THE “SAFE THIRD COUNTRY” APPROACH vs. THE NOTION OF NON-REFOULMENT IN INTERNATIONAL LAW: A CRITICAL EXAMINATION OF AUSTRALIAN LAW AND POLICY

By

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A Thesis submitted in total fulfillment of the requirements of the degree of

Doctor of Philosophy

January 2011

SCHOOL OF LAW
University of Western Sydney

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The “Safe Third Country” Approach vs. the Notion of Non-Refoulement in International Law: A Critical Examination of Australian Law and Policy
Ph.D Thesis by Shamser S Thapa, dedicated

To

My Late mother Yuddha Kumari Thapa
Acknowledgment

To my family and friends, I wish to express my eternal gratitude for your encouragement, support, and patience throughout this arduous undertaking. To all my professional colleagues at Simon Diab & Associates, thank you for your sustained encouragement. Finally, to my academic supervisors, Prof. Carolyn Sappideen, Dr Michael Head and Dr. Montserrat Gorina-Ysern and other academics and staff of the School of Law at the University of Western Sydney, thank you for your learned guidance, without which this thesis would have remained a hypothesis.
Statement of Authentication

I certify that the work in this thesis has not been previously submitted for a degree nor has it been submitted as part of requirements for a degree except as fully acknowledged within the text.

I also certify that the thesis has been written by me. Any help I have received in my research work and in the preparation of this thesis itself has been acknowledged. In addition, I certify that all the information sources and literature used are indicated in this thesis.

[Signature]

Shamser Singh Thapa

04 January 2011
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<td>Temporary Protection Visa</td>
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<td>UDHR</td>
<td>Universal Declaration of Human Rights</td>
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<td>UK</td>
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<td>USSR</td>
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Abstract

The notion of refugee was born immediately after World War I, so as to protect and promote human rights. After the adoption of the Convention Relating to the Status of the Refugees, however, much has changed in the world. Although the number of signatories is increasing, the Convention remains the same. Each country now appears to have erected barriers to prevent refugees from entering their territory and one of the much debated substantiations for so doing is the “safe third country” approach.

This thesis will focus on the “safe third country” and “effective protection” principle which some see as a breach of Article 33 of the Convention known as “refoulment” and closely examines the law and policy in Australia, and makes some international comparisons.

It also examines the doctrine of effective protection as interpreted by the Australian Courts and considers whether it breaches Australia’s Refugee Convention obligations, and analyzes two major cases, that of Minister for Immigration & Multicultural Affairs v Thiyagarajah¹ and NAGV and NAGW of 2002 v Minister for Immigration & Multicultural & Indigenous Affairs².

This thesis examines statutory effective protection as comprised in ss 36(3)–(7) of the Migration Act and discusses Australia’s attempted justification of “safe third country” provisions.

¹ (1997) 80 FCR 543 (hereinafter referred to as “Thiyagarajah”).
² (2005) 222 CLR 161.
This thesis argues that the criteria for returning refugees to ‘safe third countries’ should not be determined solely by one Country without having proper agreement with the proposed “safe third country”. In constructing these criteria, this thesis argues that Australia cannot send any refugee to another country in the name of the “safe third country” principle if there is a risk, whether knowingly or inadvertently, that the latter will violate rights which Australia itself is obligated to respect. This thesis also recommends requirements for the return of refugees to third countries, a list of minimum requirements of international law and a list of recommended best practice criteria.

The underlying theoretical framework of this thesis has thus become a bilateral agreement with the “safe third country”, with monitoring arrangements by the International Humanitarian Organizations, such as, UNHCR, for co-operation. It is a strong argument of this thesis that without any existing agreement, the safe third country principle can not guarantee non-refoulment.

This thesis attempts to provide the solution to breach of the non-refoulment principle by promoting the “agreement” concept through which Australia can assist refugees and comply with Article 33 of 1951 Refugee Convention and Protocol. The theory would also play a role to establish and promote cooperation between people on a government level and on a non-governmental level so that there will be a reasonably appropriate understanding within Australia of the plight of refugees. Further, “agreements” are essential for governments to maintain the reputation of Australia as a nation within the international community that respects refugees and human rights.
Chapter One

‘Too often the voice of the refugee has not been sought out, and if raised, has not been heard’

- Guy Goodwin-Gill

Introduction

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2 Jack Straw, then Home Secretary of the United Kingdom, ‘Towards a Common Asylum Procedure’
1.1 Background

The refugee problem is as old as civilization itself although its recognition in international law is of relatively recent origin. Nazi German human rights atrocities during the World War II were a prime catalyst for the development of international human rights law. The gross violations of human rights perpetrated during World War II saw human rights brought to the forefront of the international community’s agenda. Mass displacement of people from their home countries due to human rights violations by governments was a condition in which the international community would not turn a blind eye. In order to offer protection and rescue from such inhuman condition, the term “refugee” was coined. It evolved as a specific branch of international law after World War I as it was necessary to tackle the mass displacement of populations, particularly in Europe.  

In 1951 the international treaty on the refugee was born. Embracing the needs of that time, the Convention relating to the Status of Refugees emerged as a legal framework for providing protection to people at risk of persecution in their home countries. The Refugee Convention’s primary focus was on persecution.

The Refugee Convention was adopted by a Conference of Plenipotentiaries of the United Nations on 28 July 1951, and entered in force on 22 April 1954. It defined a refugee as a person who:

As a result of events occurring before 1 January 1951 and 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

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a result of such events, is unable or, owing to such fear, is unwilling to return to it … ³

With the passage of time and the emergence of new refugee situations, the need was increasingly felt to make the provisions of the Refugee Convention applicable to such new refugees. As a result, the 1967 Protocol was enunciated. The 1967 Protocol extended coverage to refugees throughout the world. It contained a refugee definition that was identical to the definition in the Refugee Convention except for the dateline and geographic restrictions.⁴ After consideration by the General Assembly of the United Nations, it was opened for accession on 31 January 1967 and entered into force on 4 October 1967.

At the time there were an estimated 1.5 Million refugees worldwide.⁵ Instability and havoc in many states of the world not only created more and more refugees, but also increased the number of “people of concern” to United Nations High Commission for Refugees (UNHCR). In 2009, the total number of refugees was more than ten million and the number of “population of concern” to UNHCR was more than 34 million.⁶ The reason for this increase was a myriad of social, economic, political and civil factors.

More than 59 years after its adoption, the Refugee Convention remains the only international instrument for the protection of refugees. Under the Refugee Convention, a member State’s obligations come into effect after an asylum seeker has entered a signatory State, and such obligations fell squarely on that State. As part of its obligation to protect refugees on its territory, the country of asylum is

primarily responsible for determining whether an asylum-seeker is a refugee or not. The responsibility is often incorporated into the national legislation of the country and is in most cases derived from the 1951 Convention.

The member states who welcomed the refugees generously in early days started to look for way out to turn around the flow of asylum seekers without breaching the Convention’s obligation. States have developed a series of mechanisms, usually legal procedure, to retain control over the final destination of refugees without violating the principle of non-refoulement. The current challenge for the international refugee protection system is to meet the protection needs of asylum-seekers whilst engaging the cooperation of the global community.

1.2 Definitions: Key Concepts

Before analysing the issues which will be raised, it will be ideal to define the meaning of key terminologies more often used in this thesis.

An asylum seeker is a person who has left their country of origin, has applied for recognition as a refugee in another country, and is awaiting a decision on their application. He or she is a person who is seeking an international protection. An asylum-seeker is a refugee from the moment he/she fulfils definition of “refugee” set under Refugee Convention even if his or her claim for refugee status has not yet been formally determined and recognised in the country of refuge. The formal recognition does not establish refugee status, but confirms it.

“Non-refoulement” is one of the core obligations enshrined in the Refugee Convention under Article 33 (1) which pronounces, inter alia:

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8 Ibid.
9 Ibid.
11 Ibid.
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.

Thus, the principle of non-refoulement is intended to restrict a hosting country from sending someone back into a situation of possible persecution where there is a high risk to their life or where there freedom is threatened under certain grounds would constitute such a violation.

A “safe third country”\textsuperscript{12} is a country which is recognized as a safe country for the purpose of affording refugee protection to the asylum seeker or refugee. “Safe third country” is one of the effective mechanisms brought into effect to restrict, discourage and to prevent people seeking asylum. It is also a shield to cover the recipient country from international law obligations towards refugees and asylum seekers. Arguably, the ‘safe third country’ notion was developed to overcome the possible outcome from the non-refoulement obligation of Refugee Convention set out in Article 33 (1). Under this, a Contracting State is not considered to be breaching its obligation under Article 33 (1) of Refugee Convention when it sends an asylum seeker to a third country other than the Contracting State or the Country of which the asylum seeker is a national.

\textbf{Sovereignty} is considered a fundamental attribute of States. The principle of sovereignty holds that every state has an exclusive right to take any action it thinks fit, provided that such actions does not interfere with the rights of other states, and is not prohibited by international law on that or any other ground.

The term ‘effective protection’ is used in that sense in the context of the ‘safe third country’ notion.\textsuperscript{13} More recently this term is extended to mean that some other

\textsuperscript{12} Herein after called ‘STC’.

country has the responsibility for processing the claim for asylum.\textsuperscript{14} There is no precise definition of the term ‘effective protection under international law. Some states adopted a restrictive definition which limits their obligation towards asylum seekers. A broader sense of ‘effective protection’ is emerging through two converging strands of thinking. First, there is the notion of ‘durable’ or lasting solutions for refugee protection and finally, there is a stronger emphasis on human rights that apply to refugees which arises from frustration at restrictive interpretation by States of their obligations under the Refugee Convention.\textsuperscript{15}

The concept of \textbf{durable solutions} is a desired outcome to mitigate the refugee crisis. In doing so, many mechanisms are adopted by states to solve refugee problems, for example by asserting the refugees to the new society where they are refused. Some of the techniques to achieve durable solutions are voluntary repatriation, local integration, and resettlement. However, these strategies need to be seen in the light of restoring or maintaining effective protection to refugees and not breaching non-refoulement obligations.

International refugee law consists of a number of legal sources, most notably treaty law and customary international law, the latter applying to all States irrespective of whether they are State parties to a particular treaty. Other relevant instruments include regional instruments such as those in place by the African Union (formerly the Organization of African Unity) and the Inter-American Commission on Human Rights. Regional instruments are discussed in more detail in chapter six of this thesis.

\textbf{Customary International Law} is classically defined as ‘international custom as, evidence of a general practice accepted as law’.\textsuperscript{16} Customary International Law emerges when countries engage in certain practices in the belief that those practices are required by international law. To become customary law, a practice must be generally followed, rather than just being the practice of a few countries. It differs

\textsuperscript{14} Ibid.
\textsuperscript{16} Statute of International Court of Justice art 38 (1).
from ‘treaties’ because ‘treaties’ are not binding per se unless the countries express their consent to be bound. A treaty is only effective to the extent it is implemented domestically by the parties to it. Each treaty raises its own question of domestic implementation.

The Vienna Convention on the Law of Treaties ‘VCLT’\textsuperscript{17} defines \textit{jus cogens} as ‘a norm accepted and recognized by the international community of States as a whole from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character’. The VCLT does not apply to the Refugee Convention and Protocol, as the VCLT entered into force on 27 January 1980 and therefore after Australia had become a State Party to the Refugee Convention and Protocol. Regardless, the VCLT has been considered to be a codification of customary international law regarding treaties including the parallel rules of customary international law that apply to the Refugee Convention and Protocol, even though the VCLT does not.\textsuperscript{18}

\textbf{1.3 Purpose of this study}

The ‘Safe third country’ notion is emerged from the collective European practice in 1990s and is now globally practiced. The most common use is to bar asylum seekers from entering into the host country. States are now taking different restrictive measures such as interceptions, interdictions, offshore processing, restrictive application of the refugee definition, and application of ‘safe third country’ to ensure that refugees do not flood into their country.\textsuperscript{19} These have a direct adverse impact on a refugees’ right to seek asylum by either entering the safe country, or claim asylum once they cross the borders. The question arises as to whether the right of a state is paramount to other competing interests such as the right of a refugee against refoulement.

\begin{itemize}
\item \textsuperscript{17} Vienna Convention, opened for signature 23 May 1969, 1155 UNTS 331, art 53 (entered into force on 27 January 1980).
\item \textsuperscript{18} Peter Malanczuk, \textit{Akehurst’s Modern Introduction to International Law} (Routledge, 7\textsuperscript{th} ed., 1997) 136.
\end{itemize}
The concept of protection from persecution is central to the refugee definition in the Refugee Convention. In that context, protection can be construed as the non-refoulement obligation in Article 33 of the Convention. However, in the 59 years since the inception of the Refugee Convention, Article 33 has been read down, reconstructed and flagrantly ignored by member States. It is so because the Convention and its subsequent protocol lacks specific guidelines for the implementation of non-refoulement.\textsuperscript{20} There is a conceptual gap between obligation and implementation stems from the precondition that non-refoulement applies only to persons who are determined to be refugees under Article 1 of the 1951 Convention.\textsuperscript{21} It is a common practice that a person looking for protection applies onshore which means that such person seeks international protection only after he or she is out of his country of origin.

Australia’s protection regime in very complex, consisting of different classes and sub-classes with privileges and entitlements based on a number of factors such as the place is sought on-shore or off-shore, which does not exist in international refugee law. Such differential treatment devalues the provision enshrined in section 14 of Universal Declaration of Human Right which is discussed in more detail in later chapters. This thesis also argues that creation of such different programs in municipal law demonstrates Australia has clear intention to exercise control over the definition of asylum-seekers and selection of those people to grant protection. Being one of a signatory to the UN Refugee Convention, Australia is obliged to treat such person according to the expressed commitment enshrined in the Refugee Convention.

The central work of this thesis is to examine the policies that have been implemented by States namely, the “safe third country” principle, and how such policies are endangering the principle of non-refoulement, and the refugee regime itself. In doing so, the main focus will be on Australia’s practice of determining refugee status onshore and analysing whether Australia is breaching its international

\textsuperscript{20} See generally Refugee Convention art 35 (noting that states agree to give information on their own implementation of the Convention; no specific guidelines are included in the Convention).

\textsuperscript{21} M38/2002 v Minister for Immigration and Multicultural and Indigenous Affairs (2003) 199 ALR 290, [9].
obligation by showing reluctance to accommodate recognised refugees in its own territory.

Thus, the aim of this thesis is to examine and determine what ought to be the uniform treatment of refugees in terms of refoulement to ‘safe third countries’ and when does that so called ‘safe third country’ meet the definition of ‘effective protection’ under international law.

1.4 Structure of the thesis

In an attempt to achieve the purpose of this thesis, it is structured as follows:

This chapter is an introductory chapter. Apart from defining the terms used and stating the purpose of this work, this chapter will also glimpse the trend of developed and developing countries in relation to refugee hosting via currently available data. In doing so, it will observe Australia’s relationship with the Refugee Convention. It will also show a transformation from Australia as a lenient policy adopting country towards refugees, to one of the nations whose adoption of strict policies effectively causing detriment to the asylum seekers as has been frequently criticised in the international arena.

Chapter two will examine the historical development of international refugee law. It outlines the role of the United Nations High Commissioner for Refugees and answers key questions such as “who is a refugee?” and “what are the rights of the refugee?”. It will also analyse the shortcomings of refugee definition in contemporary international community..

The origins and background of Article 33 of the Refugee Convention are examined in Chapter three. It looks at the intentions of the framers of the Refugee Convention and the importance of the principle of non-refoulement. Then it will also discuss the status of non-refoulement obligation in international law. It will again briefly look into the non-refoulement principle in other international instruments. This Chapter
will also outline the background and development of the notion of “safe third country”. In doing so, it will briefly discuss the idea of a durable solution.

Chapter four traces the development of Australia’s refugee legislation and policy. It also explores the meaning of refugee in the Australian context. It then talks about the interpretation of Article 1E and 1F in Australia. It concludes that Australia is reversing the paddle from the Refugee Convention; it criticises the government’s refugee policy. It then examines the often tense relationship between the judiciary and the executive in the application and interpretation of refugee law in Australia. It also addresses the political motivations behind legislative amendments such as the introduction of “safe third country” provisions and identifies the rhetoric that allows such policies and practices to endure.

Chapter five outlines and examines the doctrine of effective protection as interpreted by the Australian Courts and considers whether it breaches Australia’s Refugee Convention obligations. Discussing two major cases, that of Minister for Immigration & Multicultural Affairs v Thiyagarajah and NAGV and NAGW of 2002 v Minister for Immigration & Multicultural & Indigenous Affairs, and examines the principle of “effective protection”. It then goes on to discuss Australia’s unilateral decision-making and the problems with the “safe third country” concept in a practical sense. This chapter also outlines statutory effective protection as comprised in ss 36(3)–(7) of the Migration Act and examines whether the provisions are in breach of the Refugee Convention. It then looks at Australia’s refugee policies and discusses Australia’s attempted justification of “safe third country” provisions. This chapter will analyse Tampa case in relation to Australia’s non-refoulement obligation, STC notion, effective protection and durable solution practices.

Chapter six examines the core international and regional instruments that regulate refugee law and the development of such instruments. In doing so, it also discusses briefly on elaboration of the definition of refugee in such regional treaties, protection

22 (1997) 80 FCR 543 (hereinafter referred to as “Thiyagarajah”).
23 (2005) 222 CLR 161 (hereinafter referred to as “NAGV”).
extended to refugees and protection enshrined in other human rights treaties. It considers how the international community seeks to ensure non-signatory States do not refoul, it looks at the benefit of bilateral agreements with non-signatory States, and considers what such agreements should contain. It will also examine role of NGOs as a pressure group.

Chapter seven presents a brief but critical analysis of the “safe third country” principle in other western signatory States. It looks on the legislative and common law measures adopted in the United Kingdom, Canada and New Zealand. In doing so, it will also discuss the reason for the development of the STC notion and its extension and regular use by states in developed world.

Chapter eight presents a brief but critical analysis of the “safe third country” and “effective protection” principle in non-signatory States, specifically it will discuss the approaches of States (India, Pakistan, Bangladesh and Nepal) in the South Asian Region and some South East States (Thailand, Malaysia and Indonesia). The Chapter examines whether non-signatory States’ domestic laws achieve the same, better, or worse results for refugee refoulement by comparison to the Refugee Convention and the laws of signatory States. Finally, it discusses what should occur when a non-signatory State breaches a bilateral agreement and whether such agreement should contain a provision for the State to submit to the jurisdiction of the International Court of Justice.24

Chapter nine recommends ways in which the current system in Australia could be changed in order to protect the non-refoulement principle and Australia’s obligations to refugees under international law, while still allowing Australia to refuse unwarranted claims. It addresses prevention of asylum shopping, readmission agreements and access to asylum determination.

Chapter ten will provide a summary of the arguments of the thesis and briefly address the future of international refugee law. This thesis concludes by presenting recommendations on how the current legislative provision of ‘safe third country’

24 Hereinafter referred to as the “ICJ”.
enshrined in the Migration Act section 36 (3) may be reconsidered in order to become more consistent with and supportive of non-refoulement obligation of Refugee Convention Article 33(1).

1.5 Australian and Refugee Convention

As pointed out by Poynder, ‘Australia has a special relationship with the Refugee Convention’. Australia was one of the 26 states that assisted in drafting the Refugee Convention. As its sixth signatory, Australia caused the Refugee Convention’s entry into force pursuant to Article 43. In the past, Australia had a ‘strong history of active support’ for the UNHCR; it took strong measures to improve the effectiveness of the United Nations human rights treaty bodies. UNHCR has even applauded Australia for being ‘one of the most active, dynamic and supportive members of the executive committee of the high commissioner’s program’.

The special relationship with the Refugee Convention and the commendation however turned to criticism after Australia’s response to the “boat people” in recent times. It can be observed that Australia is resiling from its Refugee Convention obligations. The strongest signs thus far that the Refugee Convention is “under siege” in Australia emerged in 1994-1995 following the Government’s reaction to the arrival of 120 Vietnamese and 866 Chinese “boat people” as well as the Government’s statutory efforts to refuse access to the refugee determination process by asylum seekers fearing persecution pursuant to China’s coercive fertility control policies, known as the “one-child” policy. The Australian government’s actions, at that time, sparked a heated debate with claims that Australia unlawfully eroded its obligations under the Refugee Convention and directly undermined fundamental

28 Poynder, above n 25, [4].
refugee protection standards.\textsuperscript{29} The Australian government and media generated pandemonium insinuating that the refugees would “invade the country” and that Australia was being forced to shoulder the main burden of the world’s refugees. In fact, the prospect of Australia denouncing the Refugee Convention was raised in Parliament.\textsuperscript{30}

Australia, unfortunately, provides an excellent case study of how a member State legislates outside its Refugee Convention obligations. In 1999, the Australian government amended the Migration Act 1958 (Cth)\textsuperscript{31} thereby introducing the principle of “safe third country” into the statutory form of domestic law. UNHCR has expressed serious opposition to the mandatory detention of women and children in Australian detention centers.\textsuperscript{32} In 1999, the two-tiered visa protection program was introduced, granting permanent protection visas to those who apply for entry to Australia from overseas, and temporary protection visas to those who arrive without visas, all of which were provided for under the Migration Regulations. This allowed a refugee to apply for a Temporary Protection Visa (TPA’s) if they had not spent more than 7 days in another country after leaving their country of origin. However, TPA’s have since been abolished in August 2008 and this is beyond the scope of the thesis.\textsuperscript{33} The Tampa incident has become the epitome of the Australian Government’s position on refugees and has provided a very public demonstration of how options for dealing with arrivals of refugees are not constrained by the obligations under the Refugee Convention.

UNHCR has expressed serious opposition to the mandatory detention of women and children in Australian detention centers.\textsuperscript{34} Given the gravity of the humanitarian

\textsuperscript{29} Ibid.
\textsuperscript{31} Hereinafter referred to as the “Migration Act”.
\textsuperscript{33} DIAC, ‘Abolition of Temporary Protection visas (TPVs) and Temporary Humanitarian visa (THVs), and the Resolution of Status (subclass 851) visa’ (Media Release, Fact Sheet 68, 9 August 2008) <http://www.immi.gov.au/media/fact-sheets/68tpv_furth.htm> at 10 April 2009.
cause involved in refugee law and the widespread concern about the treatment of refugees in Australia, the importance of the research in this regard cannot be underestimated. Within two decades of the first statutory acknowledgement of the Refugee Convention, refugee law has become one of the High Court of Australia’s most substantial sources of work, as well as the single largest component of the work of the Federal Court of Australia.

1.6 Application for asylum in Australia

Australia receives relatively few refugees by world standards. The number of asylum-seeker claims in Australia peaked at 13,100 in 2001, according to United Nations High Commissioner for Refugee statistics then, fell to a low of 3200 in 2004.\(^{35}\) Claims then started to rise again in 2006, reaching 4750 in 2008 and 4361 for the first nine months of 2009.\(^{36}\) During the 2007/2008 year, 13,014 visas were granted under Australia’s Humanitarian Program, including 10,799 visas under the offshore resettlement program and 2,215 visas under the onshore component.\(^{37}\) In May 2008 the Government announced an increase in the Humanitarian Program. The Refugee category was increased to 6,500 places based upon a one-off increase of 500 places. These additional places have been set aside for the resettlement of Iraqis in recognition of their critical resettlement needs. The remaining 7,000 places were made available under the Special Humanitarian Program (also known as SHP) category and for onshore needs.\(^ {38}\)

The offshore regional composition of the Humanitarian Program is evenly distributed in past some years since 2008–09. Africa, the Middle East and Asia will remain as the priority regions and each region will be allocated a 33 per cent intake, with the remaining one per cent allocated for contingencies. In May 2009, the government announced that it would introduce legislation to enable people to whom


\(^{36}\) Ibid.


\(^{38}\) Ibid.
Australia owes non-refoulement obligations under international treaties other than the Refugees Convention, to have their claims considered under the Protection visa framework rather than through ministerial intervention.  

Analysis of the above statistics relating to visas granted to refugees and other persons in need of protection indicates that overall the visas granted under SHP supersede those visas granted under refugee categories. These figures also show the tendency of governments practice that move away them from their adherence to obligations and commitment to international refugee law.

It is noteworthy that in 2009, Australia received 0.6 per cent of the world’s asylum seekers. Refugees, including those referred for resettlement by the United Nations High Commission on Refugees, make up less than 8 per cent of migrants accepted in Australia.  

1.6.1 Boat people arrival: Reality

It is interesting to note that although much of the controversy in recent times has been on the boat people, numerically speaking, they are almost negligible. Australia’s initial experience of the “boat people” phenomenon was in the late 1970s with the arrival of “boat people” from Vietnam; there was then a lull until 1989 with the arrival of “boat people” from Cambodia. Between 1997 and 2005, only 13,126 “boat people” entered Australia. This is negligible when compared with the number of refugees arriving in other countries. In the US, for example, it is estimated that more than 500,000 illegal aliens’ arrive each year. Similarly, other

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39 DIAC, Refugee and Humanitarian Issues: Australia’s Responses (Attorney-General’s Department, June 2009) 32.
41 Ibid.
43 Ibid.
parts of Europe struggle to monitor and control the large influxes from countries such as Africa each year.\textsuperscript{45}

This also fell down drastically to total number near to 400 between 2006 and 2008. In 2008 there were 7 boat arrivals in Australia with a total of about 179 people on board.\textsuperscript{46} In recent years, there is an increment seen, for example, in the year 2009, 2750 boat people came in Australia and in first five months of 2010 this figure reached 2982.\textsuperscript{47}

Even if all those unauthorised boats arrivals were found to be genuine refugees, they would still be only 1.6 per cent of all migrants to Australia and would not go beyond Australia’s annual quota (cap) under its refugee and humanitarian program.\textsuperscript{48} The latest recently published annual report (in November 2010) from the Department of Immigration and Citizenship (DIAC) reveals that Australia issued 9236 offshore refugee and humanitarian visas and 4534 onshore protection and humanitarian visas in the 2009-10 financial year.\textsuperscript{49} However, Government responses over the years have included measures aimed at ensuring that those arriving by boat are genuine refugees, policies aimed at protecting our borders, including through cooperation with neighbouring countries, and policies aimed at deterring unauthorised boat arrivals.\textsuperscript{50}

The Australian government classifies an asylum seeker arrived by boat or who is unsuccessful in reaching Australian land as an “unlawful non-citizen”. These asylum seekers, even if genuine, are either redirected to Christmas Island or to Indonesia or other pacific countries such as Nauru. Thus, making those vulnerable people leave

\textsuperscript{47} Ibid.
the boundary of Australian domestic law jurisdiction. However, recently the High Court in M61 and M69 unanimously ruled that this offshore processing regime is fundamentally flawed insofar as the government would try to assess people outside of the law, and the ordinary protections of the court.\textsuperscript{51}

This thesis seeks to ask whether the government, political leaders and bureaucrats can treat these vulnerable people with the same kindness as we did when we received them nearly 45 years ago. Then also, the Vietnamese boat people in 1980s arrived, they did not have passports and visas in hand. This thesis urges politicians not to treat boat people as a political agenda and bring harsh laws for them labeling them opportunists.

\textbf{1.7 Refugee flow: Comparative study with other nations}

When compared with other signatory countries, Australia accepts a ‘pathetically small’ number of refugees.\textsuperscript{52} Between 2005 and 2006, 81,862 humanitarian applications were lodged requesting Australia’s intervention.\textsuperscript{53} Together, Australia and New Zealand received less than 1 per cent of the total number of refugee applications lodged worldwide.\textsuperscript{54}

In 2001 Australia had 21,800 asylum seekers or 1 to every 849 Australian people, which was 0.15\% of the world’s asylum seekers.\textsuperscript{55} Australia’s asylum approval rate was 35 per cent.\textsuperscript{56} By comparison Canada had 70,000 asylum seekers or 1 to every 443 Canadian citizens and a 58 per cent refugee approval rate.\textsuperscript{57}

\textsuperscript{54} Ibid.
\textsuperscript{56} Ibid.
\textsuperscript{57} Ibid.
In terms of individual share in the total number of asylum applications received per 1000 inhabitants, Australia was ranked number 22 in 2008, or 0.2 per 1000 inhabitants and ranked number 24 for 2004-08 per 1 USD/GDP per capita.\(^{58}\) It was the less prosperous countries of Cyprus and Malta that received the highest member of applications compared to their national populations in 2008. France and the QSA received the highest number of applications per capita compared to their national economies.\(^{59}\)

The number of refugees arriving in industrial countries is falling.\(^{60}\) Worldwide, there has been a steady fall in the number of refugee applications. But, the burden of assisting the world’s most asylum seekers is still falling on some of the world’s poorest countries.\(^{61}\). The vast majorities of refugees are fleeing to neighbouring countries and thus remain within their region of origin.\(^{62}\) By the end of 2006, 72 per cent of the world’s refugee population were provided asylum in developing or least developed countries.\(^{63}\) Records held by the United Nations High Commissioner for Refugees\(^{64}\) confirm that in the 2007 calendar year the major refugee-generating regions hosted on average between 83 and 90 per cent of ‘their’ refugees.\(^{65}\) In 2008, Pakistan alone hosted 1.8 million refugees (the largest number of refugees worldwide), followed by Syria (11 million) and Iran (980 000).\(^{66}\)

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60 Ibid.
64 Hereinafter referred to as the “UNHCR”.
One of the reasons for refugees remaining in their neighboring region is because Western Countries such as Australia block their entry. Many States, particularly industrialised States, are imposing ever more restrictive asylum policies. The group of 44 countries received an estimated 377,200 asylum applications in 2009. These States justify their actions on the basis that they are facing a growing asylum problem, they claim refugees are targeting their States. Most commentators characterize the crisis as a conflict between refugee rights and national interest, especially in cases of large scale refugee influx.

1.8 Sovereignty versus international obligations

Obviously, the principle of sovereignty is one of the major hindrances to the protection of refugees. Refugee law is confronting and contentious as it dwells within the age-old conundrum of international law itself: sovereignty versus international obligations. Every such state has a right to do what it wants within its nationals and territory. It also has right to enter into legal relationships with other sovereign states. The treaty of Westphalia in 1964 states the basic principles of sovereignty as territorial integrity, border inviolability, and supremacy of the state. Thus, by the notion of sovereignty, a state has absolute right to act in its own interest and benefit. To what extent should States be influenced by international law in the way they treat refugees?

While nation States wrestle with the idea of whether or not their own sovereignty is at stake, refugee numbers are on the increase worldwide. It is indeed a sad state of affairs that signatory States are enacting domestic legislation to counter their commitments under international law. Under the Refugee Convention, parties accept an obligation of non-refoulement, an obligation not to return a refugee to a State where he or she

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faces a threat to life or liberty. The significance of this obligation, as this thesis notes, cannot be underestimated. This issue will also be dealt in subsequent chapters.

The next chapter will deal with origin of Refugee Convention. It will also explore the definition of refugee enshrined in Refugee Convention and critically analyse it.
Chapter Two

If properly defined, refugeehood enables the maintenance of a delicate balance between domestic policies of controlled immigration and the moral obligation of the international community to respond to the plight of those forced to flee their countries. – *James C. Hathaway*

The Refugee Convention: Historical Background

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2.1 Introduction

It is a tragic situation when citizens are forced to leave their home country as a result of deprivation of their basic human rights. Particularly where the government, whose primary onus is to protect its people, removes the most basic of human rights from its citizens, economically, socially or at worst, the right to life itself. In that event, such people will have no choice other than to seek international protection to refuge in countries other than their own. Therefore, refugees are perceived as involuntary migrants, victims of circumstances which force them to seek sanctuary in a foreign country.71

This Chapter briefly examines the historical development of international refugee law. It will introduce and answer threshold questions such as “Who is a refugee?” and “What are the rights of the refugee?” It looks at the state of international affairs at the time of the development of the key international instruments. The Chapter will also briefly outline the role of the United Nations High Commissioner for Refugees.

2.2 Historical context: Development of Refugee definition

Since Rome’s reception of the fleeing Barbarians, States have opened their doors to many divergent groups corresponding in a general way to this general meaning of refugee.72 Change in social, political and economic conditions in the world was the driving force for states to abandon the centuries-old practice of permitting the free immigration of persons fleeing threatening circumstances in their home country.73 The interesting point to note is that, even though states have an obligation to protect their own nationals under customary international law. Prior to the early twentieth century, that obligation was not extended to individuals from other nations found within the borders of a State.74 Therefore, States had the discretion to accept immigrants whom they perceive would contribute to the economy or society in a

72 Ibid 348.
73 Ibid 379.
positive way, and to expel refugees under the assumption that the right to do so was inherent in a state’s sovereign powers. But, the early twentieth century saw numerous violent conflicts and political problems in the world which created exoduses beyond the capacity of individual countries to control.

Historically, from 1920 – 1935, refugees were defined largely in judicial terms, as persons or members of a group outside their State of Origin who have no freedom of international movement because they have been effectively deprived of the formal protection of their government. The purpose of refugee status conceived in judicial terms was to facilitate the international movement of persons who find themselves abroad and unable to migrate because no nation was then prepared to assume responsibility for them. This approach was developed in Europe during that period because of the influx of (mostly) Russian and Armenian refugees. It was intended to facilitate the international movement and resettlement of these groups.

From 1935-1939, the approach to defining a refugee was dominated by a social perspective, which saw refugees as helpless casualties of broad based social or political occurrence which separate them from their home society.

During the period of 1939-1950, refugees were primarily defined in individualist terms i.e. refugee is a person in search of an escape from perceived injustice or fundamental incompatibility with his home state. He is fearful of the authorities who have rendered continued residence in his country of origin either impossible or intolerable and desires the opportunity to pursue the development of his personality

78 Ibid.
79 Ibid.
During this period, refugees were considered people without state protection and such movement (flight) was personal. They were largely directed at the plight of groups such as Jewish people fleeing from Germany during that period.

Thus, this was the time when ad hoc agreements provided for refugees protection related to specific refugee situations. But, it neither developed a general definition of refugees status nor standardized any measure to protect refugees. During that period the sufficient and necessary condition to achieve refugee status were that someone was (a) outside his or her country of origin and (b) without the protection of the government of that state.

2.3 Persecution under the Nazi Regime: A Driving Force of the Refugee Convention

A major influence on the drafting of the refugee definition was undoubtedly the particular forms of persecution that had been witnessed during the Nazi regime in Germany in the 1930s and 1940s. The first wave of refugees that created a need for UNHCR came from Germany when Hitler was appointed Chancellor in 1933, soon after the Nazis came to power. By 1938, as the position of the Jews in Germany became worse, the Evian Conference was convened to try to provide a solution. The Evian Conference established a new international body, the Inter-Governmental Committee on Refugees (“IGCR”). The role of the Director of the IGCR was ‘to improve the then conditions of exodus and to replace them by conditions of orderly

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90 Hereinafter referred to as “IGCR”
emigration’ and to encourage receiving countries to develop ‘opportunities for permanent resettlement’. 91

The IGCR’s definition of refugee explicitly referred to threats to life or liberty on account of political opinion, religious beliefs or racial origin. This was subsequently picked up in the definition used in the International Refugee Organisation Constitution after the War, and then again in the Refugee Convention. Race and religious persecution were arguably the cornerstones of the Nazi regime’s attempted genocide of the Jewish people. Horrific human rights abuses were perpetrated in various concentration camps in Germany during that period. It is therefore not surprising that these grounds were selected as the most serious forms of persecution warranting protection. It remains a yardstick against which persecution today is often assessed, though it ought not to be seen as an exhaustive definition.

2.4 The Cold War: Another Historical Context for the Refugee Convention

Like the tragedy that was the Holocaust, one cannot ignore the global political situation at the time of the Refugee Convention’s drafting in 1950-1951, that being the emergence of the “Cold War”. 92 Various parts of the United Nations debates on the refugee question, particularly in the General Assembly, reveal the growing hostilities between the Union of Soviet Socialist Republics 93 and its allies and the North Atlantic Treaty Organization 94 powers and their allies on this issue. The Soviet bloc regularly accused the Western nations of both forcibly preventing displaced persons from the Soviet bloc from returning to their homelands and using such persons for forced labor. While this seems unlikely to be correct, it is also clear that various Western countries wanted to ensure that the refugee definition adopted in the Refugee Convention was broad enough to cover any dissidents leaving the Soviet bloc. 95

91 UN Ad Hoc Committee on Refugees and Stateless Persons, A Study of Statelessness, United Nations, August 1949, Lake Success - New York, Recommendation 8(f), E/1112, E/1112/Add.1 (1 August 1949) <http://www.unhcr.org/refworld/docid/3ae68c2d0.html> at 12 February 2009.
92 Walker, above n 89.
93 Hereinafter referred to as the “USSR”.
94 Hereinafter referred to as the “NATO”.
95 Ibid.
Indeed, once the Refugee Convention was adopted, those accepted as refugees by the West were almost universally from Eastern European countries under communist regimes. This was useful as an aspect of foreign policy as a basis for undermining communist regimes. Also, it was not terribly burdensome in terms of numbers, as the Eastern-bloc States imposed restrictions on exit and thus the numbers of those able to flee to the West were relatively small. The socialist states asserted the impropriety of including political dissidents among the ranks of refugees protected by international law and argued unsuccessfully that political émigrés who had suffered no personal prejudice ought not be protected as refugees under the auspices of the international community as a whole, but should instead seek the assistance of those states sympathetic to their political views.  

Their main opposition was on creation of International Refugee Organisation (IRO) in 1947 as they perceived it as ‘an instrument of the west’. Ultimately, the Soviet bloc refused to participate in the drafting of the Refugee Convention and this undoubtedly impacted the choice of persons to be protected by it.

2.5 Definition of “Refugee” under the Convention and 1967 Protocol

As already noted, the refugee problem became a concern for the international community early in the 20th century. The pattern of international action on behalf of refugees was established by the League of Nations and led to the adoption of a number of international agreements for the benefit of refugees. These instruments are referred to in Article 1(A)(1) of the Refugee Convention.

The definitions in these instruments relate each category of refugees to their national origin, to the territory that they left and to the lack of diplomatic protection by their

99 See generally James C Hathaway, ‘A Reconsideration of the Underlying Premise of Refugee Law’ (1990) 31 Harvard International Law Journal 129, 173: Notably, the original definition of refugee in the Refugee Convention was temporally limited to events prior to 1 July 1951 and allowed State parties to limit their obligations to refugees from European events. Those restrictions were removed by the 1967 Protocol.
former home country. With this type of definition “by categories”, interpretation was simple and caused no great difficulty in ascertaining who was a refugee. Although few persons covered by the terms of the early instruments are likely to request a formal determination of refugee status at the present time, such cases would occasionally arise.

Soon after World War II, the need was felt for a new international instrument to define the legal status of refugees. Instead of ad hoc agreements adopted in relation to specific refugee situations, there was a call for an instrument containing a general definition of who was to be considered a refugee.

The 1951 dateline originated as a result of the wishes of Governments. At the time the Refugee Convention was adopted, the provision was included to limit member State obligations to refugee situations that were known to exist at that time, or to those which might subsequently arise from events that had already occurred.

For the purposes of examining rights and obligations of a refugee in this thesis, the term “refugee” will be defined as per the definition contained in the Refugee Convention as amended by the 1967 Protocol. Thus a refugee will be defined as a person who:

- has left his or her country of origin alone or in a group;
- lost the protection of their own state;
- is already outside the territory of his or her country;
- is not a national of the country they are presently in; and
- for the time being, does not intend to return to his or her country for fear of persecution for reason of race, religion, nationality, political opinion or membership of a particular social group.

So, why does the international community need to be more generous to refugees than internally displaced persons and other migrants is clearly illustrated in the convention definition itself. Let us look this issue briefly before critically analyzing its appropriateness in the contemporary world.

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100 Vernant, above n 80, 26-7.
2.5.1 Refugees and ‘Internally Displaced Persons’\textsuperscript{101}

Unlike refugees, who have been deprived of the protection of their state of origin, IDPs remain legally under the protection of national authorities of their country of habitual residence. The only similarity between these two is that both flee from their primary habitant.

Refugees are entitled to protection against refoulement, the right not to be sent back to their country of origin for the duration of risk.\textsuperscript{102} They also receive a catalogue of entitlements designed to compensate them for the traditional disadvantages of their refugee status. Rights of this kind are of no value whatever to IDPs who are by definition still within their own country.

The challenge posed by internal displacement involves providing basic principles of humanitarianism and human rights, not exclusively (for example, physical protection, shelter, food, clothing, basic health care, and the integrity of the person and the family’).\textsuperscript{103} Their needs, in other words, can be answered by the effective implementation of generic human rights.

The restriction of refugee status to persons who have left their own country is logical because it defines a class of persons to whom the international community can, as a matter of practicality, undertake to provide an unconditional response. The special ethical responsibility towards refugees follows not just from the gravity of their predicament, but also from the fact that it is always possible to address their plight in ways that are not possible for IDPs who remain inside their own country.\textsuperscript{104}

\textsuperscript{101} Herein after ‘IDPs’.
\textsuperscript{103} Francis M Deng, Protecting the Dispossessed: A Challenge for the International Community (Brookings Institution Press, 1993) 134.
2.5.2 Refugees and Other migrants

Arguably, refugees and other forced migrants are first and foremost migrants, therefore, distinguishing refugees and other forced migrants from migrants generally fails to accurately capture the reality of peoples' lives. It is subject to administrative manipulation to justify management responses that assign greater value to some migrants than to others, with detrimental consequences for some migrant populations, in particular persons in flight from environmental causes and poverty.\(^{105}\)

However, being a refugee is appropriately recognized as distinct from being a forced migrant, and really only incidentally comparable to being a migrant. The risk of mingling both in a same category is that officials will fail to take account of the specificity of the duties that follow from refugee status if refugees come to be seen as no more than (forced) migrants.\(^{106}\) Subsuming refugee studies into the broader framework of forced migration studies may result in a failure to take account of the specificity of the refugee's circumstances which are defined not just by movement to avoid the risk of harm, but by underlying social disfranchisement coupled with the unqualified ability of the international community to respond to their needs.\(^{107}\)

It is neither the intention of this thesis to advocate for the similar treatment of refugee along with other categories of migrants nor it argues against it. However it strongly argues whatever the definition is, it should neither fail to do justice to the reality of peoples' lives nor support arbitrary administrative manipulation.\(^{108}\)

2.6 Criticism of the Convention definition

This definition has been the subject of much criticism. The Convention does not create a right to enter another State; only a limited obligation on a national state not

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\(^{105}\) Ibid 351.
\(^{106}\) Ibid 352.
\(^{107}\) Ibid 352.
\(^{108}\) Ibid 351.
to expel or return a refugee to a state where he or she faces persecution. In some cases, even those accepted as refugees have no right to permanent residence and hence can be consigned to a tenuous and insecure status.

