[211] Before that, Nauru and Papua New Guinea had become Australia's offshore processing centres under the legislative

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[204]Ibid., [64].

[205]Ibid., [84].

[206]Ibid., [73].

[207]Ibid., [93].

[208]Select Committee for An Inquiry, A Certain Maritime Incident, supra note 143, at 3 [1.12].

[209]The Acts are: Migration Amendment (Excision from Migration Zone) Act No.127, 2001; Migration Amendment (Excision from Migration Zone) (Consequential Provisions) Act No.128, 2001; Migration Legislation Amendment (Judicial Review) Act No. 134, 2001; Migration Legislation Amendment Act (No. 1) No. 129 2001; Migration Legislation Amendment Act (No. 6) No. 131, 2001; Border Protection (Validation and Enforcement Powers) Act No. 126, 2001; Migration Legislation Amendment Act (No. 5) No. 130, 2001.

[210]Ibid., at 4 [1.18]. See also White, M/V Tampa Incident, supra note 149, at 9; Penelope Mathew, The Tampa Issue, 13(2) Pub. L. Rev. (June 2002): A Review Essay,' 23 Adel. L. Rev. 375, at 376 (2002).

[211]Janet Phillips, The 'Pacific Solution' Revisited: A Statistical Guide to the Asylum Seeker Caseloads on Nauru and Manus Island, (Parliamentary Library, Parliament of Australia, 2012) 1, at 2, available at https://www.aph.gov.au/About_Parliament/Parliamentary_Departments/Parliamentary_Library/pubs/BN/2012-2013/PacificSolution.

framework created by s 198A of the *Migration Act 1958* (Cth). The main purpose of the 'new regime' was that unauthorised boats would not be allowed to land on the soil of Australia. Asylum applications must be submitted through an 'off-shore' procedure.[212] However, prior to this, Australia negotiated with other States in the Pacific region, namely, East Timor, Kiribati, Fiji, Palau, Tuvalu, Tonga and France (in relation to France Polynesia), but could not reach any agreement.[213]

The Pacific Solution involved three phases: first, it declared excised areas of Australia's 'migration zone' in which an asylum seeker was prohibited from bringing legal action against removal for 'unauthorised maritime entry.'[214] Second, refugee boats were transferred to a safe third country for processing of their asylum applications where the asylum seekers were held in detention camps.[215] Third, the government was given wider power to search, detain and intercept any unauthorised boat that attempted to enter into Australia's jurisdiction.[216]

To implement the Pacific Solution, Australia signed an MOU with Nauru[217] and Papua New Guinea.[218] As a consequence, Australia paid and operated the offshore processing centres in Nauru and Papua New Guinea which operate as Australia's immigration detention centres.[219]

In accordance with this policy, Australia substantially shifted its obligations and responsibilities in respect of boat refugees to the detention centres of Nauru and Papua New Guinea through an extraterritorial processing system, with refugees mainly arriving

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[212]Select Committee for An Inquiry, A Certain Maritime Incident, supra note 143, [1.14].

[213]Kneebone, The Pacific Plan, supra note 171, at 708; Phillips, The Pacific Solution Revisited, supra note 211, at 2.

[214]Section 494AA, Migration Act 1958. (Bar on certain legal proceedings relating to unauthorised maritime arrivals).

[215]Section 189, Migration Act 1958 (Detention of unlawful non-citizens).

[216]Kneebone, The Pacific Plan, supra note 171, at 697.

[217]On 10 September 2001, a Statement of Principles and First Administrative Arrangement (FAA) was signed between Australia and Nauru. Subsequently, on 11 December 2001, the Statement of Principles and First Administrative Arrangement was terminated by a Memorandum of Understanding between the Republic of Nauru and the Commonwealth of Australia for Cooperation in the Administration of Asylum Seekers and Related Issues (MOU): Select Committee for An Inquiry, A Certain Maritime Incident, supra note 143, paras [10.26]-[10.36].

[218]Ibid., paras. [10.26]-[10.34].

[219]Ibid., paras. [10.36] and [10.52].

from Indonesia by boat.[220] In fact, this policy was directly influenced by the USA's Caribbean Plan.[221] Moreover, it was a continuation of Australia's denial asylum policy that began during Indo-Chinese boat refugee crisis.[222] Thus, Bernard Ryan notes that:

> Australia's 'Pacific solution' again shows how the desire to avoid international and domestic legal guarantees can lead to extraterritorial immigration control practices. The occasional tow-backs to Indonesia were plainly motivated by the desire to avoid any legal responsibility for asylum seekers and recognised refugees. More importantly, Australia's introduction of extraterritorial processing was designed to avoid rights of access to domestic courts.[223]

The Pacific Solution continued until February 2008. A total of 1,637 people were detained in the Nauru and Manus detention centres between 2001 and 2008.[224]

The Pacific Solution is significant in two respects. First, Australia gave a clear message to the world that unauthorised asylum boats would be intercepted at sea and the refugees never welcomed to settle in Australia. Second, Papua New Guinea and Nauru provided the detention centres and permanent home of the boat refugees, whose ultimate target was to arrive in Australia.[225]

The Pacific Solution was not a 'safe' and 'effective' solution. Under the policy the right of 'illegal entry or presence' of a refugee (Article 31 of Refugee Convention) was denied. Other refugee law obligations were also violated under the policy,[226] particularly the practice of 'push back' and the interdiction of refugee boats to Indonesia, breached the *non-refoulement* principle; moreover, the

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[220]Taylor, The Pacific Solution or A Pacific Nightmare? supra note 181.