It seems that the concern with separating refugees and others such as economic migrants only arises when receiving countries want to differentiate between those they consider to be desirable and undesirable entrants, in order to better control them. For example, the Irish who went to England and America in the 19th century to escape famine and poverty or Jewish people who sought shelter in New York because of Russian Pogroms or the European displaced Persons who went to Canada and Australia in 1940s. Although this thesis is not intended to address the deficiencies contained in the Convention, it is worth while to state that there are several weaknesses in the Convention.

2.6.1 Vague definition

The main controversy lies in wide scope of the definition of ‘membership of a particular social group. The definition is vague. Owing to this, courts (particularly in Western Countries) have interpreted elements of the definition inconsistently; resulting in an uncertain and contentious law.

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112 Ibid.
2.6.2 Difficulty to separate refugee and other migrants

Interconnectedness of economic and political factors in producing migration flows makes it difficult in distinguishing between forced and voluntary migrants. Arguably, if persons affected by fundamental forms of socio-political disfranchisement are less likely than others ever to be in a position to seek effective redress from within their state, then their need for external protection is indeed more profound. UNHCR supports the interpretation of the Refugee Convention definition in a context with evolving standards of the total international human rights. According to Head, one of the deficiencies in Convention definition is:

it does not protect the starving, the destitute, those fleeing war and civil war, or even natural disaster, let alone those seeking to escape economic oppression.

Countries with weak economies, increasing inequality and widespread impoverishment may have tyrannical rulers, weak State infrastructure, and high levels of violence and human rights violations. In such event, internal political, religious and social factors influence in developing economic policy of a nation. Apart from that, donor countries/agencies condition imposed for grant or donation or loan, may affect particular groups economic viability adversely. This could deprive such group from fostering their economic wellbeing. People opposing such economic policy may have fear of persecution and therefore might flee from the country of origin.

This leads to conclusion that if a state cannot protect a particular class of citizen, then economic deprivation could also be linked to that particular social group and

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116 Foster, International Refugee Law and Socio-Economic Rights: Refugee from Deprivation, above n 114, 51.
fall under definition of Refugee Convention. These are the main conditions that cause economic migration closely linked with those that cause forced migration, leading to the migratory movement of people with ‘mixed motivation’.\textsuperscript{118} In addition, they also adopt the same route to reach their destination as do bona fide refugees.

2.6.3 Strict eligibility criteria for refugee

Only a small portion of asylum seekers can establish personal rather than generalized persecution for the purpose of the Refugee Convention definition, and owing to the large number of asylum seekers, it is impractical to carry out a case by case assessments of refugee claims;\textsuperscript{119} In 2008, only 65,280 refugees benefited from resettlement opportunity made available by a growing group of resettlement countries out of 11.5 million refugees.\textsuperscript{120} Arguably, the narrow definition of Refugee in ‘Refugee Convention 1951’ should be extended to incorporate the protection needs of those who suffer socio-economic deprivation for a Refugee Convention reason and thus shall make significant progress in upholding the human rights and humanitarian objectives of the Refugee Convention and to achieve its purpose of providing protection to those most in need of international protection.\textsuperscript{121}

2.6.4 Limited scope

The definition does not cover the internal displacement of people, such as the millions displaced by the civil war even though these people have the same needs as persons recognized as Refugee Convention refugees, such as displaced persons from


\textsuperscript{121}Foster, International Refugee Law and Socio-Economic Rights, above n 114.
Sudan and the Democratic Republic of Congo. There are 6.57 million stateless persons in the world with a total population of concern to UNHCR of 34.46 millions.

2.6.5 Not Contemporary

The problem with the Convention’s definition of refugee is that: it was designed in and for a different era, the Convention definition of refugee is outdated, as is its notion of exile as a solution to refugee problems. The Refugee Convention only assists asylum seekers who manage, invariably by means designated as “illegal”, to arrive physically in the country where they seek refuge. It confers no right of assistance on refugees unless and until they reach a signatory country. It imposes no obligation on countries not to persecute or expel their citizens, and it imposes no requirement for burden sharing between states. The asylum channel is providing an avenue for irregular migration and is linked with people smuggling and criminality; and the Convention takes no account of the impact (political, financial, social) of large numbers of asylum seekers on receiving countries.

2.7 The Rights of a “Refugee”

A recognised “refugee” acquires bundle of rights and protections under international law. s/he is granted legal entry, accorded certain rights as set out in the 1951 Convention, and is eligible for assistance. This means it gives such persons the opportunity to live with greater freedom and dignity than in their country of origin. The key purpose of the Refugee Convention was not so much to define

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123 UNHCR, Global Appeal 2010-2011: Population concern to UNHCR <www.unhcr.org/4b04002b9.pdf at 26 June 2010>This figure is as at January 2009.


126 Ibid 46.
who constitutes a refugee but to provide for the rights and entitlements that follow from such recognition.127

The Refugee Convention is an instrument of human rights protection which was intended to implement the basic right to flee persecution and to seek and enjoy asylum, and to enshrine the right against refoulement (Art. 33(2)). Thus, persons of the nature mentioned in the previous section are considered as refugees and international law prescribes the nature and extent of protection to be provided to them. Once an asylum seeker is formally recognized as a ‘refugee’ by a member state certain rights exist. The rights adhere to refugees according to a hierarchy of human rights ranging from basic rights to life and liberty to include social and economical rights.128

Basic rights adhere under the Refugee Convention to all refugees, irrespective of status. These include the negative rights against refoulement (Art. 33) and protection against discrimination as to ‘race, religion or country of origin’ (Art. 3, 4 and 8). Additionally all refugees are entitled to free access to courts of law ‘on the territory of all Contracting States (Art. 16 (1)) and they are immune from penalties if entered or attempted to enter territory without permission (Art. 31).

It also extends to social and economic rights. These rights are: a right to be self employed, a right to freedom of movement and the right not to be expelled except on social grounds, to those refugees whose presence is simply lawful (Art. 18, 26 and 32 respectively). But those who are lawful enjoy more sophisticated rights such as freedom of association, freedom of employment, eligibility for the ‘liberal professions’, housing, public relief, labour law protection and social security, and travel documents (Art. 15, 17, 19, 21, 23, 24 and 28 respectively).

127 Foster, International Refugee Law and Socio-Economic Rights, above n 114, 46.
In countries such as Australia a refugee will only become a permanent resident and will then have the full rights as a citizen after 4 years of complying residence.\textsuperscript{129} In addition to the residency requirements, there are other obligations; such as character, basic knowledge of English language etc.\textsuperscript{130} Justice Gummow makes this point, declaring that:

\begin{quote}
[T]he right of asylum is a right of States, not of the individual; no individual, including those seeking asylum, may assert a right to enter the territory of a State of which that individual is not a national.\textsuperscript{131}
\end{quote}

Under international law, refugees are basically aliens in another country and in each country aliens are treated differently to nationals. According to the provisions of the Refugee Convention, once a refugee enters another country, he or she is supposed to possess a right to demand territorial asylum in that country.\textsuperscript{132} The provisions of the Refugee Convention are strictly applicable to the States that have become party to it, but for other non-member States, such obligations, including temporary admission to its territory, do not arise.\textsuperscript{133}

Refugee rights simply establish the duty of states to treat refugees equally with their own population. Refugee rights are sometimes guaranteed to the same extent granted

\begin{flushright}
\textsuperscript{129} \textit{Australian Citizenship Act 2007 s 22.}
\textsuperscript{130} \textit{Australian Citizenship Act 2007 ss 21-23A.}
\textsuperscript{131} MIMA v Ibrahim (2000) 204 CLR 1, 45; See also Ruddock v Vadarlis [2001] FCA 1329, [193] (French J): "The power to determine who may come into Australia is so central to its sovereignty that it is not supposed that the Government of the nation would lack the power conferred on it directly by the Constitution, the ability to prevent people not part of the Australian community, from entering."; See also R Petrowicz, "The Case of the MV Tampa: State and Refugee Rights Collide at Sea" (2001) 76 Australian Law Journal 12, 14.
\textsuperscript{133} David Martin, : ‘Strategies for a Resistant World: Human Rights Initiatives and the Need for Alternatives to Refugee Interdiction’ (1993) 26 Cornell International Law Journal 753, 759. The writer proposed a further reason, namely that the Refugee Convention ‘memorializes the purity of state parties, to ensure that they will escape the taint of any responsibility so direct and visible as ... sending someone back to a place where he or she is persecuted’.
\end{flushright}
to nationals, but often only at the level provided to most favoured foreigners, or even to aliens in general.\textsuperscript{134}

\section*{2.8 Debates on refugee}

Tabori has noted definition of the ‘impenetrable jungle’\textsuperscript{135} or ‘super-maze’\textsuperscript{136} of semantics concerning the term refugee including ‘displace, send out, exclude with dislodgment, eviction, ejectment, deportation, expatriation, relegation, [and] extradition’\textsuperscript{137}. According to Haddad, the domain is further complicated by the multitude of words and labels employed in everyday parlance, in particular the media, to discuss “refugees” and related asylum issues.\textsuperscript{138}

Harrell-Bond and Voutira believe the issue is complicated by ‘the conceptual confusion surrounding our perceptions of displacement, and the lack of rigorous classification for the different conditions, causes and patterns of refugee movements in time and space.’\textsuperscript{139} As noted by Haddad, the definition of a refugee ‘will always be shaped in part by the view from which she is being defined’.\textsuperscript{140} As Connolly puts it, a ‘descriptive point of view’ does not exist.\textsuperscript{141}

According to Haddad, the word “refugee” can be described as an ‘essentially contested concept’.\textsuperscript{142} She observes that it causes disagreement because it is ‘appraisive in character and involves value judgements’ and it is ‘internally complex, comprising a changing set of ingredients that are themselves relatively complex and open-ended’.\textsuperscript{143} This is because when a signatory State incorporates the Refugee Convention into its domestic laws, the term “refugee” is invariably defined

\begin{footnotesize}
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  \item[\textsuperscript{134}] Hathaway, The Rights of Refugees under International Law, above n 102, 192-200, 228-238.
  \item[\textsuperscript{136}] Ibid.
  \item[\textsuperscript{137}] Ibid.
  \item[\textsuperscript{139}] Barbara E Harrell-Bond and Efthia Voutira, ‘Anthropology and the Study of Refugees’ (1992) 8 Anthropology Today 6, 6.
  \item[\textsuperscript{140}] Haddad, above n 138, 25.
  \item[\textsuperscript{141}] Willian E Connolly, The Terms of Political Discourse (Princeton University Press, 2\textsuperscript{nd} ed, 1983) 22-5.
  \item[\textsuperscript{142}] Haddad, above n 138, 26.
  \item[\textsuperscript{143}] Ibid.
\end{itemize}
\end{footnotesize}
as that state sees fit. For example, the Canadian Federal Court observed in 1990 that the notion ‘that for the plaintiff to be eligible for refugee status he had to be personally a target of reprehensible acts directed against him in particular ... is an error of law’.\textsuperscript{144}

United States Code of Federal Regulations (CFR) provide for the recognition of refugee status where ‘... [t]he applicant establishes that there is a pattern or practice in his or her country of nationality ... of persecution of a group of persons similarly situated to the applicant ... ’.\textsuperscript{145}

Similar positive developments have occurred in relation to other key aspects of the Convention refugee definition. The core notion of ‘being persecuted’, for example, is today generally understood to mean the risk of serious human rights violations which the state of origin either cannot or will not remedy\textsuperscript{146} --including an increasing openness to inclusion of at least the most severe risks to socio-economic rights.\textsuperscript{147} Nor are the grounds for risk narrowly conceived: risk due to ethnicity is now routinely understood to be covered by the ‘race’ category of the refugee definition,\textsuperscript{148} and the ‘particular social group’ construct is thought to be most appropriately applied to ‘... relatively large group[s] of people.’\textsuperscript{149}

\begin{footnotesize}
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  \item \textsuperscript{144} Salibian v Canada [1990] FCJ 454.
  \item \textsuperscript{145} 8 C.F.R. §208.13(b)(2)(iii).
  \item \textsuperscript{147} See, eg, James C Hathaway, ‘Debate: Rejoinder’ (2007) 20 Journal of Refugees Studies 349, 387; Horvath v Secretary of State for the Home Department [2000] 3 All ER 577; In the United States, Zen Hua Li v Attorney General (2005) 400 F. 3d 157 (USA, Court of Appeal for the 3rd Circuit) for example, risk of ‘substantial economic disadvantage’ is understood to amount to a risk of being persecuted.
  \item \textsuperscript{148} European Union Qualification Directive, OJ 304, 30/09/2004 P. 0012-0023, at Art. 10(1)(a).
  \item \textsuperscript{149} James C Hathaway, ‘Debate: Rejoinder’ (2007) 20 Journal of Refugees Studies 349, 387; ‘It is unlikely that, in adding “a particular social group” to the Convention categories, the makers of the Convention had in mind comparatively small groups of people such as members of a club or association. The Convention was not designed to provide havens for individual persecutions’: Applicant A v Minister for Immigration and Ethnic Affairs (1997) 190 CLR 225 (McHugh J).
\end{itemize}
\end{footnotesize}
2.9 Statute of the Office of the United Nations High Commissioner for Refugees

Pursuant to a decision of the General Assembly, the Office of the UNHCR was established as of 1 January 1951. The Statute of the Office of the UNHCR is annexed to Resolution 428(V) and was adopted by the General Assembly on 14 December 1950. According to the Statute, the UNHCR is called upon to provide international protection, under the auspices of the United Nations, to refugees falling within the competence of his Office.\textsuperscript{150} The Statute contains definitions of those persons to whom the UNHCR’s competence extends, which are very close to, though not identical with, the definition contained in the Refugee Convention.

Therefore, a person who meets the criteria of the UNHCR Statute qualifies for the protection of the United Nations provided by the UNHCR, regardless of whether or not he or she is in a country that is a party to the Refugee Convention, 1967 Protocol, or recognized by his or her host country as a refugee under either of those instruments. Such refugees, being within the UNHCR’s mandate, are usually referred to as “mandate refugees”.\textsuperscript{151}

As illustrated above, a person may simultaneously be a mandate refugee and a refugee under the Refugee Convention or the 1967 Protocol, notwithstanding that he or she is in a country that is not bound by either instruments, or excluded from recognition as a Refugee Convention refugee by the application of the dateline or the geographic limitation. In such cases the person would still qualify for protection by the UNHCR under the terms of the Statute.

The aforementioned Resolution 428(V) and the Statute of the UNHCR’s Office require co-operation between governments and the UNHCR’s Office in dealing with refugee problems. The UNHCR is designated as the authority charged with


providing international protection to refugees, and is required to promote the conclusion and ratification of international conventions for the protection of refugees, and to supervise their application.

Such co-operation, combined with the supervisory function, forms the basis for the UNHCR’s fundamental interest in the process of determining refugee status under the Refugee Convention and the 1967 Protocol.

Early in 1958, the United Nations Economic and Social Council\textsuperscript{152} established the Executive Committee of the UNHCR, known as ExCom, which consisted of representatives from Member States.\textsuperscript{153} The ExCom meets each October in Geneva.\textsuperscript{154} The tasks of the ExCom are to advise the UNHCR ‘in the exercise of his functions under the Statute of its Office’\textsuperscript{155} and to approve the UNHCR’s assistance programs.\textsuperscript{156} In order to become a member of the ExCom, a state must be a member of the United Nations or any of its specialized agencies, and be elected by the ECOSOC on the ‘widest possible geographical basis from those States with a demonstrated interest in, and devotion to, the solution of the refugee problem’.\textsuperscript{157} Membership of the ExCom has increased since its establishment. At present, there are 79 members of the ExCom.\textsuperscript{158}

In the exercise of its mandate, the ExCom adopts conclusions (by consensus) on international protection which address a broad spectrum of issues including asylum and non-refoulement.\textsuperscript{159} While the ExCom Conclusions are not formally binding,

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\item \textsuperscript{152} Hereinafter referred to as “ECOSOC”.
\item \textsuperscript{153} UNHCR, ‘Background on the Executive Committee’ (2001) <http://www.unhcr.org/pages/49c3646c83.html> at 29 April 2009.
\item \textsuperscript{154} Ibid.
\item \textsuperscript{155} Resolution on International Assistance to Refugees Within the Mandate of the United Nations High Commissioner for Refugees, GA Res 1166, UN GAOR, 723\textsuperscript{rd} pln mtg, UN Doc A/RES/1166 (1957), para 5(b).
\item \textsuperscript{156} UNHCR, ‘Background on the Executive Committee’(2001) <http://www.unhcr.org/pages/49c3646c83.html > at 29 April 2009; Resolution on International Assistance to Refugees Within the Mandate of the United Nations High Commissioner for Refugees, GA Res 1166, UN GAOR, 723\textsuperscript{rd} pln mtg, UN Doc A/RES/1166 (1957) para e.
\item \textsuperscript{157} Resolution on International Assistance to Refugees Within the Mandate of the United Nations High Commissioner for Refugees, GA Res 1166, UN GAOR, 723\textsuperscript{rd} pln mtg, UN Doc A/RES/1166 (1957) para 5.
\item \textsuperscript{158} UNHCR, ExCom Members: Current members <http://www.unhcr.org/pages/49c3646c89.html> at 10 August 2010.
\item \textsuperscript{159} Hereinafter referred to as the “ExCom Conclusions”.
\end{itemize}
they have persuasive authority as soft law. They express international consensus on legal matters regarding refugees and have ‘served to fill gaps in areas of the international refugee law regime not foreseen’ by the Refugee Convention or 1967 Protocol. Furthermore, ‘regard may properly be had to them [ExCom Conclusions] as elements relevant to the interpretation’ of the Refugee Convention. Also, the ExCom Conclusions are an ‘important source of interpretive guidance with regard to international refugee law’. According to Hathaway, the ExCom Conclusions have ‘strong political authority as consensus resolutions of a formal body of government representatives expressly responsible’. Furthermore, they ‘provide guidance and forge consensus on vital protection policies and practices’. The Canadian Federal Court of Appeal has also recognized the importance of the ExCom Conclusions:

[I]n Article 35 of the Geneva Convention the signatory states undertake to co-operate with the Office of the United Nations High Commissioner for Refugees (UNHCR) in the performance of its functions and, in particular, to facilitate the discharge of its duty of supervising the application of the Convention. Accordingly, considerable weight should be given to recommendations of the Executive Committee of the High Commissioner’s Programme [i.e. the ExCom Conclusions] on issues relating to refugee determination and protection that are designed to go some way to fill the procedural void in the Convention itself.

In light of the above, it is argued that ExCom Conclusions should be accorded considerable weight on international protection standards. Therefore throughout the course of this thesis, the ExCom Conclusions are quoted frequently and heavy reliance is placed on them.

163 Hathaway, The Rights of Refugees under International Law, above n 102, 113.
164 ExCom ‘General Conclusion on International Protection’ Executive Committee Conclusions No 81 (XLVIII) 1997, para (g).
165 Rahaman v Minister of Citizenship and Immigration [2002] 3 FC 537, [39].
2.10 Protection of the Refugee in the Country of Safeguard

The rights of refugees are defined in international law, but are subject to state discretion as to their implementation in national legal systems. The expansion of Convention definition of refugee in regional instruments and by Courts in some developed nations (such as Australia, America, Canada and UK) clearly indicate that it is capable of encompassing a range of claims previously thought to be outside the scope. The Refugee Convention may be interpreted in a manner that reflects contemporary understanding of the scope of human rights protection, most importantly the equal value of economic, social and cultural rights. Therefore, an ability to evolve so as to incorporate the protection needs of those who suffer socio-economic deprivation for a Refugee Convention reason has and will make significant progress in upholding the human rights and humanitarian objectives of the Refugee Convention and in achieving its purpose of providing protection to those most in need of international protection.

Unfortunately, the Refugee Convention does not impose direct legal obligations upon the refugee-emitting (or sending) countries under modern international law. For example, there appears to be no formal obligation to refrain from creating any condition which will emit refugees to other countries, obligations to take back its nationals, to pay compensation for the loss of life, property, profession, business and other criminal acts, as well as punishments to perpetrators for criminal or inhuman acts committed upon life and property of refugees.

The term “citizen” is generally applicable only to persons who are endowed with full political and civil rights of the State, whereas, the term national includes persons who, though not citizens, owe allegiance to the State of present domicile and are entitled to protection. The refugee, broadly, although not a national, are similar to

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167 Foster, International Refugee Law and Socio-Economic Rights, above n 114,343.
168 Ibid 354.
169 Ibid 354-5.
the term ‘national’. Refugees are still without the right to claim protection under customary international law.

The question then is what does the international law do to protect refugees in the ‘Country of Safeguard’ being the country that the refugee has entered to seek asylum, in particular what is to stop the Country of Safeguard from refoulement of the refugee?

In recent years, international protection is expansively interpreted in international and regional human rights treaties. This implied a non-refoulement provision (Article 3 of Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment “CAT”) into such treaties by holding that signatory states are in breach of their human rights obligations if they expel or return an individual to a situation in which he/she will be subject to treatment prohibited by the relevant treaty, such as Article 3 of the European Convention (torture or degrading treatment) or Article 6 of the ICCPR (right to life).171

In addition, member states of the Refugee Convention and its Protocol are restricted from charging penalties on account of refugee’s illegal entry or presence provided that such refugee he/she presents himself/herself without delay to the authorities and shows good cause for his/her illegal entry or presence.172 Similarly, states cannot impose restrictions on refugees’ freedom of movement except in clearly defined exceptional circumstances and in full consideration of all possible alternatives. If it is necessary, states can restrict for short period only.173 States should always provide special attention and care to particularly vulnerable refugees, such as those who were tortured or other trauma victims, unaccompanied minors, pregnant women, single mothers, elderly persons or persons with mental or physical disability.174

172 Refugee Convention art 31.
174 Ibid.
2.11 Summary

In recent times, even a refugee who meets the existing Convention definition can be a victim of refoulement. The international law should deal in depth with the status of a refugee and the refugee’s relationship with the State as well as reciprocal obligations of the State to such individuals. The nature of treatment of nationality and citizenship still differs significantly even though there are significant obligations enshrining in international treaties and conventions to protect nationals.

This thesis is intended to examine Australia’s compliance with the Convention obligations. The following chapter will examine the “safe third country” and “effective protection” notions in international law.
Chapter Three

Article 33 and the Notion of “Safe Third Country” and “Effective Protection”:
Origins and Background

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3.7 Conclusion
3.1 Introduction

A refugee could be injured in the country of refuge in many different ways. One of the most serious and common injuries that a refugee could sustain occurs when the refugee is sent back to a place where the refugee may face persecution. Non-refoulement is a principle of international law that precludes states from returning a person to a place where he or she might be tortured or face persecution.

This Chapter examines this principle enshrined in the Refugee Convention. The significance of Article 33 within the context of the Refugee Convention as a whole is reflected by it being one of the few provisions that is not subject to reservation. The first part of this chapter explores the meaning of the principle itself and its status at international law. In doing so, it also analyses the meaning of the words incorporated in Article 33. It then discusses its meaning in detail with views of different scholars and international organizations such as UNHCR.

The second part of this chapter deals with the exception created by states namely the “safe third country” notion. This chapter goes on to define “effective protection” principle and its operation i.e. its role in modifying the operation of the convention. In this process, it also examines whether non-refoulement principle has attained the status of a peremptory norm of international law from which no derogation is permitted or only customary international law’s status.

Chapters four and five examine the application of principles of ‘non-refoulement’, ‘safe third country’ and ‘effective protection’ from the Australian perspective by analysing common law and statute; and concludes that Australia’s application of this principle, both at statute and common law, is inconsistent with its international protection obligations.

\[175\] Refugee Convention art 42.
3.2 The Intentions of the Framers of the Refugee Convention and Meaning of Article 33

Non-refoulement has been a guiding principle of refugee law since its appearance in the 1933 Convention relating to the International Status of Refugees. The importance of the Refugee Convention and the issue of what Article 33 was intended to achieve was discussed during the World Conference on Human Rights. The Conference reaffirmed that everyone is entitled to the right to seek and to enjoy in other countries asylum from persecution, as well as the right to return to one's own country. This analysis is also supported by the repeated resolutions of the General Assembly that the principle of non-refoulement applies to those seeking asylum just as it does to those who have been granted refugee status. The point is illustrated by United Nations General Assembly Resolution 55/74 of 12 February 2001 which states inter alia as follows:

GA Res 55/74

The General Assembly

. . .

6. Reaffirms that, as set out in article 14 of the Universal Declaration of Human Rights, everyone has the right to seek and enjoy in other countries asylum from persecution, and calls upon all States to refrain from taking measures that jeopardise the institution of asylum, particularly by returning or expelling refugees or asylum seekers contrary to international standards; . . .

10. Condemns all acts that pose a threat to the personal security and well-being of refugees and asylum-seekers, such as refoulement . . .

178 Ibid [23].
The Conference also recognised that:

in view of the complexities of the global refugee crisis and in accordance with the Charter of the United Nations, relevant international instruments and international solidarity and in the spirit of burden-sharing, a comprehensive approach by the international community is needed in coordination and cooperation with the countries concerned and relevant organizations is required, bearing in mind the mandate of the United Nations High Commissioner for Refugees.\textsuperscript{180}

By analysing the purpose of Article 33 of the Refugee Convention, this Chapter will discuss the underlying principles of the Refugee Convention in order to ascertain exactly how far member States have drifted from the very ideals Article 33 was designed to protect.

The Refugee Convention was intended to be a durable solution to the refugee problem\textsuperscript{181} and a humanitarian exception to the rule that each nation is able to select who enters its borders.\textsuperscript{182} With 144 signatories, the Refugee Convention is one of the most widely recognised and subscribed treaties in the world.\textsuperscript{183} Article 33(1) in particular is seen as the ‘engine room’ of the Refugee Convention,\textsuperscript{184} establishing the ‘primary’ obligations on its signatories.\textsuperscript{185}

The obligations imposed by Article 33 fall short of creating a “right” of a refugee to seek asylum, or a “duty” on the part of the contracting State to whom a request for


\textsuperscript{181}Refugee Convention preamble.

\textsuperscript{182}James C Hathaway, The Law of Refugee Status (Butterworths, 1991) 2.


\textsuperscript{184}Minister for Immigration & Multicultural Affairs v Al-Sallal (1999) 94 FCR 549, 43 (Heerey, Carr and Tamberlin JJ) (hereinafter referred to as “Al-Sallal”).

\textsuperscript{185}Thiyagarajah (1997) 80 FCR 543, 51 (Von Doussa J).
asylum is made, to grant it, even if the refugee’s status as such has not been recognised in any other country. According to the travaux preparatoires, the aim was to find a balance between those arguing for the sovereign rights of each State and those arguing for the rights and obligations of refugees.

The debates of the Ad Hoc Committee on Stateless and Related Problems show a clear commitment to this basic understanding that peremptory non-admittance or ejection is normally impermissible. In that debate, the United States vigorously argued that:

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

Moreover, the Israeli delegate opined that, the article must, in fact, apply to all refugees, whether or not they were admitted to residence; it must deal with both expulsion and non-admittance.

A balance exists in Article 33(2), allowing each State to screen each refugee as rigorously as they like, even allowing a State to refuse a refugee if they are considered a security risk. Furthermore, Article 33 is read down in conjunction with Article 1, which defines a “refugee”. Particular consideration should be given to Article 1(A)(2).

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187 The record of the conference of the Refugee Convention.
189 Hathaway, The Rights of Refugee, above n 102, 316.
192 See section 2.5 of this thesis.
This reading of Article 33(1) draws support from the travaux préparatoires, and the commentaries thereon, of the Convention, as Dr Paul Weis commented:

The Secretariat draft referred to refugees ‘escaping from persecution’ and to the obligation not to turn back refugees ‘to the frontier of their country of origin, or to territories where their life or freedom would be threatened on account of their race, religion, nationality or political opinion’. In the course of drafting these words, ‘country of origin’, ‘territories where their life or freedom as threatened’ and ‘country in which he is persecuted’ were used interchangeably … there was no intention to introduce more restrictive criteria than that of ‘well-founded fear of persecution’ in Article 1A(2).193

The Refugee Convention is designed to provide protection only to those who truly require it. Persons who have successfully obtained surrogate international or national protections are not within the scope of the definition. Therefore those with United Nations protection, new nationality or residence with rights and obligations of a national are not considered to fall within the ambit of the Refugee Convention.194 However, there is a foreseeable risk that if every Refugee Convention country, such as Australia, applied the “safe third country” principle, then eventually almost every refugee will be refouled and left in limbo.195 This has been the experience in Europe where member agencies of the European Council on Refugees and Exiles196 have documented cases in which asylum seekers, owing to this practice, have been ‘bounced from one country to another without any State taking responsibility for examining their claim - in some instances even resulting in refoulement’.197

A number of factors suggest that a broad reading of the treaty contemplated by Article 33(1) is warranted. First, as has been noted, the United Nation General Assembly has extended UNHCR’s competence over the past fifty years to include

194 Refugee Convention arts 1C, 1D, and 1E.
196 Hereinafter referred to as “ECRE”.
those fleeing from more generalized situations of violence. To the extent that the concept of ‘refugee’ has evolved to include such circumstances, so also must has the scope of Article 33(1).

The Article must therefore be construed to include circumstances of generalized violence which pose a threat to life or freedom whether or not this arises from persecution. In keeping with the humanitarian objective of the Convention, the protective regime of Article 33(1) must be construed liberally in a manner that favours the widest possible scope of protection consistent with its terms. This interpretation of Article 33(1) draws support from various Conclusions of the Executive Committee which identify UNHCR’s functions, and the scope of non-refoulement, in terms of ‘measures to ensure the physical safety of refugees and asylum-seekers’ and protection from a ‘danger of being subjected to torture’. Article 33 should also be read in conjunction with Article 3, which restricts contracting States from refusing refugees based on race, religion or country of origin.

As will be discussed in Chapter five, Australia’s current s 91N of the Migration Act is arguably in contravention of Article 33 because it allows the Minister for Immigration to refuse a refugee that came from a “safe third country” according to a list of countries tabled by the Minister for Immigration. Finally, it should be noted that contracting States sign the Refugee Convention ‘in faith’ and this places an overriding obligation to perform their Refugee Convention obligations in ‘good faith’, the significance of which should not be underestimated.

3.3 Analysis of Article 33(1) of the Refugee Convention

Article 33 can be perceived as a noble and humanitarian commitment on behalf of the nations of the world, indeed reflective of the optimism and good intentions of the framers of the Refugee Convention. Turning now to discuss the meaning of Article 33 (1) in detail.

199 See Chapter 1, section 1.2, page 5 of this thesis.
3.3.1 Article 33 (1) of the Refugee Convention 1951

3.3.1.1 ‘Contracting State’

‘Contracting State’ refers to all States party to the 1951 Convention and the 1967 Protocol.200 ‘Contracting States’ also includes all sub-divisions of the Contracting State, such as provincial or state authorities, and will apply to all the organs of the State or other persons or bodies exercising governmental authority, provided that the person or entity is acting in that capacity in the particular instance.201

The principle of non-refoulement is also applicable in circumstances involving the actions of persons or bodies on behalf of a State or in exercise of governmental authority at points of embarkation, in transit, in international zones or in circumstances in which organs of other States, private undertakings (such as carriers, agents responsible for checking documentation in transit, etc) or other persons acting on behalf of a Contracting State or in exercise of the governmental activity of that State.202 The Principle of non-refoulement will apply equally to the conduct of State officials or those acting on behalf of the State wherever this occurs, whether beyond the national territory of the State in question, at border posts or other points of entry, in international zones, at transit points, etc.203

3.3.1.2 ‘expel or return (‘refouler’) . . . in any manner whatsoever’

The phrase ‘in any manner whatsoever’ emphasises that the concept of refoulement must be construed expansively and without limitation to prohibit any act of removal or rejection that would place the person concerned at risk. This includes expulsion, deportation, return, rejection, non-admittance at the frontier. It also extends to conduct that exposes individuals to the danger of torture or cruel, inhuman or
degrading treatment or punishment inter alia by way of their extradition. Where States are not prepared to grant asylum to persons who have a well-founded fear of persecution, even in transit zones or on the high sea, they must adopt a course that does not amount to refoulement.

As a matter of literal interpretation, the words ‘return’ and ‘refouler’ in Article 33(1) of the 1951 Convention may be read as encompassing rejection at the frontier; however it is equally applicable both at the border and within the territory of a State. Further support for the proposition comes from Conclusion No. 15 (XXX) 1979 which, in respect of refugees without an asylum country, states as a general principle that:

[A]ction whereby a refugee is obliged to return or is sent to a country where he has reason to fear persecution constitutes a grave violation of the principle of non-refoulement.

3.3.1.3 ‘to the frontiers of territories’

This means that the non-refoulement obligation does not permit a member state to expel or return (‘refouler’) the refugee or asylum seeker not only to his or her country of origin but to the frontier of any territory where he or she has the person concerned will be at risk of persecution. Another notable point is that it says ‘territories’ as opposed to ‘countries’ or ‘States’ which suggests that the principle of non-refoulement will apply also in circumstances in which the refugee or asylum seeker is within their country of origin but is nevertheless under the protection of another Contracting State, for example, in circumstances in which a refugee or asylum seeker takes refuge in the diplomatic mission of another State or comes under the protection of the armed forces of another State engaged in a peacekeeping or other role in the country of origin.

204 ExCom, ‘General Conclusion on Non-Refoulement’ Executive Committee Conclusions No 6 (XXVIII) 1977, para. (c).
205 ExCom, ‘Refugees Without an Asylum Country’ Executive Committee Conclusions No 15 (XXX) 1979, para. (b).
3.3.1.4 ‘where his life or freedom would be threatened’

As a matter of the internal coherence of the Convention, the words ‘where his life or freedom would be threatened’ in Article 33(1) must be read to encompass territories in respect of which a refugee or asylum seeker has a ‘well-founded fear of being persecuted’. The phrase ‘where his life or freedom would be threatened’ must be construed to encompass the well founded fear of persecution that is cardinal to the definition of ‘refugee’ in Article 1A(2) of the Convention. Article 33(1) thus prohibits refoulement to the frontiers of territories in respect of which a refugee has a well-founded fear of being persecuted.

A broad formulation also finds support in the approach adopted in various instruments since 1951. For example, the American Convention on Human Rights is cast in terms of a danger of violation of the ‘right to life or personal freedom’. The Asian-African Refugee Principles and the OAU Refugee Convention both refer to circumstances threatening ‘life, physical integrity or liberty’. The Cartagena Declaration is cast in terms of threats to ‘lives, safety or freedom’. The Declaration on Territorial Asylum, equally broad but in another dimension, refers simply to a threat of ‘persecution’, without qualification. The words ‘where his life or freedom would be threatened’ must therefore be read to include circumstances in which there is a real risk of torture or cruel, inhuman or degrading treatment or punishment.

3.3.1.5 ‘on account of his or her race, religion, nationality, membership of a particular social group or political opinion’

On a narrow construction of the Article, a threat to life or freedom would only come within the scope of the provision if it comes within one of these five categories, also construed in Article 1A(2). The general query is what if life or freedom is threatened or persecution is foreseen on account of reasons other than those specified categories such as generalised violence in the country of origin? In such case, the approach should not be limited in its effect by rigid insistence on the original words of the 1951 Convention. The proper test is the fundamental importance of the principle of non-refoulement in respect simply of ‘persons who may be subjected to persecution’
without reference to possible reasons.\textsuperscript{206} It is the facts that matter – that the person concerned is facing some objectively discernible threat of persecution or threat to life or freedom. The precise identification of the cause of that threat is not material. Conclusion No. 15 (XXV) 1979 similarly refers to persecution in unqualified terms, namely:

\begin{quote}
[A]ction whereby a refugee is obliged to return or is sent to a country where he has reason to fear persecution constitutes a grave violation of the recognized principle of non-refoulement.\textsuperscript{207}
\end{quote}

\subsection*{3.3.2 Wider interpretation of Article 33}

In essence, non-refoulement provides that a government should not eject a refugee from its state-territory or borders and ‘refoul’ that person to a place (country of origin or otherwise) where he or she might be exposed to torture or experience persecution. However, the legal status of Article 33(1) has, in the decades since its construction, been read down, re-constructed and ignored by many member States. State sovereignty exploits the flaws in the Convention. As is the fate of many well-intentioned laws, theoretical soundness often does not amount to practice. This section analyses different components in relation to the interpretation of Article 33.

\subsubsection*{3.3.2.1 Need for individual assessment of each case}

The implementation of the principle of non-refoulement requires an examination of the facts of each individual case and denial of protection in the absence of a review of individual circumstances would be a breach of the obligation.\textsuperscript{208} The application

\textsuperscript{206} ExCom, ‘General Conclusion on Non-Refoulement’ Executive Committee Conclusions No 6 (XXVII) 1977.

\textsuperscript{207} ExCom, ‘Refugees Without an Asylum Country’ Executive Committee Conclusions No 15 (XXX) 1979, para. (b).

of the non-refoulement principle involves an assessment of the risk of persecution and requires that a ‘fair and reasonable’ conclusion be reached.\textsuperscript{209}

In respect of the problem of manifestly unfounded or abusive applications for refugee status or asylum, Conclusion No. 30 (XXXIV) 1983 of the Executive Committee recommended that:

\ldots as in the case of all requests for the determination of refugee status or the grant of asylum, the applicant should be given a complete personal interview by a fully qualified official and, whenever possible, by an official of the authority competent to determine refugee status.\textsuperscript{210}

\textbf{3.3.2.2 Mass influx}

The requirement to focus on individual circumstances as a condition precedent to a denial of protection under Article 33(1) must not be taken as detracting in anyway from the application of the principle of non-refoulement to cases of the mass influx of refugees or asylum seekers. This is because the words of Article 33(1) give no reason to exclude the application of the principle to situations of mass influx.\textsuperscript{211} The applicability of the principle in such situations has also been affirmed by the Executive Committee in Conclusion No. 22 (XXXII) 1981:

\begin{quote}
I. 3. It is therefore imperative to ensure that asylum seekers are fully protected in large-scale influx situations, to reaffirm the basic minimum standards for their treatment, pending arrangements for a durable solution, and to establish effective arrangements in the context of international solidarity and burden-sharing for assisting countries which receive large numbers of asylum seekers.
\end{quote}


\textsuperscript{210} ExCom, ‘General Conclusion on the Problem of Manifestly Unfounded or Abusive Applications for Refugee Status or Asylum’ Executive Committee Conclusions No 30 (XXXIV) 1983, para. (e)(i).

II. A. 1. In situations of large-scale influx, asylum seekers should be admitted to the State in which they first seek refuge and if that State is unable to admit them on a durable basis, it should always admit them at least on a temporary basis and provide them with protection according to the principles set out below. They should be admitted without any discrimination as to race, religion, political opinion, nationality, country of origin or physical incapacity.\(^{212}\)

More recently, UNHCR, addressing State practice in respect of the protection of refugees in mass influx situations in February 2001, observed as follows:

… The purpose of group determination [of refugee status] is to ensure admission to safety, protection from refoulement and basic humanitarian treatment to those patently in need of it.\(^{213}\)

3.3.2.3 Article 33: ‘Refugee’

Whereas Article 1 (A) (2) of the Refugee Convention defines as a refugee a person who is outside the refugee’s country of origin “owing to well-founded fear of being persecuted”, Article 33 refers to “territories where his life or freedom would be threatened” on account of the same grounds as set out in Article 1 (A) (2). According to a literal interpretation of Article 33 (1), the protection is to be afforded to those who are formally recognized as ‘a refugee’ because refugee status is conferred formally as a matter of municipal law once it has been established that an asylum seeker comes within the definition of ‘refugee’ under Article 1A(2) of the 1951 Convention. Two consequences arise from this interpretation:

\(^{212}\) ExCom, ‘General Conclusion on Protection of Asylum-seekers in situations of large-scale influx’ Executive Committee Conclusions No 22 (XXXII) 1981; ExCom, ‘General Conclusion on Stateless Persons’ Executive Committee Conclusions No 74 (XLV) 1994 [r].

first, measures taken to prevent refugees from leaving their country are not in breach of Article 33 because a Convention refugee is defined as a person who is outside his or her country of nationality; and

second, the duty to admit would only arise when the denial of the right to admission would expose the Convention refugee to a real risk of return to a country where he or she would be subjected to persecution. 214

Non-refoulement is not limited to those formally recognized as refugees, but applies equally to asylum seekers and is extended to every individual who has a well founded fear of persecution, or substantial grounds for believing that he or she would be in danger of torture if returned.215 This was affirmed in Conclusion No. 6 (XXVIII) 1977 the Executive Committee, which was later reaffirmed by the Executive Committee in Conclusion No. 79 (XLVII) 1996 and Conclusion No. 81 (XLVIII) 1997 states:

the fundamental importance of the observance of the principle of non-refoulement, which prohibits expulsion and the return of refugees in any manner whatsoever – both at the border and within the territory of a State – who may be subjected to persecution or where their life or freedom would be threatened on account of their race, religion, nationality, membership of a particular social group or political opinion if returned to either the country of origin or to other territories irrespective of whether or not they have been formally recognized as refugees. 216

The link between Article 1A(2) and 33 (1) in Refugee Convention is well recognised in the application of the principle217, even if these two provisions are different. Therefore, the subject of the protection afforded by Article 33(1) of the Refugee

216 ExCom, ‘General Conclusion on Non-Refoulement’ Executive Committee Conclusions No 6 (XXVIII) 1977, para. (c); ExCom, ‘General Conclusion on International Protection’ Executive Committee Conclusions No 79 (XLVII) 1996, para. (j); ExCom, ‘General Conclusion on International Protection’ Executive Committee Conclusions No 81 (XLVIII) 1997 Para. (i).
Convention is a ‘refugee’ as this term is defined in Article 1A(2) of the Convention, as amended by the 1967 Protocol. As such, the principle of non-refoulement will avail such persons irrespective of whether or not they have been formally recognized as refugees. In sum, the protective arrangement, non-refoulement under Article 33(1) of the convention, is extended to persons who have not yet been formally recognized as refugees.

3.3.2.4 ‘Risk of life or freedom’ or ‘Fear of Persecution’

Dr Paul Weis said:

The words ‘where their life or freedom as threatened’ may give the impression that another standard is required than for refugee status in Article 1. This is, however, not the case.

... The words ‘to the frontiers where his life or freedom would be threatened’ [in Article 33(1)] have the same meaning as as ‘well-founded fear of persecution’ in Article 1A(2) of the Convention. It applies to the refugee’s country of origin and any other country where he also has a well-founded fear of persecution or risks being sent to his country of origin.\textsuperscript{218}

The same conclusion was expressed by Late Professor A. Grahl-Madsen in a seminal study on the 1951 Convention in the following terms:

[T]he reference to ‘territories where his life or freedom would be threatened’ does not lend itself to a more restrictive interpretation than the concept of ‘well-founded fear of being persecuted’; that is to say that any kind of persecution which entitles a person to the status of a Convention refugee must be considered a threat to life or freedom as envisaged in Article 33.\textsuperscript{219}

Thus, the broad reading of the phrase ‘where his life or freedom would be threatened’ encompass circumstances in which a refugee or asylum seeker (a) has a


well-founded fear of being persecuted, (b) faces a real risk of torture or cruel, inhuman or degrading treatment or punishment, or (c) faces other threats to life, physical integrity, or liberty. The question, then, may arise that, recognizing the threats noted in (b) and (c) above, in any event, are likely to fall within modern understanding of a risk of ‘being persecuted’. It is argued that an expansion of UNHCR’s agency mandate and the duty of non-return under international human rights law cannot be relied upon to override the linkage between the risks described in Article 33(1) and entitlement to recognition of refugee status under Article 1. However, English and Australian courts took position that: Article 33’s guarantee against refoulement where ‘life or freedom would be threatened’ for a Convention ground extends to situations where there is a risk of ‘being persecuted’ for a Convention ground.

This line of interpretation was supported by Lord Goff in the decision of the House of Lords in Sivakumaran:

> It is, I consider, plain, as indeed was reinforced in argument by counsel for the High Commissioner with reference to travaux préparatoires, that the non-refoulement provision in Article 33 was intended to apply to all persons determined to be refugee under Article 1 of the Convention.

Similarly, Simon LJ in another English case also held that:

> In my judgement it is Article 1 … which must govern the scope of Article 33 rather than the other way round.

The Federal Court of Australia has endorsed a similar approach. In M38, the full Federal Court held that:

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221 Hathaway, The Rights of Refugees under International Law, above n 102, 52, 64-8, 305.
222 Ibid 306.
223 R v Secretary of States of the Home Department, Ex parte Sivakumaran [1988] 1 All ER 193, 202-3.
224 Adan v Secretary of State for Home Department [1997] 1 WLR 1107.
Article 33 states that the principle of non-refoulement, which applies to persons who are refugees within the meaning of Article 1. Although the definition of ‘refugee’ in Article 1 and the identification of persons subject to the non-refoulement obligation in Article 33 differ, it is clear that the obligation against refoulement applies to persons who are determined to be refugees under Article 1.225

3.3.2.5 The magnitude of threat

The issue is whether the threat contemplated by Article 33(1) is broader than simply the risk of persecution. In particular, to what extent Article 33(1) precludes refoulement under a threat to life or freedom than in consequence of persecution.

The further question is the likelihood of the threat materializing and standard of proof. The threshold of proof in respect of the determination of refugee status for the purposes of Article 1A(2), whether a refugee has a well-founded fear of being persecuted etc. is the requirement that it be established ‘to a reasonable degree’ taking account of all the relevant facts.226 This means that the threshold required is to show whether the person concerned would be exposed to a ‘real risk’ of persecution or other pertinent threat.227

Therefore, it is suggested that too much weight should not be placed on the qualifying phrase in Article 33(1) and insofar as the threat of persecution is concerned, the consequences of discarding reference to the criteria may not be of great practical significance.

226 UNHCR Handbook [42].
3.3.3 Non-refoulement: Summary

The international protection underlying refugee status is based on the prevention of human rights violation.\textsuperscript{228} States following the absolute state sovereignty approach view their non-refoulement obligation under the 1951 Convention as applicable only when a person seeking refugee status successfully makes it to their borders. So there is no obligation to facilitate the arrival of refugees into their territory. This approach recognises the 1951 Convention’s support for a crucial distinction between expelling a refugee who has gained access to a state’s border, which Article 33 does not permit, and actively inhibiting a refugee from gaining access to the border, which article 33 does permit.\textsuperscript{229}

States are bound only by a good faith effort to take necessary steps to implement the provisions of the 1951 Convention.\textsuperscript{230} The textual ambiguity of Article 33 to exclude certain classifications of applicants, though already acknowledged as refugees under Article 1, from non-refoulement protections.\textsuperscript{231} Because non-refoulement protection is limited to those defined as refugees, states exercise significant latitude in deciding which asylum-seekers have access to 1951 Convention protections.\textsuperscript{232}

It is true that the 1951 Convention has no language requiring states to assist refugees in leaving their country of origin and arriving at the border of a receiving state. It has been held that preventing potential refugees from reaching their borders is also consistent with Article 33 obligations.\textsuperscript{233} The application of the Refugee Convention and the recommendations of the UNHCR are qualified by each nation’s sovereign right to decide who it will admit to its territory, who it will allow to remain there and

\textsuperscript{228} Kees Wouters, International Legal Standards for the Protection from Refoulement’ (Intersentia, 2009) Chapter 1.
\textsuperscript{229} Hathaway, The Rights of Refugees under International Law, above n 102, 310.
\textsuperscript{230} Ved P. Nanda (ed), Refugee Law and Policy: International and US Response (Greenwood Press, 1989) 4-5 where it is argued that without enabling acts incorporating the Convention provisions into the municipal laws of states, these conventions are not effective. ... the manner in which the definition is applied ... may vary depending on the country ....
\textsuperscript{232} Nanda (ed), Refugee Law and Policy, above n 230, 9.
ultimately who will be permanently resettled.\textsuperscript{234} States following the absolute state sovereignty approach conceive that their non-refoulement obligation under the 1951 Convention as applicable only when a person seeking refugee status successfully makes it to their borders and does not impose an obligation to facilitate the arrival of refugees into their territory.\textsuperscript{235} It is against this backdrop that the humanitarian idealism of Article 33 must and always will operate

Two points about the scope of Article 33 should particularly be noted. First, it prohibits the sending of a refugee from its state-territory or borders and ‘refouler’ that person to a place (country of origin or otherwise) where he or she might be exposed to torture or experience persecution on Refugee Convention grounds.\textsuperscript{236} It extends to both refugees and asylum seekers who have a well-founded fear of persecution, or substantial grounds for believing that he or she would be in danger of torture if returned.\textsuperscript{237} Second, the phrase “in any manner whatsoever” has the effect of prohibiting indirect, as well as direct, expulsion of a refugee to a persecution country.\textsuperscript{238}

This means that this article not only applies to recognized refugees who are already present in the territory, regardless of mode of entry or migration status but also equally applicable to asylum seekers who are already present pending a determination of a refugee status, on the grounds that those with a prima facie claim to refugee status are entitled to protection, for otherwise there would be no effective protection.\textsuperscript{239} UNHCR’s ExCom has also emphasized that the principle of non-refoulement shall be applied irrespective of whether or not the person concerned has been formally recognized as a refugee.\textsuperscript{240} Indirect refoulement occurs when a State returns a refugee to a country which subsequently returns the refugee to a third State where the refugee

\textsuperscript{234} Hathaway, The Law of Refugee Status, above n 182, 14.
\textsuperscript{239} Goodwin-Gill, above n 88, 137.
\textsuperscript{240} ExCom, ‘General Conclusion on Non-Refoulement’ Executive Committee Conclusions No 6 (XXVIII) 1977.
has a well-founded fear of persecution for one or more of the Refugee Convention reasons.\textsuperscript{241} As noted by Lord Hobhouse of the House of Lords:

\begin{quote}
[F]or a country to return a refugee to a state from which he will then be returned by the government of that state to a territory where his life or freedom will be threatened will be as much a breach of Article 33 as if the first country had itself returned him there direct. This is the effect of Article 33.\textsuperscript{242}
\end{quote}

The scope of inquiry needed to be carried out by the sending State to make sure that a refugee is protected from indirect refoulement in the third State has been a contentious issue.\textsuperscript{243} A pivotal factor for consideration is the inherent difficulties that could arise if the sending state and third state interpret the provisions of the Refugee Convention differently.\textsuperscript{244} For instance, if the third state adopts a more restrictive interpretation, the sending state may be at risk of breaching its non-refoulement obligations under Article 33 by removing the refugee to that third state.\textsuperscript{245} This issue is problematic because of the reality that, as noted above, each country is free to interpret the Refugee Convention as it sees fit.

If Article 33(1) strictly prohibits member states from returning refugees, directly or indirectly, where his or her life or freedom is threatened, then the remarkable point is, ‘Why are states still trying to find ways to exclude any arrivals to their shore/territory?’. The simple answer is: legal, social, economic and political issues are the reasons for such reluctance. Accepting refugees means accepting international obligations towards refugees and the provision of all benefits that they are entitled.\textsuperscript{246} For example, in this globalised world, economic conditions of a country determine its external and internal relations in terms of politics and social

\begin{flushright}
\textsuperscript{242} R (ex parte Adan) v Secretary of State for the Home Department [2001] 2 WLR 143 (Lord Hobhouse).
\textsuperscript{244} Ibid 246.
\textsuperscript{245} Ibid.
\textsuperscript{246} Christina Boswell, The Ethics of Refugee Policy (Ashgate Publishing Ltd, 2005) 3.
\end{flushright}
harmony. Taking responsibility for refugees means additional economic as well as social load, such as competition in employment, business and also cultural considerations.\textsuperscript{247} Therefore the states started to explore how to restrict access to national asylum procedure\textsuperscript{248}, without breaching their non-refoulement obligation. As a result, over the last couple of decades, numerous signatories to the Refugee Convention have, in reply to perceived deficiencies with the international system governing the protection of refugees, devised and implemented wide-ranging strategies to discourage persons from seeking asylum in the developed North.\textsuperscript{249}

Initially, developed by Scandinavian States in the 1980s to tackle secondary movements\textsuperscript{250}, the concept of ‘safe third country’, also known as ‘protection elsewhere’\textsuperscript{251} has received increasing acceptance in state practice. It is also a notable fact that there is no provision in the 1951 Refugee Convention which directly supports the STC notion. The following section examines ‘safe third country’ notion, in detail, in international law.

### 3.3.4 Development and Meaning of ‘Safe Third Country’ notion:

In this section we focus more on meaning of Safe Third Country (STC) notion and its relation with non-refoulement obligation at large.

The use of the STC notion has its origins in the collective European practices. Its official recognition dates from the 1990 Dublin Convention and the 1992 EU Ministers’ Resolution.\textsuperscript{252} STC accepts that, ‘an asylum seeker may be refused admission to the state’s asylum procedure in a particular State on the ground that he

\begin{itemize}
\item \textsuperscript{247} Ibid.
\item \textsuperscript{249} Foster, ‘Protection Elsewhere: The Legal Implications of Requiring Refugees to Seek Protection in Another State’, above n 243, 223-4.
\item \textsuperscript{250} Agnès Hurwitz, The Collective Responsibility of States to Protect Refugees (Oxford University Press, 2009) 45.
\item \textsuperscript{251} Penelope Mathew, ‘Safe for Whom? The Safe Third Country Concept Finds a Home in Australia’ in Susan Kneebone (ed), The Refugees Convention 50 Years on: Globalisation and International Law (Ashgate Publishing, 2003) 133, 142.
\end{itemize}
or she could request or should have requested and, if qualified, would actually be granted, asylum and protection in another country. In practice this means countries, with reference, may refuse entry to a refugee seeker solely on the grounds that s/he could or should have applied for asylum in a country through which s/he transited on the way to the destination.

Many states (for example Australia) consider they have no obligation to grant admission to an asylum seeker if he or she has already obtained or could/would have obtained the effective protection elsewhere. Thus, this strategy involves forcibly removing an asylum seeker or refugee to a third country which will supposedly afford the person protection. Under this practice, the asylum seeker or refugee is transferred to the “country of first asylum” or a “safe third country”. The “country of first asylum” is the country in which the asylum seeker or refugee travelled through between his departure from his home country and his or her arrival in the country in which he or she has sought, or has attempted to seek, protection. The notion of “country of first asylum” implies that the asylum seeker or refugee already found protection in the first country.

3.3.4.1 Safe Third Country (‘STC’) and International Laws; the non-refoulement obligation

Since there is no absolute obligation for states, in either Refugee Convention or UDHR, to process asylum seekers, states are free to interdict, return or remove asylum seekers to a STC provided that the non-refoulement obligation is respected.

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255 This is of course subject to the fact that the third country is only bound to afford the asylum seeker protection if he or she is found to satisfy the definition of refugee contained in the Refugee Convention.
256 Foster, ‘Protection Elsewhere: The Legal Implications of Requiring Refugees to Seek Protection in Another State’, above n 243, 224.
The legal basis for the application of STC is the link between Article 31(1) and 33(1) of the Refugee Convention. Article 31 (1) of Refugee Convention which states that:

[t]he Contracting States shall not impose penalties, on account of their illegal entry or presence, on refugees who, coming directly (emphasis added) 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.258

The countries advocating STC notion emphasize the word “directly” in Article 31 (1) and interpret it as, ‘refugees who do not come directly from a country in which their life or freedom are threatened may be sent back to a country in which they have been or could have been granted protection’.259

In addition to its so-called attachment with Article 31(1), the supporters of STC seek legal authority in Article 33 (1) by implication from the limits of the negative non-refoulement obligation in Article 33(1) of the Refugee Convention.260 It is argued that Article 33 (1) allows the member state to send an asylum seeker to a ‘safe third country’ where there is no danger at his life or freedom. If it is taken in support of STC then it can be supported by many other international obligations which prohibit states to sent asylum seekers to the situation either in his or her country of origin or in another states, where there is a risk of life or freedom such as Article 3261 of the Committee Against Torture, Article 7262 of the International Covenant on Civil and

258 Refugee Convention art 31 (1).
261 Committee Against Torture, opened for signature 10 December 1984, 1465 UNTS 85, art 3 (entered into force 26 June 1987) (hereinafter “CAT”) states that: No party shall expel, return (refouler) or extradite a person to another state where there are substantial grounds for believing that he would be in danger of being subjected to torture.
Political Rights, Article 3 of the European Commission of Human Rights etc. However, it should be noted that, if a state engages in chain deportation, it may ultimately violate the International obligation of non-refoulement if the asylum seekers ultimately end up in a state in which they are faced with a serious risk of torture, cruel, inhuman or degrading treatment.

In response to the Governments claim that Article 33(2) of the Refugee Convention 1951 permitted states to derogate from its obligations not to refoule, the Court in the case of Chahal v UK held that:

The Convention prohibits in absolute terms torture or inhuman or degrading treatment or punishment, irrespective of the victim's conduct.

The measures adopted by states vary and rest upon the premise that particular groups of asylum seekers or refugees should not be given the chance to acquire refugee protection in the country in which they have sought, or attempted to seek, that protection. This means that States tend to read the extent of their non-refoulement obligations narrowly by reference to a territorial-sovereignty nexus but, Article 33’s non-refoulement obligation extends beyond the actual territory and territorial waters to any situation where the State has ‘effective control.’

3.3.4.2 Rationale for ‘Safe Third Country’

From state’s perspective, States have an obligation to protect its citizens, arguably this obligation overrides a States obligation to provide protection to refugees. Furthermore, there is no right to free movement to states. States are involved in intricate series of mechanisms ensconced by multilateral and bilateral agreements to relocate refugees

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263 Hereinafter “ECHR”: art 3 provides absolute prohibition against torture or inhuman or degrading treatment or punishment.
265 Foster, ‘Protection Elsewhere: The Legal Implications of Requiring Refugees to Seek Protection in Another State’, above n 243, 224.
from one state to another, also known as ‘safe third country’ concept.\footnote{268} In addition to these procedural mechanisms, states use other mechanism such as transit zones that allow states to refuse review of asylum claims and thus remove applicants from their borders.

The ‘safe third country’ notion is justified on a number of grounds: First state’s sovereignty. By not allowing asylum seeker in their own territory, states are exercising their right to exclude people who are not members of their community; Secondly, states do not owe any responsibility to these asylum seekers and thirdly, admission of asylum seekers could be a threat to national identity such as fear of refugee ‘overload’, strain on national resources, xenophobia, racism, or fear of a ‘takeover’ of refugees that do not ‘mix’ with nationals in terms of ethnic background, race, religion, or culture. They also argue that if asylum seekers are not restricted to the safe first country, then they will try to seek asylum in their country of choice. In addition, this trend will encourage ‘asylum shopping’ and some countries will be over-burdened with refugees.

On one hand, the principle of sovereign state gives unrestricted power to a state to make rules or to act in its best interest; on the other hand the international bodies such as UN and others advocate and declare that, ‘everyone has the right to seek and to enjoy in other countries asylum from persecution’\footnote{269}.

States supporting STC argue that it is based principally on the expectation of burden sharing among states. If an asylum seeker is sent to the STC and the asylum seeker has a fear of persecution then the burden of proof is shifted to the applicant who must then demonstrate that the proposed safe third country is not safe. The idea of burden sharing among nations is a step towards finding durable solutions for refugees. It is particularly important for states on the periphery of the refugee producing state. Many countries have declared the list of STCs in their legislation.


\footnote{269} United Nations General Assembly, Universal Declaration of Human Rights, GA Res 217A(III), UN Doc A/810 at 71 (1948) (hereinafter referred to as “UDHR”), Article 14 (1).
The criteria to evaluate STC are not uniform; for example, Austrian law states that all nations that signed either the refugee convention or its Protocol are to be considered safe.\textsuperscript{270} There is a problem with such declarations. Many countries such as Afghanistan, Sierra Leone and Liberia have signed the refugee convention. These countries are either in civil war or have serious security issues; and some countries are extremely racist and there is always fear of xenophobic conflict. These countries can never be considered safe. Moreover, in many instances applicants are simply sent to a safe third country without guarantees that the state in question will accept responsibility. The ultimate result is that, the applicant is returned to their country of origin.

From a socio-economic perspective, there should be a balance between interests of asylum-seekers and states. Some states are rich and have plenty resources to accommodate asylum-seekers and some states are poor and cannot sustain additional burden within their limited resources. Similarly, asylum-seekers’ social, cultural and religion beliefs also attract refugees to one country than other. These are the reasons for making some countries more popular among asylum-seekers than others. Therefore, if it is not restricted then such a right to choose a country for asylum can lead to inequities between states. States find it very difficult to manage the large ‘flows’ of refugees. Merely physical presence of spontaneous asylum-seeker is neither entitled to priority nor will be justified where others are also greater and urgent needs (such as those in country of first asylum).\textsuperscript{271}

Completely different from these above-mentioned two perspectives, from asylum-seekers’ perspective, the inability to seek asylum in the country of their choice is a breach of international law obligations.\textsuperscript{272} Refugee Convention does not contain a specific right to seek asylum and is similarly silent on the matter of refugee status determination procedures. Even though there is freedom to leave one’s country and to flee persecution in international instruments such as Refugee Convention Article

\textsuperscript{270} Matthew J Gibney and Randall Hansen (eds) Immigration and Asylum: From 1900 to the Present (ABC-CLIO, 2005) 549-50.
\textsuperscript{272} Ibid.
33; UDHR Articles 5, 13 and 14; ICCPR Articles 7 and 12; and CAT Article 3, there is no corresponding duty upon a state to admit a refugee. While there is no right under international law to asylum, states have a duty under international law not to obstruct the right to seek asylum. Moreover, the legality of many measures adopted by states can be called into question under international law.

Asylum seekers are, generally, people who are forced to flee because of a failure of national protection. Fleeing and seeking asylum is the only realistic option for many refugees. Even though there are some qualifications (used to justify STC notion that can be challenged) which are designed to discourage ‘forum shopping; there are some indications that the legitimate preferences, such as on the basis of family, language and cultural connection of the asylum seeker are relevant in determining ‘durable solutions’. In addition to these factors, similarity of political views or race or religion of a country also might be cause to target a destination country for asylum. The objective of durable solutions should not be to prevent movement. It should be to manage better sensitive issues at stake, including national security and identity, social and state interests in such a way that it promotes a proper sharing of responsibilities and also maximizes the benefits that migration of all sorts can bring to host societies. The right to seek asylum and the right against refoulement are the twin key precepts of refugee protection.

In the context of human rights law, it is clear that non-refoulement precludes ‘the indirect removal to an intermediary country’ in circumstances in which there is a danger of subsequent refoulement of the individual to a territory where they would

277 Ibid 144.
278 Ibid 129.
be at risk. The State concerned has a responsibility to ensure that the individual in question is not exposed to such a risk. States operating ‘safe country’ policies requires such policies to take account of any risk that the individual concerned may face of subsequent removal to a territory of risk not to breach non-refoulement obligation. In Conclusion No. 58 (XL) 1989 of the Executive Committee of UNHCR which, addressing refugees and asylum seekers who move in an irregular manner from a country where they have already found protection, provides that they may be returned to that country ‘if . . . they are protected there against refoulement’.

Having regard to these factors, the prohibition of refoulement in Article 33(1) of the 1951 Convention must be construed as encompassing the expulsion, return or other transfer of a refugee or asylum seeker both to a territory where he or she may be at risk directly and to a territory where they may be at risk of subsequent expulsion, return, or transfer to another territory where they may be at risk.

A ‘safe third country’ must not be a place where the asylum Seeker has a well-founded fear of persecution on one of the grounds set out in the Refugee Convention. The ‘safe third country’ must not be one that will send the asylum-seeker to a country where he/she will be at risk of persecution as defined by the Refugee Convention. The “safe third country” principle provides that if the asylum Seeker could have obtained protection in another country, the so-called “safe third country”, then the State will therefore have no obligation to allow the asylum-seeker a right to access the refugee determination procedure of that country and consequentially (dependent on The procedure of the respective State’s “safe third country” law) that the refugee be returned to an alternative country. It aims to restrict the asylum seekers access to national asylum procedure. Thus, the ‘safe third country’ concept is

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based upon the false understanding that there is no responsibility to process an asylum seeker if protection can be sought in a safe alternative country.\footnote{Ibid 129.}

The STC notion is also a barrier to ‘durable solutions’. The STC notion has developed as a practice whereby States deny asylum seekers access to their national processes and instead seek to pass their responsibility on to other states. It is an attack on the fundamental principle of asylum, a principle which is vital to international refugee protection.

\subsection*{3.3.5 Concept of “Effective protection”}

“Refugee” is a temporary status in the sense that whenever the fear of persecution ends, the status also elapses. This is a group of people who are very vulnerable and who are in immediate need of protection. A state’s violation of its non-refoulement obligations is tantamount to a “death warrant” for a asylum seeker who upon return to his country of origin faces as a near certaint death or persecution. Put another way, when an asylum applicant is not provided with adequate protection of life or freedom by his or her own country, the applicant will have no other option except to flee beyond the territory. The grave consequences for refugees also exemplify why the strict obligation of non-refoulement is so fundamental to international refugee law.

The international refugee regime is premised upon the principle of cooperation and collective responsibility of States in the protection of refugees. UNHCR Executive Committee Conclusion No 22 (XXXII) 1981 emphasised the need to protect asylum seekers according to ‘basic human standards’ and ‘fundamental civil rights’ whilst providing temporary protection.\footnote{Susan Kneebone, ‘Pacific Plan: The Provision of ‘Effective Protection’?’ (2006) 18 International Journal of Refugee Law 696, 700.} The rights accorded to protect refugees are discussed under chapter 2 (2.7) and will not be repeated here again. However, it will be sufficient here to note that the Convention confers tiers of rights on ‘refugees’ according to relationship or status of the state from which asylum is sought and
other human rights instruments such as ICCPR, CAT, UDHR etc also protect refugees against any sort of discrimination and deprivation of liberty.\(^{286}\)

Effective protection is quality protection where the following situations are at a minimum reliably guaranteed:\(^{287}\)

- there is no likelihood of persecution, of refoulement, or torture or other cruel, inhuman or degrading treatment or punishment;
- there is no real risk to the life of the person(s) concerned;
- there is a genuine prospect of an accessible durable solution in or from the asylum country, within a reasonable time frame;
- pending a durable solution, stay is permitted under conditions which protect against arbitrary expulsion and deprivation of liberty and which provide for an adequate and dignified means of existence;
- the unity and integrity of the family is ensured; and
- the specific protection needs of the affected persons, including those deriving from age and gender, can be identified and respected.

In sum, the protection can be rendered to refugees and asylum seekers by giving a genuine and realizable prospect of a durable solution; and it will be effective only when international commitment to provide a permanent solution is obvious.\(^{288}\)

### 3.3.6 Concept of ‘Durable solutions’

UNHCR’s Executive Committee’s Conclusions indicate that states practice should always take into account the rights of individual. It supports the view that refugees may proceed directly or indirectly to a country of asylum subject to ‘good reasons’ for doing so.\(^{289}\)

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\(^{286}\) Ibid 703-7.


\(^{288}\) Ibid.

Durable solutions address the refugee question in its entirety. This requires examination of the root causes and options for tackling these causes as well as preventive measures. These are short-term as well as long-term solutions. Within this comprehensive approach, the institution of asylum remains one of the many actions open to states to meet their humanitarian objectives to boost livelihood and self-reliance opportunities for refugees. It also includes the creation of conditions conducive to voluntary return and sustainable reintegration, as well as support for local integration; and where applicable, resettlement will serve as a protection tool, durable solution and burden-sharing mechanism.\(^{290}\)

However, it is also evident that burden/responsibility sharing is also abused by developed countries. In many instances, rich countries pay substantial amounts to poorer countries to take their refugees, effectively enabling richer states opt out their international obligations. For example, in EU, the Western EU member countries transfer their burden to poor Eastern EU countries. Australia has also adopted same strategy with lucrative economic offers to its neighbour countries such as Nauru.

Whatever the current practice of developed states in responsibility/burden sharing, one can be optimistic that this situation may change if developed countries extend their genuine cooperation and honour the non-refoulement obligation as a guiding principle of refugee law. This is established in complementary areas of international law, in human rights treaties and in international customary law. The following section will examine the status of the rule embodied in Article 33, that is, the rule prohibiting refoulement of refugees, in international law. It poses the question “Is non-refoulement a norm of customary international law?” and after answering in the affirmative, it goes on to consider whether the rule has gone as far as attaining the status of jus cogens.

3.4 Principle of Non-Refoulement in International Law

First, this section will consider whether the rule prohibiting the refoulement of refugees, as enshrined under the Refugee Convention, has become a customary norm of international law. This issue has been debated since the 1960s. The majority doctrinal position is that the rule has over time acquired the character of a rule of customary international law.

3.4.1 Characteristic of customary international law and Article 33

Customary international law does purport to bind all states except those that have specifically objected to the creation of a particular rule. Since Article 33 is immune from any reservation, it is no longer merely a matter of treaty-based obligation (applicable only to state parties) but instead now binds all states, including those which have never signed.

Customary international law develops from the practice of States. The practice of states mean official governmental conduct reflected in a variety of acts, including official statements at international conferences and in diplomatic exchanges, formal instructions to diplomatic agents, national court decisions, legislative measures or other actions taken by governments to deal with matters of international concern. Therefore, it consists of rules of law derived from the consistent conduct of States acting out of the belief that the law required them to act that way.

A consensus has developed among courts and scholars that customary international law has the status of federal common law which is labeled as the "modern

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292 Ibid.
It is argued that customary international law preempts inconsistent state law, is binding authority and even supersedes prior inconsistent national legislation. It could be argued that non-refoulement is a fundamental component of the customary prohibition on torture and cruel, inhuman and degrading treatment or punishment. Principle of non-refoulement has been established in customary international law which prohibits return or expulsion where there are substantial grounds for believing that a person ‘would face a real risk of being subjected to torture, cruel, inhuman or degrading treatment or punishment’.  

3.4.1.1 Non-refoulement as customary international law

According to an Advisory Opinion to the UNHCR in 2007, a rule must satisfy two elements before it can become part of customary international law: consistent State practice and opinio juris. The Advisory Opinion concluded that the rule of non-refoulement satisfies both elements of customary international law and thus ‘constitutes a rule of customary international law’. Accordingly, the Advisory Opinion asserted that the rule is binding upon all States, not only upon the signatories of the Refugee Convention and/or the 1967 Protocol. In reaching its conclusion, the Advisory Opinion noted the practice of non-signatory States hosting large refugee populations, often in mass influx situations. Furthermore, on the issue of opinio juris, it made the following remark:

In UNHCR’s experience, States have overwhelmingly indicated that they accept the principle of non-refoulement as binding, as demonstrated, inter alia, in numerous instances where States have responded to UNHCR’s

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298 The Extraterritorial Application of Non-Refoulement Obligations under the 1951 Convention relating to the Status of Refugees and its 1967 Protocol (Advisory Opinion to the UNHCR) (26 January 2007) 7 <http://www.unhcr.org/refworld/docid/45f17a1a4.html> at 30 April 2009. The Advisory Opinion defined opinio juris as the ‘understanding held by States that the practice … is obligatory due to the existence of a rule requiring it’.
299 Ibid.
300 Ibid.
301 Ibid.
representations by providing explanations or justifications of cases of actual or intended refoulement, thus implicitly confirming their acceptance of the principle.\footnote{302} In addition, the Advisory Opinion stated that the customary international law status of the rule prohibiting refoulement had been re-affirmed in international and regional agreements. At the international level, the Advisory Opinion referred to a Declaration adopted by member States of the Refugee Convention and/or its 1967 Protocol in 2001 which acknowledges that the applicability of the principle of non-refoulement is ‘embedded in customary international law’.\footnote{303} At the regional level, the Advisory Opinion cited the Mexico Declaration and Plan of Action to Strengthen the International Protection of Refugees in Latin America which recognizes the ‘jus cogens nature of the principle of non-refoulement’.\footnote{304} Another declaration which addresses this issue is the 2001 San Remo Declaration on the Principle of Non-Refoulement which arose following a symposium between members of the International Institute of Humanitarian Law, UNHCR representatives, and experts in international law.\footnote{305} It asserts that the principle of non-refoulement of refugees ‘can be regarded as embodied in customary international law on the basis of the general practice of States supported by a strong opinio juris’.\footnote{306} This point is clarified as follows:

That is not to say that every specific legal ramification of the principle of non-refoulement of refugees is generally agreed upon today in the context of

customary international law … But while there are doubts affecting borderline issues, the essence of the principle is beyond dispute.307

Roda Mushkat is also a proponent of the majority view. Mushkat argues that there is ‘ample evidence’ that the rule of non-refoulement of refugees has become part of customary international law, binding on all States, even States not signatories to the Refugee Convention.308 According to her, such evidence includes the fact that the rule has been:

codified in the ‘Magna Carta of refugee rights’ … incorporated in various international legal instruments … It has been affirmed and re-affirmed in numerous declarations in different international fora, in successive resolutions of the UN General Assembly and the Executive Committee of the UNHCR as well as in the laws and practices of states.309

In conclusion, Mushkat contends that the rule has ‘crystallized into a customary norm of international law’.310

Similarly, Greig asserts that it is ‘inescapable that the definition of refugee for purposes connected with the obligations contained in the [Refugee] Convention and [1967] Protocol has attained a general currency’.311 He concludes that ‘there seems to be no doubt as to the reception of non-refoulement as a rule of customary international law’.312

Sir Elihu Lauterpacht and Daniel Bethlehem, both prominent legal scholars, were commissioned by the Office of the UNHCR to examine the scope and content of the principle of non-refoulement in international law in 2001. Lauterpacht and Bethlehem examined three factors, namely, the fundamentally norm creating

307 Ibid.
309 Ibid.
310 Ibid.
312 Ibid 133-4.
character, the widespread and representative State support, and the consistent practice and general recognition of the rule and concluded that non-refoulement ‘must be regarded as a principle of customary international law’. Principle of non-refoulement has been established in customary international law which prohibits return or expulsion where there are substantial grounds for believing that a person ‘would face a real risk of being subjected to torture, cruel, inhuman or degrading treatment or punishment’.

An expert roundtable, organized by the UNHCR and the Lauterpacht Research Centre for International Law, was held at the University of Cambridge on 9–10 July 2001. There were 33 participants, comprising of experts in international law, UNHCR representatives, and NGO representatives. The participants discussed the opinion by Lauterpacht and Bethlehem and ‘largely endorsed’ the opinion and concluded that ‘non-refoulement is a principle of customary international law’.

3.4.1.2 Argument against non-refoulement as a customary international law

It should be pointed out however that the majority view has not received universal support. It has been suggested that there is a lack of evidence to support the proposition that the principle prohibiting refoulement has reached a status of customary international law. According to Coleman, ‘[t]he real disagreement with regard to the fulfillment of the requirements of customary international law by the principle of non-refoulement concerns the requirement of generality of practice’. According to Hathaway, ‘the notion that customary international law has expanded the concept of refoulement and suggests that those proponents who argue for an

314 Ibid 87.
expanded understanding of the rule against non-refoulement are undermining the protection that is now available under the Convention’.  

Kay Hailbronner also points out that most countries in Eastern Europe, Asia and the Near East have consistently refused to ratify refugee agreements which include non-refoulement provisions. Owing to this, Hailbronner describes the principle of non-refoulement as ‘universal customary law in the making, and regional customary law in Western Europe, the American Continent, and Africa’.  

Hathaway concurs with the view of Hailbronner. In his view, ‘the opinio juris component of the test for customary status is not clearly satisfied, as most states of Asia and the Near East have routinely refused to be formally bound to avoid refoulement’. Hathaway claims that there is ‘insufficient evidence’ that the duty of non-refoulement has ‘evolved at the universal level beyond the scope’ of Article 33 of the Refugee Convention’. According to Hathaway, ‘custom can evolve only through interstate practice in which governments effectively agree to be bound through the medium of their conduct’. He argues that this standard is not yet met in the case of the obligation of non-refoulement. As such, Hathaway concludes that ‘it is absolutely untenable to suggest that there is anything approaching near-universal respect among states for the principle of non-refoulement’. On that final point, Hathaway notes that the UNHCR has officially expressed its ‘distress’ at the ‘widespread violation of the principle of non-refoulement and of the rights of refugees’.  

317 Hathaway, The Rights of Refugees Under International Law, above n 102, 364.
319 Ibid 129.
320 Hathaway, The Rights of Refugees Under International Law, above n 102, 364.
321 Ibid 363.
322 Ibid.
323 Ibid.
324 Ibid 364.
3.4.1.3 Concluding view: non-refoulement as a Customary Law

Despite the dissenting opinions, it is argued that the principle of non-refoulement has evolved beyond the Refugee Convention and has matured into a norm of customary international law. Strict universal observance of a rule is not required for it to be part of customary international law. As the ICJ has pointed out:

The Court does not consider that, for a rule to be established as customary, the corresponding practice must be in absolutely rigorous conformity with the rule. In order to deduce the existence of customary rules, the Court deems it sufficient that the conduct of States should, in general, be consistent with such rules, and that instances of State conduct inconsistent with a given rule should generally have been treated as breaches of that rule, not as indications of the recognition of a new rule.326

It appears that States are abiding by the rule prohibiting refoulement of refugees because they accept that they are legally obliged to do so. It is also noteworthy that the principle of non-refoulement was already incorporated in various international instruments adopted under the auspices of the League of Nations: for example in Convention relating to the International Status of Refugees, 1933 (Article 3); and Convention concerning the status of refugees coming from Germany, 1938 (Article 5). In light of the above, the conclusion may be drawn that the principle of non-refoulement is a customary norm of international law and is consequently binding on all countries, including countries which are not signatories to the Refugee Convention.

3.4.2 Principle of non-refoulement and jus cogens

The conclusion above leads to a further question whether the principle of non-refoulement has gone as far as attaining the status of jus cogens. Some scholars have gone as far as to assert that the principle of non-refoulement has acquired the status

of jus cogens. Jean Allain, Goodwin-Gill and Karen Parker are proponents of this view.

Allain begins from the premise that the rule of non-refoulement is part of customary international law. He then proceeds to examine whether the rule has achieved the status of jus cogens. Allain accords considerable weight to the ExCom Conclusions. He argues that the ExCom conclusions establish that the principle of non-refoulement has, over time, acquired the status of jus cogens. According to Allain, the earliest indication of the norm being regarded as jus cogens was in conclusion number 25 of 1982 when the ExCom member states agreed that the principle of non-refoulement was ‘progressively acquiring the character of peremptory rule of international law.’ He goes on to point out that by the late 1980s, ExCom member States asserted that ‘all states’ were obliged to refrain from refoulement as such conduct was ‘contrary to fundamental prohibitions against these practices. Finally, Allain relies on conclusion 79 of 1996, namely that the ‘principle of non-refoulment is not subject to derogation’, to establish that the principle has thus acquired the status of jus cogens.

In addition, Allain notes that the jus cogens status of the norm is recognized in international agreements such as the Cartagena Declaration on Refugees. Allain refers to the conclusions of the Colloquium, comprised of ten Latin American States, in which they agree that the principle of non-refoulement ‘is imperative in regard to refugees and in the present state of international law should be acknowledged and

328 Ibid 85.
329 Ibid; ExCom, ‘General Conclusion on International Protection’ Executive Committee Conclusions No 25 (XXXIII) 1982, para (b).
observed as a rule of jus cogens’.\textsuperscript{333} Although recognizing that it is not a legally binding instrument, Allain asserts that the Cartagena Declaration on Refugees has become the basis for refugee policy in Latin America and has been enacted into law by domestic statute in various countries in the region.\textsuperscript{334} Furthermore, he notes that the recommendations of the Cartagena Declaration on Refugees have been repeatedly endorsed by intergovernmental organizations such as the General Assembly of the Organisation of American States.\textsuperscript{335}

Finally, as a subsidiary indicator of the character of the principle of non-refoulement, Allain considers the writings of legal scholars in international law.\textsuperscript{336} On that point, he quotes with approval, Harold Koh who has noted that ‘[n]umerous international publicists now conclude that the principle of non-refoulement has achieved the status of jus cogens’.\textsuperscript{337}

Similarly, Karen Parker argues that ‘[d]ue to its repeated reaffirmation at universal, regional, and national levels, the principle of non-refoulement has now become characterized as a peremptory norm (jus cogens) for this hemisphere’.\textsuperscript{338} Goodwin-Gill also recognizes the peremptory character of the principle of non-refoulement.\textsuperscript{339}

The aforementioned opinion by Lauterpacht and Bethlehem considered whether the rule of non-refoulement had attained the status of customary international law. They concluded that:

\begin{quote}
the evolution of customary international law rules in the area [of non-refoulement] is important and must be acknowledged. Indeed, it may well be
\end{quote}

\begin{footnotes}
\textsuperscript{333} Cartagena Declaration on Refugees, [5].
\textsuperscript{335} Ibid.
\textsuperscript{336} Ibid.
\textsuperscript{337} Ibid.
\end{footnotes}
that the relevant rules amount to jus cogens of a kind that no State practice and no treaty can set aside.\textsuperscript{340}

\textbf{3.4.2.1 Arguments against the proposition that principle of non-refoulement is jus cogen}

The opposing view on this issue, namely the position that the principle of non-refoulement conforms only to customary international law and is thus outside the realm of jus cogen, has been advanced by many commentators. Nils Coleman is one such commentator. In 2003, Coleman responded to Allain’s above remarks on this issue. In summary, he was of the view that Allain’s argument is ‘based on primarily teleological argumentation’ and concluded that the ‘existence of a peremptory norm of non-refoulement cannot be considered realistic’ given the current practice of states.\textsuperscript{341}

Some rules, such as the prohibition of genocide, torture and slavery have been accepted and recognized as peremptory norms with relatively little disagreement.\textsuperscript{342}

To the contrary, the issue of the international legal status of the principle of non-refoulement has been a source of much controversy.

With regard to Allain’s reference to the Cartagena Declaration on Refugees, Goodwin-Gill and Jane McAdam have pointed out that the Cartagena Declaration on Refugees arose following the refugee crisis in Central America during the 1980s.

\textsuperscript{340} Lauterpacht and Bethlehem, ‘The Scope and Content of the Principle of Non-Refoulement: Opinion’, above n 202, 141.
and that it ‘emerged not from within a regional organization, but out of an ad hoc group of experts and representatives from governments in Central America’.  

Furthermore, they note that it attempts to expand the definition of a refugee to include ‘persons who have fled their country, because their lives, safety or freedom have been threatened by generalized violence, foreign aggression, internal conflicts, massive violation of human rights or other circumstances seriously disturbing public order’.  

In response to Allain’s point on the Cartagena Declaration on Refugees, it has been argued that the Cartagena Convention on Refugees, which arose from a particular crisis in one part of the world, attempts to elevate the principle prohibiting refoulement to include so called “humanitarian refugees” and that such elevation amounts to the creation of a new norm with larger scope than the Refugee Convention, rather than establishing that the rule prohibiting refoulement has acquired jus cogens status.  

3.4.2.2 Non-refoulement as jus cogens: Conclusion

The remainder of this section addresses the question posed at the beginning of this section, namely: what is the status of the rule prohibiting refoulement in international law. The foregoing analysis establishes that the rule prohibiting refoulement is a norm that most likely belongs to the realm of customary international law. However, the assertion that it has gone as far as attaining the status of jus cogens elicits as much skepticism as support. This is not helped by the fact that neither the opinion by Lauterpacht and Bethlehem nor the ensuing meeting made an assertion that the rule prohibiting refoulement had indeed attained the status of a peremptory norm. Against the backdrop of this ambiguity, it might be, at least at this stage, too far to characterize the obligation of non-refoulement as jus cogens.

344 Ibid 38.
345 C v Director of Immigration (2008) 138 ILR 537 [6], Hartman J defines humanitarian refugees as ‘people fleeing civil wars, natural disasters or the generalised anarchy’.  

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Nevertheless, the principal of non-refoulement remains the cornerstone of international refugee protection.\textsuperscript{346} It recognizes that a State which sends a person to a place where he or she would be persecuted effectively renders the first State an accomplice to that persecution.\textsuperscript{347} Thus, in the words of Goodwin-Gill, refoulement is ‘to be distinguished from expulsion or deportation, the more formal process whereby a lawfully resident alien may be required to leave a state, or be forcibly ejected therefrom’.\textsuperscript{348}

Although it appears that the Refugee Convention permits member States to restrict refugees’ access to their territory, any such restriction must not breach the principle of non-refoulement. Article 33 of the Refugee Convention prohibits both direct and indirect refoulement.\textsuperscript{349}

Since the Refugee Convention does not contain any right to asylum, it is feasible that a member State may refuse to grant refugee status without breaching the principle of non-refoulement. Therefore, under the Refugee Convention, member States are required to either accept refugees or not send them to a country where they would be at risk of persecution for a convention reason. This again illustrates the tension between the doctrine of state sovereignty and an individual’s right to seek and receive or enjoy asylum in other countries.