[221]See, Stephen Legomsky, The USA and the Caribbean Interdiction Program, 18 In'l. J. Refugee L. 677 (2006).

[222]Susan Kneebone, Controlling Migration by Sea: The Australian Case in Bernard Ryan and Valsamis Mitsilegas (eds), Extraterritorial Immigration Control: Legal Challenges (2010) 347, at 356.

[223]Bernard Ryan, Extraterritorial Immigration Control: What Role for Legal Guarantees? in Bernard Ryan and Valsamis Mitsilegas (ed), Extraterritorial Immigration Control: Legal Challenges (2010) 3, at 30-31.

[224]Phillips, The Pacific Solution Revisited, supra note 211, at 3.

[225]Aulden Warbrooke, Australia's 'Pacific Solution': Issues for the Pacific Islands, 1(2) Asia and the Pacific Policy Studies (2014) 337, at 338.

[226]Article 3 (non-discrimination as to race, religion or country of origin); Article 16 (access to courts) and Article 25 (administrative assistance), 1951 Refugee Convention.

human rights situation in Indonesia was not satisfactory.[227] The Pacific Solution was arguably a policy of arbitrary detention, discrimination, and a violation of human rights and refugee law. Therefore, it has been argued that it is not a 'good model to follow.'[228]

Australia's bilateral agreement with Papua New Guinea was examined in the courts in *Namah v Pato*.[229] Papua New Guinea's opposition leader, Belden Norman Namah, challenged the legality of the offshore 'regional processing' centre of Manus Island (around 300 kilometres off the coast of the main island of Papua New Guinea), where the asylum seekers were detained under the Pacific Solution agreement with Australia. On 26 April 2016, the Supreme Court of PNG in *Namah v Pato*[230] unanimously decided in a panel of five judges that the detention camp on Manus Island, funded by Australia, was unconstitutional according to the *Papua New Guinea Constitution*.[231] The Court ordered that:

> Both the Australian and Papua New Guinea governments shall forthwith take all steps necessary to cease and prevent the continued unconstitutional and illegal detention of the asylum seekers or transferees at the relocation centre on Manus Island and the continued breach of the asylum seekers or transferees Constitutional and human rights.[232]

As a result, Australia's extraterritorial detention and regional processing system in PNG became unlawful by the decision of the Court.[233] However, on the same date, in response to the judgment,

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[227]Kneebone, Controlling Migration by Sea, (n 222) 359; Tara Magner, A Less than "Pacific" Solution for Asylum Seekers in Australia, 16(1) Int'l. J. Refugee L. 53 (2004).

[228]Kneebone, The Pacific Plan, supra note 171, at 720.

[229]Namah v Pato [2016] PGSC 13; SC1497 (26 April 2016), Supreme Court of Papua New Guinea.

[230]Ibid.

[231]In the judgment, the Papua New Guinea Supreme Court held that a person could be arrested and detained by reason of committing a criminal offence. Any detention or arrest outside the scope of Article 42 (Liberty of the person) of the Constitution would be unconstitutional and therefore illegal: Namah v Pato, Ibid., at 13-14 [32-33]. The Constitution of the Independent State of Papua New Guinea came into effect 16 September 1975.

[232]Namah v Pato, Ibid., [74(6)].

[233]Azadeh Dastyari and Maria O'Sullivan, Not for Export: The Failure of Australia's Extraterritorial Processing Regime in Papua New Guinea and the Decision of the PNG Supreme Court in Namah, 42 Monash Univ. L. R. 308, at 313 (2016).

the Home Affairs Minister of Australia stated in a media release that:

> This is a decision of the Supreme Court of Papua New Guinea. Australia was not a party to the legal proceedings. It does not alter Australia's border protection policies—they remain unchanged. No one who attempts to travel to Australia illegally by boat will settle in Australia . . . People who have attempted to come illegally by boat and are now in the Manus facility will not be settled in Australia.[234]

The legality of the detention centre on Manus Island was also challenged under Australian law, with the legislative and executive power of the Australian government tested in *Plaintiff S195/2016 v Minister for Immigration and Border Protection*.[235] The validity of Australia's involvement in the regional processing arrangements was examined by the High Court of Australia. The question to be decided was whether the actions of the Australian government would be invalid under Australian law according to the landmark decision of the PNG Supreme Court in *Namah v Pato*.[236]

The facts of the *Plaintiff S195/2016 Case* were that the plaintiff was an Iranian national, who entered the migration zone at Christmas Island and became an 'unauthorised maritime arrival' within the meaning of the *Migration Act 1958* (Cth).[237] He was taken to Papua New Guinea by Australian officials and sent to the 'regional processing country' under s 198AB(1) of the Act.[238] The plaintiff's refugee application was unsuccessful under PNG law and he was kept in custody.[239] In the meantime, the PNG Supreme Court in *Namah v Pato* held that the detention centre was invalid

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[234]The Hon Peter Dutton MP: Minister for Home Affairs, PNG Supreme Court Judgement, (Media Releases, 26 April 2016), available at https://minister.homeaffairs.gov.au/peterdutton/2016/Pages/png-supreme-court-judgement.aspx.

[235]Plaintiff S195/2016 v Minister for Immigration and Border Protection [2017] HCA 31. (Plaintiff S195/2016 case).

[236]Maria O'Sullivan, The Legality of Manus Island detention under Australian law—The High Court decides in Plaintiff S195, Rights in Exile (2017), available at http://rightsinexile.tumblr.com/post/165949637452/the-legality-of-manus-island-detention-under.

[237]Plaintiff S195/2016 v Minister for Immigration, supra note 230, para 1.

[238]Ibid.

[239]Ibid., para 4.

under the Constitution.[240] Subsequently, influenced by the decision, the plaintiff filed a case in Australia to examine the validity of the MOU and the regional resettlement arrangement with PNG.[241]

The High Court in *Plaintiff S195/2016* unanimously rejected the plaintiff's case, where the plaintiff claimed that the Australian administration could only be exercised outside of Australia—if it is lawful in the applicable foreign State.[242] The decision established that Australia has authority to establish and maintain its offshore immigration detention centre despite the rejection of the Supreme Court of PNG in *Namah v Pato*.[243] The decision exposes the court's inability to restrain government policy that undermines the liberty and human rights of refugees—the rights that are ensured by international legal instruments, and which Australia is committed to ensure.[244]

The judgment has established that even though an Australian citizen enjoys the highest level of access to justice and human rights, the situation is different for the unauthorised boat arrival (due to the mandatory offshore immigration detention established under the domestic law). As a result, there is a clear conflict between the international human rights standard and domestic jurisprudence.[245] In fact, as a signatory State of international refugee law conventions, UNCLOS III and core international human rights conventions,[246] Australia has an obligation to ensure

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[240]Namah v Pato, supra note 229.

[241]Plaintiff S195/2016 v Minister for Immigration, supra note 235, paras 5–8.

[242]Ibid., para 29.

[243]Amy Maguire, Case Comment: Plaintiff S195/2016 v Minister for Immigration and Border Protection [2017] HCA 31 (17 August 2017), 4 UNSW L. J. For. 1, at 1 (2017).

[244]Ibid., at 11.

[245]Ibid., at 12.

[246]Australia is a party to the seven core international human rights treaties: International Covenant on Civil and Political Rights (ICCPR); International Covenant on Economic, Social and Cultural Rights (ICESCR); International Convention on the Elimination of All Forms of Racial Discrimination (ICERD); Convention on the Elimination of All Forms of Discrimination against Women (CEDAW); Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT); Convention on the Rights of the Child (CRC); Convention on the Rights of Persons with Disabilities (CRPD). Moreover, the Human Rights (Parliamentary Scrutiny) Act 2011, No. 186, 2011 also adopted in Australia to monitor the country's obligations under these treaties. See Attorney General's Department, Government of Australia, International Human Rights System <https://www.ag.gov.au/RightsAndProtections/HumanRights/Pages/International-Human-Rights-System.aspx>.

the rights of refugee and asylum seekers. The UN Working Group on Arbitrary Detention has observed Australia's refugee law and policy and criticised it for being in breach of international human rights law.[247]

On 31 October 2017, Australia's offshore immigration detention camp in Manus Island (also known as 'Australia's Guantanamo') was closed according to the court order of the PNG Supreme Court, and 600 detainees were forced to shift to other places.[248]

In *Plaintiff M68-2015 v Minister for Immigration and Border Protection*, the regional processing detention camp of Nauru was also challenged in the High Court of Australia where the plaintiff filed a prohibitory injunction, *inter alia*, on the ground that the offshore detention centre in Nauru was illegal. The High Court dismissed the case by majority decision (6:1) and held that s 198AHA of the *Migration Act 1958* empowers the government to run the regional processing centre.[249]

Apart from the Pacific Solution policy, Australia established bilateral arrangements with regional States to manage boat refugees. The next part of this research focuses on these arrangements.

VII
BILATERAL AGREEMENTS WITH REGIONAL COUNTRIES

A. Australia and Cambodia

In 2014 the Australian government faced political pressure in relation to relocating boat people to PNG and Nauru.[250] The two countries expressed that they would accept some of the asylum

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[247]Helen Davidson and Saba Vasefi, UN Body Says Australia Breached Human Rights Laws and Needs to Review Migration Act, The Guardian (online, 16 October 2018), available at https://www.theguardian.com/ australia-news/2018/oct/16/un-body-says-australia-breached-human-rights-laws-and-needs-to-review-migration-act.

[248]Why is the Manus Detention Centre being Closed?, Al Jazeera (online, 30 October 2017), available at https://www.aljazeera.com/news/2017/10/manus-detention-centre-closed-171024212852806.html.

[249]Plaintiff M68-2015 v Minister for Immigration and Border Protection [2016] HCA 1 (Plaintiff M68-2015 case).

[250]Madeline Gleeson, The Australia-Cambodia Refugee Relocation Agreement is Unique, but does Little to Improve Protection, Migration Policy Institute (2016), available at https://www.migrationpolicy.org/article/australia-cambodia-refugee-relocation-agreement-unique-does-little-improve-protection.

seekers from Australia, but were not prepared to accept all of them.[251] In response, Australia searched for an alternative country other than PNG and Nauru to which it could transfer the asylum seekers.[252] Finally on 26 September 2014, Australia and the Kingdom of Cambodia (Cambodia) signed a memorandum of understanding (MOU) relating to the settlement of refugees in Cambodia, along with related Operational Guidelines.[253] Under the MOU, the asylum seekers who had originally tried to reach Australia by boat but were subsequently transferred to Nauru under the Pacific Solution, would be resettled in Cambodia on the basis of permanent settlement.[254] The permanent settlement would only be applicable to persons who were already recognised as refugees in Nauru and voluntarily accepted in writing the option of resettlement in Cambodia.[255]

The Cambodian government signed the resettlement agreement with Australia to accept the asylum seekers in exchange for money.[256] According to the agreement, Australia would bear the direct cost of the agreement, which included assisting Cambodia in establishing appropriate arrangements for the refugees to re-establish their lives, including health insurance and temporary accommodation.[257] Australia would also be responsible for the cost of the travel of Cambodian officials to the Republic of Nauru to provide information on the living conditions, customs, traditions, culture and religion of Cambodia to the refugees who might be settled.[258]

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[251]Ibid.