The original draft of Article 33 did not contain the exceptions to the principle of non-refoulement which now appear as subsection (2) in the existing Article 33.\textsuperscript{350} Interestingly, during that same drafting stage, States opposed a “right to asylum” provision in the Universal Declaration of Human Rights\textsuperscript{351} and in the Refugee


\textsuperscript{348} Goodwin-Gill, above n 88, 69.

\textsuperscript{349} Andrea Hadaway, ‘Safe Third Countries in Australian Refugee Law: NAGV v Minister for Immigration & Multicultural Affairs’ (2005) 27 Sydney Law Review 727, 727: The UNHCR and others have emphasized the ‘responsibility of the receiving state under the [Refugee] Convention to protect refugees from both direct and indirect refoulement’.


\textsuperscript{351} United Nations General Assembly, Universal Declaration of Human Rights, GA Res 217A(III), UN Doc A/810 at 71 (1948) (hereinafter referred to as “UDHR”).
Convention itself.\textsuperscript{352} Article 33(2) was later inserted as a ‘concession to State sovereignty’, it identified potential justifications for States to derogate from the non-refoulement obligations under the Refugee Convention.\textsuperscript{353} Thus, a State may lawfully justify expulsion of a refugee in certain limited and exceptional circumstances. The elements of this have been summarized by Lauterpacht and Bethlehem.\textsuperscript{354}

First, the danger must be prospective in nature.\textsuperscript{355}

Second, the danger must be to the country of refuge. Although nothing in the Refugee Convention prevents a member State from controlling activity/persons within its jurisdiction that may pose a security risk to other states or the international community as a whole, any such action cannot result in the refoulement of refugees.\textsuperscript{356} The exceptions in Article 33(2) represent a compromise between the danger of exposing the refugee to refoulement and the danger the refugee poses to his or her country of refuge.\textsuperscript{357} A narrow approach to the scope of these exceptions should be applied; consistent with the ‘humanitarian and fundamental character of the prohibition of refoulement’.\textsuperscript{358}

Third, on the issue of a State’s margin of appreciation and the seriousness of the risk, Lauterpacht and Bethlehem stated the following:

This margin of appreciation is, however, limited in scope. In the first place, there must be “reasonable grounds” for regarding a refugee as a danger to the security of the country in which he is. The State concerned cannot, therefore, act either arbitrarily or capriciously … Second, the fundamental character of the prohibition of refoulement, and the humanitarian character of the 1951


\textsuperscript{353} Ibid.


\textsuperscript{355} Ibid 135.

\textsuperscript{356} Ibid.

\textsuperscript{357} Ibid.

\textsuperscript{358} Ibid.
Convention more generally, must be taken as establishing a high threshold for the operation of exceptions to the Convention.\(^{359}\)

Fourth, the assessment of risk requires consideration of individual circumstances. As explained by Lauterpacht and Bethlehem:

It is the danger posed by the individual in question that must be assessed. It will not satisfy the requirement that there be “reasonable grounds” for regarding a refugee as a danger to the security of the country for such an assessment to be reached without consideration of his or her individual circumstances.\(^{360}\)

Finally, there is a requirement that the principle of proportionality be observed.\(^{361}\) This entails a consideration of a number of factors including the following which were identified by Lauterpacht and Bethlehem: \(^{362}\)

(a) the seriousness of the danger posed to the security of the country;
(b) the likelihood of that danger being realized and its imminence;
(c) whether the danger to the security of the country would be eliminated or significantly alleviated by the removal of the individual concerned;
(d) the nature and seriousness of the risk to the individual from refoulement;
(e) whether other avenues consistent with the prohibition of refoulement are available and could be followed, whether in the country of refuge or by the removal of the individual concerned to a safe third country.

### 3.4.3 Impact on application: “customary law or jus cogens”

If non-refoulement in the refugee context has emerged as a jus cogens norm, then the treaty-based exceptions to non-refoulement must be re-examined and strictly limited. The characterization of non-refoulement as jus cogens prohibits a broad

\(^{359}\) Ibid 135-6.
\(^{360}\) Ibid 137.
\(^{361}\) Ibid.
\(^{362}\) Ibid 137-8.
application of the Article 33(2) exceptions even though those exceptions articulate state intent. If the principle of non-refoulement is considered as emerged as jus cogens norm, drawing on the consensus of states, and the non-derogability of the principle and if the peremptory character of non-refoulement is accepted as valid, then the breadth of the Article 33(2) exceptions is called into question.\textsuperscript{363} Therefore, if the principle of non-refoulement is accepted as jus cogens, in order to avoid contravening its norm and safeguard the underlying refugee protection regime, Article 33(2) must be strictly limited.\textsuperscript{364} Save for the exception in Article 33(2), which has a very high threshold especially given that a person granted refugee status has already passed the hurdles of Article 1F, the drafters of the Refugee Convention have made it abundantly clear that refugees should not be returned to any country where they face the risk of persecution for one or more of the convention grounds.\textsuperscript{365}

At the very minimum, the Refugee Convention entitles refugees to ‘protection absent asylum’.\textsuperscript{366} This reflects the objective and purpose of the Refugee Convention, namely, to ‘assure refugees the widest possible exercise of these fundamental rights and freedoms’.\textsuperscript{367} However, the absence of a universally accepted interpretation of the term asylum means that the receiving State alone determines the ‘material content of asylum and to whom it will or will not accord it’.\textsuperscript{368}

\textbf{3.5 International Human Rights Law and Non-Refoulement}

Academics from around the world have been questioning whether the Refugee Convention’s lack of protection of some critical civil rights renders the Refugee Convention an incomplete document and puts into question the intent of the drafters.

It has been suggested that the participants in the drafting of the Refugee Convention may not have intended for the Refugee Convention to be limited to ‘situation specific

\begin{thebibliography}{99}
\bibitem{364} Ibid 44.
\bibitem{365} McIvor, above n 352, 27.
\bibitem{366} Ibid 28.
\bibitem{367} Refugee Convention preamble.
\end{thebibliography}
rights required by the precarious nature of refugee hood’ because they assumed that ‘all other rights would be protected by general human rights law’. Otherwise, it is argued, the Refugee Convention would not have addressed subjects already accepted as legitimate aspects of general human rights protection, such as the right to engage in wage-earning employment.

International human rights jurisprudence is pertinent to refugee protection with regard to both the relevant provisions as well as the way those provisions can assist in the interpretation of the Refugee Convention. This section will examine two key international human rights instruments which address the principle of non-refoulement, namely, the ICCPR and the CAT.

### 3.5.1 International Covenant on Civil and Political Rights (ICCPR)

The ICCPR contains several provisions which are relevant to the protection of asylum seekers and refugees including:

- Member States must apply the protections afforded under the ICCPR to all persons within its territory and subject to its jurisdiction without discrimination.
- The right to life.
- The right not to be subjected to torture or to cruel, inhuman or degrading treatment or punishment.
- If deprived of one’s liberty, the right to be treated with humanity and with respect.
- The right to a fair hearing by a competent, independent and impartial tribunal and the right to defend oneself.

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370 Ibid.
372 Ibid art 7.
373 Ibid art 10.
374 Ibid art 14.
Article 4(1) allows member States to derogate from certain obligations under the ICCPR in times of public emergency which threaten the life of the nation to the extent strictly required by the exigencies of the situation. However, such measures must not be inconsistent with the State’s other obligations under international law and must not involve discrimination solely on the ground of race, colour, sex, language, religion or social origin. Article 4(2) provides that derogation from a number of articles, including Articles 6 and 7, are not permitted. This is significant because such provisions are relevant to the expulsion of a refugee; they add to the ‘impetus of non-refoulement obligations owed to those facing risks of death and torture in other countries’.376

It is implied in the ICCPR that a person has the right to be protected from being put in a situation where there are reasonable grounds for believing that the rights conferred upon him/her by the ICCPR may be violated. That is, a State’s removal of a person (either directly or indirectly) to a situation where his or her life is at risk, or where he or she is at risk of being subjected to torture or to cruel, inhuman or degrading treatment or punishment, effectively amounts to a violation of the States obligations under the ICCPR.

3.5.2 Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT)

The non-refoulement rule is ‘powerfully expressed’ in the Convention against Torture (CAT) on Article 3 which provides:

No State Party shall expel, return (“refouler”) or extradite a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture.377

For the purpose of determining whether there are such grounds, the competent authorities shall take into account all relevant considerations including, where

376 McIvor, above n 352, 30.
applicable, the existence in the State concerned of a consistent pattern of gross, flagrant or mass violations of human rights.

The CAT is clear and absolute in its terms – if a person can establish, on substantial grounds, that he or she is at risk of being tortured in a particular State, the person may not be returned to that particular State. The protection afforded to persons against torture under the CAT is much broader than the protection provided under the Refugee Convention. First, the CAT does not limit the scope of persons to whom its protection applies – it applies equally to all persons, irrespective of legal status. Second, Article 3 of the CAT is not subject to any exception whatsoever. Furthermore, it is non-derogable; even persons who pose a risk to national security are protected under the CAT.

Despite the forceful expression of the principle of non-refoulement in the CAT, the protection provided by the CAT is guarded. The protection under the CAT is afforded to persons who fear future torture; the fear of cruel, inhuman or degrading treatment or punishment may not be sufficient for a claim under the CAT. Also, as pointed out by Feller, the rights afforded to persons under the CAT are usually inferior to the rights afforded to recognized refugees under the Refugee Convention. Therefore, although the CAT makes no distinction between people of different status, it does not ‘regularise the standing of those protected by the CAT as the Refugee Convention does for refugees’. It should be remembered that the CAT provides a person with the right not to be returned to a situation of torture whereas the Refugee Convention provides additional rights, such the right to engage in wage-earning employment or self-employment, and access to education, social security, administrative assistance, and housing.

378 McIvor, above n 352, 33.
380 McIvor, above n 352, 33.
381 Ibid art 18.
382 Ibid art 22.
383 Ibid art 24.
384 Ibid art 25.
385 Ibid art 21.
Gorlick argues that a narrow interpretation of the Refugee Convention is ‘driving rejected asylum seekers to human rights treaty bodies’ and that asylum seekers would not have to resort to the CAT and other such bodies if ‘states honour the spirit of their obligations under the refugee instruments’.  

Despite the binding international norm of non-refoulement, countries have sought to avoid their obligations under this norm via the “safe third country” argument. This issue will be addressed in the next section. This thesis argues that even if there is a safe third country where the refugee can have effective protection, he or she should not be sent to that country if he or she has family ties with Australia. It is a fundamental human right for a family to live together and, as a fundamental unit of a society, to receive respect, protection, assistance and support. This right is not limited to nationals living in their own country but also to non-nationals and is protected by international law.

3.6 International Norms and Domestic Policy

Merely being a signatory to a treaty does not incorporate the treaty into Australia’s domestic law. The treaty must be transformed into domestic law through an act of Parliament. As such, it is open to Parliament to legislate outside of its international obligations. Sackville has identified examples of this:

- The excision of designated areas from Australia’s “migration zone”. Asylum seekers arriving at these designated areas are precluded from lodging protection applications thus making them susceptible for removal to a ‘declared country’.
- The term “persecution” in Article 1A(2) of the Refugee Convention has been qualified by s 91R of the Migration Act. Section 91R provides, inter alia,  

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389 Migration Act 1958 (Cth) ss 5, 46A, 198A.
that Article 1A(2) does not apply in relation to persecution for one or more of the Refugee Convention reasons unless the reason is the ‘essential and significant reason, or those reasons are the essential and significant reasons, for the persecution’ and the persecution involves ‘serious harm to the person’ and ‘systematic and discriminatory conduct’.\footnote{Roz Germov and Francesco Motta, Refugee Law in Australia (Oxford University Press, 2003) 190 contend that s 91R, in respect of its redefinition of the ‘causation’ requirement, ‘is not in accordance with the proper construction or objective of the Refugees Convention’.}

- The concept of membership of a particular social group has been refined by s 91S of the Migration Act. In situations where the particular social group consists of the applicant’s family, s 91S requires a decision maker to disregard any fear of persecution, or any persecution, experienced by any family members of the applicant if the reason for the fear of persecution is not one of the reasons listed in Article 1A(2) of the Refugee Convention.\footnote{Section 91S of the Migration Act was enacted in response to Federal Court decisions such as Minister for Immigration & Multicultural Affairs v Sarrazola [2001] FCA 263.}

In light of the above, the question arises as to whether the Refugee Convention ought to be deemed a product of its time, inter alia a product of the Cold War, reflective of the western political interests at that time, and thus unsuitable to tackle the current environment of large numbers of people escaping persecution or merely looking for a better life? If the answer is in the affirmative, the question is whether the Refugee Convention can endure in its existing form - either as an imperative element of international law or as a component of Australian municipal law. Although an interesting question, this thesis is limited to the issue of refoulement; thus an analysis of the scope of the Refugee Convention, or its adequacy at this time, is outside the scope of this thesis.

3.7 Conclusion

The main objective of the drafters of the Refugee Convention to incorporate non-refoulement obligation is at risk of being lost. A growing number of States are attempting to curb, or completely preclude, the right to access protections enshrined in the Refugee Convention. States are failing to abide by the purpose, spirit and letter
of Article 33 of the Refugee Convention. This reveals how far states have strayed from the ideals the Refugee Convention was intended to protect.

Even more worrisome is the growing trend of countries adopting measures to avoid and circumvent their obligations under the Refugee Convention, in particular those developed countries such as Australia which are seeking to further diminish the application of Article 33 by adopting the “safe third country” principle as a means of refouling refugees to other countries, which in many cases are too poor to accommodate. Although at this time the obligation of non-refoulement cannot, with certainty, be characterized as jus cogens, it is most likely, at the very least, a customary norm of international law and is consequently binding on all countries, even if they are not signatories to the Refugee Convention. That should not be forgotten.

Against this background, it is foreseeable that if every signatory to the Refugee Convention adopted measures similar to Australia’s “safe third country” provisions, then nearly all asylum seekers and refugees could be refouled and effectively left in legal limbo, thereby resulting in “refugees in orbit”.

The purpose of the Refugee Convention was to create a durable solutions to the international refugee problem. As such, States should cease interpreting measures such as “safe third country” so broadly that genuine refugees will be effectively refouled thus rendering protections under the Refugee Convention futile. In addition to a lack of standardized application, there is also no uniform interpretation of the scope of obligations encompassed under Article 33.\(^\text{392}\)

The intention of the Refugee Convention was not to deprive its signatories from their right to control their borders. It was however intended to be a commitment by all the signatories to create durable solutions to the refugee problem. Therefore, in keeping with the spirit of the Refugee Convention, Australia and other Refugee Convention

countries should not continue to implement principles such as the “safe third country” so broadly that genuine refugees will be refouled thus rendering the Refugee Convention useless.

A restrictive reading of Article 33 suggests that non-refoulement would be limited to those who have already entered the territory of a receiving state. It serves as no surprise then that signatory States such as Australia have implemented domestic legislation and policies that are not only questionable in terms of their adherence to Article 33, but often in direct breach of the very concept (that is of non-refoulement) that underlies the Refugee Convention.

Article 33 is currently narrow in its application and does not apply to people seeking refuge from flood, famine or poverty. It applies to refugees whose flight is motivated by persecution rooted in civil or political status\(^3\) or on socio-economic ground\(^4\) The Refugee Convention is also described as being deficient by failing to create a right to enter a State, but rather a negative obligation not to refoul a refugee to the country where they have Refugee Convention fear.\(^5\) It therefore seems fundamentally flawed that Refugee Convention countries, such as Australia, seek to further diminish the application of Article 33 by implementing the “safe third country” principle as a means of “refouling” refugees to other countries, which in many cases are too poor to accommodate them.\(^6\) The next Chapters will outline the implementation of the Refugee Convention in Australia.

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\(^3\) Emily F Carasco, Immigration and Refugee Law: Cases, Materials and Commentary (Emond Montgomery Publications, 2007) 471.

\(^4\) Foster, International Refugee Law and Socio-Economic Rights: Refugee from Deprivation, above n 114, 87-155.


Chapter Four
Implementation of the Refugee Convention in Australia

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4.1 Introduction

The emergence of refugee law as a new discipline has been one of the most striking recent developments in Australian law. Public and political polarization influenced by refugee law has been at the forefront in recent times. Australia, like any signatory to the Refugee Convention, has a sovereign and unequivocal right to apply and interpret the Refugee Convention however it sees fit.

The Australian Constitution gives the Commonwealth Parliament power to make laws with respect to “naturalization and aliens” and “immigration and emigration”, pursuant to which The Migration Act 1958 (Cth.) and accompanying Regulations regulates the entry into, and presence in, Australia of aliens, or non-citizens. Australia acceded to the Refugee Convention on 22 January 1954 and to the 1967 Protocol on 13 December 1973, thereby undertaking to apply their substantive provisions. However, those provisions do not form part of Australian law unless and to the extent that they have been validly incorporated into our municipal law by statute. The parliament has not incorporated the whole of the Convention and its Protocol into domestic law but it has, by s36 of the Act, effectively incorporated the Convention definition of refugee contained in Article 1A.

Refugee law in Australia has been criticised at the national and international level. In particular, after the Tampa case in 2001, the Australian government’s credibility was severely tarnished. With criticism by many scholarly publications and outright

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399 Australian Constitution s 51(xix).
400 Australian Constitution s 51(xxvii).
401 Migration Regulations 1994 (Cth) (hereinafter referred to as the “Migration Regulations”).
402 Shaw v MMA (2003) 218 CLR 28, a majority of High Court held that non-citizens are “aliens” for the purpose of s 51(xix) of the Constitution.
404 See, 5.11 of this thesis for the facts of Tampa case.
405 See, eg, Penelope Mathew, ‘Australian Refugee Protection in the Wake of the Tampa’ (2002) 96 American Journal of International Law 661; Michael Head, ‘The High Court and the Tampa
disagreement expressed by the UNHCR against the Australian policy on mandatory detention, Australia has been presented not as a compassionate and refugee friendly country, but rather as deviating from its obligations under the Refugee Convention.

For example, Canada's Immigration Act, implementing non-refoulement in the Canadian domestic legal system, allows a refusal to review an applicant's asylum claim if coming from a receiving state that has agreed to share the responsibility of examining asylum applications. It is within this gloomy reality that the humanitarian idealism of Article 33 must exist.

This Chapter will analyse Australian laws and practices in relation to refugees. This will explain why “safe third country” and “effective protection” provisions have been introduced. It discusses the development of Australia’s refugee policy and legislation. It then takes a closer look at the often tense relationship between the judiciary and the executive in the application and interpretation of refugee law in Australia. The first part of this chapter will deal with the political sensitivity of refugee law in Australia and the final part will make some suggestions as to how Australia can better comply with its obligations under the Refugee Convention.

4.2 Politico-Legal Sensitivity of Refugee Law in Australia

Given the above developments, one can understand how refugee law would attract the attention of persons and organizations interested in using the law to defend the rights of refugees in Australia. However, recently Australia’s refugee policy has attracted considerable public attention and disrepute. This can be attributable, to some extent, to cases which have questioned Australia’s migration policy, such as the Tampa case.


The principle issue in the Tampa case was the validity of the conduct of the Commonwealth in relation to 433 asylum seekers who were rescued by the Norwegian freighter MV Tampa from their sinking wooden boat in the Indian Ocean on 26 August 2001. The Commonwealth refused the refugees entry to its migration zone on the grounds that they did not have valid visas to enter Australia. At the time of the rescue, the Tampa was situated about 140 kilometers north of Christmas Island. The matter received a huge amount of press coverage and was subject to wide debate both international and within Australia.

At first instance, Justice North, in the Federal Court of Australia, held that the Commonwealth had acted unlawfully in detaining the asylum seekers and ordered that they be released from government control and brought ashore. The Australian government swiftly appealed the decision to the Full Court of the Federal Court. In a decision handed down on 17 September 2001, the majority, comprising of Justices Beaumont and French, set aside Justice North’s decision and held that the Commonwealth government was acting within its executive power under s 61 of the Australian Constitution. The Full Federal Court effectively endorsed the application of the so-called “Pacific Strategy” to unauthorized boat arrivals in which refugees were detained and transported to offshore processing centers. An application for special leave to appeal the decision of the Full Federal Court was subsequently filed in the High Court. However, on 27 November 2001, the High Court did not grant special leave to appeal.

The events surrounding the Tampa and the subsequent litigation are an example of the ‘peculiar political sensitivity of refugee law’. The High Court’s decision to not grant special leave in some ways affirmed the legality of the government’s actions; nevertheless the issue attracted much debate in the media and general public. It is

410 Ruddock v Vadarlis [2001] FCA 1329.
411 Sackville, above n 388, [13].
unfortunate that some would say that the harsh stance that the Government took was a contributing factor to his subsequent election win.

Ever since the Tampa incident, the Australian government has made the refugee policy a political points scoring game rather than giving real protection to refugees because the government had created a phobia whereby citizens harbor false fears that a wave of “boat people” might overwhelm the population or that Australia is the number one destination for the world’s illegal immigrants. Without hesitation, and to fulfill its political desire, it was later disclosed that the government had been less than truthful with a view to election success, providing ample opportunity for spin doctors to show their wares. The “children overboard” case is a vivid example. As a result of such a lie, later quietly admitted by the Prime Minister to be utterly false, the government was able to retain power. Prior to the Tampa incident, the Liberal government was trailing in the election campaign. Such a negative campaign against the refugees has stigmatized genuine refugees and tarnished Australia’s international record.

Another political measure has been the use of derogatory “tags”. Human rights advocates and organizations hold the Australian Government and media liable for creating public antipathy to refugees, specifically referring to the ‘demonising’ and vilifying labeling of refugees such as “boat people”, “queue jumpers”, and “illegal immigrants”. In response, the Government has claimed that human rights advocates and NGOs have lost touch with mainstream public opinion.

418 Millbank, above n 125, 1.
419 Ibid.
Over the years, the government and media have made claims that cannot be justified about asylum seekers and “boat people” thereby creating an ‘uncharitable and harsh view of asylum seekers in the minds of many Australians’.\textsuperscript{420} Former Liberal Prime Minister, Malcolm Fraser, has identified some of the “big lies” that have been told to the Australian community including:\textsuperscript{421}

- Asylum seekers threw their children overboard.
- Asylum seekers sewed together the lips of their children.
- “Boat people” are queue jumpers (this claim is indeed absurd as no such queue exists).
- “Queue jumpers” take the places of genuine refugees (this is not correct; in fact the Commonwealth has not always filled its quotas).
- Asylum seekers are illegal (this is plainly wrong, international law bestows on all persons the right to seek refugee asylum, in addition, international law does not require a person to seek asylum in their first country of arrival).
- Australia has one of the most generous intakes of refugees (the statistics clearly do not support such a claim).
- Australia is being bombarded by mass influxes of “boat people” (this claim is not supported by the evidence).
- The “boat people” are not genuine refugees (the evidence does not support this claim, for example, in 1999, 97 per cent of applicants from Iraq and 93 per cent of applicants from Afghanistan who lodged protection visa applicants without valid visas were found to be genuine refugees by the Australian government).
- Unauthorized arrivals can afford to pay people smugglers and thus are not genuine refugees (this is simply untrue, access to funds does not negate the validity of refugee claims).

\textsuperscript{421} Ibid.
The Howard government’s tough stance on immigration was a cornerstone of his political success in many ways. The Howard government’s handling of the Tampa incident won him a lot of support in the 2001 election. It is thus not surprising that since the Labour party’s election victory in late 2007, the Rudd government has been mindful of the political backlash it would cause if it challenged the tough stance. Perhaps the elected Government is responding to what the public wants, however the problem is that the Australian Government and the media are manipulating the truth, or even outright lying to the public, in an attempt to convince the public that the reason refugees are being sent to other countries is that they are not our responsibility - even going as far as suggesting that they may be terrorists and most certainly “queue jumpers”. This may be tantamount to propaganda.

Australia’s human rights record on refugees has received much criticism, both at the national and international level. This thesis argues that Australia should use the arrival of unauthorized arrivals as an opportunity to alleviate some of the burden that has been placed on developing countries because in most cases genuine refugees will not be able to depart their country of origin with genuine papers or legally.

The former Minister for Immigration, Senator Chris Evans, had reflected on how refugee issues had influenced Australian politics:

It is no secret that under the previous government, the issue of refugee protection was the subject of a deeply divisive debate. Australia’s international reputation was tarnished by the way the previous government sought to demonise refugees for its own domestic political purposes. This is

unfortunate, since it overshadowed some of the positive work on refugee protection that continued during those years.\textsuperscript{426}

It is ironic that against this background Australia was on the Expanded Bureau of the then United Nations Commission on Human Rights (the pre-eminent United Nations human rights body) between 2003 and 2005\textsuperscript{427} and that Australia’s Permanent Representative to the United Nations in Geneva was elected as President of the Commission in 2004.\textsuperscript{428} Following which the Law Council of Australia developed an action plan for Australia’s human rights development.\textsuperscript{429} Among the recommendations of the action plan were that Australia uphold and legislate to give effect to Australia’s obligations under international human rights agreements.\textsuperscript{430} In its plan, the Law Council argued that Australia’s mandatory detention of child asylum seekers contravens Article 3(1) of the Convention on the Rights of the Child.\textsuperscript{431} The fact that refugees may be Stateless does not mean they are not human beings and therefore Australia has a responsibility to protect their human rights. Unfortunately, the recommendations made by the Law Council and the appointment of an Australian as President of the United Nations Commission on Human Rights does not appear to have been a catalyst for reform of Australia’s refugee law. It is totally inexcusable and unlawful on an international level that Australia would continue mandatory detention of minors.


\textsuperscript{427} Joint Standing Committee on Foreign Affairs, Defence and Trade, Commonwealth Parliament, Reform of the United Nations Commission on Human Rights (2005) [2.26]; The Expanded Bureau is made up to the Chair, three Vice-Chairs, the Rapporteur and five regional coordinators: at [2.18]; Note: the United Nations Commission on Human Rights was replaced with the United Nations Human Rights Council in 2006.


\textsuperscript{429} Law Council of Australia, National Action Plan on Human Rights, Submission to Attorney General’s Department, 11 June 2004.

\textsuperscript{430} Ibid [22].

\textsuperscript{431} Ibid [18]; Convention on the Rights of the Child, opened for signature 20 November 1989, 1577 UNTS 3 (entered into force 2 September 1990) (hereinafter referred to as the “CROC”).
4.3 Development of Australia’s Refugee Policy

This section will briefly trace the development of Australia’s refugee policy. It will examine the historical, political and social influences which have shaped Australia’s refugee policy.

Starting from federation in 1901, one of the first Acts passed by the new Commonwealth Government was the Immigration Restriction Act 1901. It implemented the government’s policy that discriminated on the basis of race and colour commonly known as White Australia Policy. Immigration policy and law in the new federation of Australia was both restrictive and selective. It was designed to meet economic and political considerations and was based on the accepted wisdom of a firmly established racial hierarchy. Following the World War I, the Commonwealth became the principal participant in the Empire Settlement Scheme, designed for the ‘redistribution of the white population of the British Empire’. Australia’s initial response to the refugee problem occurred in 1921. At that stage the Australian government’s involvement was guarded and influenced by the notorious “White Australia” Policy.

The “White Australia” policy favoured Anglo-Saxon and Celtic applicants and explicitly excluded Asian and coloured applicants. From 1921 to 1938, only 3,500 refugees entered Australia. In late 1938, in response to the Jewish refugee problem arising from the deteriorating situation in Germany and Hitler’s occupation of Austria, the government had agreed to take 15,000 refugees who had escaped Nazi persecution and had made their way to various European centres. Over the next

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433 Ibid.
436 Ibid.
three years, Australia received about half of the agreed 15,000 refugees. Unfortunately, less than half entered Australia before the intake was interrupted by the outbreak of war in Europe. In June 1940, the government also agreed to accept around 2,000 civilians interned in England as enemy aliens, mostly Jewish refugees. This period has great significance in Australia’s Immigration history: it was the first time that Australia had significantly participated in the provision of assistance to refugees; and it was the beginning of the demise of White Australia Policy. The “White Australia” policy reflected Australia’s stance on immigration until its abolition, a gradual process which took 25 years. It finally ended with the Whitlam government in 1973. The fact that the “White Australia Policy” survived until well after the World War II demonstrates that fears of invasion from the Asia was deep seated and long lasting.

In 1946, in response to Australia’s significant labour shortages, Minister Calwell looked to the refugee camps. Then also, Minister Calwell’s policy was intended to keep Australia ‘white’. Minister Holt’s decision in 1949 to allow 800 non-European refugees and Japanese war brides to stay was the first step towards a non-discriminatory (other than European) immigration policy. From 1947 to 1952, 181,700 refugees and displaced persons were admitted in Australia via this system and associated non-government organisation sponsorships. In 1952 Australia joined the Inter-governmental Committee for European Migration, and in 1954 Australia ratified the United Nations convention Relating to the Status of Refugees 1952.

439 Ibid.
441 Department of Immigration & Citizenship, ‘Abolition of the “White Australia” Policy’ (Media Release, Fact Sheet No 8, 11 October 2007).
442 Ibid.
443 Pittaway, above n 434, [1].
444 Department of Immigration and Citizenship, ‘Abolition of the ‘White Australia’ Policy’ (Media Release, Fact Sheet No 8, 10 September 2009).
445 Hereinafter referred to as “NGO”.
446 Pittaway, above n 434, [2].
The next major step was in 1957 when non-Europeans with 15 years residence in Australia were allowed to become Australian citizens. Between 1956 and 1958 Australia admitted about 14,000 Hungarian refugees. In 1958 Australia replaced the Immigration Restriction Act 1901 with the Migration Act of 1958 introducing a simpler system of entry permits and abolished the controversial dictation test. The revised Act avoided references to questions of race. It was in this context that the Minister for Immigration, Sir Alexander Downer, stated that 'distinguished and highly qualified Asians' might immigrate.

Australia’s intake of refugees in the years following the war was geared towards filling Australia’s labour shortages as opposed to intervening on humanitarian grounds. The government evaded liability for ‘hard to place’ refugees. As pointed out by Pittaway, this ‘set the tone for Australia’s future refugee policy’. The refugees may have been welcomed only to satisfy the labour shortages.

Following the triumph of the settlement program in satisfying Australia’s immigration requirements, the government’s stance altered. Australia participated in the creation of the UNHCR, it was one of the original drafters of the Refugee Convention, and it was the sixth country to ratify the Refugee Convention. Furthermore, Australia played a key role in the establishment of the Intergovernmental Commission for European Migration and accepted 199,000 refugees via this scheme in the period between 1953 and 1973.

In 1977, the then Minister for Immigration, the Hon Mr Mackellar, tabled in Parliament a statement of principles and a strategy for a comprehensive refugee policy. This was a response to the Indo-Chinese refugee crisis. The 1977

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448 Immigration Restriction Act 1901 s 3. This section enables government to exclude any person who 'when asked to do so by an officer fails to write out at dictation and sign in the presence of the officer, a passage of fifty words in length in an European language directed by the officer.
449 Department of Immigration and Citizenship, ‘Abolition of the ‘White Australia’ Policy’ (Media Release, Fact Sheet No 8, 10 September 2009).
450 Pittway, above n 434, [2].
451 Ibid.
452 Ibid [3].
108
Mackellar policy statement marked the beginning of an explicit refugee policy. Before this, refugees entered Australia as migrants. The four key principles of the policy were as follows:

1. Australia fully recognises its humanitarian commitment and responsibility to admit refugees for resettlement.
2. The decision to accept refugees must always remain with the government of Australia.
3. Special assistance will often need to be provided for the movement of refugees in designated situations or their resettlement in Australia.
4. It may not be in the interest of some refugees to settle in Australia. Their interests may be better served by resettlement elsewhere. The Australian government makes annual contribution to the United Nations High Commissioner for Refugees (UNHCR) which is the main body associated with such resettlement.

These four principles remain a formal basis of the present policy, albeit there have been frequent changes in the legislation and policies to the contrary.

In 1979, in response to the influx of refugees from Indo-China, the UNHCR introduced a resettlement program for displaced people living in refugee camps. Shortly thereafter, the Australian government began a scheme of refugee selection whereby authorized personnel from Australia and UNHCR representatives attended refugee camps and selected refugees deemed to be resettlement in Australia.

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454 Ibid.
455 Ibid.
458 Pittaway, above n 434, [6].
459 Ibid [7].
Australia and its policies were not always flexible and more open towards refugees and asylum seekers.\textsuperscript{460} In 1990 the Hawke Labour Government announced the establishment of the Port Headland detention centre in Western Australia to accommodate unauthorised arrivals.\textsuperscript{461} The migration Reform Act 1992 correspondingly introduced mandatory detention for ‘unlawful non-citizens.\textsuperscript{462} To summarise its policy until early 1990s, it can be said that it made great progress in developing inclusive immigration and refugee policy.

4.3.1 Recent development in refugee issue:

Much has changed since the Minister for Immigration set out Australia’s refugee policy in 1976 in terms of the number of the refugees accepted as well as in the erecting of barriers to curtail the influx of refugees. In a speech delivered to the UNHCR in June 2008, the then Minister for Immigration stated that:

\begin{quote}
The Australian Government works closely with UNHCR on a number of fronts to promote and support the protection rights of refugees … we [Australia] have a system for refugee protection that is designed to ensure a fair go for those who seek Australia’s protection, and a humane response to those who need that protection … The Rudd Labor Government is focused on strengthening and promoting Australia’s contribution to refugee protection …\textsuperscript{463}
\end{quote}

However, at the time of writing this thesis it is too early to assess this statement or criticize whether it is in line with the reality. As mentioned earlier the Rudd Labour Government had increased the number of refugees that would be accepted from Iraq and Senator Evans had launched an enquiry into the treatment of asylum seekers in detention centers. The government’s recent decision to halt processing of the

\textsuperscript{460} Hatami, above n 440.
\textsuperscript{462} Hatami, above n 440.
refugee applications for Afghans and Sri Lankans\textsuperscript{464} and re-open Curtin Air Force Base to hold newly arrived Sri Lankan and Afghanis asylum seekers, who are affected by the decision to suspend processing is also highly criticised by media, academics and human rights advocates.\textsuperscript{465}

Recently, the current Prime Minister Ms Julia Gillard in her speech said:

\ldots my Government is not interested in pursuing a new Pacific Solution - instead Australia is committed to the development of a sustainable, effective regional protection framework. That means building a regional approach to the processing of asylum seekers, with the involvement of the UNHCR, which effectively eliminates the on shore processing of unauthorised arrivals and ensures that anyone seeking asylum is subject to a consistent process of assessment in the same place.\textsuperscript{466}

After Labor formed a minority government in 2010, Minister for Immigration and Citizenship, Chris Bowen MP, announced the Government will immediately lift the suspension of processing of asylum claims from Afghan asylum seekers.\textsuperscript{467} However, it seems that there is no mention of Sri Lankan Asylum applicants.

In relation to opening a “processing centre” (not detention centre), even though the President of East Timor said to former PM Rudd that Timor-Leste will not take any favour from Australia and will take any proposal with an open mind, based purely


\textsuperscript{467} Chris Bowen, ‘Suspension of Processing of Afghan Asylum Seeker Claims to be Lifted’ (Press Realse, 30 Setember 2010) < http://www.chrisbowen.net/media-centre/allNews.do?newsId=3752> at 1 October 2010.
on humanitarian consideration, East-Timorian President was cautious with his giant neighbor and had said that he needed to talk with his cabinet.\textsuperscript{468}

In relation to people in detention centres, Prime Minister said:

… Australia’s basic decency does not accept the idea of punishing women and children by locking them up behind razor wire or ignoring people who are fleeing genocide, torture, and persecution, nor does it allow us to stand back and watch fellow human beings drown in the water, but equally that there is nothing inconsistent between these decencies and our commitment to secure borders and fair, orderly, migration. I am committed to treating people with decency while they are in Australian detention, but if people are not found to be refugees, I am committed to sending them home, I believe Australians are prepared to welcome those who are genuine refugees ….\textsuperscript{469}

But later, East Timor declined to do Australia’s “dirty work” stating its poverty as a main reason.\textsuperscript{470} However, there is some indication that East Timor is trying to bargain.\textsuperscript{471} East Timor’s Council for Ministers decided that any proposal for a regional asylum seeker centre should have been raised first in the Bali Process, which was established in 2002 to counter a surge in people smuggling in the Asia-Pacific region.\textsuperscript{472} Indonesian Foreign Minister also said any regional processing centre should be part of a regional co-operation framework and a “broader picture”.\textsuperscript{473} The next Bali Ministerial Meeting is expected to be called by the end of 2010 (till the time of finalizing this thesis, it was not fixed) and in the meantime Chris Bowen, Minister of Immigration and Citizenship, on behalf of the Australian

\textsuperscript{473} Ibid.
government, is going to East Timor in October to negotiate with the East-Timorian
government and try to persuade it.\footnote{Chris Bowen, ‘Suspension of Processing of Afghan Asylum Seeker Claims to be Lifted’ (Press
Realese, 30 Setember 2010) < http://www.chrisbowen.net/media-centre/allNews.do?newsId=3752> at 1 October 2010.} Then prime Minister also hinted that the center
could be built in another country provided it was a signatory to the UN Refugee
Convention.\footnote{Tom Allard and Phillip Coorey, ‘Timor says it’s too poor to do Australia’ dirty work’ Sydney Morning Herald, (Sydney) 8 July 2010 <www.smh.com.au/national/timor-says-its-too-poor-to-do-australias-dirty-work-20100707-100pv.html> at 19 September 2010.} New Zealand is also cautious about embracing the proposal and
indicated that NZ will keep itself out of what is an intense domestic political debate
in Australia.\footnote{Ibid.}

Therefore, after analysing these political bargaining, this thesis comes to the
conclusion that the government is still showing its willingness to take every measure
that could be taken to keep asylum seekers out of reach from its territory by
expanding its off-shore “detention centres” by offering attractive economic and
financial development to its poor neighbouring nations. However, it confronted with
an interesting crossroad because of recent High Court decision in M61 and M 69,
where High Court declared that decision-makers made an error of law, and further,
failed to observe the requirements of procedural fairness by not allowing the
Christmas Island detainees access to the municipal legal system. Now, the ball is in
Government’s court and it is to see how it resolves the obstacle created by the High
Court’s decision.

4.4 The Development of Australia’s Refugee Legislation

It was not until 1989 that the Commonwealth legislation established comprehensive
provisions pertaining to the granting of entry permits. The Migration Act 1958 (Cth)
and accompanying Regulations\footnote{Migration Regulations 1994 (Cth) (hereinafter referred to as the “Migration Regulations”).} are the relevant legislation with regard to refugee
recognition. Prior to 1989, the Minister for Immigration\footnote{On several occasions, the Minister for Immigration has been responsible for another portfolio in
addition to immigration such as ethnic/multicultural/indigenous affairs or citizenship. Throughout
this thesis, a reference to the “Minister for Immigration” will be a reference to the Minister
responsible for overseeing the Department of Immigration even though he/she may also have been
responsible for other portfolios, in addition to immigration. Similarly, a reference to the “Department}
grant or refuse entry permits on any basis pursuant to the general discretion provided under s 6A of the Migration Act. As noted by Crock, until 1989 ‘the admission or expulsion of non-citizens [including asylum seekers] was regarded as a matter of ministerial prerogative and an inappropriate subject for judicial review’.

The Migration Act became the first Commonwealth statute to mention the Refugee Convention s 6A. The section was introduced into the Migration Act by the Migration Amendment Act (No 2) 1980 (Cth). And even then, the provisions were designed to considerably restrict the categories of migrants which would be entitled to acquire permanent residence status after their arrival into Australia. Section 6A(1)(c) of the Migration Act provided as follows:

(1) An entry permit shall not be granted to a non-citizen after his entry into Australia unless one or more of the following conditions is fulfilled in respect of him, that is to say—

... (c) he is the holder of a temporary entry permit which is in force and the Minister has determined, by instrument in writing, that he has the status of refugee within the meaning of the Convention relating to the Status of Refugees that was done at Geneva on 28 July 1951 or of the Protocol relating to the Status of Refugees that was done at New York on 31 January 1967.

A refugee who had entered Australia had to satisfy a three-tiered decision making process before being granted permanent residency. This required a temporary entry permit, refugee status, and a permanent entry permit. The legislation did not provide expressly that the Minister for Immigration could determine refugee status or that a person could apply for such determination. It was certainly an unusual way to

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introduce Australia’s obligations towards refugees, that is, through an exception to a prohibition on an otherwise broad and unfettered power. It is not surprising that its interpretation caused some confusion. In the case of Minister for Immigration & Ethnic Affairs v Mayer the majority of the High Court found that s 6A(1)(c) ‘impliedly confers upon the Minister the function of determining … whether a particular applicant for an entry permit’ has refugee status.\textsuperscript{481}

Prior to the amendment of the Migration Act under the Migration Reform Act 1992, the term “refugee” was defined in s 4(1) of the Migration Act as having the same meaning as it has in Article 1 of the Refugee Convention. Section 4(1) considered whether the asylum seeker, to the satisfaction of the Minister for Immigration, had the status of a refugee as defined by the Refugee Convention. This consideration was gauged by reference to the protection obligations owed by Australia under the Refugee Convention as a matter of international law.\textsuperscript{482} Under the legislation before the 1992 amendments, Australian courts considered if the asylum seeker established a status as a refugee within the meaning of Article 1A(2). If so, the asylum seeker became entitled to enjoy the rights and obligations due to a refugee under the Refugee Convention and gain an entry permit allowing residency in Australia.\textsuperscript{483}

The Migration Reform Act 1992 repealed that definition of refugee, along with the related provisions of the Migration Act that had required the Executive, as a matter of domestic law, to extend protection to refugees within the meaning of the Refugee Convention. In place of the repealed provisions, the definition of a refugee was inserted into s 5, the definition was the same definition contained in the Refugee Convention as amended by the 1967 Protocol. Provisions were enacted to establish a class of visa to be known as protection visas and to prescribe a criterion for a protection visa in the terms which now appear in s 36(2) of the Migration Act.

s 36(2) now considers whether Australia has protection obligations to a person under the Refugee Convention. Australia has non-refoulement obligations under Article 33 to persons who are refugees as defined in Article 1 of the Refugee Convention.

The main criteria for a protection visa is found in Section 36(2) of the Act and is that the decision maker must be satisfied that the applicant is a non-citizen in Australia and is either:

- a person to whom Australia has protection obligations under the Refugees Convention as amended by the Protocol (s 36(2)(a));
- a member of the same family unit as a person to whom Australia has protection obligation and who holds a protection visa (s 36(2)(b)).