[252]Asylum Insight: Facts and Analysis, Cambodia Resettlement Deal (2018), available at https://www.asyluminsight.com/cambodiadeal#.XKSDPFUzbIW.

[253]Memorandum of Understanding between the Government of the Kingdom of Cambodia and the Government of Australia, Relating to the Settlement of Refugees in Cambodia (26 September 2014), available at <https://dfat.gov.au/international-relations/themes/people-smuggling-trafficking/Documents/cambodia-australia-mou-and-operational-guidelines.pdf >.

[254]Ibid., MOU, Article 4.

[255]Ibid.

[256]As a part of the Cambodian deal, Australia agreed to pay $40 million for various development projects and $15 million for the resettlement costs. On top of that Australia gave $79 million in aid to Cambodia. Australia and Cambodia Sign Refugee Resettlement Deal, BBC (online, 26 September 2014), available at https://www.bbc.com/news/world-asia-29373198.

[257]MOU between Australia and Cambodia, supra note 253, Articles 10–12.

[258]Ibid., MOU, Operational Guidelines, Article 4.

The MOU between Cambodia and Australia stated that the objective of the agreement was to 'expand protection opportunities and durable solutions for Refugees in the Asia-Pacific region'[259] and to 'demonstrate the importance of regional cooperation on Refugees' settlement in accordance with the Refugees Convention.'[260] However, human rights groups, especially Human Rights Watch, pointed out that Cambodia had a poor human rights record.[261] It was unclear how the rights of refugees would be guaranteed in Cambodia. Moreover, the actual purpose of the MOU was not 'responsibility-sharing' between the parties, but rather to shift Australia's responsibility for boat refugees to other countries.[262] The UNHCR expressed its serious concern about the Australia-Cambodia agreement on the relocation of the refugees. It maintained that this practice of relocation of refugees 'could set worrying precedent.'[263] António Guterres, the UN High Commissioner for Refugees, remarked that 'this is a worrying departure from international norms . . . It's crucial that countries do not shift their refugee responsibilities elsewhere.'[264] This was not the 'global refugee system' of 'international responsibility sharing.'[265]

In fact, the Australia-Cambodia agreement violates the spirit of international refugee law, especially the *non-refoulement* principle (Article 33) of the 1951 Refugee Convention, as well as the 'international co-operation' and 'burden-sharing' commitments set forth in the Preamble to the Convention. Cambodia was not the destination country for the boat refugees. Their targeted land was Australia. However, under the agreement with Cambodia, Australia provided a direct financial contribution to Cambodia of A$55.5

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[259]MOU between Australia and Cambodia, supra note 253, Article 2a.

[260]Ibid., Article 2c.

[261]Asylum Insight: Facts and Analysis, Cambodia Resettlement Deal, supra note 252; Human Rights Watch, Colombia Events of 2017, available at https://www.hrw.org/world-report/2018/country-chapters/colombia#304ce9. According to Human Rights Watch, 'The ruling Cambodian People's Party maintains power through violence, politically motivated prosecutions, repressive laws, and corruption.'

[262]Kaldor Centre for International Refugee Law, The Australia-Cambodia Refugee Deal (2018) 1, at 11, available at https://www.kaldorcentre.unsw.edu.au/sites/default/files/Research%20Brief_Cambodia_ Aug2018.pdf.

[263]UNHCR, UNHCR Warns Australia-Cambodia Agreement on Refugee Relocation Could Set Worrying' Precedent (2014), available at https://www.unhcr.org/5425570c9.html.

[264]Ibid.

[265]Ibid.

million for the refugee arrangement and in return Cambodia agreed to accept the refugees.[266] The 'true burden-sharing' of refugee protection does not shift by monetary agreement. Other actors need to be involved as well, such as the UNHCR, and the human rights situation and domestic refugee protection system of the receiving country need to be assessed. [267]After considering the evidence, this study contends that the Australia-Cambodia deal not only ignores international refugee law, but also indicates a gap in the protection regime, where a State's obligations to refugees has been transferred to another country through direct financial dealing.

The MOU was concluded initially for four years.[268] Only seven asylum seekers resettled to Cambodia under the deal. The agreement expired on 26 September 2018. The Australian government has not yet declared any plan to continue the deal.[269] The arrangement faced severe criticism. It was described as 'collapsed'[270] and a 'ridiculous' plan that cost just over A$55 million.[271]

Apart from the Australia-Cambodia refugee agreement, Australia also made an agreement with Malaysia to shift its responsibility for refugees to that country.

B. Australia and Malaysia

On 25 July 2011, the governments of Australia and Malaysia signed a bilateral agreement for the transfer and resettlement of

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[266]Kaldor Centre for International Refugee Law, Australia-Cambodia Agreement for Refugees in Nauru (2019), available at https://www.kaldorcentre.unsw.edu.au/publication/cambodia-and-refugee-protection.

[267]Monique Failla, Outsourcing Obligations to Developing Nations: Australia's Refugee Agreement with Cambodia, 42 Monash Univ. L. Rev. 638, at 683-684 (2016).

[268]Article 17, MOU between Australia and Cambodia. Article 17 states: 'This MOU will come into effect on the date of signature by both Participants and will remain in effect for an initial period of four years.'

[269]Asylum Insight: Facts and Analysis, Cambodia Resettlement Deal, supra note 252.

[270]Failla, supra note 267, at 683.