The ‘protection obligation’ in Clause 2(a) may not apply to a refugee for the purposes of Article 1 if he or she comes within the exclusionary provisions of Clauses D, E or F. Article 1 has been read in conjunction with Article 33 to limit Australia’s obligations under the Refugee Convention.

On 1 September 1994, major legislative changes came into operation. The changes had been enacted in December 1992 when the Migration Reform Act 1992 (MRA) was passed, but did not take effect until 1 September 1994. Since 1 September 1994, the Department has granted 2 kinds of permanent refugee and humanitarian visas; namely, permanent protection visa, broadly speaking, granted to persons who enter Australia lawfully, and who are then found to be refugees within the meaning of the Convention and offshore refugee and humanitarian visas, which are granted to persons outside Australia who are either refugees within the meaning of the Convention, or who meet other humanitarian criteria. These visas are in turn split into 2 categories - special assistance program (SAP) visas (subclasses 200-204) and special assistance categories (SAC) (subclasses 205-219). The main difference

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484 See also clause 866.221 of Schedule 2 to the Regulations
487 Migration Regulations, subclass 866.
between the 2 categories is that SAC visas were targeted towards particular nationalities or ethnic groups. The SAC visa subclasses were removed from the Migration Regulations with effect from 1 November 2001, but SAC visas granted before that date continue in effect.

The Protection (Class XA) visa was inserted into the Regulations 20 October 1999 by the Migration Amendment Regulations 1999 (No. 12), replacing the Protection (Class AZ) visa. This amendment (No. 12) also introduced the Temporary Protection Visa subclass 785 (TPV). From 20 October 1999 until 11 November 2000, refugees who did not enter Australia with valid visas, were granted a TPV instead of Permanent Protection Visa. Prior to this regulation change, all persons in Australia (including unauthorized arrivals) found to be refugees had immediate access to a permanent protection visa (PPV). The TPV imposed a number of restrictions on refugees that were not imposed on PPV holders, including:

- protection against persecution was supposed to expire after three years;
- no right to sponsor dependant family members;
- to study at tertiary institution required payment of overseas student rates;
- freedom of movement was restricted considerably;
- refugees had no access to orientation assistance, including information about essential services;
- no access to accommodation support and provision of basic household items;
- no access to English language tuition;
- no access to community support programmes.

The Regulations were further amended on 1 November 2000. Since September 2001, under visa sub-class 451, refugees resettled from places of ‘secondary movement’ no longer received permanent residence, only temporary protection.

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489 Hatami, above n 440.
491 Migration Amendment Regulations 2000 (No. 5).
However they were entitled to apply for permanent visa after five years and during the five years period they were neither allowed to enjoy family reunification nor other rights enjoyed by permanent visa holders. Conversely, refugees who arrived in Australia or on ‘excised territories’ without authorization, either by air or sea, including those who spent seven days or more in another country, were entitled to a Temporary Protection Visa, which was subject to review after 30 months, with no access to permanent visas, unless the Minister so decides. In addition to this, any refugee with a TPV that applied for a protection visa on or after 27 September 2001 was required to satisfy regulation 866.215. These rules were created to discourage secondary movement of refugees.

Further amendments to migration legislation came into effect on 1 October 2001 to clarify the application in Australia of the Refugee Convention and to strengthen powers to protect asylum processes against an increasing incidence of fraud in the presentation of claims. The purpose of the new legislation was to ensure that the arrival of a person at one of those Australian territories would no longer 'be sufficient grounds for application for status under the Migration Act'. That means the Minister for Immigration had discretion to waive this requirement where it was in the public interest. This means that the current position stresses both the Minister’s discretion and the status of person as refugee. These unauthorized arrivals could have applied for further protection visas if they had a continuing protection need but they could only access a temporary protection visa for an additional 3 years.

492 Regulation 866.215
(1) if the applicant has held a subclass 785 (Temporary Protection) visa since last entering Australia, the applicant, since leaving his or her country, has not ever resided, for a continuous period of at least 7 days, in a country in which the applicant could have sought and obtained effective protection;

(a) of the country; or

(b) through the offices of the United Nations High Commissioner for Refugees located in that country.

(2) the Minister may waive the requirement under subclass (1) if the Minister is satisfied that it is in the public interest to do so.


494 Migration Regulations sch 2, reg 866.215(2).

495 Hereinafter referred to as “TPV”.

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This change arose out of the events of August 2000 in which 433 Afghan asylum-seekers were rescued from a sinking boat in the seas north-west of Christmas Island by a Norwegian freighter, the MV Tampa.\textsuperscript{496} The Australian Government refused to allow the ship to bring the asylum-seekers onto Australian land or into an Australian port (that is, into the migration zone). The Australian military boarded and took control of the ship ensuring that the rescued persons could not set foot on Australian soil. There was a stand-off, and the matter was ‘resolved’ by what is known as the ‘Pacific Solution’.\textsuperscript{497}

From 1 October 2001, the Refugee Convention does not apply in relation to persecution unless a Refugee Convention reason is the essential and significant reason for the persecution of the applicant, and the persecution involves serious harm to the person. The legislation also:

- Prevents people basing their applications on conduct in Australia designed purely to strengthen their claims;\textsuperscript{498}
- Clarifies circumstances in which people will not receive protection because of their serious criminal conduct;\textsuperscript{499}
- Provides increased powers to draw adverse inferences if a person fails to provide information on oath or affirmation\textsuperscript{500} or cannot provide reasonable explanation for the absence of any identity documents\textsuperscript{501}; and
- Prevents people whose protection visas have been cancelled, or who have previously applied as family members and been refused, from making another protection visa application.\textsuperscript{502}

\textsuperscript{498} Migration Act s 91R(3).
\textsuperscript{499} Migration Act s 501.
\textsuperscript{500} Migration Act s 91V.
\textsuperscript{501} Migration Act s 91W.
\textsuperscript{502} Migration Act s 48A.
This TPV regime was criticized internationally. The policy was flawed in the following ways:

- the TPV regime was in breach of Australia’s obligation to refugees in that it denied access to certain entitlements (as listed above);
- the TPV regime resulted in significant trauma and psychological harm to refugees who held the TPV;
- the requirement that TPV refugees underwent periodic determination of their status as refugees was contrary to international practice and the spirit of the Convention and;
- with relevance to the wider Australian community, the creation of a social underclass had the potential to impact negatively on the wider community;
- the TPV regime was used by the Australian government as a deterrent and a form of punishment for all unauthorized arrivals;
- the TPV was a discriminatory practice that created two classes of refugees resulting in an inequitable distribution of resources for people with the same needs.

4.4.1 Family Reunion and Temporary Protection Visa

There was a wide outcry when the temporary protection visa (TPV) regime was in existence. Once a person is recognized as a refugee, he or she should be given proper protection. There are many rights enshrined in Refugee Convention that refugees are entitled. This includes the right to housing (Article 21), public relief (Article 23), social security (Article 24) and travel documents (Article 28). However, the TPV regime was so inhuman that the refugees would not be able to enjoy, not only these rights but also the right to reunite with their family members. Family is an integral component in rebuilding a life and during the TPV regime, Australian policy denied family reunion to vulnerable people often affected by torture and trauma. It is the clearest example of the lack of compassion,

understanding and humanity towards the plight of refugees, and could amount to a disproportionate penalty under Article 31. This separation was a major cause of suffering and anguish amongst many refugees in Australia. Dr. Michael Head commented saying that,

“Even if a visa is granted, most 'excision zone' asylum seekers will be prevented from ever obtaining permanent residency or citizenship in Australia, thus depriving them of basic legal and democratic rights, including family reunion rights, as well as access to essential welfare and health facilities.”

He went on to say further that;

“These measures are only likely to lead to greater numbers of refugees undertaking longer voyages, trying to evade naval warships and reach the mainland. The first known victims of this legislation were more than 350 refugees who drowned in the Java Sea on October 20, 2001 trying to get to Australia. Among them were at least five women and 13 children who perished as a direct consequence of the denial of family reunion rights. The husbands of the five women were already living in Australia, having arrived on previous boats and won the right to refugee status. But under the legislation, the five Iraqi men had been banned from ever applying for family reunion visas for their wives and children.”

Amnesty International Australia stated that Refugees holding TPVs faced a life in limbo limiting the ability to contribute effectively to Australian society. The temporary nature of this visa could lead to difficulties in developing relationships and affects the refugee’s overall sense of purpose in the Australian community. While the 1951 Convention does not include a specific provision relating to family

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505 Head, above n 5.
506 Ibid.
unity, subsequent Conclusions of the Executive Committee\textsuperscript{508} and State practice further indicate that it is well accepted that recognised refugees be allowed to be reunited with their family members, including at a minimum, immediate family members, and especially children and adolescents.\textsuperscript{509} For many, these struggles were faced alone as the TPV keeps them separated from their family members. Refugees on TPVs lived with the knowledge that they might be returned to a place of danger (from where their family might have also fled) upon the cessation of their visa. TPVs resulted in prolonged, even indefinite, family separation. They placed women and children in danger overseas and are unprecedented in their need for refugees to reprove their protection needs every 3 years. Even children who arrived in Australia on their own were not spared from the harsh realities of this policy. The TPV regime was unnecessary and harsh and punished people who were recognised as being affected by human rights abuses. There is also a general consensus that this is a fundamental right (see ICCPR Article 23).\textsuperscript{510}

Finally, the Senate Legal and Constitutional References Committee (SLCRC)\textsuperscript{511} reported that there was a widespread belief among submitters that if an asylum seeker had been found to satisfy the criteria of a refugee, as defined by the Refugee Convention, they should be granted a Permanent Protection Visa (PPV). The Law Society of South Australia (LSSA) pointed out that Australia was the only country in the world which used a temporary protection visa regime:

\begin{quote}
Australia is the only country to grant temporary status to refugees who have been through a fully adjudicated process and have been found to be refugees according to the 1951 Refugees Convention definition. Australia’s approach
\end{quote}

\textsuperscript{508} See ExCom, ‘General Conclusion on Family Reunification’ Executive Committee Conclusions No 24 (XXXII) 1981; ExCom, ‘General Conclusion on Refugee Children’ Executive Committee Conclusions No 47 (XXXVIII) 1987 Para (d); ExCom, ‘General Conclusion on Refugee Children and Adolescents’ Executive Committee Conclusions No 71 (XLV) 1994 ExCom, ‘Conclusion on Refugee Children and Adolescents’ Executive Committee Conclusions No 84 (XLVIII) 1998, paras (a) (i), (b) (i); ExCom, ‘Conclusion on International Protection’ Executive Committee Conclusions No 85 (XLIX) 1998, paras (u) – (x); ExCom, ‘General Conclusion on Protection of the Refugees’ Family’ Executive Committee Conclusions No 88 (L) 1999.


is at odds with the United Nations High Commissioner for Refugees (UNHCR) Handbook, which emphasises the importance of providing refugees with the assurance that their status will not be subject to constant review in the light of temporary changes in their country of origin.\footnote{Legal and Constitutional Affairs Committee, Migration Act 1958, Administration and Operation of Migration Act 1958 (2006) [8.13].}

The main criticism of the TPV was that, because visas were only for a limited period of 3 years, it prolonged fear and uncertainty for asylum seekers. Before the expiry of their TPV, the person must re-apply for a further protection visa, requiring a full re-examination of their case. This meant that TPV holders lived in a constant state of uncertainty, which often adversely affected their mental health. The LSSA claimed that:

The impact of the TPV regime and extended processing periods on applicants is enormous. Lawyers/migration agents and mental health professionals who work with TPV holders report a high incidence of mental health problems in this client base. Research carried out by the University of New South Wales supports this, with preliminary findings showing that refugees placed on TPVs have a 700% increase in risk for developing depression and post-traumatic stress disorder compared to refugees with Permanent Protection Visas (PPVs).\footnote{Ibid [8.14].}

Some of the strongest criticism of the TPV regime was aimed at the prohibition on sponsoring family members and the ban on re-entry if the TPV holder left Australia. Submitters argued that the restrictions on family reunion and travel have a highly detrimental effect on all family members, both in Australia and overseas, which is a major contributing factor to deterioration in the mental health of asylum seekers. This policy can also impact on families when they are finally reunited, as explained by the Brotherhood of St Laurence:

It also creates havoc later when families that have been forcibly separated are reunited and welfare agencies are left to clean up the mess. Another
unintended consequence relates to TPV minors who, because of the extended periods, it is not 36 months but much longer than that move out of their minor status into adult status. That means that they cannot then sponsor their families as they fully expected they would be able to do, and therefore have to use other provisions which are very costly.\footnote{Legal and Constitutional References Committee, Migration Act 1958, Administration and operation of the Migration Act 1958 (2006) <http://www.unhcr.org.au/pdfs/InquiryintotheAdministrationOperationoftheMigrationAct1958.pdf> at 5 July 2010.}

As noted in the above SLCRC report, the UNHCR had found that that the TPV regime was introduced in response to a large influx of unauthorized arrivals, rather than to deal with individuals or small numbers of unauthorized arrivals. The UNHCR’s main concerns about Australia’s TPV regime were the existing laws on temporary protection visas and temporary humanitarian visas, which denied an entitlement to family reunion, because they provided no right to re-enter Australia if they left and that they were not eligible to receive convention travel documents.

Under such pressure from several organizations and individuals, the TPVs were abolished on 9 August 2008.\footnote{Department of Immigration & Citizenship, ‘Abolition of Temporary Protection Visas (TPVs) and Temporary Humanitarian Visa (THVs), and the Resolution of Status (Subclass 851) visa’ (Media Release, Fact Sheet No 68, 9 August 2008).} The government concluded that ‘temporary protection’ visas did nothing to prevent unauthorised arrivals despite the former government’s rhetoric. Of the 11,000 temporary visas granted, 9800 had eventually progressed to permanent visas.\footnote{Yuko Narushima, ‘1000 refugees receive protection, not detention’ Sydney Morning Herald (Sydney) 16 May 2008 <http://www.smh.com.au/.../1000-refugees-receive-protection../.../1210765059727.html > at 5 July 2010.} However, mandatory detention is continuously effective for asylum seekers. The effect of this change is that all persons recognised as refugees by Australian immigration authorities will be given permanent protection rather than TPVs. Those persons still holding TPV when the government brought this policy, will also be able to access a permanent visa and be assessed for eligibility for permanent residence.\footnote{DIAC, ‘Resolution of Temporary Protection Visa and Temporary Humanitarian Visa Caseload’ (2008) < www.immi.gov.au/refugee/tpv_thv/abolition/resolution.htm> at 5 July 2010.} Shortly thereafter, the Minister for Immigration announced that the 1000 or so refugees who were in Australia on TPVs
at the time the TPVs were abolished would ‘have their status resolved and will be afforded the same benefits and entitlements as holders of a Permanent Protection visa’.

However, as promised in election, the Rudd Government abolished TPVs, closed the so-called pacific solution, introduced decent values to detention policy and provided independent review of negative asylum decisions. They were the positive signs for refugee world in Rudd government’s era.

It is also noteworthy that, Liberal’s under Tony Abbot’s leadership are of the opinion that adopting harsh measures for asylum seekers is necessary. In relation to refugee matters, the Liberals had proposed to:

- not allow entry to any asylum seekers who does not have valid documents;
- restore ministerial veto;
- give priority for refugee camp applicants (rather than those who seek to take their place by arriving illegally, whether by boat or other means);
- introduce private sponsorship pilot program (also known as ‘Canadian scheme’ on which citizens could sponsor a refugee).

To achieve these outcomes, the Liberal’s proposed strategy under ‘border protection strategy’ was:

- strengthen off shore processing in another country;
- introduce protection visas, and
- send back the boats where the circumstances allows.

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519 Chris Bowen, ‘Irregular Migration – The Global Challenge’ (Speech delivered at the Sydney Institute, Sydney, 24 March 2010).
These observations clearly flag out that both main political parties are tough on asylum seekers issues and committed to breach international obligations in the name of border security.

Whether these amendments are in line with the Convention obligations or contradict the Convention will be discussed in the following paragraphs.

4.4.2 The On-Shore Refugee Determination System

The on-shore refugee determination system was only developed in Australia after the arrival of Indo-Chinese “boat people” from the late 1970s. The ‘defection’ of the few people who sought asylum from communist countries in the 1950s and 1960s was arranged through foreign affairs, rather than immigration officials. 521 It was not until the numbers of asylum seekers grew rapidly in the 1990s that a comprehensive refugee determination system was developed within the immigration portfolio. This comprised initial decision-making by Department of Immigration officials upon lodgment of the protection visa application. The application must be valid and is not prevented by other provisions to be processed because invalid applications cannot be assessed on its merit. 522 There is access to merits review by an independent 523 Refugee Review Tribunal, 524 and access on matters of law to judicial review and introduction of privative clause to limit the judicial review right of the refugees. The independence of the RRT has been questioned on various occasions because of portfolio Ministers being able to influence the funding, staffing composition, practice and procedure directions, measurement of the tribunal members’

521 Millbank, above n 125.
523 See, eg, Some consider it to be not entirely independent - Mr. Bruce Haigh, a Refugee Review Tribunal member for five years from 1995 and a former diplomat, said “It is supposed to be an independent tribunal, but it is not,” Mr Haigh said. "People are appointed to the tribunal on $90,000 plus cars and other perks, and if they want to have their term renewed, they end up agreeing with certain directions and influences.”; Kerry- Anne Walsh “Visa staff pressured in appeals decision” Sydney Morning Herald (Sydney) 29 June 2003 <http://www.smh.com.au/articles/2003/06/28/1056683950237.html> at 15 November 2009.
524 Hereinafter referred to as the “RRT”.
performance, and the continued employment of tribunal members in relation to the corresponding division.\textsuperscript{525}

4.4.3 Status during Processing

Usually, people who apply for a protection visa arrive lawfully in Australia and subsequently apply for protection. Most of these applicants receive a bridging visa upon lodging a Protection Visa application.\textsuperscript{526} In most cases, the bridging visa allows the applicant to remain lawfully in the community until the Protection Visa application is finalised.

Some bridging visas allow the applicant to work in Australia; other bridging visas do not have work rights attached. A bridging visa ceases:

- Once a protection visa is granted;\textsuperscript{527}
- When another visa is issued (including a bridging visa) other than a special purpose visa or a maritime crew visa;\textsuperscript{528}
- 28 days after withdrawal of a protection visa application.\textsuperscript{529}

\textsuperscript{525} Labor and Democrat Senators minority report states: This is demonstrated by the portfolio Minister being able to influence the funding, staffing composition, practice and procedure directions, measurement of the tribunal members’ performance, and the continued employment of tribunal members in relation to the corresponding division. This closer relationship between the executive and tribunal presents a major obstacle for a body that must have and be seen to have independence. Victoria Legal Aid warned that: We know that the tribunal is not a chapter III court; it is not independent in the same way as the judiciary, but we would certainly say that things like binding directions and things like asking the department for permission in effect to hand down a decision positively on the papers cut against what an independent executive tribunal ought to be in a civilised Western democracy…Concerns were also raised about the method of the appointment of tribunal members. The Minister whose department’s decisions will be reviewed by a particular division of the tribunal will be the Minister responsible for recommending the appointments of the executive member and tribunal members for that particular division to the Governor-General… The Law Council of Australia cautioned: Put yourself for a moment in the position of an applicant: you go to a tribunal and you think, rightly or wrongly – because the minister gets to appoint members – there is a close correlation between the department that you are unhappy with and the tribunal you end up before. If you have a perception that this is just another aspect of internal review by the department, if you lose – and you might well lose on the merits – you are going to have an added perception that you have not been dealt with fairly, which is not a good thing for our system of government… <http://wopared.aph.gov.au/Senate/committee/legcon_ctte/completed_inquiries/1999-02/art/report/01.doc > at 27 August 2009.

\textsuperscript{526} Migration Act 1958 (Cth) s 37, sub-div AF; Migration Regulations sch 2, subclasses 010, 020, 030, 051.

\textsuperscript{527} Migration Regulations sch 2, subclasses 010, 020, 030, 051.

\textsuperscript{528} Migration Act s 82(3).
• If the holder leaves Australia (applies to Bridging visas A, C, D & E)\textsuperscript{530}

• On cancellation of any substantive visa held (applies to Bridging Visas A & B only)\textsuperscript{531} or

• On the cessation date if the bridging visa is granted for a specific period of time.\textsuperscript{532}

4.4.4 Assessment of Claims and Merits Review

In practice, the refugee determination process is run as a separate unit but is very much a part of the migration portfolio. This is borne out most forcefully in the government’s decision to reduce the intake of humanitarian cases from overseas by the number of persons granted residence in Australia as refugees. The refugee claimants within Australia – their detention, the processing of their cases and the role played by the courts in reviewing decisions, especially after the introduction of the privative clause in the Migration Act – have been the source of conflict in the migration field in recent years. These are discussed below.

4.4.4.1 Assessment of Claims

When a Protection Visa application is made, an officer from the Department of Immigration, acting as a delegate of the Minister for Immigration, decides if the applicant meets Australia’s obligations under the Refugee Convention.\textsuperscript{533} This is done by assessing the claims against the definition of a refugee set out in the Refugee Convention as amended by the 1967 Protocol. All applications are assessed on an individual basis. If the application is successful, the applicant is granted the appropriate protection visa.

\textsuperscript{529} Migration Regulations sch 2, subclasses 010, 020, 030, 051.
\textsuperscript{530} Migration Regulations sch 2, subclasses 010, 020, 030, 051.
\textsuperscript{531} Migration Regulations sch 2, subclasses 010, 020.
\textsuperscript{532} Migration Regulations sch 2, subclasses 010, 020, 030, 051.
\textsuperscript{533} Migration Act 1958 (Cth.) s 65.
4.4.4.2 Merits Review

An important right enjoyed by asylum seekers processed in Australia is the right to merits and judicial review of their asylum decision. This right is not available for those who are processed outside Australia. Where an application by a person in Australia is refused for any reason other than character grounds, that person can seek a merits review of that decision from an independent tribunal, namely the RRT. If the refusal is based on character grounds, the refusal can be reviewed by the Administrative Appeals Tribunal. The independence of the RRT is an important safeguard against the influence of political constraints that may affect a government department. The removal of an independent review may give rise to allegations of political intervention in refugee decision making and create a risk of refoulement of genuine refugees. The RRT examines the applicant's claims against the Refugee Convention definition as amended by the 1967 Protocol, providing an informal, non-adversarial setting to hear evidence. If the RRT is unable to make a decision favorable to the applicant on the written evidence available, it must give the applicant the opportunity of a personal hearing. The RRT plays a significant role in ensuring procedural fairness for asylum seekers. Between 1 July 1993 and 28 February 2006, the RRT overturned 7885 cases decided by DIMA. In the last financial year (09/10), the RRT set aside 23% cases decided by DIAC.

Protection Visa applicants rejected by the RRT (and who have no other legal reason to be in Australia) have 28 days to depart Australia. If they stay beyond this 28 day period, they may be removed from Australia. The Minister of Immigration has the power to intervene after an RRT or AAT decision relating to a Protection Visa, but is not compelled to do so. The Minister may intervene to substitute a more favorable decision for the RRT or AAT.

534 Migration Act 1958 (Cth) s 411(2)(a).
536 Hereinafter referred to as the “AAT”.
537 Migration Act s 425.
540 Migration Regulations sch 2, subclasses 010, 020, 030; See also, Migration Act ss 477, 477A.
541 Migration Act s 417.
favorable decision to the applicant if the Minister believes it is in the public interest to do so.  

4.4.4.3 Right to judicial review

The right to judicial review of decisions by Commonwealth officers is protected under s 75(v) of the Australian Constitution. This right ensures that Commonwealth officers are prevented from exceeding their power, and encourages adherence to the rule of law. Decisions which are not made by Commonwealth officers will not be subject to judicial review under s 75(v) of the Constitution. This means that judicial review does not include decisions made by UNHCR officials or IOM.  

The first attempt to limit the scope of judicial review occurred in 1994 when Part 8 was inserted into the Migration Act. The provisions of Part 8 effectively removed the Federal Court’s jurisdiction in respect of decisions made under the Migration Act, except to the extent limited by s 476. Part 8 was subject to an unsuccessful constitutional challenge in the High Court in Abebe v Commonwealth. In that case, the majority of the High Court held that Parliament has power under s 77(i) of the Australian Constitution to bestow the Federal Court jurisdiction over only part of a matter.  

Thus, it is obvious that Part 8 of the Migration Act was introduced to restrict judicial access by narrowing and removing previously recognised grounds of reviews such as i) denial of natural justice, ii) unreasonableness, iii) taking an irrelevant consideration into account, iv) failure to take into account a relevant consideration, v) reasonable apprehension of bias, and vi) abuse of power. This part, further,  

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542 Migration Act ss 417.
543 Church of Scientology v Woodward (1982) 154 CLR 25, 70.
545 Migration Act 1958 (Cth) s 476 provides that the Federal Magistrates Court has no jurisdiction over a primary decision. A primary decision is defined in sub-s 476(4) as a ‘private clause decision or purported private clause decision: (a) that is reviewable under Part 5 or 7 or section 500 (whether or not it has been reviewed); or (b) that would have been so reviewable if an application for such review had been made within a specified period’.
limited the scope of judicial review to the Federal Court as long as the decision-maker acts in good faith, has the authority to make the decision, the decision relates to the subject matter of the legislation, and that it does not exceed constitutional limits.\textsuperscript{548}

In October 2001, the Federal Government amended the Migration Act by the Migration (Judicial Review) Act 2001 (Cth). Under the amendment, an applicant’s right to judicial review was limited by a privative clause.\textsuperscript{549} The amendment was again an attempt to erode the scope of available grounds of judicial review in migration matters. The constitutional validity of the privative clause was unsuccessfully challenged in Plaintiff S157/2002 v Commonwealth however the majority of the High Court read the provisions such that the amendments would not protect a decision infected by jurisdictional error.\textsuperscript{550}

It is noteworthy that in the previous financial year (2009/10), the RRT received a total of 90 court remittals despite such restrictive privative clause.\textsuperscript{551} Such restrictions breach Article 16 of the Refugee Convention, which provides right to access to courts and may also ultimately breach non-refoulement obligation.

\textbf{4.5 Definition of “Refugee” under Migration Act 1958}

Section 36(2)(a) of the Migration Act defines as a criterion for a protection visa that the applicant is a ‘non-citizen in Australia to whom the Minister is satisfied Australia has protection obligations under the Refugees Convention as amended by the Refugees Protocol’. A question which commonly arises when determining whether a person is a refugee under Article 1A(2) of the Refugee Convention is whether the person comes within one of five “convention reasons” - that is, race, religion, nationality, political opinion or membership of a particular social group. The first four of these reasons are fairly self evident; it is the application of the

\textsuperscript{548} Edwards, ‘Tampering with Refugee Protection’, above n 504, 209.
\textsuperscript{549} Migration Act 1958 (Cth) s 474.
\textsuperscript{550} (2003) 211 CLR 476.
\textsuperscript{551} See Above n 539.
The phrase ‘particular social group’ that the Australian Government has come under intense scrutiny over.

The phrase attracted considerable controversy in Australia following the plethora of successful refugee claims by Chinese applicants on the basis of China’s “one-child policy”. In 1994, the Federal Court accepted that a ‘particular social group’ was ‘those who, having only one child do not accept the limitations placed on them or who are coerced or forced into being sterilized’.552 The government quickly reacted. The Minister for Immigration both appealed the Federal Court’s decision and introduced the Migration Legislation Amendment Bill [No 3] 1995 (Cth) into the Senate. Clause 2 of the Bill stated, inter alia, that:

(3) The fertility control policies of the government of a foreign country are to be disregarded in determining if a non citizen is a member of a particular social group (within the meaning of the Refugee Convention as amended by the Refugee Protocol) for the purpose of considering an application for a protection visa.

(4) The fertility control policies of the government of the People's Republic of China are an example of the policies referred to in subsection (3).

In fact, the Bill did not come before Parliament for a vote because on 16 June 1995 the Full Federal Court set aside the Federal Court’s decision.553 This is an example of further restricting refugees by amending domestic legislation and using Parliament where necessary to reverse Court decisions. Another example is the attempt to define the meaning of ‘persecution’ enshrined in Article 1A(2). Section 91R of the Migration Act provides that obligations under the 1951 Convention do not come into effect unless the persecution is:

a) the essential and significant reason, or those reasons are the essential and significant reasons for the persecution; and

552 Minister of Immigration & Ethnic Affairs v Respondent A (1994) 127 ALR 383, [88].
553 Minister of Immigration & Ethnic Affairs v Respondent A (1995) 57 FCR 309. The High Court later affirmed the decision of the Full Federal Court in Applicant A v Minister for Immigration & Ethnic Affairs (1997) 190 CLR 225 (hereinafter referred to as “Applicant A”).
b) the persecution involves serious harm to the person; and

c) the persecution involves systematic and discriminatory conduct.

Thus, ‘persecution’ is also given very restrictive interpretation and the conditions imposed to establish ‘fear of persecution’ are very high standards.\footnote{Edwards, ‘Tampering with Refugee Protection’, above n 504, 203-4.}

In addition, Section 91S of the Migration Act requires the decision-maker to ‘disregard any fear of persecution, or any persecution, that any other member or former member (whether alive or dead) of the family has ever experienced …’.\footnote{Ibid.}

This provision does not recognize a claimant’s very real fear of being persecuted as a result of his or her membership in the family of someone who fears or has faced persecution.\footnote{Ibid.}

\subsection*{4.6 Can Australia Justify its Responses to the Refugee Convention?}

Australia appears to be violating its obligations under Articles 1A(2) and 33 of the Refugee Convention. In 2005, the former Minister for Immigration, Multicultural and Indigenous Affairs, Amanda Vanstone stated:

Australia’s resettlement program goes beyond our international obligations and assists not only refugees, but others with links to Australia who are subject to human rights abuses in their home countries.\footnote{Department of Immigration, Multicultural and Indigenous Affairs, Refugee and Humanitarian Issues: Australia’s Response (2005) 7 <http://www.immi.gov.au/media/publications/pdf/refhumiss-fullv2.pdf> at 26 August 2009.}

This generosity is commendable, but at the same time it shows that Australia has created its own system of refugee protection over and beyond its international obligation to refugees. Introducing quasi-refugee category via Humanitarian Programs rather than adopting refugee convention’s obligation in the domestic law,
it has completely mislead and confused the whole international protection regime focused on refugees.\textsuperscript{558}

This leads one to ask whether Australia can defend its actions by relying on the international law of accommodations. This section will consider reservations, limitation or “clawback” clauses, derogations and denunciations.

4.6.1 Reservations

Article 42(1) of the Refugee Convention permits States, at the time of signature, ratification or accession, to make reservations to certain articles of the Refugee Convention. However it explicitly precludes the making of reservations in respect of a number of articles, including Article 1 (which contains the definition of a “refugee”) and Article 33 (which prohibits the expulsion or refoulement of refugees).

Article 2(1)(d) of the Vienna Convention also states that reservations must be formulated at the time of signature, ratification or accession. At present, there are no reservations in place limiting the application of the Refugee Convention in Australia. Also, any fresh reservation by Australia to either of these articles would arguably be contrary to Article 19 of the Vienna Convention, namely that a reservation must be compatible with the ‘object and purpose’ of the Convention.\textsuperscript{559} As such, any fresh reservation to Article 1 or Article 33 would be of doubtful validity.

4.6.2 Limitation Clauses

Professor Higgins defines limitation or “clawback” clauses as those that permit ‘in normal circumstances, breach of an obligation for a specified number of public reasons’.\textsuperscript{560} The Refugee Convention contains a number of such clauses. For

\textsuperscript{558} William Maley , ‘Refugees’ in Robery Manne (ed), The Howard Years (Black Inc, 2004) 145, 147.
\textsuperscript{559} Poynder, above n 25, [41].
example, Article 33(2) which allows states to reject an asylum claim if there is a reasonable ground to believe that acceptance of that particular asylum claim may pose a danger to the community of that country’. Nevertheless, it would be difficult for Australia to justify its conduct by recourse to “clawback” clauses as the limitation ‘would seem to be directed at the individual refugee who might constitute a danger to the security of the receiving country and its community and not to provide an excuse for the refoulement of groups of refugees’. 561

4.6.3 Derogations

Article 9 of the Refugee Convention permits States to derogate from the provisions of the Refugee Convention in times of war or national emergency:

Nothing in this Convention shall prevent a Contracting State, in time of war or other grave and exceptional circumstances, from taking provisionally measures which it considers to be essential to the national security in the case of a particular person, pending a determination by the Contracting State that that person is in fact a refugee and that the continuance of such measures is necessary in his case in the interests of national security.

Two important points should be noted about Article 9. First, the word ‘provisionally’ indicates that measures derogating from the provisions of the Refugee Convention can only be of a temporary character. 562 Secondly, the use of the expression “particular person” suggests that derogation measures must be made on an individual basis, not on a group basis. 563

Thus, a high threshold must be met in order to invoke derogation clauses. This can be seen in European jurisprudence. For example, a report prepared by the European

Obligations under the UN Convention on Refugees’ (1995) 2 Australian Journal of Human Rights 75, [42].


562 Poynder, above n 25, [46].

563 Ibid.
Commission of Human Rights in 1969 outlined the meaning of the term ‘public emergency threatening the life of the nation’ contained in Article 15(1) of the Convention for the Protection of Human Rights and Fundamental Freedoms\(^{564}\) for the purpose of assessing the legitimacy of derogations:

(1) It must be actual or imminent.
(2) Its effects must involve the whole nation.
(3) The continuance of the organised life of the community must be threatened.
(4) The crisis or danger must be exceptional, in that the normal measures or restrictions … are plainly inadequate.\(^{565}\)

Given this high threshold, Australia would be hard pressed to justify its conduct as a “derogation” from its obligations under the Refugee Convention. Even if it could be established that derogation could apply to a group (as apposed to a specific person),\(^{566}\) it is clear that the spate of “boat arrivals” in Australia in recent times is not so serious as to warrant such derogation. Contrary to the Government rhetoric that the wave of “boat people” are a threat to Australia’s security and/or sovereignty, the fact is that these arrivals ‘are a threat only to the highly questionable policy of migration control’.\(^ {567}\) Australia’s international image will certainly be tarnished if the government attempt to derogate from its Refugee Convention obligations on the basis of the “influx of boat people” entering Australia given that, by world standards, the number of “boat people” entering Australia’s borders is relatively small.

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\(^{564}\) Opened for signature 4 November 1950, 213 UNTS 221 (entered into force 3 September 1953).


\(^{566}\) Poynder, above n 25, [49]: suggests that ‘[t]his might be a possibility if Australia was to seek to rely upon the principle of derogation under customary international law, as opposed to the Refugee Convention’.

\(^{567}\) Poynder, above n 25, [49].
4.6.4 Denunciations

Article 44(1) of the Refugee Convention permits signatory states to denounce the Refugee Convention. It provides that ‘[a]ny Contracting State may denounce this Convention at any time by a notification addressed to the Secretary-General of the United Nations’.

However, Article 44(1) of the Refugee Convention must be read in conjunction with Article 43 of the Vienna Convention which provides as follows:

The invalidity, termination or denunciation of a treaty, the withdrawal of a party from it, or the suspension of its operation, as a result of the application of the present Convention or of the provisions of the treaty, shall not in any way impair the duty of any State to fulfil any obligation embodied in the treaty to which it would be subject under international law independently of the treaty.

Article 43 of the Vienna Convention clearly includes customary international law. As such, even if Australia were to denounce the Refugee Convention pursuant to the requirements outlined in Article 44, Australia would still be under an obligation to comply with the principles contained in the Refugee Convention if acquired the status of customary international law. On that point, it is later argued that the definition of “refugee” and the non-refoulement obligation contained in the Refugee Convention have both acquired the status of customary international law. Thus, it is argued that Australia would still be bound to abide by both principles irrespective of whether it was a signatory to the Refugee Convention.

4.7 The Exclusion and Cessation Clauses in the Refugee Convention

Although the aim of this thesis is to examine whether Australia’s “safe third country” policies and practices violate its non-refoulement obligations under international law, it is important to discuss the exclusion and cessation clauses

\footnote{568 See section 3.4 of this thesis.}
contained in the Refugee Convention as these clauses may be employed by member States to effectively refoul refugees.

### 4.7.1 The Exclusion Clauses

Certain categories of people are specifically excluded from the protection accorded to refugees under the Refugee Convention. The exclusion clauses are contained in Articles 1D, 1E and 1F of the Refugee Convention. Article 1D provides that the Refugee Convention does not apply to persons who are receiving protection or assistance from other organs of the United Nations other than the UNHCR. Article 1E provides that the Refugee Convention does not apply to persons who have acquired the rights and obligations comparable to nationality in another country (excluding the country which he or she is claiming asylum). Article 1F provides that the Refugee Convention does not apply to persons who have committed a crime against peace, a war crime, a crime against humanity, a serious non-political crime or a crime contrary to the purposes and principles of the United Nations. Whilst Articles 1D and 1E are self-explanatory, Clause 1F has attracted considerable debate, specifically the exclusion of terrorists under subsection (c).

It is worth pointing out some ambiguities in the Refugee Convention. For instance, Article 1(A) of the Refugee Convention identifies those to whom the term “refugee” applies, containing in sub-clause (2) the “Convention definition”, and the whole of Article 1 is headed ‘Definition of the Term “Refugee”’. The reach of Clause A is qualified by what follows. In particular, Clause C states that the Refugee Convention in certain circumstances ‘shall cease to apply to any person falling under the terms of section A’. Clauses D, E and F each state that the Convention or its provisions ‘shall not apply’ to certain persons.

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The exclusion clause (1E) was originally intended to bar from international protection all ethnic German refugees from Central and Eastern Europe who had taken up residence in Germany during or following the Second World War.\(^{570}\)

For Article 1E to apply, a refugee under Convention must have:

- “has taken residence” means the person concerned must benefit from a residency status which is secure and hence include the rights accorded to nationals to return to, re-enter and remain in the country concerned. These rights must be available in practice. It does therefore not apply to individuals who could take up residence in that country, but who have not done so.
- been currently recognised by the country concerned as having these “rights and obligations” attached to possession of the nationality of that country. If the competent authorities of the country concerned recognized the person as having such rights in the past but no longer endorse this recognition, Article 1E is inapplicable. “Rights and obligations” means the person, with the exception of minor divergences, in essence enjoys the same civil, political, economic, social and cultural rights and has on the whole the same obligations as nationals.\(^{571}\)

The obligation under Article 33 is subject to the important rider that applications for a protection visa (as the refugee application is technically called) may not need to be dealt with by a decision maker where there is effective protection in a third country which does not infringe the right of non-refoulement, or where pursuant to Article 1E the Convention does not apply to a person recognized as having the rights and obligations attached to the possession of nationality of a third country.\(^{572}\) The object and purpose of Article 1E is to exclude those refugees who do not require refugee protection because they already enjoy a status which, possibly with limited

\(^{570}\) Hathaway, The Law of Refugee Status, above n 182, 211.
exceptions, corresponds to that of nationals. A strict test is, therefore, called for in order to be excludable under Article 1E. Article 1E concerns “persons who might otherwise qualify for refugee status and who have been received in a country where they have been granted most of the rights normally enjoyed by nationals, but not formal citizenship”.573

For Article 1E to apply, it would therefore be necessary inter alia to examine in the individual case.574

a) whether the person has been granted secure residence in the country concerned including the right to return to and re-enter that country;
b) whether, with the exception of minor divergences, the person basically has the same civil, political, economic, social and cultural rights as well as obligations as nationals;
c) whether in particular the person is fully protected against deportation and expulsion;
d) the current and future availability and effectiveness of this status in practice;
e) whether, if outside the above-mentioned country, the person has a well-founded fear of being persecuted there.

In Nagalingam 575, the Federal Court of Australia first considered Article 1E in 1992, in which Onley J, made it clear that it was not sufficient for the applicant to have refugee status in Norway for Article 1E to apply. Onley J, emphasized that Article 1E has narrow application, which should be strictly applied and that the Department of Immigration would be restrained from deporting the claimant until the matter is considered.

In Barzideh v Minister for Immigration and Ethnic Affairs, Hill J, further stressed the limited application of Article 1E stating that this article only excluded an asylum seeker being considered a refugee when she/he holds “the same rights and is under the same obligations as a national of the country where he/she was residing”.

Exclusion clauses represent the most extreme sanction of international refugee law; they supersede a refugee’s fundamental right to non-refoulement. The UNHCR has repeatedly warned against the hasty use of exclusion clauses. For example, the UNHCR’s Guide on International Protection states as follows:

The exclusion clauses must be applied “scrupulously” to protect the integrity of the institution of asylum, as is recognised by UNHCR’s Executive Committee in Conclusion No. 82 (XLVIII), 1997. At the same time, given the possible serious consequences of exclusion, it is important to apply them with great caution and only after a full assessment of the individual circumstances of the case. The exclusion clauses should, therefore, always be interpreted in a restrictive manner.

Whilst an internationally agreed definition of terrorism is still under debate, acts commonly considered to be terrorist in nature are likely to fall within the exclusion clauses even though Article 1F should not be interpreted as simply an anti-terrorism provision. It is also possible that in some cases, Article 1(F) may not need to be considered, as the fear of legitimate prosecution [rather than persecution] automatically excludes an applicant from the Refugee Convention. Article 1(F)(b) is the exclusion clause which has traditionally been of most relevance in exclusion cases on the basis of terrorism. Issues surrounding the operation of the exclusion clauses were first brought to international attention as a result of the Great Lakes Crisis in 1994. This crisis prompted the fear that individuals who were guilty of

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576 (1997) 72 FCR 337.
578 See, eg, Craig Sander, “(Crisis in the Great Lakes) - Environment: Where have all the flowers gone ... and the trees ... and the gorillas?” 110 (1997) Refugee Magazine Issue <http://www.unhcr.org/publ/PUBL/3b80c6e34.html> at 10 June 2009; Refugee Survey Quarterly (1998) 17(2).
genocide were being offered refuge under the Refugee Convention by the international community.