[271]David Boyle, Australia's Cambodia Refugee Deal is Dead, VOA News (online, 1 November 2018), available at https://www.voanews.com/a/australia-s-cambodia-refugee-deal-is-dead/4638263.html.

asylum seekers between the two countries.[272] The Operational Guidelines to Support Transfers and Resettlement (Operational Guidelines) were also issued.[273] The asylum seekers would be transferred from Australia to Malaysia under sub-s 198A(3) of the Migration Act 1958 (Cth).[274] During the negotiation process of the agreement the International Organization for Migration (IOM) and the Office of the UNHCR were also involved.[275] The bilateral agreement was achieved under the Regional Cooperation Framework of the Bali Process.[276]

Under the agreement, Australia would transfer a maximum of 800 asylum seekers to Malaysia.[277] In response, Australia agreed to resettle 4000 recognised refugees from Malaysia.[278] The agreement was effective for four years from the date of signature.[279] It applied to the asylum seekers who had arrived irregularly by sea in Australia or been intercepted at sea by the Australian authorities in the course of attempting to reach Australia.[280] The Australian government agreed to bear all the costs[281] and Malaysia agreed to provide all required assistance for the disembarkation and transfer of transferees.[282] The agreement

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[272]Arrangement Between the Government of Australia and the Government of Malaysia on Transfer and Resettlement, 25 July 2011, available at https://www.kaldorcentre.unsw.edu.au/sites/default/files/arrangement-australia-malaysia-transfer-resettlement.pdf. Julia Gillard, Australia and Malaysia Sign Transfer Deal, (Media Release, Department of Prime Minister and Government, Australia Government, Transcript ID: 18033, 25 July 2011), available at http://pmtranscripts.pmc.gov.au/release/transcript-18033.

[273]Operational Guidelines to Support Transfers and Resettlement (Operational Guidelines), available at https://www.kaldorcentre.unsw.edu.au/sites/default/files/australia-malaysia-operational-guidelines.pdf.

[274]Australian Human Rights Commission, Inquiry into Australia's Agreement with Malaysia in relation to Asylum Seekers, (2011), at 3 [5], available at https://www.humanrights.gov.au/sites/default/files/content/legal/submissions/2011/20110914_asylum_seekers.pdf.

[275]Harriet Spink, Australia-Malaysia Asylum Seeker Transfer Agreement (Parliamentary Library, Parliament of Australia, 2011), available at https://www.aph.gov.au/About_Parliament/Parliamentary_Departments/Parliamentary_Library/FlagPost/2011/July/Australia-Malaysia_asylum_seeker_transfer_agreement.

[276]Preamble, Arrangement Between the Government of Australia and the Government of Malaysia.

[277]Ibid., Clause 4 (Transfers to Malaysia) and Clause 7 (Agreed Numbers).

[278]Ibid., Clause 5 (Resettlement to Australia) and Clause 7 (Agreed Numbers).

[279]Ibid., Clause 19 (Effective Date, Termination and Amendment).

[280]Ibid., Clause 4.

[281]Ibid., Clause 9.

[282]Ibid., Clause 10.

would be performed according to the countries' respective international obligations.[283] The agreement provided that:

> Operations under this Arrangement will be carried out in accordance with the domestic laws, rules, regulations and national policies from time to time in force in each country and in accordance with the Participants' respective obligations under international law.[284]

However, the Australia-Malaysia agreement put into question Australia's obligations under international and domestic law.[285] In Plaintiff M70/2011 v Minister for Immigration and Citizenship (Malaysian Solution Case), the validity of the agreement was examined by the High Court of Australia.[286] The plaintiff filed proceedings against their transfer from Australia to Malaysia. The key question was whether Australia, as a Refugee Convention signatory party, could involve a party that is not a party to the Convention (i.e. Malaysia) that had no domestic law for refugees; in other words, Malaysia had no obligations under international law or domestic law.[287] The Full Bench of the High Court, by majority (6:1; Heydon J dissenting) declared a permanent injunction on the Australia-Malaysia agreement.[288] The Court ruled that the Minister cannot sign an agreement for refugee resettlement with a country unless that country has international legal obligations or its domestic law ensures effective procedures for refugee protection.[289]

In Plaintiff M70/2011 the High Court severely criticised Australia's non-compliance with the non-refoulement obligation of

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[283]Ibid., Clause 1(3).

[284]Ibid., Clause 12.

[285]Michelle Foster, The Implications of the Failed "Malaysian Solution:" The Australian High Court and Refugee Responsibility Sharing at International Law, 13(1) Melb. J. Int'l. L. 1 (2012).

[286]Plaintiff M70/2011 v Minister for Immigration and Citizenship; Plaintiff M106/2011 v Minister for Immigration and Citizenship [2011] HCA 32.

[287]Foster, supra note 285, at 11-12.

[288]Plaintiff M70/2011, supra note 286, paras [68-69], [137-148], [258-259].

[289]High Court of Australia, Judgment Summary: Plaintiff M70/2011 v Minister For Immigration And Citizenship, (31 August 2011), available at http://www.hcourt.gov.au/assets/publications/judgment-summaries/2011/hca32-2011-08-31.pdf.; Naomi Hart, Case Notes: Plaintiff M70/2011 v Minister for Immigration and Citizenship; Plaintiff M106/2011 v Minister for Immigration and Citizenship [2011] HCA 32 (31 August 2011), 18 Aus. Int'l. L. J. 207 (2011).