Under Article 33(2) of the Refugee Convention, a signatory can expel or return a refugee when ‘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’. The standard of proof required to enliven this provision is high and furthermore it should only be applied in the most exceptional of circumstances.\(^{579}\)

### 4.7.2 The Cessation Clauses

The cessation clauses are contained in Article 1(C) of the Refugee Convention and set out six circumstances under which refugee status may be lawfully withdrawn or “ceased”. Article 1(C) is based on the principle that international protection to a refugee should not be granted when it is no longer necessary or justified. Where Articles 1C(1)-(4) deal with voluntary acts of the refugee leading to cessation, Article 1C(5)-(6) deal with a relevant change in the circumstances in the recognised refugee’s country of origin. The contentious clause of article 1C is 1C(5), the others are to some extent self-explanatory. Art 1C(5), which has typically been invoked by the UNHCR in consultation with states, by way of a general declaration that circumstances in a particular country have fundamentally changed so as to remove a particular threat that may have been faced by a large number of refugees under its mandate.\(^{580}\) Thus, it allows a state to withdraw protection of a recognised refugee when a refugee’s country is origin is safe for him or her. In determining whether a country of origin is ‘safe’, conclusions reached by European Immigration Ministers in 1992 noted four factors to be considered, although these are not specified:\(^{581}\)

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\(^{581}\) Matthew J Gibney and Randall Hansen (eds), Immigration and Asylum: From 1900 to the present (ABC-CLIO, 2005) 555.
The previous number of refugees from that country and recognition rules;
Observance of human rights in the country;
Democratic institutions in the country; and
Stability in the country

Taking a broader approach is the UNHCR Guidelines and Executive Committee of the High Commissioner's Programme’s definition of ‘the changes in the refugee's country’. It is interpreted as, requiring 'substantial, effective and durable' or 'fundamental and enduring' changes. Some indicators are democratic elections, significant reforms to the legal and social structure, amnesties, repeal of oppressive laws, dismantling of repressive security forces, and general respect for human rights.\textsuperscript{582} Withdrawal of protection has serious consequences for a refugee therefore UNHCR emphasise to the need to find ‘durable solutions’ in the context of refugee protection.\textsuperscript{583}

The UNHCR does not expect human rights to be very good in the refugee’s country of origin but, emphasise that the changes be ‘substantial, effective and durable’ towards the development of national institutions to protect human rights are necessary.\textsuperscript{584} Substantial is defined as that the power structure under which there was a real possibility of persecution no longer exists. Effective means that the non-existence of fear for persecution should exist in fact, rather than simply promised, and reflects a genuine ability and willingness on the part of the home country's authorities to protect the refugee. In terms of durability, no minimum time frame has been established, but one to one-and-half years has been suggested as indicative of

\textsuperscript{582} UNHCR, ‘Guidelines on International Protection: Cessation of Refugee Status under Article 1C(5) and (6) of the 1951 Convention relating to the Status of Refugees (the “Ceased Circumstances” Clauses)’, HCR/GIP/03/03 (10 February 2003), para 3; ExCom, ‘General Conclusion on International Protection of Refugees 1975 - 2004’ Executive Committee Conclusions No 69 (XLIII) 2004, 136-7.
\textsuperscript{583} UNHCR, ‘Guidelines on International Protection: Cessation of Refugee Status under Article 1C(5) and (6) of the 1951 Convention relating to the Status of Refugees (the “Ceased Circumstances” Clauses)’, HCR/GIP/03/03 (10 February 2003), para 6.
durable change. Interestingly, the UNHCR itself generally waits for four or five years to elapse before making a declaration of cessation.

The 'substantial, effective and durable' test is consistent with the UNHCR Guidelines and the views of other state parties to the Refugee Convention. But, Emmett J in NBGM said there should be strict adherence to the actual language of the Refugee Convention, which simply refers to particular circumstances 'ceasing to exist' because the test of 'substantial, effective and durable' does not constitute a legal test as these words do not appear in the Refugee Convention.

In Australia, Article 1C(5) began to be applied to refugees in 2003 because of the temporary protection visas (TPV) rule. That is the Australian practice to grant a protection visa to persons individually determined to be refugee under the Convention for three years, they were then required to apply afresh for a permanent protection visa. The grant of such visa includes both recognition of protection and an entitlement to temporary residence. There was not a clear and precise position of Art 1C (5) until the High Court handed down its decision in QA A H and NGBM in 2006. Before the High Court’s decision in 2006, one interpretation in NBGM, the court said:

'the underlying rationale of the Refugees Convention is that ’ ... so long as the relevant well-founded fear exists, such that a person is unable or unwilling to avail himself or herself of the protection of the country of his or her nationality, he or she will be permitted to remain in the Contracting State', therefore, that protection obligations continue only for so long as a person meets the criteria of art 1A(2).

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585 Ibid.
586 Ibid.
587 Ibid 151.
588 NBGM v Minister for Immigration & Multicultural Affairs (2006) 231 ALR 380 (hereinafter referred to as ‘NBGM’).
590 See for detail 4.4 of this thesis.
Thus, ‘cessation will apply if the applicant cannot show that they have a well-founded fear of persecution for one of the five Refugees Convention reasons. This interpretation effectively negates the purpose of art 1C(5) and requires a TPV holder to make a fresh application for refugee status.

In QAAH, the majority held that the correct test for granting a permanent protection visa to a person who has already been recognised as a refugee pursuant to the grant of a temporary protection visa (TPV), is via application of the cessation clause in Article 1C(5) of the 1951 Refugee Convention, rather than considering the matter afresh under Article 1A(2) of the Convention. Importantly, the majority also found that it is for the decision maker attempting to argue cessation to present evidence that clearly demonstrates that the cessation requirements apply to the individual applicant. Put simply, in a decision concerning a person on a TPV applying for permanent protection the onus is on the decision maker to demonstrate that the person is no longer a refugee rather than on the applicant to demonstrate why they continue to be a refugee.

Related to this, the grant of a TPV to an applicant demonstrates that Australia has recognised that it owes ‘protection obligations’ to him or her (pursuant to the criteria in section 36(2) of the Act and Items 785, Schedule 2 of the Regulations). Thus, the presumption at law is that person continues to be a refugee and to be owed protection obligations by Australia until the Department or RRT successfully applies one of the cessation clauses to that applicant.\(^\text{592}\)

However, on the issue of these cessation clauses, the High Court has held that simply because someone has been granted refugee status through a TPV, it may not necessarily follow that the same applicant would automatically satisfy the requirements for the grant of further protection.\(^\text{593}\) In QAAH\(^\text{594}\) and NBGM\(^\text{595}\) the High Court held that each application had to be assessed from the start. In other

\(^{592}\)O’Sullivan, above n 589.
words, even though a person had been granted a TPV (and in the process been found to be a refugee), in any subsequent application for further protection visa he or she must still establish that they satisfy all of the requirements for refugee status. The majority held that Australian domestic law is determinative of the legal question relating to cessation and thus the holder of TPV is not entitled to a further protection visa if they no longer face persecution pursuant to Article 1A(2) of the Convention.\textsuperscript{596} This means that Article 1(C) of the Refugee Convention plays no role in assessing an application for further protection visa by TPV holders and onus to re-establish is upon the refugee.

The High Court, thus, decided that when that further protection visa comes to be assessed, the relevant criterion is that the applicant is a person to whom Australia has protection obligations under the Convention under section 36 of the Migration Act.\textsuperscript{597}

The majority’s conclusion, is that, Article 1C (5) operates automatically according to its terms, and does not need for its application to be triggered for any particular kind of visa.\textsuperscript{598} Kirby J dissenting found that Article 1C(5) did in fact require a separate and distinct test from Article 1A(2)\textsuperscript{599} In order to operate Article 1C(5), a person first must have been recognised as a refugee under Article 1A(2)\textsuperscript{599} In order to operate Article 1C(5), a person first must have been recognised as a refugee under Article 1A(2) which also suggests that the convention contemplates a separation between the stages of recognition of refugee status and that of cessation.\textsuperscript{600} These two also can be distinguished at the stages of assessment.\textsuperscript{601}

Under Article 1A(2) the question asked is ‘will this person face a real chance of persecution for a Convention reason if returned to his or her country’?;

\textsuperscript{596} QAAH [2006] HCA 56. [34]-[36].
\textsuperscript{597} QAAH [2006] 231 ALR 340.
\textsuperscript{598} Ibid 352.
\textsuperscript{599} Ibid 366-9.
\textsuperscript{600} O’Sullivan, above n 589.
\textsuperscript{601} Ibid 603.
Under Article 1C(5) the question asked is ‘have country conditions in the refugee’s country of origin changed sufficiently such that he or she no longer need international protection of Refugee Convention?.

In NM (Afghanistan) v Secretary of State for the Home Department\textsuperscript{602}, the UK Court of Appeal stated that:

…it is abundantly plain that Article 1C is, in itself, of no relevance when the decision-maker is determining whether or not a person is a ‘refugee’ within the meaning of Article 1A.

Thus, in United Kingdom unlike the High Court decision, the legal position is that Articles 1A(2) and 1C(5) set out different and distinct criteria, and such findings are important in terms of the meaning of ‘protection’ under the Refugee Convention i.e. it goes to the question of whether refugee status ceases if there is an absence of persecution (Article 1A(2) approach) or only if effective protection is available in the country of origin (an Article 1C(5) approach).\textsuperscript{603}

In Chan v Minister for Immigration & Ethnic Affairs,\textsuperscript{604} the High Court considered whether Article 1 of the Refugee Convention required refugee status to be determined at the time when the test laid down by the Refugee Convention is first satisfied, so that it ceases only in accordance with the Article of the Refugee Convention providing for cessation, or whether refugee status is to be determined at the time when it arises for determination.

In Minister for Immigration & Multicultural Affairs v Singh,\textsuperscript{605} the High Court, in considering s 36(2) of the Migration Act, proceeded on the footing that a decision-maker does not err in law in considering as a preliminary issue whether the applicant for a protection visa falls within an exception in Article 1(F). The adoption of the expression ‘to whom Australia has protection obligations under the Convention’

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\textsuperscript{602} [2007] EWHC 214, [12].
\textsuperscript{603} O’Sullivan, above n 589, 604-6.
\textsuperscript{604} (1989) 169 CLR 379 (hereinafter referred to as “Chan”).
\textsuperscript{605} (2002) 209 CLR 533 (hereinafter referred to as “Singh”).
removes any ambiguity that it is to Clause A only that regard is to be had in determining whether a person is a refugee, without going on to consider, or perhaps first considering, whether the Refugee Convention does not apply or ceases to apply by reason of one or more of the circumstances described in the other sections in Article 1.

The High Court resolved that the ambiguity arose by the decision in Chan\(^{606}\) by making it clear that Australia owe protection obligations to an applicant as mandated by s 36 of the Migration Act may be satisfied by a prior determination to that effect in the course of considering an earlier application for a protection visa, including a TPV; refugee status.\(^{607}\) Once it is established, then it continues until the cessation clause is engaged; and the s 36 test will be satisfied where there is such a prior determination, and the cessation clause has not been engaged.

It remains to be considered in what manner one should approach the application of Article 1(C) - how does one establish whether the “circumstances in connection with which an applicant has been recognized as a refugee have ceased to exist”\(^{605}\)?

Professor Hathaway has set out the three requirements which have emerged within Canadian jurisprudence for determining whether there has been a sufficient change in a refugee’s country of origin, such that the circumstances which gave rise to the grant of status have ceased to exist:

First, the change must be of substantial political significance, in the sense that the power structure under which persecution was deemed a real possibility no longer exists … Second, there must be reason to believe that the substantial political change is truly effective … it ought not to be assumed that formal change will necessarily be immediately effective … The formal political shift must be implemented in fact, and result in a genuine ability and willingness to protect the refugee … Third, the change of circumstances must be shown to be durable. Cessation is not a decision to be taken lightly on the basis of transitory shifts in the political landscape, but

\(^{606}\) (1989) 169 CLR 379.

should rather be reserved for situations in which there is reason to believe that the positive conversion of the power structure is likely to last.\textsuperscript{608}

Professor Hathaway’s views need to be considered by every state (including Australia) while applying cessation clauses.

The High Court decision in NGBM and QAAH held that domestic law outweighs Refugee Convention obligations which provide that refugee status applies until a cessation clause under Article 1C of the Convention is applicable. However, the High Court held that refugees need to prove afresh their refugee status in every three months (in TPV regime) which does envisage a potential loss of status triggered by the expiration of domestic visa arrangements.\textsuperscript{609}

\section*{4.8 The Tension between the Executive and the Judiciary}

Recent observed practice is that the Executive, with the backing of Parliament, has pursued a policy of restricting judicial review in migration cases.

In common law Countries, the tension between the executive and the judiciary is obvious as a result of the separation of power doctrine.\textsuperscript{610} The courts are the ‘Third Arm of Government’ in partnership with the other branches of government,\textsuperscript{611} and their role is important to uphold the values of the common law and human rights\textsuperscript{612}.

The clash is evident, especially, in cases relating to the Migration Act 1958 (Cth). Migration litigation and especially refugee law has become a substantial component of the workload of the High Court, the Federal Court and the Federal Magistrates Court. For the year 2007-2008, 63 per cent of civil special leave applications filed in the High Court represented migration matters the majority of which comprised of

\begin{footnotesize}
\begin{itemize}
\item \textsuperscript{608} Hathaway, The Law of Refugee Status, above n 182, 199-203.
\item \textsuperscript{609} QAAH [2006] HCA 53, [38].
\item \textsuperscript{610} Michael McHugh, ‘Tensions Between the Executive and the Judiciary’ (Speech delivered at the Australian Bar Association Conference, Paris, 10 July 2002).
\item \textsuperscript{611} Susan Kneebone, ‘What is the Basis of Judicial Review’ (2001) 12 (2) Public Law Review 95.
\item \textsuperscript{612} Susan Kneebone, ‘Bouncing the Ball between the Courts and the Legislature: What is the score on refugee issues?’ (Paper presented at the Castan Centre for Human Rights Law Conference, Melbourne, 4 December 2003) 1.
\end{itemize}
\end{footnotesize}
individuals alleging to satisfy the criteria of “refugee” set out in the Refugee Convention and consequently to be eligible for protection visas.\footnote{High Court of Australia, Annual Report 2006-2007, 11.} Similarly, more than 450 applications for special leave to appeal immigration matters were filed with the High Court in 2007-08, but this dropped to about 250 cases in 2008-09.\footnote{Jamie Walker, ‘Courts crack down on asylum appeals’ The Australian (Sydney) 5 January 2010} It dropped from nearly 50 per cent to 39 per cent in 2009-10.\footnote{High Court of Australia, Annual Report 2009-2010, 14.}

A number of court decisions, such as the 2001 Tampa incident, have attracted considerable public attention.\footnote{See section 5.11 of this thesis.} They have also tended to contribute to increasing tensions between the courts and the executive,\footnote{Michael McHugh, ‘Tensions Between the Executive and the Judiciary’ (2002) 76 Australian Law Journal 567; Ronald Sackville, ‘Judicial Review of Migration Decisions: An Institution in Peril?’ (2000) 23 University of New South Wales Law Journal 190.} as well as tensions on the international front.

The Minister for Immigration accuses some judges of the Federal Court of undermining the will of Parliament.\footnote{‘Butt out, Ruddock tells Judges’, The Australian, (Sydney), 4 June 2002.} The full Federal Court responds by asking the Minister to explain his comments to the Court – in the words of The Australian, serving on the Minister “a judicial press release”.\footnote{‘Ruddock Cops a Judicial Press Release’, The Australian (Sydney), 4 June 2002.} Judges of the High Court have also rebuked Parliament for imposing a “great inconvenience” on the Court.\footnote{Re Refugee Review Tribunal; Ex parte Aala, (2000) 204 CLR 82, [133]; see also Re Minister for Immigration and Multicultural Affairs; Ex parte Durairajasingham (2000) 168 ALR 407, [13]; Abebe v Commonwealth, (1999) 197 CLR 510.}

Following the perceived generosity shown by the courts towards refugees, the federal government has passed legislation intended to curb the access to and the scope of judicial review in migration cases, thus bringing to the forefront significant debate concerning the Australian Constitution.\footnote{Sackville, above n 388, [10].} It should be noted that although access to judicial review on legal error has been curtailed, access to the High Court under its original jurisdiction is still available to refugees.\footnote{Australian Constitution s 75.}
Judicial review of Commonwealth administrative decisions inevitably has the possibility of generating tension between the executive and the judiciary, irrespective of the political platform of the government in power. In 2002, Justice McHugh warned about the perils of the ongoing conflict:

If the Executive Government is continually criticising the Judiciary, the authority of the courts of justice is likely to be undermined and public confidence in the integrity and impartiality of the judges is likely to be diminished. Continuing conflict is also likely to induce the Executive Government to prevail on the legislature to take the extreme step of reducing or abolishing judicial review with the result that the rule of law is undermined.

This friction has been exacerbated by the increased scope of judicial review, demonstrated by the seemingly escalating obligations of natural justice and the expansion of judicial review to prerogative powers formerly considered immune from judicial processes.

Writing extra-judicially, Justice Sackville has identified some of the reasons for the escalating friction:

- The fact that the notion of judicial review of refugee claim determinations has swiftly transformed a predominately unreviewable administrative power into a process that is very much susceptible to strict examination by the judiciary.
- The reality that immigration policies have been one of the most sensitive political issues in Australia, even prior to Federation.
- Regardless of the rhetoric aimed at so-called “illegal arrivals” and “queue jumpers”, the Refugee Convention, compels State parties to

623 Sackville, above n 388, [13].
624 Michael McHugh, ‘Tensions Between the Executive and the Judiciary’ (Speech delivered at the Australian Bar Association Conference, Paris, 10 July 2002).
625 Sackville, above n 388, [13].
626 Ibid [14].
provide protection to persons who meet the Convention definition of “refugee” irrespective of their mode of arrival into Australia.

- Parliament’s constant efforts to set aside unwanted court judgments or to limit the scope of judicial review without recognising the substantial disparity between its subjective aims and the motivation to be ascribed to it by the courts when employing commonly accepted rules of statutory construal.

As an example of the conflict between Judiciary and executive, it is relevant to state the then Minister for Immigration Mr Ruddock who argued that the courts ought not be involved in review of migration matters because the judiciary is "ill-suited" to deal with these matters.627 He said that courts with their emphasis on protecting individual rights are not in a position to weigh the relative influence of other values in the refugee determination system.628 He said that many disciplines, such as political and organizational theory, and social psychology impinge on administrative law. Associated with these disciplines are values other than legal norms such as the rule of law.629 These values include public accountability, fiscal responsibility, administrative efficiency and, in the migration area, international comity.630 He further stated that:

"task of assigning priorities to the numerous competing values inherent in the refugee determination system properly falls to the Parliament [Emphasis added]". 631

Academics and Human Rights commentators are also concerned with this ‘tug of war’. It has been argued that the legislative measures to limit the refugee definition

628 Ibid.
629 Ibid.
630 Ibid.
631 Ibid.
are inconsistent with international law and international jurisprudence and this has led to much confusion and increased litigation.\textsuperscript{632} It was further argued:

The decisions … demonstrate the courts acting as guardians of human rights in this context. The analysis of s91R and s91S decisions demonstrates that when the legislature steps in, the waters become very muddied. … the application of the refugee definition should be left to the courts to apply under the Refugees Convention.

…

In this game it is those whose human rights need protection who are being tossed back and forth. It should be left to the courts to decide when those human rights need protection … without legislative intervention.\textsuperscript{633}

Similarly, Professor John McMillan, Ombudsman of Commonwealth, earlier had said:

If there are present deficiencies in the Australian system of administrative law and public administration, they need to be explained by example and if judicial method is as capable or better than legislative or executive method for distilling enduring community values, that needs to be demonstrated.\textsuperscript{634}

Some academics argue that some judges intervened excessively in administrative decision based on unreasonableness.\textsuperscript{635} There are cases where court held the departmental decision invalid simply because the officials did not ask plaintiffs to clarify differences in the detail of marriage.\textsuperscript{636} In another case\textsuperscript{637} where the department cancelled family allowance benefit because the defendant had not

\textsuperscript{632} Susan Kneebone, ‘Bouncing the Ball between the Courts and the Legislature: What is the score on refugee issues?’ (Paper presented at the Castan Centre for Human Rights Law Conference, Melbourne, 4 December 2003).

\textsuperscript{633} Ibid.


\textsuperscript{635} Elizabeth Carroll, ‘Scope of Wednesbury unreasonableness: In need of reform?’ (2007) 14 Australian Journal of Administrative Law 86.

\textsuperscript{636} Prasad v Minister for Immigration and Ethnic Affairs (1985) 6 FCR 155.

\textsuperscript{637} Department of Social Security v O’Connell (1992) 38 FCR 540.
advised his change of address to the department; the court set aside that department’s decision. In that case, the court imposed overly burdensome obligations on the department to identify the correct address of every beneficiary. Such cases could be in thousands. Court’s such decision may not be commonly regarded as logical or reasonable itself.

Judicial review of administrative action is expanding in such a way it is becoming difficult to predict whether an administrative action would survive challenge. If a court overreacts to the public-officer’s decision, it will undermine the credibility of administrative body. Therefore, even if it is accepted that a court while reviewing a decision looks at how a public-officer interpreted the applied law, did they follow procedure and was the decision made legally correct, a court can add significant administrative burdens of the bureaucracy easily.

Conversely, not having a review mechanism also gives too much arbitrary power to bureaucracy. However it is also equally true that judicial body can quash or set aside the decisions made by bureaucracy reviewing administrative decisions. Judicial review is a weapon which gives judicial body power to negotiate with executive branch. A Court, quoting Professor Wade, had said that the court must resist the temptation of putting itself into decision-maker’s shoes and decide the case as it thinks appropriate.

4.9 Antagonisation of the Refugee

It is indeed the time of the “international community” whereby travel between States is extremely fluid. This high level of mobility has made immigration laws and policies at an international level one of the most contentious issues in world politics. People move to other countries not only because of “well-founded fear” but also

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638 Ibid.
because of “well-founded desire” to have a better life. Political parties and people in many developed countries are paranoid about people coming from developing countries and question whether they are genuine refugees.

In many Western countries, including Australia, elections have been determined by immigration policies. As antipathy towards asylum seekers grows, carefully nurtured through successive elections by our politician, Australia is reaching a position which allows any cruelty and indignity to be visited upon asylum seekers and their children. Besides politicians, there is evidence that Australians who are suffering financial hardship and those living in rural and outer-metropolitan regions are more antagonistic to immigrants and, most likely, to asylum seekers in particularly. Such antagonism attitude towards refugee emerges from their political beliefs, social dominance orientation, extreme national attachment, national security post 9/11, anger and fear in relation to opportunity and social security.

Under the so-called “skilled migration” policy, rather than focusing on oppressed people of the world, the government has evidenced a preference for educated and professional skill based people.

As already noted, the bulk of refugees are escaping to poor, developing States. The media portrays such refugees as traumatized groups, forced to flee their homes and desperately requiring assistance. By contrast, the arrival of asylum seekers in Western states is often met with suspicion. Asylum seekers that can afford to pay so-called people smugglers are stereo-typed as “cashed up” and thus draw little, if any, sympathy or compassion from the Australian public. Moreover, in States

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642 For example, moving for job-related reasons or simply a desire to live in a different country.
643 Michael Walzer, Spheres of Justice: A Defense of Pluralism and Equality (Basic Books, 1984) 39 defends limits on immigration on the ground that ‘restraint of entry’ protects the ‘politics and culture of a group of people committed to one another and to a shared life’.
644 Political parties in France, Switzerland, Belgium and Austria in particular have mobilized the anti-immigration vote.
647 See section 3.6 of this thesis.
recording very low acceptance rates of refugees, the public perception is that the vast majority of asylum applications are motivated by economic and/or social factors. Even in States experiencing high refugee claim acceptance rates, such as Canada, the application of the Refugee Convention engenders just as much skepticism as public support and acceptance.

4.10 The Need for a Compassionate Approach by Australia

Twentieth century refugee law was intended to be a humanitarian exception to the rule that each nation was able to select who entered its borders. The fundamental purpose behind the origin and development of the refugee law is to protect and promote basic human rights and dignity. Thus refugee law rightly can be called a law pertaining to humanity. It is argued that the Australian approach is contrary to these human rights resulting in mandatory sentencing and detention. Unfortunately in Australia, it appears refugee law only applies as a last resort and only when Australia is absolutely compelled to offer protection.

 Refugees will not be granted refugee status under the Refugee Convention unless they arrive in the receiving State. Australia predetermines its decision calling them “illegal” even before they have been processed. Refugees are left no real and genuine option. The lack of recognition by the Australian public of the international legal dimension of Australia’s derogations of its Refugee Convention obligations may be a product of media and government neglect, or misinformation; thus highlighting the country’s ignorance of the refugee experience. Australia has been blessed with the history of surprisingly little internal conflict, the experience of the indigenous inhabitants the marked exception. The only direct experience of war in modern times was the bombing raids in Darwin and a single Japanese incursion into Sydney Harbour over 50 years ago.

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649 Millbank, above n 125, 15.
650 Ibid.
652 Refugee Convention art 1.
Australia has much to gain by recognising and promoting the rights of refugee claimants in this country. The assumption of an internationally binding obligation to determine refugee claims and to offer asylum to those recognised as refugees forces Australia to consider itself within the global context. The strength of the processes put in place is a mark of the maturity of the nation. Unfortunately, Australia’s refugee policy appears to be a breach of its international law obligations.

As Deane Lusher, Nikola Balvin, Amy Nethery and Joanne Tropea in their writing said:

In signing the Refugee Convention, Australia has made a public commitment to refugees, Yet Australia treats one group of refugees with compassion and concern [those who arrive under the offshore component], and another with suspicion and contempt [those who arrive under the on-shore component]. This difference in approach contradicts international law and norms maintaining that asylum seekers should not be discriminated against depending on their mode of arrival to the country in which they seek protection … Australia needs a single humane policy for treating people seeking protection. There are other ways for Australia to maintain border protection that do not violate its obligations to people seeking asylum.653

4.11 Conclusion

The duties imposed by the Refugee Convention are of little consequence in the context of Australia’s selection of people overseas for inclusion in its refugee and special humanitarian program. This is because even if an asylum seeker fulfils the criteria set out the 1951 Convention Relating to the Status of Refugees (1951 Convention), he or she may be prevented from immediately entering Australia due to capping.654 Also, there appears to be some limits to the government’s ability to

654 Migration Act 1958 section 85 of the permits the Minister for Immigration to ‘cap’ or limit the number of visas which can be granted each year in a particular visa subclass; when the cap is reached, applicants must wait in a queue for their visa grant consideration in the following year, this is of
“select” on-shore refugees for residence and practical difficulties in attempting to restrict the admission of potential asylum seekers.655

Australia has been providing protection to refugees through its humanitarian program however a relatively nominal number of refugees have settled. It does not mean that it can depart from its obligations under the Refugee Convention. Indeed, the scale of the refugee problem in other countries should provide an impetus.656 It has been argued that Australia is not doing its part.657 Australia has ‘gained international notoriety for its harsh treatment of asylum seekers’.658 Even before the 2001 Tampa incident ‘the message that Australia dealt somewhat harshly with refugees trying to get to Australia had become widely known in many places’.659

This thesis strongly argues that sovereignty does not abrogate the State’s obligation to assist and provide shelter to the vulnerable groups, even if they do not have permanent relationship with the State. This is based on basic human rights principles. It argues that Australia can accommodate more refugees if there is political willingness to do so.

course subject to places becoming available: Department of Immigration & Citizenship, ‘Managing the Migration Program’, (Media Release, Fact Sheet No 21, 7 April 2009).


656 Millbank, above n 125, 21.


658 Mary Crock, Ben Saul and Azadeh Dastyari, Future Seekers II: Refugees and Irregular Migration in Australia (Federation Press, 2nd ed, 2006), 40.

659 See, eg, ABC Television, ‘Fraser Blasts Asylum Seeker Policy’, Lateline, 14 November 2001 <http://www.abc.net.au/lateline/content/2001/s417232.htm> at 27 April 2009; See the detail discussion in section 5.11 of this thesis for the circumstances surrounding the Tampa incident.
Chapter Five

Doctrine of effective protection: Development in Australia

‘I’m afraid the image of Australia today is less of a carefree sunburnt sporting nation and more the image of Tampa and its human cargo, of riots and protests at Woomera, of Australian funded detention centers on the Pacific Islands’

- Irene Khan, Secretary-General of Amnesty International

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5.1 Introduction – Doctrine of ‘effective protection’ in Australian Case laws

By signing the Refugee Convention, Australia has agreed to protect asylum seekers who seek refuge, if they can show they meet the criteria set out in Art 1A(2) of the Refugee Convention. The common practice is that, without specific legislative incorporation, an international treaty does not become part of our national legal system.661 In cases of ambiguity in legislation, the courts should prefer an approach that favours treaty.662 However, the tendency in the Australian Courts to focus on text rather than context is reflected more broadly in a tendency to concentrate very much on relevant domestic legislation to the exclusion of norms of international law.663

The ‘safe third country’ concept took on great significance in Australia with the arrival of the boat people from China over the Christmas/New Year period who had been expelled from Vietnam to China in the late 1970s following a border war between the two countries.664 While the government volunteered to accept refugees from the conflict, it also responded by instituting the first on-shore refugee determination system.665 In 1978, this represented no more than a series of extra-legislative arrangements to channel refugee claims through an advisory committee which would recommend the grant or refusal of refugee status to the Minister in whom Parliament had vested a simple power to grant entry permits.666 Australia, later, effectively denied protection to such asylum seekers by signing Memorandum of Understanding ‘MoU’ with China, also brought regulations on 27 January 1995 designating China to be a safe third country for the purposes of all Vietnamese nationals who had been resettled in China,667 and Migration Legislation Amendment Bill (No 2) 1995 (Bill No 2) backdated these provisions to 30 December 1994.668

661 Minogue v HREOC (1999) 84 FCR 438.
662 Acts Interpretation Act 1901 (Cth) s 15AB(2)(d).
664 Poynder, above n 25.
665 Mary Crock, Immigration and Refugee Law in Australia (Federation Press, 1998), 127.
666 Ibid 127-8.
668 Poynder, above n 25.
This clearly illustrates that the legislative effect was developed to give effect to its intention. It also shows that, in Australia, the “safe third country” notion was expounded by courts before it was legislated under Statute. In fact, the judicialisation of refugee law seems to have begun in earnest in 1985 - two cases were heard in that year – one in the Federal Court\textsuperscript{669}, the other in the High Court of Australia\textsuperscript{670}.\textsuperscript{671} The test for ‘effective protection’ emphasised by the courts to was based on ‘practical reality’.\textsuperscript{672} It did not matter whether protection available was ‘as a result of an officially recognised right of entry or as a result of some existing practical means of safely entering the country concerned’.\textsuperscript{673} It also did not take into account whether the third country is safe for asylum seeker from other violations of fundamental human rights.\textsuperscript{674}

Under statutory provisions, even if a person falls within the definition of a refugee under s36(2) of the Migration Act, Australia is not required to provide such a person protection where he or she has not taken all possible steps to attain “effective protection” in a “safe third country”.\textsuperscript{675} In such a case, Australia’s decision to not provide protection is not seen as a violation of Australia’s Article 33 non-refoulement obligation.\textsuperscript{676}

In addition to the doctrine of effective protection, there exists statutory effective protection as comprised in ss 36(3)–(7) of the Migration Act. These provisions

\textsuperscript{669} Azemoudeh v Minister for Immigration and Ethnic Affairs (1985) 8 ALD 281. In the event, the Minister did not comply with the order made, although Mr Azemoudeh was taken off the flight in Hong Kong and permitted to apply for refugee status there.

\textsuperscript{670} Mayer v Minister for Immigration and Ethnic Affairs (1985) 157 CLR 290, the Court recognised s6A(1)(c) of the Migration Act 1958 as the source of the Minister’s power to grant refugee status. It held (at 302) that refugee status decisions were judicially reviewable under the ADJR Act and that reasons for such decisions could be sought under s 13 of that act. The case confirmed the Minister’s obligation to consider claims for refugee status and established that the standard governing the determination of refugee status was that set down in the Refugee Convention.


\textsuperscript{674} Taylor, ‘Protection Elsewhere/ Nowhere’, above n 672, 305.

\textsuperscript{675} Migration Act 1958 (Cth), s 36(3).

\textsuperscript{676} Thiyagarajah (1997) 80 FCR 543.
provide that Australia does not have Refugee Convention obligations to a person who has not taken all possible steps to access a legally enforceable right to enter or remain in a safe third country. The statutory provisions are only applicable to protection visa applications lodged on or after 16 December 1999, whereas the common law doctrine of effective protection is applicable to all protection visa applications, irrespective of when the application was lodged.\(^677\) Put another way, the statutory provisions are narrower than common law doctrine of effective protection.\(^678\)

This Chapter will explore the development of ‘effective protection’ concept, the ‘safe third country’ notion and ‘non-refoulement’ principle in Australian context. In doing so, it will, initially, analyse the judicial interpretation of these concepts. Then, it will outline and examine the legislative development. And finally, it will explore whether statutory effective protection as comprised in ss 36(3)–(7) of the Migration Act are in breach of the Refugee Convention.

### 5.2 The Doctrine of Effective Protection: Thiyagarajah

The principle of “effective protection” was initially propounded by the Full Court of the Federal Court in Thiyagarajah\(^679\). This case required a determination of whether ‘as a matter of practical reality and fact, the applicant is likely to be given effective protection by being permitted to enter and live in a third country where s/he will not be under any risk of being refouled to his original country’.\(^680\) The principle developed in Thiyagarajah\(^681\) absolved Australia of substantively determining applications for asylum under the Refugee Convention where a person has effective protection in a safe third country.

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\(^677\) Mirko Bagaric et al, Migration and Refugee Law in Australia: Cases and Commentary (Cambridge University Press, 2007) 381.

\(^678\) Ibid.

\(^679\) (1997) 80 FCR 543.

\(^680\) Al-Zafiry v Minister for Immigration & Multicultural Affairs [1999] FCA 443 (hereinafter referred to as “Al-Zafiry”), [26].

\(^681\) (1997) 80 FCR 543.
Facts of the Case:
Varatharajah Thiyagarajah is of Tamil origin and a citizen of Sri Lanka. Mr Thiyagarajah left his country after he was arrested and harassed by government forces who suspected that he had assisted the Tamil Separatist organisation, known as LTTE (Liberation Tigers of Tamil Eelam), and arrived in France in May 1985 and in November 1988 was granted refugee status. Along with refugee status, he was issued with a Carte de Resident and a Titre de Voyage (together referred to as "French papers") which allowed him to travel in and out of France. His Carte de Resident was valid for 10 years, was automatically renewable and was equivalent to permanent residence. Having lived in France for more than five years, he was eligible to apply for French citizenship. However, without French citizenship he was not eligible to vote and was barred from certain occupations, including work in the public service. Similarly, his Titre de Voyage (French travel document) was also valid until 1 December 1995. On 30 November 1994, he was granted a visitor's visa from the Australian authorities in France. The visa was valid until 12 March 1995. He arrived in Australia on 12 December 1994 with his wife and child. After his arrival in this country, he applied for a protection visa under s 36 (2) of the Act. His wife’s two brothers were living in Australia. Mr Thiyagarajah claimed that in France he was threatened and harassed by the LTTE and that the French police were unwilling or unable to protect him.

Primary decision maker and RRTs decision
The primary decision maker and Refugee Review Tribunal (RRT) rejected Mr Thiyagarajah’s claims in relation to the position in France and concluded that there was nothing to suggest that the authorities of that country were unable or unwilling to protect him. They said that Mr Thiyagarajah was also protected against return (refoulement) to Sri Lanka in accordance with the provisions of the Convention.

The Tribunal also found that the Mr Thiyagarajah fell within the exception to the definition of the term "refugee" in Art 1E of the Convention as he had taken residence having the rights and obligations attached to the possession of French nationals.
In relation to ‘rights and obligations’, the RRT opined that certain qualifications on refugees with residence status such as bar to enter public services and certain professions was not inconsistent with having the rights of de facto nationality within the meaning of Article 1E. However, the Tribunal considered that it did require that the refugee "have recourse to the authorities for protection against persecution". In this last regard, it found that "there [was] no real chance that the French authorities [were] unable or unwilling to provide such protection."

**Federal Court – initial hearing**

On appeal to the Federal Court, Justice Emmett held that the RRT had erred in interpreting and applying Article 1E in such a way.682 His Honour emphasized that Article 1E was intended to have only a very limited application and does not extend to persons who has merely obtained refugee status in a state other than Australia or the state of their nationality. Moreover, His Honour held that, Article 1E is applicable only to such persons who have all the rights of a national other than actual citizenship and political rights.683 Therefore, it is ‘not necessary that a person be treated in all respects as a national’ for Article 1E to apply, ‘quasi nationality status’ is sufficient.

**Full Federal Court:**

On appeal the Full Federal Court decided that as Mr Thiyagarajah had ‘effective protection’ in France as the ‘safe third country’, it was not strictly necessary to determine the scope of article 1E. Thus, even though the case concerned the application of Art 1E of Refuge Convention, on the Full Federal Court the discussion turned on Article 33 and its relationship to Article 1A(2) of the Refugee Convention. The full court analysed the doctrine of effective protection in a safe third country based on international developments such as those in Europe contained in the Resolution on a Harmonized Approach to Questions concerning Hosts Third Countries passed on 1 December 1992 by the Ministers of the Member States of the European Communities Responsible for Immigration.684 Justice Van Doussa (with

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683 Ibid [54].
684 A copy of the Resolution on a Harmonized Approach to Questions concerning Hosts Third Countries is available at
whom Justices Moore and Sackville agreed), held that application of Article 1E need not to be decided in this case because ‘[a]s a matter of domestic and international law, Australia does not owe protection obligations to the respondent who has effective protection in another country [France] which has accorded him refugee status’. 685

The Full Court differed from the view taken by the Tribunal with respect to Art 1E of the Convention and agreed with Hill J in Barzideh686 that it was to be construed as that Art 1E is not "rendered inapplicable merely because the person who has de facto national status does not have the political rights of a national ... [b]ut short of matters of a political kind ... the rights and obligations of which the Article speaks must mean all of those rights and obligations and not merely some of them. 687 In dicta however, Von Doussa J agreed that if Mr Thiyagarajah had come within the scope of article 1E, there would have been no need for ‘separate and antecedent inquiry’ as to whether he had a ‘well-founded fear’ within the meaning of article 1A(2). 688 Even though His Hounor’s analysis of the issues suggests that the reason that article 1E stands alone is because it precludes risk of refoulement, 689 His Honour linked the application of article 33 as imposing the ‘non-refoulement obligation’ under the convention and the ‘general protection obligation’ owed under article 1A(2) of the Convention. The effect of Article 1E is that someone who has already been granted the rights that citizens possess in a third country, even if he/she does not have formal citizenship in that third country, is not a refugee.

His Honour also emphasised that the Article 1 shall be read as whole and ‘understood as together comprising the definition of refugee’. 690 According to Van Doussa J, the expression ‘effective protection’ means … protection which will effectively ensure that there is not a breach of article 33 if that person happens to be

688 (1997) 80 FCR 543, 555 (Von Doussa J).
690 (1997) 80 FCR 543, 555.
a refugee. However, as Susan Kneebone in her article said, this approach to read article 1 is difficult to reconcile with His Honour’ view that article 1E is independent.

The Full Court noted that "the possible application of Art 33 was not in terms referred to by the [Tribunal]." In the view of the Full Court that was of no consequence because, in the context of Art 1E, the Tribunal had found that "there [was] no real chance that the French authorities [were] unable or unwilling to provide such protection". In essence, the Full Court was of the view that the appeal should be dismissed because, had the Tribunal considered Art 33, it would necessarily have concluded that Australia did not owe protection obligations to Mr Thiyagarajah.

Justice Von Doussa followed the reasoning of the minority in Nguyen v Director of Immigration (Hong Kong) where Lord Geoff of Chieveley and Lord Hoffmann, after referring to Article 33, said:

Refugee status is thus far from being an international passport which entitles the bearer to demand entry without let or hindrance into the territory of any Contracting State. It is always a status relative to a particular country or countries. And the only obligations of Contracting States are, first, not to punish a refugee who has entered directly from the country in which his life or freedom was threatened for a Convention reason and secondly, not to return him across the frontier of that country. In all other questions of immigration control: for example, punishment for illegal entry from a third country, or expulsion to a third country from which there is no danger of refoulement to a country falling within Article 33, the question of whether a person has refugee status is simply irrelevant.

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691 Ibid 562.
693 (1997) 80 FCR 543.
694 Ibid 565.
695 Ibid [54]; Nguyen Tuan Cuong v Director of Immigration (Hong Kong) [1997] 1 WLR 68, 79.
Justice Von Doussa also referred to the legislative scheme in the United Kingdom and Canada that had successfully implemented safe third country provisions.696 Justice Von Doussa referred extensively to the literature of Goodwin-Gill and despite that writer’s objections to the safe third country provisions of European states, Justice Von Doussa relied on Goodwin-Gill’s conclusion that:

The most that can be said at present is that international law permits the return of refugees and asylum seekers to another State if there is substantial evidence of admissibility, such as possession of a Convention travel document or other proof of entitlement to enter.697

His Honour concluded that ‘[s]ubject to consideration of Article 33, Australia did not owe protection obligations to the respondent as he had been recognised as a refugee in France and had been accorded the rights and obligations of a refugee under the Refugees Convention in France’.698 In other words, an asylum seeker could be removed (pursuant to Australia’s international protection obligations under the Refugee Convention) to a third country if he or she had “effective protection” in the third country.

According to Justice Von Doussa, in determining whether an applicant has “effective protection” in a third country, three considerations must be taken into account. The three considerations may be summarized as follows:699

1. Whether the applicant has the right to reside in, enter and re-enter the third country;
2. Whether there is a risk that the third country will return the applicant to a country where he or she claims to fear persecution for one or more of the Convention reasons; and

3. Whether the applicant has a well-founded fear of persecution in the third country.

5.2.1 Thiyagarajah and its Implications

On appeal, the High Court did not cast any doubt on the principles developed in Thiyagarajah\(^{700}\) by the Full Federal Court with regard to Article 33 or 1E.\(^{701}\) However, in NAGV\(^{702}\), Justice Emmett in dissent, held that that Thiyagarajah\(^{703}\) was flawed and wrongly decided because Justice Von Doussa did not consider the fact that Australia had made reservations to Article 32 and his Honor’s reasoning proceeded on the basis that Australia had the obligation that would arise under Article 32.

The reasoning entails a conclusion that, because Australia is not precluded by international law from expelling or returning an applicant for a protection visa, Australia has no protection obligations under the Refugee Convention to that person. As a consequence, the reasoning of the Full Court in Thiyagarajah\(^{704}\) was considered defective and not compelling. On 9 October 2003 Justice Emmett, in an Addendum to the earlier decision above, conceded that Australia had in fact withdrawn its reservations to Articles 28 and 32. However, Justice Emmett still maintained that the reasoning in Thiyagarajah\(^{705}\) was flawed.

The majority in NAGV\(^{706}\) agreed with the conclusion of Justice Emmett that the Full Court’s decision in Thiyagarajah\(^{707}\) was wrongly decided. The majority held that the usual consequence of this should be that they would refuse to follow Thiyagarajah\(^{708}\) and should give effect to ‘the true intent of the statute’.\(^{709}\) However, because of the

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\(^{700}\) (1997) 80 FCR 543.
\(^{701}\) Thiyagarajah [2000] 199 CLR 343.
\(^{702}\) NAGV (2003) 130 FCR 46.
\(^{703}\) (1997) 80 FCR 543.
\(^{704}\) Ibid.
\(^{705}\) Ibid.
\(^{706}\) NAGV (2003) 130 FCR 46.
\(^{707}\) (1997) 80 FCR 543.
\(^{708}\) Ibid.
jurisprudence that had developed on the basis of Thiyagarajah\textsuperscript{710} the majority did not see it as the role of the Full Federal Court to overturn the decision.

5.2.2 Effective Protection - Judicial Development

‘Effective protection’ means that there will not be a breach of Article 33 by the safe third country if the person is a refugee.\textsuperscript{711} Thus, for protection to be effective, there must not be a risk of ‘chain refoulement’, so that the refugee is eventually refouled to his or her country of origin without substantive consideration of their claim of asylum.

The decision in Thiyagarajah\textsuperscript{712} began a line of authority in which courts have side-stepped considering art 1E, and instead applied a concept of ‘effective protection’ in a ‘safe third country’ to refuse protection visas in a large number of cases ie. instead of considering whether a person is a refugee within the meaning of art 1A(2), and a person to whom the art 1E exception applies.\textsuperscript{713} The decision thus established a trend to make Article 33 the centerpiece of analysis and application of the Refugee Convention in Australian courts and also simultaneously incorporated the safe third country notion into Australian case-law.\textsuperscript{714} This case study shows how the government’s argument on non-refoulement principle and ‘forum hopping’ won the day as well as how the legislative policy predominates.\textsuperscript{715}

Thiyagarajah\textsuperscript{716} was followed and applied in Rajendran\textsuperscript{717} where the applicant was being returned to a country where he did not have refugee status. In the case of Rajendran, the Full Federal Court upheld the Federal Court decision to apply the

\textsuperscript{710} (1997) 80 FCR 543.
\textsuperscript{711} Thiyagarajah (1997) 80 FCR 543, 562.
\textsuperscript{712} [2000] 199 CLR 343.
\textsuperscript{715} Ibid.
\textsuperscript{716} (1997) 80 FCR 543.
\textsuperscript{717} (1998) 86 FCR 526.
effective protection doctrine to a third country where that asylum seeker was entitled to permanent residence and had been provided with effective protection.\textsuperscript{718}

In Minister for Immigration & Multicultural Affairs v Gnanapiragasam\textsuperscript{719}, Justice Weinburg extended the doctrine of effective protection to situations where the applicant had a presumed right to re-enter Germany and hold a temporary residency.\textsuperscript{720} The Federal Court held that a right to temporary residency would be sufficient only where the applicant would have effective protection.\textsuperscript{721} It was also relevant that Germany was a signatory to the Refugee Convention and the applicant could therefore apply for refugee status once there.

The effective protection doctrine was taken to the ultimate extent in the decision of Al-Sallal when the Full Court of the Federal Court held that effective protection extended to a safe third country even if that country was not a Refugee Convention signatory.\textsuperscript{722} In that case, Jordan was held to be a safe third country because the appellant had resided there and there was no real risk that Jordan would refoul that person to Iraq, which is where the Refugee Convention fear was held.

It is difficult to say why the Federal Court judges in the above cases continued to broaden the definition of effective protection and thereby strip away the very fabric of the principle of non-refoulement. These decisions were made in a context where Federal Court judges were accused of being “creative” and indulging in legal “frolics”.\textsuperscript{723}

Subsequent to the decision on Thiyagarajah\textsuperscript{724}, the government brought in legislation and two conflicting lines of authority developed. The first, influenced by the muddled Thiyagarajah jurisprudence, considered that s 36 (6) codified the ‘effective nationality’ cases. The interpretation required that the right ‘to enter and

\textsuperscript{718} Ibid.
\textsuperscript{719} (1998) 88 FCR 1.
\textsuperscript{720} (1998) 88 FCR 1 (hereinafter referred to as “Gnanapiragasam”).
\textsuperscript{721} Ibid.
\textsuperscript{722} (1999) 94 FCR 549.
\textsuperscript{724} (1997) 80 FCR 543.
reside’ be assessed as a matter of practical reality and fact. Secondly, the right referred to in s 36 (6) was intended to refer to a legally enforceable right to enter and reside in a third country which was enunciated by French J in W228 v Minister for Immigration (2001). The earlier line of authority was rejected by full federal court in Minister for Applicant C.725 726

In 2002, in the matters of V872/00A, V900/00A, V854/00A, V856/00A, and V903/00A v Minister for Immigration & Multicultural Affairs,727 Justice Tamberlin held that there were the following three key questions that should be considered when assessing common law effective protection in terms of Article 33. These matters basically raised the question of common law effective protection.

1. Is there a third country in which the applicant will not face a real chance of persecution for a Convention reason?
2. Can the applicant gain access to that third country?
3. In that third country, will the applicant be safe from refoulement?

The remainder of this section will discuss these three questions in light of the decision of V872/00A728 and other cases.

1. Is there a third country in which the applicant will not face a real chance of persecution for a Convention reason?

A potential safe third country must be evaluated in the same way as the “well-founded fear” test applied in the Article 1A context. If the applicant would face a real chance of persecution for a Refugee Convention reason in a third country, return of the applicant to that country (directly or indirectly) would breach Article 33(1).729

In Al-Sallal, the Full Federal Court found that the ‘practical ability’ to return is the real focus of effective protection and concluded that the fact that a country is or is

725 MIMIA v Applicant C [2001] FCA 1332.
727 [2002] FCAFC 185, [82] (hereinafter referred to as “V872/00A”).
728 Ibid.
729 Ibid.
not a party to the Refugee Convention is not conclusive or determinative of the issue.\textsuperscript{730}

2. Can the applicant gain access to that third country?

The applicant must be able to gain access to another country of protection as a ‘matter of practical reality and fact’. In Al-Zafiry v Minister for Immigration & Multicultural Affairs\textsuperscript{731}, Justice Emmett held that for the doctrine of effective protection to apply the applicant must be permitted to enter and live in a third country where he will not be under any risk of being refouled to his original country as ‘a matter of practical reality and fact’.

Israel’s ‘right of aliya’ states that every Jew has the right to go to Israel and become a citizen.\textsuperscript{732} In NAGV\textsuperscript{734}, the High Court held that a Jews right to return to Israel provides that Jews everywhere are Israeli citizens by right. Thus despite having never visited Israel, the applicants (seeking protection from a Refugee Convention fear they held in Russia) were found to have effective protection in Israel. The Court held that the principle of effective protection requires that the applicant has a connection with the third country in the sense that one can be satisfied that the country in question will accord him or her effective protection.

In Minister for Immigration & Multicultural Affairs v Sameh,\textsuperscript{735} the Full Court of the Federal Court held that the RRT had erred in not considering whether the applicant would in all practical reality, reasonably be able to travel to Iraq to access the effective protection.\textsuperscript{736} The Court held that where an applicant would have a real chance of not being able to reach the border of the putative safe third country that would be the same as a real chance of being refused entry to that country.

\textsuperscript{731} [1999] FCA 443.
\textsuperscript{732} Al-Zafiry [1999] FCA 443, [26].
\textsuperscript{733} Matthew J Gibney and Randall Hansen (eds), Immigration and Asylum: From 1900 to the Present (ABC-CLIO, 2005) 945.
\textsuperscript{734} (2005) 222 CLR 161.
\textsuperscript{735} [2000] FCA 578.
\textsuperscript{736} Minister for Immigration & Multicultural Affairs v Sameh [2000] FCA 578.
3. In that third country, will the applicant be safe from refoulement?

The applicant will only have third country protection where the applicant would face no real chance of being refouled from the potential third country to the country of feared persecution to ensure that Article 33(1) is not indirectly breached by returning an applicant to a third country, which may then send the applicant on to a country of threatened persecution. If there were to be such a real chance of refoulement, then effective protection could not be applied in relation to that country and that applicant. 737

5.3 Where to Now? A Closer Look at the Decision in NAGV

Prior to the High Court’s decision in NAGV738, the common law effective protection principle was very broad and applied to allow the refoulement of refugees in almost any situation. The doctrine failed to consider whether a person could be protected by the Refugee Convention in a country that is not a signatory to it and may also have had a poor human rights record. Furthermore, the doctrine excluded a consideration of the presence or absence of a bilateral agreement between Australia and the alleged safe third country. In effect, there was no guarantee that once an asylum seeker was deported to that country that they will enjoy a durable solution to their refugee problem.

The case of NAGV739 allowed the High Court of Australia the opportunity to reconsider the line of authority beginning with Thiyagarajah740. The High Court’s decision in the case of NAGV741 heralded a new approach to the issue of effective protection in safe third countries and refoulement in Australian jurisprudence. It considered Australia’s obligations towards protection visa applicants pursuant to s 36 of the Migration Act and Article 33 of the Refugee Convention. It reversed what was considered the “settled law” enunciated by the Full Federal Court decision in

739 Ibid.
740 (1997) 80 FCR 543.
Thiyagarajah\textsuperscript{742}. The High Court in NAGV effectively determined that the approach to third country protection followed in the Thiyagarajah line of cases was erroneous. The High Court considered s 36(2) as it applied before ss 36(3)-(7) were inserted into the Migration Act.

It held that the fact that Australia might not breach its protection obligations under Article 33(1) by returning a “refugee” to a third country would not mean that Australia had no protection obligations under the Refugee Convention in respect of that person.\textsuperscript{743} The next section reflects on the High Court’s decision in NAGV\textsuperscript{744} and considers the importance and subsequent ramifications of this case on the notion of non-refoulement.

5.3.1 NAGV: The Facts and the Appeal to the Full Federal Court

The case concerned an application for a refugee protection visa by a father (born 1962) and son (born 1982) lodged on 16 July 1999, both having arrived in Australia from their country of birth the Russian Federation. The locus of their protection application lay in the well founded fear of persecution by reason of the father’s political activities and opinions, and their religious belief, Judaism. The delegate for the First Respondent Minister for Immigration refused to grant the appellants protection visas. This decision was affirmed by the RRT notwithstanding the finding that the appellants ‘have a genuine fear that if they returned to Russia they would be persecuted because they are Jews and because of the first appellant’s political activities and opinions’.\textsuperscript{745} Applying the decision in Thiyagarajah, the RRT proceeded on the footing that:

\begin{quote}
[g]enerally speaking, Australia will not have protection obligations under [the Convention Relating to the Status of Refugees done at Geneva on 28 July 1951 and the Protocol Relating to the Status of Refugees done at New York on 31 January 1967 (together ‘the Convention’)] where an applicant for
\end{quote}

\textsuperscript{742} (1997) 80 FCR 543.  
\textsuperscript{743} NAGV (2005) 222 CLR 161, [29] (Gleeson CJ, McHugh, Gummow, Hayne, Callinan and Heydon JJ), [99] (Kirby J).  
\textsuperscript{744} Ibid.  
\textsuperscript{745} Ibid [1].
refugee status has ‘effective protection’ in a country other than that person’s country of nationality, that is a third country.\footnote{NAGV (2005) 222 CLR 161, [3] (Gleeson CJ, McHugh, Gummow, Hayne, Callinan and Heydon JJ).}

The RRT concluded that the appellants would have effective protection in Israel. The RRT was satisfied that:

if the appellants had travelled to Israel they most probably would have been allowed to enter and reside there, that there was no evidence that there would be a risk of the appellants being returned from Israel to Russia, and that there was no evidence supporting a conclusion that they had a well-founded fear of persecution in Israel.\footnote{Ibid [6].}

Notwithstanding that the first appellant’s wife was not Jewish, the appellants had never been to Israel, they do not speak Hebrew and the existence of an apprehension to move to Israel on the part of the appellants for fear of discrimination, and philosophical opposition to national service requirements in Israel, the RRT ‘was not satisfied that those reasons were relevant to the consideration of whether the appellants would have effective protection in Israel’.\footnote{Ibid [7].}

In essence, the RRT determined that Australia did not owe the applicants protection obligations so as to enliven the provision of s36 (2) of the Migration Act to grant protection visas. The RRT held that it was not inconsistency with Australia’s obligation under the Refugee Convention as the applicants were able to enter and reside in a safe third country, namely Israel. The decision of the RRT was upheld on appeal to the Federal Court of Australia by Justice Stone, the appellants having sought certiorari and mandamus relief.\footnote{NAGV [2002] FCA 1456.} The decision of Justice Stone was upheld by the Full Court of the Federal Court of Australia.\footnote{NAGV (2003) 130 FCR 46.} However, Emmett J, in dissent, concluded that the decision of Thiyagarajah was not only wrongly decided,
but that it could not be distinguished and should not be followed. The Full Court of the Federal Court, comprising of Justices Finn, Emmett and Conti, accepted that:

if the appellants’ case otherwise were made out, there had been a failure to observe the requirements in ss 36 and 65 of the [Migration] Act with respect to the issue of protections visas and thus jurisdictional error to which the privative clause provisions of the Act did not apply.

All three judges of the Federal Court conceded that Thiyagarajah had been wrongly decided. However, Justices Finn and Conti concluded, with Justice Emmett dissenting, that, due to the body of jurisprudence that had developed following the decision in Thiyagarajah, it was inappropriate to depart from what had been regarded as settled law.

The High Court subsequently granted the parties special leave to appeal the Full Federal Court’s decision.

5.3.2 The Decision of the High Court

The full bench of the High Court reconsidered the interpretation of s 36(2) of the Migration Act advanced in Thiyagarajah and the subsequent case law and unanimously held that the construction was erroneous. Chief Justice Gleeson and Justices McHugh, Gummow, Hayne, Callinan and Heydon delivered a joint judgment quashing the decision of the RRT and remitting the matter to the RRT for reconsideration according to law. Justice Kirby concurred with the orders outlined in the joint reasons but delivered a separate judgment.

754 (1997) 80 FCR 543.
756 (1997) 80 FCR 543.
757 Hereinafter referred to as the “joint reasons”.
Section 36 of the Migration Act provided, at the time of the appellants application for protection visas, as follows:

1. There is a class of visas to be known as protection visas.
2. A criterion for a protection visa is that the applicant for the visa is a non-citizen in Australia to whom Australia has protection obligations under [the Refugee Convention].

Section 65(1) of the Migration Act as it then was, compelled the Minister for Immigration to grant a protection visa to an applicant who satisfied the requirements contained in s 36(2) and s 65(1). The appellants in that case had fulfilled the relevant requirements of s 65(1).

The RRT decisions, and the appeals to the Federal Court, were based solely on the construction of s 36(2) of the Migration Act and whether the appellants were owed protections obligations under the Refugee Convention when there existed a safe third country where the appellants could enter and reside, in this case Israel.

Determination of the issue centered on an interpretation of the Refugee Convention Articles relating to refoulement, in particular Article 33, and whether the appellants were refugees for the purpose of the Migration Act, the definition of which had been removed from the Migration Act by the Migration Reform Act 1992. The definition that was applied by the High Court to the term “refugee” was the same as the definition contained in Article 1 of the Refugee Convention. The Commonwealth had enacted a definition of such term however pursuant to the Migration Reform Act 1992, it had removed the previous s 4 definition contained in the Migration Act of “refugee”. The joint reasons on examination of this point stated that the Explanatory Memorandum to the Migration Reform Act 1992 supported the view that only a “technical change” was being made; it ‘contained no support for a construction of the new legislation which would supplement and qualify the determination that a person is a refugee, with that term bearing by force of the Act the same meaning as it had in Art 1 of the Convention’.  

The basis of the Respondents submissions was that irrespective of whether or not a person was a “refugee” pursuant to Article 1 of the Refugee Convention, there is no international obligation to permit the appellants to remain in Australia ‘if Australia assesses a third State, here Israel, as being one which will accept the appellants, allow them to enter and to remain, and not “refoule” them to a country of persecution’. The argument in essence is when a safe third country is available, Australia does not owe a refugee protection obligations under the Refugee Convention. Or, in other words, if Australia is not in breach of the refouler provisions pursuant to Article 33 by the existence of a safe third country, Australia owes no protection obligations under s 36(2) of the Migration Act.

The joint reasons (with whom Justice Kirby concurred) rejected this argument stating:

Consideration of the use in s 36(2) of the plural “protection obligation” discloses a non sequitur in the reasoning for which the Minister contends. Australia owed an obligation in respect of the appellants not to return them to the Russian Federation or to the frontiers of any other territories where their life or freedom would be threatened in the manner identified in Art 33(1). That is not disputed. From the circumstance that Australia might not breach its international obligation under Art 33(1) by sending the appellants to Israel, it does not follow that Australia had no protection obligations under the Convention.

The joint reasons further stated that:

The grant of a protection visa to an otherwise unlawful non-citizen removes liability to further detention (s 191) and to removal from Australia (s 198). The adoption by the Act of the definition spelled out in Art 1 of the [Refugee] Convention may have given this benefit to refugees to whom in

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759 In this case, it was conceded that the appellants satisfied the criteria of “refugees”.
761 Ibid [81] (Kirby J).
762 Ibid [29] (Gleeson CJ, McHugh, Gummow, Hayne, Callinan and Heydon JJ).
particular circumstances Australia may not, as a matter of international obligation under the Convention, have owed non-refoulement obligations under Art 33.\textsuperscript{763}

Justice Kirby pointed out that nothing in the Refugee Convention, either expressly or by implication, absolves Australia of complying with its protection obligations under the Refugee Convention where a person has effective protection in a safe third country.\textsuperscript{764} Furthermore, he pointed out that if the Respondent’s submissions were accepted ‘no Contracting State ever has “protection obligations” to a refugee who may (on whatever basis) be entitled by law to protection by another State’.\textsuperscript{765} His Honour pointed out that:

the constitutions of numerous countries create rights to seek and obtain asylum. Specifically, until 1993, the Grundgesetz (The Basic Law for the Federal Republic of Germany) provided that “[p]olitically persecuted individuals enjoy the right of asylum”. This was an “absolute right” and included the rights of entry and non-refoulement. The Minister argued that the issue in this appeal was whether s 36 of the Act “conferred an entitlement to a protection visa upon persons who have a well-founded fear of being persecuted for a Convention reason in their country of nationality but who have the right to enter, and settle in, a third country in which they do not have a well-founded fear of persecution or of expulsion”. If the Minister's argument were accepted, and if the Minister’s argument with respect to the Law of Return were applied to the German Constitution as it stood before 1993, it would seem to follow that Australia would never have owed protection obligations to any person. All such persons would have had a right to asylum in Germany. It would be an absurd result if the generosity of other States’ refugee laws meant that Australia was thereby relieved of international obligations that it voluntarily accepted with other nations. Such

\textsuperscript{763} Ibid [59].
\textsuperscript{764} Ibid [90].
\textsuperscript{765} Ibid [91].
a result should not be reached by implication. It could not have been what
was intended by Parliament when it enacted s 36(2).  

In essence, the problem that arose for the Respondent Minister for Immigration was
that upon the appellants having been deemed “refugees” pursuant to the Refugee
Convention and the Migration Act, they were protected from removal under s 198 of
the Migration Act notwithstanding that removal of the appellants to Israel would not
have been a breach of Article 33 of the Refugee Convention. Despite submissions to
the contrary, there was not an additional criteria to determining whether the
appellants were refugees, that being an absence of a safe third country. In the words
of their Honours:

Having regard to the subject, scope and purpose of the Reform Act, the
adjectival phrase in s 26B(2) (repeated in s 36(2)) “to whom Australia has
protection obligations under [the Convention]” describes no more than a
person who is refugee within the meaning of Art 1 of the Convention. That
being so and the appellants answering that criterion, there was no superadded
derogation from that criterion by reference to what was said to be the
operation upon Australia’s international obligations of Art 33(1) of the
Convention.  

The effect of this decision is that decision makers can no longer rely on a
determination of whether the applicant can, as a matter of practical reality and fact,
gain access to another country of protection in order to conclude that Australia does
not owe protection obligations to an applicant. As a result, a protection visa can no
longer be refused on the basis that an applicant has common law effective
protection. Applying the common law effective protection principle in decision-
making now or making decisions influenced by this principle will amount to a
jurisdictional error.  

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766 NAGV (2005) 222 CLR 161, [91].
767 Ibid [42] (Gleeson CJ, McHugh, Gummow, Hayne, Callinan and Heydon JJ).
768 SZGRA v Minister for Immigration & Multicultural Affairs [2006] FMCA 1097 (Lloyd-Jones
FM, 15 September 2006).
5.3.3 Critique of the High Court’s Decision in NAGV

It is argued that the decision of the High Court in NAGV\textsuperscript{769} is consistent with Australia’s obligations under international law.

The right to non-refoulement enshrined in Article 33 which can be characterised either as a right (to enter and remain) or an obligation (not to return someone), has been described as the ‘foundation stone of international protection’ for refugees.\textsuperscript{770} A person who satisfies the definition of a refugee under the Refugee Convention is entitled to the benefits of the Refugee Convention including the right under Article 33 not to be returned to a country where his or her life would be threatened on account of a Refugee Convention reason, unless the person is excluded under Articles 1C, 1D, 1E, 1F, 32, or 33(2) of the Refugee Convention, or s 36(3) of the Migration Act.

Section 36(2) of the Migration Act compels Australia to provide protection to persons who met the definition of a refugee under the Refugee Convention. The fact that there is a third country which the person could find effective protection does not absolve Australia of its obligation to provide protection to that person. Even if Australia can send a person to a “safe third country” without breaching the Refugee Convention, it does not follow that Australia does not have protection obligations to that person under the Refugee Convention. As pointed out by Taylor, whether Australia can send a person to a “safe third country” without breaching the Refugee Convention is irrelevant to the fulfillment of the criterion contained in s 36(2) of the Migration Act.\textsuperscript{771} Taylor identified three important points about the common law test of effective protection:\textsuperscript{772}

- A person could be sent to a third country where his or her other fundamental human rights could be violated;

\textsuperscript{769} NAGV (2005) 222 CLR 161.
\textsuperscript{770} Guy S Goodwin-Gill and Jane McAdam, The Refugee in International Law (Oxford University Press, 3\textsuperscript{rd} ed, 2007) 421.
\textsuperscript{772} Ibid.
• A person could be sent to a third country simply because he or she has an existing practical means of safety entering the country, as opposed to an officially recognized right of entry into the country;
• A person could be sent to a third country where he or she has no prior contact.

The official rhetoric concerning refugee law reform is for the most part unhelpful because there is no requirement in international law for refugees to seek asylum in the first country they come to. Furthermore, people who arrive in a country (without prior authorisation) and seek protection are not “illegal”. Whilst it is important to promote a more equitable sharing of burdens responsibilities, ‘that goal is not served by a system of purely discretionary resettlement or fiscal transfers which promotes or sustains local responses’ such as mandatory and long-term encampment which are not themselves rights-regarding.

5.3.4 Legislative Response

It should be noted that the principles formulated by the High Court in NA GV and subsequently applied are applicable in only a limited number of protection visa applications. In 1999, the Australian Federal Government amended the Migration Act via the enactment of the Border Protection Legislation Amendment Act 1999 (Cth). Part 6 of the Amending Act headed Amendments to Prevent Forum Shopping applies to all visa applications made from 16 December 1999. In the matter of NA GV, the appellants had lodged their applications for protection visas on 16 July 1999 i.e. before 16 December 1999 and thus the amendments were not applicable in that case.

The 1999 amendments, which apply to protection visa application lodged before 16 December 1999, effectively render the principles formulated in NA GV.

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774 Ibid.
775 (2005) 222 CLR 161.
776 Ibid.
777 Ibid.
introducing statutory qualifications to Australia’s protection obligation where protection is available in a country other than Australia. In sum, under the new amendment (ss 36 (3)), Australia does not owe protection obligation to a person who:  

- has a right to enter and reside in any country – whether permanently or temporarily; and  
- has not taken all possible steps to avail him/herself of that right.

Other two new provisions (36 (4)-(5) are exceptions to the safe third country established by s (36(3)) that where the individual concerned:  

- does have a well-founded fear of Convention based persecution in that country; and  
- does have well-founded fear of refoulement from the safe third country to the persecutory country.

The issue that arose in cases applying this legislation was: what is meant by the ‘right to enter and reside’? It was interpreted in cases came before courts as a right that must be an existing legally enforceable one, it would be insufficient if an applicant could make some arrangement to re-enter a country where there is no present right to enter or reside there.

The case of SZFKD v Minister for Immigration & Multicultural & Indigenous Affairs concerned an applicant (from Nepal) who had been denied refugee status by the RRT on the basis of a right to reside and enter India. This case was decided under the amended s36 rather than the authorities on effective protection. The Federal Magistrates Court found that the RRT only considered whether the applicant had ‘a right to reside and enter’ India. It failed to consider and make essential

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779 Ibid.
780 Ibid.
781 [2006] FMCA 49.
782 The details of the amendments are discussed throughout this chapter.
findings as to whether the ‘right’ it found for the applicant was ‘a legally enforceable right’. Further, the Federal Magistrates Court found that the evidence accepted by the RRT that the applicant had a right to enter and reside in India was flawed in that material did not establish a ‘legally enforceable right’. The evidence referred to a suggested de facto ‘ability’ of some Nepali nationals to enter India and obtain refuge there. The findings did not identify or consider the legal framework under which such entry was achieved.

Ultimately, decision makers must ensure that there is a factual finding on whether the applicant’s ability to enter a safe third country is an ‘existing legally enforceable right’ and not some lesser expectation of a discretionary permission to enter for residence.

A close examination of the High Court’s decision in NAGV leads one to conclude that Australia cannot send a refugee (who is already in the Australian migration zone) to a “safe third country” because by ratifying the Refugee Convention and 1967 Protocol and importing these provisions in domestic law, Australia has accepted its obligations under the Refugee Convention.

It is interesting to consider what the decision of the High Court would have been in the matter of NAGV had the appellant’s in that case filed their applications for protection visas after the amendments to the Migration Act came into effect. Given the above discussion on practical realities and legal enforceability to enter, it is argued that the amendments alone would not have been sufficient to shift the burden because in that case the appellants could not, as a matter of practical reality, have been deported to Israel, the safe third country. Thus it is argued that the High Court would have come to the same conclusion because the joint reasons concluded that

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783 SZFKD v Minister for Immigration & Multicultural & Indigenous Affairs [2006] FMCA 49, [40].
784 Ibid [41] – [42].
785 Ibid [43].
786 Ibid.
789 Ibid.
Article 33 and the other protection obligations under the Refugee Convention are owed to any person that satisfies the definition of refugee under Article 1 of the Refugee Convention. As such, it is argued that the common law would have prevailed over the statute in such a case, albeit statutes always prevail over common law; however, if the statutes do not provide remedy effectively, then the room for common law should still be there.

Although sending the appellants to Israel may not be a breach of the obligation under Article 33, this does not relieve Australia of the other protection obligations owed to the appellants under the Refugee Convention, nor does it follow that no protections obligations are owed under the Refugee Convention. The interpretation of the amendments to s 36 did not arise for consideration in NAGV. However, in regards to ss 36(3) to 36(7), Justice Kirby stated that ‘[i]t may be that issues will arise in the future under exclusion provisions of Australian statutes, which will present questions of ambiguity’. The joint reasons mentioned that Parliament might have taken steps (by amending s 36) to qualify explicitly the operation of the Refugee Convention definition for the purposes of s 36(2).

5.4 Conclusion – ‘effective protection’ principle in judiciary interpretation

NAGV produced only a pyrrhic victory for asylum seekers wishing to stay in Australia because, although it established that the applicants in that case could not be refused refugee status in Australia on the grounds that they could find refuge in Israel, the decision was based on the meaning of the Migration Act 1958 (Cth) at the time the application for refugee status in Australia had been lodged. Since then, the Act has been amended to specify that an applicant must first take all possible steps to avail themselves of the protection offered by a safe third country in order to qualify for protection in Australia. Thus, the interpretation of the act which

790 Ibid.
791 Ibid [99].
792 Ibid [58] (Gleeson CJ, McHugh, Gummow, Hayne, Callinan & Heydon JJ).
794 Ibid.
applied at the time this family applied for refugee status in Australia no longer applies and the effect of the decision is moot. 795

The High Court has handed down an important decision on the question whether acknowledged refugees from one country who are able to claim ‘effective protection’ in a ‘safe’ third country are entitled to a protection visa in Australia. The issue was decided on the basis of the provisions of s 36(2) of the Migration Act 1958 as they were when the applicants applied for protection visas, before the amendment of s 36 in 1999.

The High Court in effect rejected the view of the Full Court of the Federal Court in Minister for Immigration and Multicultural Affairs v Thiyagarajah (1997) 80 FCR 543 that Australia had no protection obligations in those circumstances because Article 33 of the Convention (concerning ‘non-refoulement’) did not prevent their removal to the third country. 796 Six judges delivered a joint judgment in which they refused to imply the limitation sought by the Minister in relation to a Convention refugee’s right to a protection visa. Justice Kirby expressed the belief that it would be absurd to hold by implication that the Convention or the Migration Act removed Australia’s protection obligations because of the generosity of other States’ refugee laws, an interpretation that if universalised could potentially ‘send refugees shuttling between multiple countries’. 797

Since the safe third country provisions were introduced, the Courts have applied them and the doctrine of effective protection with the combined effect of having almost every claim rejected. A number of cases discussed above illustrate that in real life situations sending asylum seekers to a country where they have never been and do not wish to go is unreasonable. For example, sending asylum seekers to Israel just because they are Jewish and have some sort of right to go there is absurd. The safe third country provisions do not require courts to have regard for the safety or

795 Ibid.
797 Ibid.
the ability of the so called “safe third country” to protect the refugees. It can hardly be said that Australia has met its Refugee Convention obligations in ‘good faith’.

The “safe third country” provisions and the case law disregard the risk of sending an asylum seeker to a country that is not a signatory to the Refugee Convention, which Australia is purporting to comply with. It is essential that any putative safe third country provide protection to the refugee. However, reality demonstrates the gap between the rhetoric of best practice and the bare minimum standards of international law that refugees fall through. The standard for effective protection is articulated as follows: ‘[S]o long as, as a matter of practical reality and fact, the applicant is likely to be given effective protection by being permitted to enter and live in a third country where he will not be under any risk of being refouled to his original country, that will suffice.’ The provisions have little regard to the wishes of the asylum seeker or the lack of connection the asylum seeker has with the country that they are being deported to. The fact that many of the signatories to the Refugee Convention have introduced similar provisions creates a risk that asylum seekers will have nowhere to turn and the aim of having a durable solution to the refugee problem will be lost. In sum, Australia cannot rely on its domestic legislation to avoid international treaty obligations.

Statutory effective protection comprised in ss 36(3)–(7) of the Migration Act has the effect that the protection visa application under examination must be refused if an applicant has not taken all possible steps to access a legally enforceable right to enter or remain in a safe third country. The purpose of these provisions is to ‘prevent

798 NAEN v Minister for Immigration & Multicultural & Indigenous Affairs [2004] FCAFC 6 (hereinafter referred to as “NAEN”).
801 Al-Rahal (2001) 110 FCR 73, 96 (quoting Al-Zafiry (1999) FCA 443, 558-59; S115/00A (2001) 180 ALR 561, [6]: Where an applicant for a protection visa in Australia is “as a matter of practical reality and fact,” likely to be given “effective protection” in a third country by being permitted to enter and live in that country where he or she will not be at risk of being returned to his or her original country, Australia can (consistent with Article 33) return the applicant to that third country without considering whether he or she is a refugee.
802 See, eg, Chapters 6-8 of this thesis for detail.
the misuse of Australia’s asylum processes by “forum shoppers”. The provisions ‘ensure that persons who are nationals of more than one country, or who have a right to enter and reside in another country where they will be protected, have an obligation to avail themselves of the protection of that other country’. The effect of s 36(3) is that Australia is taken not to have Refugee Convention obligations to a person who has not taken all possible steps to access a legally enforceable right to enter or remain in a safe third country. An applicant must take all possible steps to avail himself/herself of a right to enter and reside in, whether temporarily or permanently and however that right arose or is expressed, any country apart from Australia, including countries of which he/she is a national. These provisions, combined with the common law effective protection doctrine, are so broad that almost any refugee could avail themselves elsewhere. The provisions are clearly in breach of Australia’s Refugee Convention obligations because rather than Australia considering if the asylum seeker has a Refugee Convention fear and therefore applying the non-refoulement principle, the process focuses on where else Australia can send the person without needing to consider if they are a refugee.

The next sections will discuss statutory effective protection under the Migration Act.

5.5 Legislative development of ‘safe third country’ notion in Australia - Introduction

The previous sections traced the judicial development of the doctrine of “effective protection” in Australia with reference to Article 33 of the Refugee Convention. This and next sections will outline statutory effective protection under the Migration Act and argue that the provisions are in breach of Australia’s Refugee Convention obligations and do not work in practice.

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803 Supplementary Explanatory Memorandum, Border Protection Legislation Amendment Bill 1999 (Cth), [2].
804 Supplementary Explanatory Memorandum, Border Protection Legislation Amendment Bill 1999 (Cth), [2].
805 Migration Act s 36(3).
Before discussing the legislative development of ‘effective protection’ doctrine, it should be noted that the High Court has determined that when interpreting international conventions that have been enacted into domestic law, the text should bear the same meaning as it does in the treaty provisions. The High Court has also held that the rules of statutory interpretation would then apply as enunciated in the Vienna Convention to which Australia is a signatory. The Vienna Convention has been ratified by the legislature by enactment of the Migration Act.

For the first time, the ‘effective protection doctrine’ was enshrined in Migration Act in early 1990s to prevent certain groups of people from claiming asylum in Australia if they had access to protection in a nominated country. In September 1994, Migration Legislation Amendment Bill (No 4) 1994 (Bill No 4 1994) was introduced into the Senate which sought to prevent two groups of asylum seekers from gaining access to Australia's refugee determination process: first, all non-citizens who are "covered" by the Comprehensive Plan of Action; secondly, all non-citizens for whom there is a "safe third country" which provides that where a person has access to protection in a safe third country, they will be denied access to Australia's on-shore refugee process.

In 1999, the legislations were amended fundamentally designing in a such way that the potential asylum seekers would seek protection in countries other than Australia if at all possible. These changes were introduced to bar asylum claims from people who could have access to protection in any country other than their country of origin.

There are two general features of the incorporation of Australia’s obligation under the Refugee Convention; first, inclusion of these obligations in the general statute

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808 Crock, Saul and Dastyari, above n 658, 110.
809 Crosio, Second Reading Speech, House of Representatives Hansard, 8 November 1994, at 2831. Another five boats carrying a total of 103 Vietnamese nationals were to arrive from Galang Island from August to December 1994.
810 Crock, Saul and Dastyari, above n 658, 110.
(the Migration Act 1958 (Cth) and finally, a personal discretionary power to Minister for Immigration such as so-called safety-net provision in s 417, ss 48B and 65.\footnote{Susan Kneebone, ‘What We Have Done with the Refugee Convention: The Australian Way’ in Savitri Taylor (ed) Nationality, Refugee Status and State Protection: Explorations of the Gap between Man and Citizen (Federation Press, Volume 22 No 2, 2005) 91.}

The specific protection obligations under the Refugee Convention are incorporated into the Migration Act via s 36 which states:

1. There is a class of visas to be known as protection visa.
2. A criterion for a protection visa is that the applicant for the visa is:
   i. A non-citizen in Australia to whom the Minister is satisfied that Australia has protection obligations under the Refugee Convention.

Therefore, this chapter will focus on the development of ‘effective protection’ principle in Migration Law since 1999.

**5.6 Existing Law Relating to the Safe Third Country Issue: The Statutory Provisions**

A form of complementary protection was once written into Australia’s Migration Act 1958. Under former section 6A(1)e of the Act, non-citizens with ‘strong compassionate and humanitarian grounds’ to remain in Australia could be granted residence. But throughout the 1980s and 1990s, the courts broadened their interpretation of the term ‘strong compassionate and humanitarian’ to such a degree that the Australian parliament and immigration bureaucracy felt that their ability to control immigration was being compromised.\footnote{David Bitel, ‘Whither compassion? Australia’s response to the refugee dilemma’ (Paper presented at Public Accountability and the Law: Public Interest Law Conference Proceedings, The University of New South Wales, 8-10 October 1992); Mary Crock, ‘Judicial review and part 8 of the Migration Act: Necessary reform or overkill?’ (1996) 18 Sydney Law Review 278, 278-9.} For this reason, the government
deleted S6A(I)e from the law, instead granting the immigration minister the power to allow a humanitarian stay.\textsuperscript{813}

Australia’s Migration Act contains provisions permitting refoulement (even those persons who have satisfied the Refugee Convention definition of a refugee) in circumstances where they can apparently receive protection in a so-called “safe third country”. Migration Legislation Amendment Bill (No 4) 1994 (Bill No 4 1994), which commenced on 15 November 1994, provides that a non-citizen who is covered by CPA or in relation to whom there is a safe third country and who made an application for a protection visa between 1 September 1994 and the commencement of the Act but had not been granted a protection visa before the commencement of the Act is to be treated as if he or she made an application for protection visa after the commencement of the Act. However, subject to two exceptions ‘access by Regulation’ and Ministerial Discretion’, a protection visa application is invalid if made by a non-citizen who is covered by ‘an agreement relating to persons seeking asylum between Australia and a country that is, or countries that include a country that is, at that time, a safe country in relation to the non-citizen.\textsuperscript{814} In 1999, the Migration Act was amended to include ss 36(3) - 36(7), which deem Australia to have no protection obligations to an asylum seeker in certain circumstances. The changes made to the Migration Act came into force on 16 December 1999 and thus only apply to protection visa applications made on or after 16 December 1999.

This section will examine the existing statutory provisions which address the safe third country issue. First, it will examine the statutory prescription of “safe third countries”. Second, it will consider statutory effective protection, contained in ss 36(3) - 36(7) of the Migration Act.

\textsuperscript{814} Migration Act 1958 (Cth) ss 91C(1), 91E.
5.6.1 Statutory Prescription of “Safe Third Countries”

Sections 91A-G in sub-div AI of the Migration Act state that certain non-citizens, for whom there is a prescribed “safe third country”, are not allowed to apply for a protection visa and are subject to removal from Australia under Division 8 of the Migration Act. Section 91A explains the motivation behind the subdivision:

This subdivision is enacted because the Parliament considers that certain non-citizens who are covered by the CPA, or in relation to whom there is a safe third country, should not be allowed to apply for a protection visa, or in some cases, any other visa. Any such non-citizen who is an unlawful non-citizen will be subject to removal under Division 8.815

Section 91D(1)-(2) of the Migration Act defines “safe third countries” as follows:

Safe third countries
(1) A country is a safe third country in relation to a non-citizen if:
   (a) the country is prescribed as a safe third country in relation to the non-citizen, or in relation to a class of persons of which the non-citizen is a member; and
   (b) the non-citizen has a prescribed connection with the country.
(2) Without limiting paragraph (1)(b), the regulations may provide that a person has a prescribed connection with a country if:
   (a) the person is or was present in the country at a particular time or at any time during a particular period; or
   (b) the person has a right to enter and reside in the country (however that right arose or is expressed).

Thus, a country is deemed to be a “safe third country” under s 91D(1) if it is prescribed by the Minister for Immigration (by regulation) as a safe third country in relation to the non-citizen, or with respect to a class of persons of which the non-

815 CPA is the Comprehensive Plan of Action approved by the International Conference on Indo-Chinese Refugees, held at Geneva, Switzerland, from 13 to 14 June 1989: Migration Act s 91B(1).
citizen is a member, and the non-citizen has a prescribed connection with the country.

Section 91G of the Migration Act provides that, where the minister announces by notice in the Gazette that he or she intends to make a regulation prescribing a safe third country, the regulation thus foreshadowed can backdate the prescription to the date of the announcement or after (being a date not more than six months prior to the coming into effect of the regulations.\textsuperscript{816} The essence of s 91G is that an application for a protection visa which was valid at the time it was made may later be rendered invalid by the backdated operation of a safe third country prescription.\textsuperscript{817} It should also be noted, however, that s 91G(3) of the Migration Act provides that s 91G does not render invalid the protection visa application of a person who has actually been granted a substantive visa pursuant to the application before the regulation comes into force.\textsuperscript{818}

A non-citizen is deemed to have a prescribed connection with a country if he or she was physically present in the country at a particular time or the non-citizen has a right to enter and reside in the country (irrespective of how that right arose or is expressed).\textsuperscript{819} The Migration Act calls on the Minister for Immigration to table before Parliament a detailed statement covering various aspects of those countries prescribed as a safe third country.

In early 1995, Parliament designated the People’s Republic of China\textsuperscript{820} a “safe country” for the purpose of Vietnamese nationals who had fled Vietnam following the 1979 border war and resettled in China. Delegates of the Department of Immigration advised the Senate Legal and Constitutional Affairs Committee that the UNHCR had stated that:

\textsuperscript{816} Migration Act 1958 (Cth) s 91G.
\textsuperscript{818} Migration Act 1958 (Cth) s 91G(3).
\textsuperscript{819} Migration Act 1958 (Cth) s 91D(2).
\textsuperscript{820} Hereinafter referred to as “PRC”.

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[I]n their view China had provided and would continue to provide effective protection to this group. From their point of view, provided China was prepared to take them back, which they were, and they provided an undertaking they would continue to provide effective protection, UNHCR had no problems with them being excluded from our protection visa process and being returned to China.821

The People’s Republic of China remains the only country to have been prescribed as a “safe third country” under s 91D.

The existing Regulation 2.12A of the Migration Regulations relevantly provides as follows:

Safe third country and prescribed connection (Act, s91D)

(1) For paragraph 91D(1)(a) of the Act, PRC is a safe third country in relation to a person who entered Australia without lawful authority on or after 1 January 1996 and, as covered by the agreement between Australia and PRC, meets any of the following criteria:
   (a) is a Vietnamese refugee settled in PRC;
   (b) has been a Vietnamese refugee settled in PRC;
   (c) is a close relative of a person mentioned in paragraph (a) or (b);
   (d) is dependent on a person mentioned in paragraph (a) or (b).

(2) For paragraph 91D(1)(b) of the Act, a person mentioned in subregulation (1) has a prescribed connection with PRC if, at any time before the person entered Australia:
   (a) the person resided in PRC; or
   (b) a parent of the person resided in PRC.