Article 33(1) of the Refugee Convention. The judgment particularly noted Australia's various extraterritorial systems against refugees.[290] Kiefel J pointed out that 'The mechanisms chosen in Australia have varied from time to time.'[291] However, the obligation under the Refugee Convention does not have any automatic status under Australian domestic law.[292] The Court also remarked that 'No such obligations, of non-refoulement or to determine a claim to refugee status, are expressly stated in the Migration Act.'[293] The Plaintiff M70/2011 Case is a milestone against Australia's bilateral refugee transfer agreements. Sasha Lowes observes that the decision is 'an important victory for asylum seekers.'[294] In fact, with its Plaintiff M70/2011 decision, the High Court reminded Australia that it needs to respect the international commitments to which it has agreed.

C. Australia and the USA

Australia's regional refugee processing centre on Nauru Island off Papua New Guinea (PNG) was closed by the decision of the PNG Supreme Court on the grounds of unconstitutionality. Thereafter, Australia tried to find a new destination to transfer boat arrivals.[295] In November 2016, U.S. President Obama agreed to resettle up to 1,250 refugees from Nauru to the USA.[296] The USA did not ratify the 1951 Refugee Convention but had ratified the 1967 Protocol to the Convention, which expressly mentions the application of the provisions of the Refugee Convention.[297] So even though the USA was not a signatory to the 1951 Refugee

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[290]Sasha Lowes, The Legality of Extraterritorial Processing of Asylum Claims: The Judgment of the High Court of Australia in the "Malaysian Solution" Case, 12(1) Human Rights L. Rev. 168, at 180 (2012).

[291]Plaintiff M70/2011 case, supra note 286, para 217.

[292]Ibid., para 218.

[293]Ibid.

[294]Lowes, supra note 290, at 182.

[295]Amnesty International, Australian Government Takes Extreme Step in Shirking Responsibility (2016), available at https://www.amnesty.org.au/australia-usa-refugee-deal/.

[296]Asylum Insight: Fact and Analysis, United States Resettlement Deal (2017), available at https://www.asyluminsight.com/united-states-resettlement-of-refugees-on-nauru-and-manus island#.XKuELdIzZdj.

[297]Article 1 of the 1967 Protocol provides that The States Parties to the Protocol undertake to apply articles 2 to 34 inclusive of the [1951 Refugee] Convention to refugees.

Convention, under the 1967 Protocol it is obliged to ensure refugee protection.[298]

The Australia-USA agreement was agreed at the executive level,[299] but did not involve Congressional approval. No detailed information is available on the agreement.[300] In 2017, the first 54 refugees were transferred from Nauru and resettled in the USA,[301] and in January 2018 58 refugees departed for the USA.[302] However, President Donald Trump, the current U.S. President, does not support the bilateral agreement. Already he has labelled his predecessor's agreement as a 'dumb deal.'[303] At present, the USA is not interested in resettling refugees from Nauru.[304] Therefore, it

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[298]Kaldor Centre, Factsheet: The 1967 Protocol (2018), at 1, available at https://www.kaldorcentre.unsw.edu.au/sites/default/files/Factsheet_1967%20Protocol_Sep2018.pdf.

[299]Paul Karp, Australia's Deal to Resettle Refugees in the US: What We Know so far, The Guardian (online, 13 November 2016), available at https://www.theguardian.com/australia-news/2016/nov/13/australias-deal-to-resettle-refugees-in-the-us-what-we-know-so.

[300]Kaldor Centre, Factsheet: Australia—United States Resettlement Arrangement (2018) at 1, available at <https://www.kaldorcentre.unsw.edu.au/sites/default/files/Factsheet_Australia-US%20resettlement%20deal_24%20March%202020..pdf>; Stephanie Anderson, Malcolm Turnbull Silent On When Processing Will Begin For US Refugee Resettlement Deal, ABC News (online, 30 January 2017), available at https://www.abc.net.au/news/2017-01-30/no-timeline-for-refugee-resettlement-deal-with-us/8223838; Ann Deslandes, The Deafening Silence Around The Australia-US Refugee Deal, TRT World (online, 2 August 2018), available at https://www.trtworld.com/magazine/the-deafening-silence-around-the-australia-us-refugee-deal-19326.

[301]Ibid., Kaldor Centre, at 2; Michael Koziol, US to Accept 54 Refugees from Manus Island and Nauru in first intake, The Sydney Morning Herald (online, 20 September 2017), available at https://www.smh.com.au/ politics/federal/us-to-accept-54-refugees-from-manus-island-and-nauru-in-first-intake-20170920-gykw7o.html.

[302]Ibid., Kaldor Centre; Damien Cave, Why the U.S. is Taking 58 Refugees in a Deal Trump Called "Dumb", The New York Times (online, 23 January 2018), available at <https://www.nytimes.com/2018/01/23/world/australia/manus-refugees-trump.html>.

[303]Claire Phipps, Trump Rages At "Dumb Deal" With Australia Over Refugee Resettlement—As It Happened, The Guardian (online, 6 July 2018), available at <https://www.theguardian.com/australia-news/live/2017/feb/02/donald-trump-dumb-deal-australia-refugee-resettlement-live>; Kevin Lui, Trump Called a U.S.-Australia Refugee Swap "Dumb" But the First Refugees Will Soon Arrive in the U.S., Time (online, 20 September 2017), available at <http://time.com/4949330/australia-us-refugee-swap-deal/>.

[304]A leaked transcript of a telephone conversation in late January 2017 between Australian Prime Minister Malcolm Turnbull and Donald Trump indicates that the USA

is unclear whether the Trump Administration will continue the agreement with Australia in relation to the boat refugees.[305]

In sum, Australia has adopted various mechanisms to deter the arrival of boat refugees into its main land that included the Pacific Solution and bilateral agreements with other States for extraterritorial refugee processing arrangement. Under the Pacific Solution, Australia excluded some of its land (island) from the migration zone; thus, even if a boat refugee physically presents/arrives in Australia's soil, the refugees cannot claim the legal protection from the areas. Moreover, the boat refugees are relocated to other countries to deal with their asylum claim, and are detained in detention camps in those countries. Even though Australia's extraterritorial refugee processing systems were challenged in the domestic courts on several occasions, in the *Plaintiff S195/2016* and *Plaintiff M68-2015* cases the highest court of Australia approved the government's offshore asylum processing and detention procedure. As a result, Australia avoided its international commitment to refugee protection by domestic jurisprudence, which indicates that there is a gap in international refugee law. In addition, by sending the boat refugees to the other States Australia not only disrespects the *non-refoulement* principle but also ignores the international refugee protection commitment.

VIII
EVALUATION OF BOAT REFUGEE POLICY OF AUSTRALIA

Australia is a party to international refugee instruments and by agreeing to these conventions, Australia has demonstrated generosity and humanitarianism toward refugees. However, the exception is the 'boat refugee' issue. This paper focused on the

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is not interested to resettle 'any' of the refugees from Nauru. U.S. President Trump does not want the USA to be a 'dumping ground.' Greg Miller, Julie Vitkovskaya and Reuben Fischer-Baum, "This Deal Will Make Me Look Terrible": Full Transcripts of Trump's Calls With Mexico And Australia, The Washington Post (online, 3 August 2017), available at https://www.washingtonpost.com/graphics/2017/politics/australia-mexico-transcripts/?utm_term=.79687e0f6ff6.

[305]Emma Larking, Controlling Irregular Migration in the Asia-Pacific: Is Australia Acting against its Own Interests?, 4(1) Asia and the Pacific Policy Studies (2017) 85, at 93; Colin Packham and Yeganeh Torbati, Exclusive: Australia-U.S. Refugee Swap Again In Doubt As Officials Exit Nauru, Reuters (online, 15 July 2017), available at www.reuters.com/article/us-usa-trump-australia-exclusive-idUSKBN1A00EG.

various policies and laws to deter the boat refugees which Australia has adopted.[306] By using the shortcomings of international law, and because there is no refugee determination procedure as per the 1951 Convention and the 1967 Protocol and no clear guidelines in the refugee law about the disembarkation of refugees, Australia was able to adopt a policy of interdiction at sea. During the Tampa incident, the Australian government swiftly and harshly changed its refugee policy with the intention of not allowing a single rescued person on Australian land. Moreover, Australia uses its regional supremacy and shifts its refugee obligations to nearby poor and undeveloped States (Nauru and Papua New Guinea) in the name of a regional arrangement for refugee protection. Australia claims that it is respecting the spirit of the 'Bali Process' by developing regional cooperation arrangements on refugee protection.[307] However, in fact, there is no 'burden sharing' agreement; rather Australian regional arrangements indicate 'burden shifting.'[308] Moreover, if refugees attempt to reach Australia by boat, they are sent to the mandatory detention centres of regional States in the name of the Pacific Solution, which is against the spirit of international commitment. Therefore, Australia's refugee policy should not be a model for rest of the world.[309] In fact, Australia's laws and practices toward the boat refugees has pointed out the gaps of international law, and Australia has transformed those gaps into its of domestic law.

According to a new report (2019), due to Australia's tough interdiction policy at sea, since 2015 no refugee boats/undocumented migrant boats have managed to arrive in Australia's territory. On the other hand, the Labor party (the opposition party) alleged that at the moment around 80 people are arriving daily by air in Australia and claiming protection visas—

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[306]See also, Mary Crock, Shadow Plays, Shifting Sands and International Refugee Law: Convergences in the Asia-Pacific, 63(2) Int'l. & Comp. L. Quar. 247 (2014).

[307]The Bali Process is a forum of 45 states and 4 organisations including the United Nations High Commissioner for Refugees (UNHCR), the International Organization for Migration (IOM). The Bali Process is co-chaired by Indonesia and Australia. In 2002 the Bali Process forum was established to support and strengthen practical cooperation on refugee protection and to raise regional awareness on international migration, including human trafficking and smuggling, and other components of migration management in the region. The Bali Process <https://www.baliprocess.net/>.

[308]Taylor, The Pacific Solution or A Pacific Nightmare?, supra note 181; Crock, Shadow Plays, Shifting Sands and International Refugee Law, supra note 306.

[309]John Minns, Kieran Bradley and Fabricio H. Chagas-Bastos, Australia's Refugee Policy: Not a Model for the World, 55(1) International Studies (2018) 1.

they are labelled 'the new 'boat people.' From 2014-2015 to August 2019, almost 100,000 people who arrived by plane in Australia applied for refugee protection. But the government did not focus on this new type of refugee flow; rather it always put the 'boat refugee' issue on their political agenda.[310] Asylum seekers by boat are being used as a 'political wedge.' Thus, it has been noted that 'government policy in this area is not being driven by national security concerns, but rather by a desire to continue using refugees as a political wedge.'[311] Research data shows that in 2014-15, a total of 8587 applications for protection visas were lodged by people who arrived by plane in Australia, and 9554 applications in 2015-16. The numbers of plane arrival refugees doubled in 2016-17 to 18,290 and increased again to 27,931 in 2017-18. On the other hand, in 2012-13, at the peak time of boat arrivals, a total of 18,365 applications were lodged by the boat refugees in Australia.[312] In this regard Labor's immigration spokesman, Shayne Neumann, alleged that the Minister for Home Affairs 'Peter Dutton's record-breaking number of onshore asylum claims cannot go unexplained and he can't wash his hands of his poor track record.'[313] Shayne

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[310]Jack Snape, The New 'Boat People'? How Labor's Focus on Air Arrivals Only Hints at New Immigration Challenge, ABC News (online, 9 October 2019), available at https://www.abc.net.au/news/2019-10-09/labor-concered-at-asylum-seeker-numbers-arriving-by-plane/11581494; Matt Martino, Chart of the Day: What Does it Mean When the Government Says the Boats Have Stopped?, ABC News (online, 31 August 2018), available at https://www.abc.net.au/news/2018-08-31/chart-of-the-day-asylum-seeker-boat-turnbacks/10061754; Kelsey Munro Alex Oliver, Polls Apart: How Australian Views Have Changed on "Boat People", Lowy Institute (online, 19 February 2019), available at https://www.lowyinstitute.org/the-interpreter/polls-apart-how-australian-views-have-changed-on-boat-people; David Crowe, Australia on Track for New Annual Record for Asylum Seekers Arriving by Air, The Sydney Morning Herald (online, 8 October, 2019), available at https://www.smh.com.au/politics/ federal/australia-on-track-for-new-annual-record-for-asylum-seekers-arriving-by-air-20191007-p52yfs.html.

[311]Mary Crock and Daniel Ghezelbash, It's High Time We Stopped Playing Politics with Migration Laws, ABC News (online, 14 February 2019), available at https://www.abc.net.au/news/2019-02-14/politicisation-of-refugees-stop-playing-politics-with-migration/10808394.

[312]Gareth Hutchens and Sarah Martin, More Asylum Seekers Come to Australia by Plane Than Boat, The West Australian (online, 18 February 2019), available at https://thewest.com.au/politics/federal-politics/more-asylum-seekers-come-to-australia-by-plane-than-boat-ng-b881108447z.

[313]Ibid.

Neumann also claimed that 'the government has taken its eye off the skies due to its obsession with boat arrivals.'[314]

Another report noted that in 2008 a total of 4768 'plane people' arrived by aircraft in Australia as legitimate tourists, business and other visas holders, whereas only 161 people arrived by boat during the same period, which is around 96 per cent less than the 'plane people.' Moreover, the plane people are much less likely than boat people to be genuine refugees, with only about 40-60 per cent granted protection visas, compared with 85-90 per cent of boat people who are found to be genuine refugees.[315] In this context, Professor Mary Crock, an Australian migration law expert, remarked that the boat people issue is 'old politics' in Australia which is 'politicians' expedient obsession.'[316] She also added that in general, a small number of boat refugees arrive in Australia where nearly all are 'genuine refugees.'[317]

The Refugee Council of Australia further suggests that asylum seekers are forced to flee; thus, it is not always possible to obtain travel documents or travel through authorised channels. According to the 1951 Refugee Convention, refugees have a lawful right to enter a country for the purposes of seeking asylum, regardless of whether they hold valid travel or identity documents (Article 31). Consequently, refugees who arrive in Australia by boat are not acting illegally according to the Australia's commitment of the Convention.[318]

Finally, this paper suggests that as a signatory State of the international refugee law, it is a legitimate expectation that Australia should act according to its international commitment toward refugee protection. Otherwise, deterrence polices and ignorance tactics toward boat refugees violate Australia's international commitments and are an unlawful act in international law.

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[314]Australian Associated Press, More Asylum Seekers Come by Air: Keneally, The Canberra Times (online, 4 June 2019), available at https://www.canberratimes.com.au/story/6200257/more-asylum-seekers-come-by-air-keneally/?cs=14231#gsc.tab=0.

[315]Claire Harvey, Asylum-Seekers Arrive by Plane, Not Boat, The Sunday Telegraph (online, 25 October 2009), available at https://www.dailytelegraph.com.au/news/national/asylum-seekers-arrive-by-plane-not-boat/news-story/c8d8c5186aaecc05915c285a02e00085.

[316]Ibid.

[317]Ibid.

[318]Refugee Council of Australia, People Who Come by Boat (2019), available at https://www.refugeecouncil.org.au/boat-arrivals/.

IX
CONCLUSION

Australia is a signatory State to the 1951 Refugee Convention and 1967 Protocol - which represents a positive approach to the international commitment on refugee protection. In the past, Australia showed its welcome policy to the Vietnamese boat people. It also developed its domestic law (*Migration Act 1958* (Cht)) to ensure fair migration procedure. However, since 2001, Australia has demonstrated a restrictive view toward boat refugees. By adopting Operation Relex, Operation Sovereign Borders, the Pacific Solution and the *Maritime Act 2013,* Australia has empowered its enforcement agencies to tow refugee boats from its territorial zone back to the country of origin. Australia has identified the gaps in international refugee law and operates within those gaps. Australia sends undocumented boat people to a 'safe country' and concludes bilateral agreements to achieve this.

Australia has also shifted its international commitment on refugees to other States through the Regional Cooperation Framework and the refugee resettlement program. Australia continues its negative attitude toward boat refugees by sending them to offshore detention centres in the name of a durable solution for the refugee problem. The *Tampa* affair reflects Australia's harsh policy on boat refugees. Although on several occasions Australian boat refugee policy has been challenged in the Australian courts, unfortunately on every occasion the court supported the government policy and interpreted the refugee law from a narrow point of view (with the exception of the *Malaysia Solution case*). Therefore, under present law and policy, protection of boat refugees is a challenging issue in Australia where international obligations are overshadowed by domestic law and policy, and this jeopardizes the international commitment and influences other States to take similar 'strict' measures toward the boat refugees. As a result, the refugee protection regime is pushed back up against the cliff.