(3) In this regulation:

821 Evidence to Senate Legal and Constitutional Affairs Committee, Parliament of Australia, Canberra, June 2000 (Department of Immigration & Multicultural Affairs).
(a) agreement between Australia and PRC means the agreement constituted by the Memorandum of Understanding, the English text of which is set out in Schedule 11, together with the exchange of letters between representatives of Australia and PRC dated 18 September 2008 and 7 October 2008, the text of which is set out in Schedule 12; and

(b) the use of the word Vietnamese is a reference to nationality or country of origin, and is not an ethnic description.

Note 1 PRC is defined in regulation 1.03.

Note 2 This regulation ceases to be in force at the end of 4 December 2010 - see subsection 91D (4) of the Act.

Regulation 2.12A relates to a memorandum of understanding between Australia and the PRC that was signed on 25 January 1995 in which Australia and PRC agreed that, in relation to the recent and possible future unauthorized arrivals in Australia of Vietnamese refugees settled in PRC, the two countries would engage in friendly consultations and seek proper settlement of the issue through agreed procedures.

Australia and the PRC agreed that Vietnamese refugees who had settled in PRC and are returned to PRC under agreed verification arrangements will continue to receive the protection of the PRC government. The MOU was ‘created in the spirit of international cooperation and burden sharing and maintaining and further developing the friendly relations between PRC and Australia’.  

It is submitted that merely prescribing a particular country as a “safe third country” does not itself constitute compliance with the Refugee Convention. The reason for such is that there are no checks and balances; the failure of either country to fully

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comply with the terms of the MOU would prejudice the safety of the Vietnamese refugees. Furthermore, the MOU does not offer any remedies for refugees. This thesis will argue that a bilateral treaty or agreement with a provision for monitoring parties will be more effective in ensuring the protection of the refugees. This is because a MOU merely reflects the intention of the parties - it is not a legal commitment, whereas a bilateral agreement is a legal document which is binding on the parties.

Similarly, Subdivision AK of the Act has provisions to exclude the non-citizens with access to protection from third countries. The objectives of introducing Subdivision AK in Migration Act are clearly stated in the official Hansard,\(^{824}\) which states, that the Subdivision was enacted because the Parliament considered that ‘a non-citizen who could avail himself or herself of protection from a third country, because of nationality or some other right to re-enter and reside in the third country, should seek protection from the third country instead of applying in Australia for a protection visa, or, in some cases, any other visa’\(^{825}\).

Section 91N - Non-citizens to whom this Subdivision applies

(1) This Subdivision applies to a non-citizen at a particular time if, at that time, the noncitizen is a national of 2 or more countries. (2) This Subdivision also applies to a noncitizen at a particular time if, at that time:

(a) the non-citizen has a right to re-enter and reside in, whether temporarily or permanently and however that right arose or is expressed, any country (the available country) apart from:

(i) Australia; or

(ii) a country of which the non-citizen is a national; or

(iii) if the non-citizen has no country of nationality—the country of which the non-citizen is an habitual resident; and

(b) the non-citizen has ever resided in the available country for a continuous period of at least 7 days or, if the regulations


prescribe a longer continuous period, for at least that longer period; and (c) a declaration by the Minister is in effect under subsection (3) in relation to the available country.

(3) The Minister may, after considering any advice received from the Office of the United Nations High Commissioner for Refugees:

(a) declare in writing that a specified country:

(i) provides access, for persons seeking asylum, to effective procedures for assessing their need for protection; and

(ii) provides protection to persons to whom that country has protection obligations; and

(iii) meets relevant human rights standards for persons to whom that country has protection obligations; or

(b) in writing, revoke a declaration made under paragraph (a).

(4) A declaration made under paragraph (3)(a):

(a) takes effect when it is made by the...
Amendment Bill 1999 (Cth). Section 36(3)-(7) of the Migration Act embodies statutory effective protection.

Section 36(3) thus defines those persons to whom Australia is taken not to have protection obligation and require an assessment as to whether a refugee has taken all possible steps to exercise a legally enforceable right to enter and reside in a safe third country, failure of such will result in a negative outcome under s 36(3). There is conflicting authority as to whether the onus is on an applicant to satisfy the Tribunal that he or she is not excluded under s 36 (3) by a failure to take ‘all possible steps’ to avail him/herself of a right to enter and reside in another country, or whether the Tribunal is obliged to address all the elements of s36(3) even where those elements are not controversial.

In SZLAN830, Graham J held that it was for the appellant to satisfy the Tribunal that the criterion in s36(2)(a) had been satisfied and that required the appellant to satisfy the Tribunal that he had not been excluded from eligibility for a protection visa by his failure to take all possible steps to avail himself of a right to enter and reside in, relevantly, India. His Honour disagreed with the contrary approach taken by Allsop J in SZHWI,831 where his Honour found the Tribunal erred in not considering whether the applicant had taken all possible steps to avail himself of a right to enter and reside in circumstances where this point had not been conceded by the applicant and was not otherwise in issue.

It is clear that s 36(3) applies to any country apart from Australia. This not only includes “safe third countries” but also countries in which the refugee is a citizen. However, ss 36(4) and (5) of the Migration Act qualify this by stating that s 36(3) does not apply if the refugee has a well-founded fear of persecution in that country for a Refugee Convention reason; or where the refugee has a well-founded fear that the country will return the refugee to another country where the refugee will be persecuted for a Refugee Convention reason.

830 (2008) 171 FCR 145 [58].
It can be derived from s 36(3) that there is an automatic disqualification for applicants by operation of law. This means that if a person has a legally enforceable right to enter and remain in a safe third country, that person is disqualified from the grant of a protection visa. The crucial issue is whether the right is “legally enforceable”, otherwise s 36(3) has no operation.

‘Right to enter and reside’ under section 36(3):

The right to which s 36(3) refers is not merely a right to enter but, a right to enter and reside. It means right to be present physically whether temporarily or permanently. There are two contradicting views in relation to what constitute ‘temporarily or permanently’. One authority says that, it does not constitute a right to enter and reside while having right to enter into a country in a transit visa. While the right to reside may not be permanent, it must be co-extensive with the period in which protection equivalent to that to be provided by Australia as a contracting state would be required. Therefore, a right to enter and to reside for the purpose of tourism or business is not a tight to enter and to reside for the purpose of receiving protection or some equivalence to that to be provided by a Contracting state under the convention.

Another authority states that where one has temporary residence permit which only needs to notify the officials of that country of his or her intention to re-enter, is a right to enter and reside, even if it is temporarily.

Analysing those views, it is clear that the concept of ‘reside’ in s 36(3) is not settled yet. However, it is clear that it involves questions of fact and degree ie. such rights must be legally enforceable right and that should be presently existing right.

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833 There is some uncertainty as to what this phrase means, as was made clear by Tamberlin J in V872/00A [2002] FCAFC 185 at [81]: ‘The concept of a right to enter which is legally enforceable has inherent difficulties. In order to properly determine whether the right can be legally enforced in the safe third country it would be necessary to examine the law of that country in detail … Such an exercise could be lengthy and difficult requiring the assistance of experts in foreign law’.
834 Ibid [34].
835 Ibid [42], [75].
836 Ibid [48].
‘Legally enforceable right’ under s 36(3)

The courts have indicated that a legally enforceable right to enter and reside is a right which need not be explicitly provided for or embedded in the law of the third country involved.\(^{839}\) It may also include rights in the form of a liberty, permission or privilege which does not give rise to any particular duty upon the State in question, such as a discretionary grant.\(^{840}\) In the latter case such a liberty, permission or privilege would be sufficient for the purposes of s 36(3) notwithstanding that there is no positive law of the State in question imposing a correlative duty in law to recognise the right, provided it has not been withdrawn and was not otherwise prohibited by law.\(^{841}\)

It has also been accepted by the courts that a right may be “enforceable” even though it can be revoked without notice and even without reasons.\(^{842}\) This is because the notion of sovereignty includes the right of a country to exclude persons.\(^{843}\) For example, where an applicant holds an existing visa, the applicant may have a legally enforceable right to enter the country in question. While such visas could be subject to cancellation, this would mean that the right in question is somewhat vulnerable, not that it did not exist. In this instance, the visa could make out a legally enforceable right to enter and reside within the meaning of s 36(3). The right must include an element of enforceability, as the refugees would be able to assert the legal status of the (as yet unrevoked) right, against the authorities of the third country involved.

It is worth noting that in Al Khafaji,\(^{844}\) Gummow J suggested in obiter dicta that the ‘right’ referred to in s 36(3) is a right in the Hohfeldian sense, with a correlative duty of the relevant country, owed under its municipal law to the applicant personally, which must be shown to exist by acceptable evidence.\(^{845}\)

\(^{839}\) V856/00A v Minister for Immigration & Multicultural Affairs [2001] FCA 1018, [31] (Allsop J).
\(^{840}\) Ibid.
\(^{841}\) Ibid.
\(^{842}\) Applicant C (2001) 116 FCR 154, [58] (Stone J).
\(^{843}\) WAGH v Minister for Immigration & Multicultural & Indigenous Affairs [2003] FCAFC 194, [58].
\(^{845}\) Ibid [19]-[20].
Presently existing right
The right referred to in s 36(3) must be an existing right, and not a past or lapsed right, or a potential right or expectancy. The ‘right’ in 36(3) is more than an opportunity to seek the favourable exercise of a discretion. It must mean, at least, a degree of certainty in an applicant’s circumstances that arises out of an entitlement exercisable by the applicant. A legally enforceable right to enter and reside in a country as evidenced by a current but unused visa, or in legislation relating to class of person which the claimant is a member (such as North Korean citizen are considered citizen of South Korea according to the South Korean law; Nepali has right to reside in India under the Treaty of Peace and Friendship between Nepal and India) might be caught by s 36(3) notwithstanding that the claimant has never visited that country.

A few points on the interpretation of s 36 should be noted. Australian authorities determine and interpret what constitutes “refoulement”. As can be seen in practice, the system frequently causes violations of Australia’s obligation under the Refugee Convention not to refoul refugees because authorities do not correctly identify individuals who are entitled to refugee status. According to the Refugee Council of Western Australia, this arises as a result of deficiencies in the information obtained and used by the Department of Immigration and the RRT, deficient legal skill during the initial assessment of the protection visa application, a narrow construal by Australian courts; repeated and forcible political incursions into the legal domain, and the non-compellable and non-appellable discretionary humanitarian and public interest powers of the Minister for Immigration.

847 N1045/00A v MIMA [2001] FCA 1546.
848 Ibid.
5.7 Justification of the “Safe Third Country” Provisions

This section will address the reasoning and justification for refoulement of asylum seekers to so-called “safe third countries”, irrespective of whether they meet protection criteria. This will be done through a critical analysis of the government’s argument that refugees should not be allowed to “queue jump” or “forum shop” for their country of asylum and questions whether the government is justified in refusing to even consider a refugee’s application. This section will also question whether the government’s argument of “border protection” is justified and asks whether the safe third country provisions contained in ss 36(3)–(7) and 91 are politically motivated and damage our international reputation.

It has been suggested that Article 33 aims to ‘help those with nowhere to go, not to help those that had somewhere to go but did not want to go there’. In practice, the Australian Government has taken this to mean that Australia does not owe protection obligations under Article 33 if the applicant would be adequately protected in a safe third country. The Australian Government has labeled refugees as “illegal”, “bogus claimants”, “queue jumpers” and “forum shoppers”. This is despite the fact that every person has a right to seek asylum. This type of political labeling was the justification during the Tampa incident which was discussed in Chapter Three. As demonstrated in Chapter One, Australia has one of the lowest intakes of asylum seekers.

Border protection fears in the wake of the September 11 terrorist attacks are the other tool used by the government to refuse asylum seekers. Claims by the government

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that many asylum seekers are “forum shopping” and “queue jumping” and should not be allowed to settle in Australia are simply untrue. 856 By this reasoning, asylum seekers cannot choose where they resettle, but the Australian Government can choose who they let in as asylum seekers.

The reasoning for the 1999 third country provisions are that non-citizens for who there is a “safe third country” that they can avail themselves in, should not be allowed protection 857 and they should seek protection from a third country instead of applying to Australia. 858 The problem with this reasoning is that not every country deemed to be a “safe third country” is willing to accept or protect the asylum seeker or refugee. 859 In some cases, the countries that have been deemed to owe protection to the asylum seeker or refugee have refused to grant them entry and the asylum seeker has been left in limbo. 860 In other cases, the government has ordered the deportation of an asylum seeker to a country which was not a signatory to the Refugee Convention, with no guarantee that they would comply with the Refugee Convention. 861 For example in NAGV 862 Australia was prepared to force a Jew who has never been to Israel to go there even though that it is difficult for Israel to protect the asylum seeker.

The UNHCR has stated that sending away a refugee because they may have a right in another country is ‘contrary to the spirit of mutual commitment that must prevail in mechanisms of responsibility-sharing and international solidarity’. 863 Given that the purpose of the “safe third country” concept is the ‘appropriate allocation of responsibility for receiving and considering asylum claims’, this thesis will argue in

857 Migration Act 1958 (Cth) s 91A.
858 Migration Act 1958 (Cth) s 91M.
861 For example, in the case of Al-Sallal (1999) 94 FCR 549 the apparent “safe third country” was Jordan, a country not a signatory to the Refugee Convention.
favour of bilateral or multilateral arrangements on the basis of agreed criteria for fairly apportioning such responsibilities.864

5.8 What if the Safe Third Country Refuses to Admit the Refugee?

There is no provision in s36(3) of the Migration Act for a situation that may exist where the safe third country or country in transit refuses to admit or allow the refugees to pass through their territory, which means, even if there is a “safe third country” in accordance with s 36(3) where refugees can be afforded “effective protection”, Australia may not always be able to repatriate or deport them to that country without having a bilateral agreement, as proposed by this thesis. For example, Australian domestic law and international human rights laws were tested rigorously in Al-Kateb v Godwin where the High Court made a decision in favour of indefinite detention.865 This case relied on principles of statutory interpretation to decide the fundamental question of whether indefinite (meaning permanent and unending) detention is lawful in a situation where there is no real likelihood of removal in the foreseeable future. The remainder of this section will provide an in-depth analysis of that case.

5.8.1 Al-Kateb v Godwin: Case Summary

The appellant, Mr Al-Kateb was denied refugee status because he had another country to go to, yet that country would not accept him. He was a stateless Palestinian who was born and lived most of his life in Kuwait. He arrived in Australia in December 2000 and applied for a protection visa. His application was dismissed by the Department of Immigration, the RRT, the Federal Court and the Full Court of the Federal Court. Mr Al-Kateb then told the Department of Immigration that he wished to leave Australia and be sent to either Kuwait or Gaza. By then, he had spent an extended period of time in Australian immigration detention, and had subsequently yielded to the pressure of his circumstances and signed the relevant papers allowing for his deportation from Australia. However, as

864 Ibid.
a result of his statelessness, no country in the world could be found to accept him, which therefore barred any possibility of removal within the foreseeable future, leaving him suspended in a legal limbo between detention and removal. This situation highlighted a clear gap within the legislation which could have been bridged by a simple amendment allowing for a third option in cases where removal was not possible, for example, by introducing a provision to release such persons until alternative arrangements have been made. However, the Department of Immigration appeared to have assumed that it was entitled to interpret indefinite detention as meaning for the term of his natural life.

5.8.2 Al-Kateb v Godwin: Judicial Outcome on Indefinite Detention

The High Court of Australia was split 4:3 (Justices McHugh, Hayne, Callinan and Heydon in the majority, with Chief Justice Gleeson, and Justices Gummow and Kirby dissenting), the majority finding that such detention is lawfully provided for under the relevant sections of the Migration Act. This thesis argues that the court’s decision was in breach of its obligation under the ICCPR. It shows the complete unwillingness on the part of the court (except Kirby J) to engage with the principles of international human rights laws.\(^{866}\)

5.8.3 Al-Kateb v Godwin: Justifications Given

In his judgment, Chief Justice Gleeson noted that the Migration Act does not expressly provide for circumstances where removal is not reasonably practicable in the foreseeable future, once again highlighting a gap in the legislation.\(^{867}\) Justice Gleeson then stated that the consequence of this gap was that the judicial choice was between treating that detention as indefinite or as suspended.\(^{868}\) If the appellant is to be kept in detention until removed, and to be removed as soon as reasonably practicable, which could mean that the appellant is to be kept in detention for as long as it takes to remove him, and that, if it never becomes practicable to remove him, he

\(^{868}\) Ibid [22].
must spend the rest of his life in detention. The appellant argued that the Migration Act could be interpreted in another way, namely that he should be detained if, and so long as, removal is a practical possibility, and if removal is not a practical possibility, then the detention is to come to an end, at least for so long as that situation continues. Justice Gleeson’s immediate preference was for the latter, as he noted that:

courts do not impute to the legislature an intention to abrogate or curtail certain human rights or freedoms (of which personal liberty is the most basic) unless such an intention is clearly manifested by unambiguous language, which indicates that the legislature has directed its attention to the rights or freedoms in question, and has consciously decided upon abrogation or curtailment.

His Honour noted that this proposition had been confirmed in earlier cases of Coco v The Queen and Plaintiff S157/2002 v Commonwealth. Furthermore, Justice Gleeson rejected the proposition that the case could be decided by implication, stating that:

[t]he possibility that a person, regardless of personal circumstances, regardless of whether he or she is a danger to the community, and regardless of whether he or she might abscond, can be subjected to indefinite, and perhaps permanent, administrative detention is not one to be dealt with by implication.

Clearly, one of the central issues in this case was that of the Constitutional doctrine of the separation of powers. The Federal Parliament is vested with power to make decisions with regard to ‘aliens’, yet Chapter III of the Australian Constitution

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869 Ibid [14].
870 Ibid.
871 Ibid [19].
875 Australian Constitution s 51 (xix).
vests the judicial power of the Commonwealth exclusively in the Judiciary, thus disallowing any form of punishment to be carried out by the legislative or executive branches of government.

Each of the judgments raised points of law that in isolation may correctly be considered fundamental to the proper functioning of the rule of law within Australia. Notably, each of the judges commented on the exclusive vesting of the power to punish in Chapter III of the Constitution courts, all agreeing that the courts’ monopoly on this aspect of government is sacrosanct. However, their Honours disagreed fundamentally upon whether or not administrative immigration detention is of a punitive nature, and therefore in contravention of the separation of powers doctrine. On this point, Justice McHugh argued that a law requiring the detention of a foreign alien derives its character from the purpose of detention:

A law requiring the detention of the alien takes its character from the purpose of the detention. As long as the purpose of the detention is to make the alien available for deportation or to prevent the alien from entering Australia or the Australian community, the detention is non-punitive.876

Justice McHugh’s distinction on this point ignores the conditions of immigration detention within Australia, because

[i]rrespective of whether or not detention is designed to be punitive and irrespective of whether or not the conditions in a detention centre are appropriate for the purpose of excluding somebody from the Australian community while their visa application is being processed, detention is experienced as a form of punishment.877

Twelve years earlier in the case of Lim v Minister for Immigration, Local Government & Ethnic Affairs, Justices Brennan, Deane and Dawson held that the executive power to detain aliens is valid so long as it is limited to a legitimate administrative purpose if the detention which those sections require and authorize is not so limited, the authority which they purportedly confer upon the Executive cannot properly be seen as an incident of the executive powers to exclude, admit and deport an alien. In that event, they will be of a punitive nature and contravene Ch. III’s insistence that the judicial power of the Commonwealth be vested exclusively in the courts which it designates.

Further, their Honours cited English jurist Sir William Blackstone’s view that ‘the confinement of the person, in any wise, is an imprisonment’. No matter which way this proposition is stated, it stands in diametric opposition to Justice McHugh’s assertion in Al-Kateb v Godwin.

In justification of his position in Al-Kateb v Godwin, Justice McHugh cited Polites v Commonwealth, mentioning the common law presumption that as long as a statute permits, it should be interpreted in accordance with international law. Justice McHugh cites the rationale of this finding to be that the legislature should not be taken to have legislated in violation of existing rules of international law, so the law should be construed with this implication, in the absence of any express indication to the contrary.

However, as was decided in Polites v Commonwealth, the implication must give way where the words of the statute are inconsistent with the implication. Justice

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879 Ibid [32].
880 Lim v Minister for Immigration, Local Government & Ethnic Affairs (1992) 176 CLR 1, [23].
882 (1945) 70 CLR 60, at 68-9, 77, 80-81.
884 Ibid.
885 (1945) 70 CLR 60.
886 (2004) 219 CLR 562, [63].
McHugh considers that the case of Al-Kateb v Godwin gave rise to such a situation, thereby allowing for interpretation of the three relevant sections of the Migration Act to mean that if the appellant is to be kept in detention until removed, he should be detained for as long as it takes to remove him, with the logical consequence that if he can never be removed, he will spend the rest of his life in immigration detention.\textsuperscript{887}

The High Court thus held that there is no implied limitation to the mandatory detention provisions and that regardless of the human consequences of such a finding, it is possible for the executive to hold a person in immigration detention for the term of their natural life. Justice McHugh himself described his own ruling in Al-Kateb v Godwin as ‘tragic’.\textsuperscript{888}

\textbf{5.8.4 A further analysis of Al-Kateb}

Many academics have raised the concerns on the issue of detention without a trial. Although three members of the court, including the Chief Justice and Gummow J, whose record is that of customarily being at the core of the court’s majority, dissented in Al-Kateb, Gleeson CJ and Gummow J did so primarily on the narrow grounds of statutory interpretation, not on constitutional principle.\textsuperscript{889} They found that the Migration Act, as currently drafted, did not specifically support the prolonged detention of an entire class of people.\textsuperscript{890} If it wished, the federal government could overcome these objections by moving amendments to the legislation, and by drafting future legislation in this and other spheres, such as ‘counter-terrorism’ to explicitly authorise indefinite detention.\textsuperscript{891}

It was an important feature of the decision in Al-Kateb that all members of the Court accepted that had Mr Al-Kateb been an Australian citizen, the executive government

\textsuperscript{887} Ibid [33] – [35].
\textsuperscript{888} (2004) 219 CLR 562, [31].
\textsuperscript{889} Michael Head, ‘High Court Sanctions Indefinite Detention Of Asylum Seekers’ (2003) 8(1) University of Western Sydney Law Review 154.
\textsuperscript{890} Ibid.
\textsuperscript{891} Michael Head, “Detention Without Trial-a threat to democratic rights” (2005) 9 University of Western Sydney Law Review 33-51.
would have had no similar power to detain him.  

This is because, under Australia’s constitution, a citizen may be detained only consequent upon a finding of criminal guilt and the imposition of a sentence by a properly constituted Federal Court. Had the Human Rights Act been in place, however, the situation would have been different. This is because the Act applies to ‘all people within Australia’s jurisdiction’.  

No relevant distinction could be drawn, then, between citizens, refugees and aliens.

This case represents a most emphatic and deliberate assertion of the government’s sovereignty over principles of international human rights law. That being the case, Mr Al-Kateb’s indefinite detention by the executive would certainly be found to be inconsistent with the International Covenant on Civil and Political Rights which provides that ‘every person has the right to liberty and security of the person’ and, more particularly, that ‘no one may be arbitrarily arrested or detained’.  

The idea that Mr Al-Kateb could be detained indefinitely and perhaps for life, would constitute the clearest infringement of both national and international guarantees with respect to the ‘liberty of the subject’.

Following this case, the legislature took steps to attenuate the harsh operation of the relevant sections of the Migration Act by extending the Minister for Immigration’s public interest discretion by introducing a Bridging (Return Pending) Visa in May 2005.  

This visa allows for the release (pending removal) of detainees who have been co-operating with all efforts to remove them from the country, but where removal has not been reasonably practicable at the time.

In the above case, even though Palestine or Kuwait may have been safe third countries for Mr Al-Kateb, Australia had been unable to send him to those countries which resulted in extended detention. This also negates the concept of “safe third

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894 Ibid.
895 Ibid.
896 Migration Act s 195A.
country” because if there is a safe third country for a refugee and he/she cannot enter that country because he/she is not granted permission from that country, Australia will be unable to send the refugee to that country.

Since Al-Kateb the test stated by the majority in Lim, that to be valid detention must be ‘reasonably capable of being seen as necessary for the purposes of deportation or necessary to enable an application for an entry permit to be made and considered’, is no longer good law in Australia. All that is necessary to satisfy the requirements of court is that the purpose be non-punitive: one should not start with the assumption that detention laws are punitive. Finally, Kirby and Gummow JJ maintained their dissenting view in Al-Kateb that detention was not unlimited in circumstances where a detainee requested removal from Australia and ‘where such removal is unlikely as a matter of reasonable practicability’. 897

5.9 Safe Third Country Provisions: The Infirmities of the Concept in Practice

This section evaluates the safe third country provisions and the practical problems associated with it. UNHCR has suggested that a safe third nation is that one which is ‘safe’ ‘not only from refoulement but also ‘from the violations of other any kind of fundamental human rights’. 898 This means:

No country can return a refugee or asylum seeker to a third country knowing that the country will do anything to that person that the sending country would not have been permitted to do itself – regardless whether the third country is a party to the 1951 Convention or to any other human rights conventions. 899

The fact that a removing country does not actually desire the mistreatment it foresees is irrelevant and it will be complicit in the mistreatment because, whether it wishes the outcome or not, it is knowingly acting in a manner which will, in fact,

899 Legomsky, above n 13.
facilitate mistreatment. The practical problem is measurement of the necessary or required quantum of knowledge. Generally it should be considered as the rights set out in the Refugees Convention and human rights treaties ranging from the basic human rights to the minor rights. A country cannot excuse, if it violates a right even a minor knowingly either directly or indirectly. In light of this Prof Legomsky argued for a ‘variable degree of certainty’ approach, which he elaborated as follows:

The destination country will still be barred from knowingly assisting the third country to violate international law, but the level of knowledge required will vary inversely with the seriousness of the potential harm. If, for example, the human right at stake is fundamental, the rule might be that return must be withheld when there are ‘substantial grounds for believing the person would be in danger’ of being denied the particular right, to borrow the language of article 3 of the Convention against torture. In contrast, if the particular right is far less critical, return might be prohibited only when the third country’s violation is a practical certainty.

Sending an asylum-seeker to a safe third country might be risky if such country has the standards contemplated which include:

- the risk of chain refoulement;
- the third country may not be party to the Refugee Convention;
- the third country may not have an effective refugee determination procedure in place;
- asylum seekers may not be protected from discrimination and privacy;
- there might be threats to physical security and basic subsistence;
- the third country might practice long-term indiscriminate and arbitrary detention or other human rights abuses; and
- there might not be any link between the asylum seeker and the third country.

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900 Ibid.
901 Ibid.
902 Ibid.
903 Ibid 572.
It is argued that the safe third country provisions do not work practically and are in breach of Australia’s Refugee Convention obligations. Nauru provides a dramatic example of asylum seekers being sent to a "safe" third country that is not a signatory to the Refugee Convention and further has no established practice or infrastructure to deal with refugees. Adding more tension to Australia's concept of "safe", there is also (inter alia) evidence of sparse water supply, arbitrary detention of asylum seekers contrary to the constitution of Nauru, and continuing political instability.

It also seems clear that refugees predominately from Afghanistan and Iraq have no connection with a small island near the equator and nor would they choose to go there voluntarily.

In Applicant C, the appellant, a citizen of Iraq, arrived in Australia by boat from Indonesia on 20 December 1999. He applied for a protection visa pursuant to the Migration Act 1958 (Cth) ("the Act"). In his application, he claimed to have a well-founded fear of persecution if he were to return to Iraq. The delegate of Minister and Refugee Review Tribunal (RRT) refused to grant the applicant a protection visa on the basis that Australia had no obligation to grant the applicant a protection visa because he could obtain effective protection in Syria. The RRT in the case of Applicant C was satisfied that the Iraqi refugee would be able to re-enter Syria through an Iraqi opposition group that had previously sponsored him and that, upon re-entry to Syria, he would be able to reside there on an indefinite basis and would not be at risk of being refouled to Iraq. However this is a curious outcome given that it was well documented that Iraq and Syria were accused of being in collaboration and even partners in the so called war of terror.

904 Goodwin-Gill, above n 88, 91.
906 Ibid.
908 Legomsky, above n 13, 664.
910 Ibid.
The applicant appealed to the federal court for a review of the Tribunal's decision. On primary hearing, Carr J made orders setting aside the Tribunal's decision and remitting the matter to a differently constituted Tribunal for reconsideration according to law. The Minister applied from that decision to full federal court.

On appeal to full federal court, Justice Stone (with whom Justices Gray and Lee agreed) considered that the principle in Thiyagarajah was not restricted to cases where the protection available to a refugee arises from the grant of refugee status by another country, but will also apply where the refugee is entitled to permanent residence in the third country. In that case it was established that s 36(3) was intended to refer to a legally enforceable right to enter and reside in a third country. The full court also rejected the submission that s36 (3) codifies the principle of effective protection in Thiyagarajah which means that Australia does not owe protection obligations under the convention to a person who can obtain effective protection in a third country and to a person who has not taken all steps to avail himself or herself of a legally enforceable that is right to enter and reside temporarily or permanently in a third country 36 (3).

The effect of Applicant C was to sanction two standards for implementation of the no-refoulement principle. First, the higher standard of s 36(3), which is consistent with the UNHCR ExCom Conclusions 58 and 85, and secondly a lower standard of ‘practical reality and fact’ for application of s 36(2).

Following the decision in Applicant C, further conflicting jurisprudence emerged in federal court where:

- one view challenged the correctness of the ‘effective protection’ analysis in Thiyagarajah or accepted its precedential value with qualification; and

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913 (1997) 80 FCR 543.
916 Ibid.
917 Ibid 205-6.
• another view also emerged that the scope of ‘protection obligation’ under the Migration Act should be determined by the terms of the Act and whether ‘effective protection’ is available.\textsuperscript{919}

Another example that indicates Australian practice in declaring safe third country itself by introducing legislative provision such as s 36(3) of Migration Act can be seen as a failure and an attempt to avoid international obligation in providing effective protection. It has also been criticised in terms of its applicability in practice. The case of Aladdin Sisalem is an example of this. Sisalem spent 18 months in Australia’s immigration detention centre on Manus Island, Papua New Guinea, with 10 months of that period as the sole detainee.\textsuperscript{920} Despite mounting pressure from the international community, including the UNHCR, the Australian Government refused to grant Sisalem refugee status maintaining that he had “effective protection” in Kuwait, his former country of residence. Finally, under immense national and international pressure the Minister for Immigration granted Sisalem a protection visa under the humanitarian and public policy discretion.\textsuperscript{921} The solitary detention of Sisalem cost Australian taxpayers approximately $216,666 per month.\textsuperscript{922} His solitary detention cost an estimated $1.3 million in the six months commencing July 2003.\textsuperscript{923} The overall cost (including maintenance, water and power) of keeping the detention centre open during that period was $4.3 million.\textsuperscript{924} Australia’s offshore processing regime has damaged Australia’s international reputation and has cost taxpayers hundreds of millions of dollars.\textsuperscript{925}

While Australia may be criticised for stretching the concept of safe third country to breaking point, there is "no clear legal basis to contest the Australian reallocation

\textsuperscript{918} This line began with NAGV (2003) 130 FCR 46.
\textsuperscript{919} This line of jurisprudence began with NAE v Minister for Immigration [2003] FCA 216 (Sackville J).
\textsuperscript{923} Ibid.
\textsuperscript{924} Ibid.
scheme.\textsuperscript{926} As Hathaway notes, the legality of Australian practice ultimately depends on the foreseeable risk of direct or indirect refoulement.\textsuperscript{927}

Australia illumines this analysis further, legislatively permitting the extra-territorial interception of asylum seekers and a denial of access to Australian protection.\textsuperscript{928} A legal fiction is created: an asylum seeker in certain areas of Australia does not engage domestic jurisdiction, irrespective of international obligations, essentially creating a "rights free" zone.\textsuperscript{929} Thus, in the eyes of the domestic courts there was no infringement of non-refoulement, not because there was no evidence of a return to or risk of persecution, but because the asylum seekers did not engage the protection responsibilities through a lack of jurisdiction.\textsuperscript{930}

5.10 The Future for Effective Protection?

Arguably, it is not the principle of non-refoulement that is in doubt, but rather the scope and application of non-refoulement is in doubt.\textsuperscript{931} If every country in the world implements a non-entrée regime like Australia, international protection would be all but over. Therefore, for Australia if there is any lesson to be learnt from the unfortunate incidents involving the Tampa and Pacific Solution, it must involve an acknowledgement of the evils of allowing politics to intrude into the duty of refugee protection.\textsuperscript{932}

In light of the Federal Governments enunciation of amending legislation, the effective protection of refugees from refoulement in Australia is in a state of flux, and arguably is contrary to international obligations. For example, the justifications for a border management system to protect the national community by ensuring that

\textsuperscript{927} Ibid; Penelope Mathew, ‘Australian Refugee Protection in the Wake of the Tampa’ (2002) 96 American Journal of International Law 661, 667.
\textsuperscript{929} McIvor, above n 352.
\textsuperscript{930} Ibid.
\textsuperscript{931} Ibid.
people who may be a security, criminal or health risk to it are sound however; it shall not be used as a sword to prevent people who are seeking protection in Australia from gaining a refuge status. Interception, interdiction and airport turnarounds have been enormously successful from an immigration control perspective however, from a protection perspective, these mechanisms have a profound impact on individuals seeking asylum who are in need of protection from the risk of life or freedom or persecution. Migration Act mandates the detention of ‘unlawful non-citizens’ until they are either granted a visa or are removed from the country\textsuperscript{933} which is also barrier for improvement of future of effective protection of refugees. It should comply with UNHCR directives which emphasise to avoid detention as far as possible and if necessary, make it as shorter as possible.\textsuperscript{934}

There is support for the view that the amendment to the Migration Act may cause absurdity when one considers Australia’s obligations at international law. For instance, it may be argued that no Jewish person could attain effective protection in Australia, all being welcome in Israel.

Similarly, if a Protection Visa applicant is rejected under ss 36(3) and 91 of Migration Act based on the safe third country principle, the problem arises as to whether as a matter of practical reality that person can be deported to the safe third country. Australia has returned/denied to refuse many asylum seekers to situations of persecution who ought to have been granted refugee status and also those who, while not refugees in the strict legal sense, have fears for their lives and liberties.

Therefore, an effective protection regime would be possible in Australia only when Australia’s non-refoulement and other human rights obligations as articulated in the various international conventions and covenants to which Australia is party, are followed genuinely, having bona fide intention and is incorporated in the municipal law. Even if it is decided that the applicant can be sent to another safe third country without breaching the Refugee Convention, there are some examples where the

\textsuperscript{933} Migration Act 1958 (Cth) ss 189, 196.
\textsuperscript{934} ExCom, ‘General Conclusion on Detention of Refugees and Asylum Seekers’ Executive Committee Conclusions No 44 (XXXVII) 1986.
applicants are not accepted by any country, maximizing the prospect of indefinite detention.

It is clear that the future of effective protection lies in the development of a comprehensive practice of managing asylum seeker cases from the beginning of the protection determination process to the end. Therefore, it involves close partnerships between government, International communities and asylum seekers themselves.

5.11 Australia: Test Case (non-refoulement, STC, effective protection and durable solution)

In recent times, some states have implemented excessively wide applications of the “safe third country” rule. An example of this is Australia’s notorious “Pacific Solution” which was condemned widely. The so-called Pacific Solution was initiated in August 2001 after the Tampa crisis. The Norwegian freighter MV Tampa rescued 433 mostly-Afghani asylum seekers after their fishing vessel sank in international waters en route to Australia. The then Prime Minister refused to let the group enter Australia and asylum seekers were sent to Nauru for the first time. Offshore processing centres were set up on Manus Island in Papua New Guinea and on Nauru. The government of the two Nations received millions of dollars in aid in exchange. Virtually every asylum seeker trying to reach Australia by boat and without authorization was detained in one of those remote camps. The Manus Island detention centre had ceased to be used since the last asylum seeker left in 2004. Nauru was shut down on 8th of February 2008 after the 21 remaining asylum seekers flew to Australia, marking the very end of the Pacific Solution.935

The Government’s decision to prevent boat arrivals from seeking asylum in Australia was considered a clear and blatant abrogation of Australia’s international obligations under the Refugee Convention.

In May 2006 UNHCR has stated: "If this were to happen, it would be an unfortunate precedent, being for the first time, to our knowledge, that a country with a fully functioning and credible asylum system, in the absence of anything approximating a mass influx, decides to transfer elsewhere the responsibility to handle claims made actually on the territory of the state."\(^{936}\)

The policy was unprincipled, unethical, impractical and undermined the purpose of the international refugee protection framework, which is that asylum should be provided to refugees in the country of arrival unless they can access effective protection elsewhere. The Pacific Solution failed this standard.\(^{937}\)

**Obligation not to impose penalty for illegal entry**

The policy was in clear violation of Article 31 of the Refugee Convention which prohibits State signatories from discriminating against refugees on the basis of mode of arrival.\(^{938}\) Unauthorized air arrivals continue to be permitted to apply for asylum in Australia, whilst boat arrivals are to be sent to third countries where they will receive a lesser standard of treatment.

It is a cornerstone of the Refugee Convention that countries of first asylum should admit refugees from neighbouring countries regardless of the political relationship between the two countries. Once political considerations intrude, the integrity of the system is compromised and the concept of refugee protection placed at risk.

The Government's previous justification for the Pacific Solution was to deter 'secondary movement' - i.e. those refugees who had bypassed other countries where they could have sought and obtained effective protection. They also argued that it deters “people smugglers” who exploit vulnerable people and risk their lives in boats.

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936 Media Relations and Public Information, UNHCR, Geneva (Media release, 18 April 2006).
938 Refugee Convention art 31(1).
to reach Australia. The proposed legislation directly targets direct refugee arrivals who are unable to access protection elsewhere.

Not only that, unauthorised detention is also considered a penalty under the Refugee Convention, it is only allowed with some qualifications if it is necessary to combat a threat to security or mass influx. Penalty encompasses both criminal and administrative sanctions and apart from a few days of investigation or for the purpose of identity or security verification detention of refugees thereafter is penalty.

Non-refoulement obligation

The use of the Australian navy to intercept vessels carrying asylum seekers for the purposes of trying to divert them from Australia was dangerous, compromises the role of the navy and may have breached Australia's obligations under the Refugee Convention not to refoule refugees by returning them to a situation of persecution. Any co-operation between Australian and Indonesian navies in relation to asylum seekers fleeing Indonesia (including from West Papua) would be breach of the obligation to offer protection to refugees.

The Australian Government justified the Pacific Solution's compatibility with the Refugee Convention on the basis that Australia is not breaching the fundamental principle of non-refoulment under Article 33 of the Refugee Convention by transferring asylum seekers arriving in Australia to safe third countries, namely Nauru and Papua New Guinea where their claims would be processed. The concept of non-refoulment requires that no refugee be returned to a place in which they are at risk of persecution.

941 Ibid.
States are accountable for breaches of non-refoulement obligation if the act in question is carried out by their agent, under their authorised capacity or direction, no matter whether in or beyond the national territory. The independent contractors running the facilities in PNG and Nauru are paid by, and under the ultimate control of, the Australian government.

**Effective Protection**

Persons who have effective protection in a safe third country, including the right to enter in and reside in a third country, may be excluded from the scope of refugee protection. However, this presupposes some linkage to the safe third country or a level of protection more than that of a transitory nature. The designation of countries such as Nauru and Papua New Guinea as 'safe third countries' for asylum seekers who have arrived in Australia was an abuse of the concept. Nauru and Papua New Guinea are no more than transit camps to which asylum seekers have no connection and which have no capacity to accommodate refugees on an ongoing basis or provide a durable solution.

The concept of offshore processing centres in third countries (such as Papua New Guinea and Nauru) was incompatible with the intent of the Refugee Convention and was a technical mechanism by receiving states to attempt to circumvent Convention obligations. Further, Nauru is not member state of the Convention and Papua New Guinea has made significant reservation to the Convention, therefore it was not guaranteed that Nauru was bound by non-refoulement obligation. It is unsafe to assume that these countries can afford effective protection to the refugees.

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942 International Law Commission, Draft Articles on the State Responsibility arts 4, 8.
Safe Third Country
It is feasible for countries to adopt “safe third country” initiatives for the purpose of achieving a more stable and equitable distribution\(^{946}\) of asylum and refugee burdens, hence putting states in a better position to assist asylum seekers and refugees. Unfortunately that does not appear to be the motivation for States that have adopted “safe third country” approaches. Rather, it appears that states have employed these tactics to avoid and circumvent their obligations under the Refugee Convention.

The Refugee Convention does not explicitly address the issue of the validity of “safe third country” approaches. Nevertheless, the States that have adopted such measures have defended their actions on the ground that the Refugee Convention implicitly allows safe third country policies. Foster explains their position as follows:

[T]hese policies are founded on an implicit authorization—a form of reasoning based on the fact that the Refugee Convention does not provide a positive right to be granted asylum. The key protection in the Refugee Convention is non-refoulement (Article 33), the obligation on states not to return a refugee to a place in which he will face the risk of being persecuted. States reason that, as long as they do not violate this prohibition, they are not required to provide protection to refugees who reach their territory, but rather they are free to send refugees to other states, possibly even states that are not parties to the Refugee Convention.\(^{947}\)

Durable Solution
The Pacific Solution was a costly experiment in human lives which resulted in the unnecessary and prolonged detention of many genuine refugees. Most of the other countries did not accept to resettle these refugees as they were perceived to be Australia's responsibility. According to the government’s statistics, a total of 1,016 people (in Australia 590 and in New Zealand 387) were ‘resettled’ out of 1,550

\(^{947}\) Foster, ‘Protection Elsewhere: The Legal Implications of Requiring Refugees to Seek Protection in Another State’, above n 243, 226.
people held under the Pacific strategy.\textsuperscript{948} As at November 2003, 411 rejected asylum seekers had accepted the ‘voluntary return package’, some were still being processed on Christmas Island and 2 Iraqis were still in detention.\textsuperscript{949} The facilities on Nauru were being maintained at the cost of A$ 1 million per month ‘in a contingency state’.\textsuperscript{950} The Australian government bears direct responsibility for the physical and psychological health consequences of the policy on the refugees affected by it. Lowering of standards will have a devastating effect on developing countries dealing with refugee inflows who will begin to question why they should permit asylum applications to be lodged within their own territories where developed countries exempt themselves from fundamental protections. Such measures retard the development of human rights standards globally.

Many academics and refugees advocates opposed this STC concept. At its core, the Government’s proposal sought to introduce new laws which would mean that all people who arrive informally, (so-called ‘unauthorised’), by boat in Australia will be automatically transferred to ‘offshore’ processing centres to have their claims for refugee status assessed. Offshore processing, most likely in Nauru, would apply to all boat arrivals regardless of where they land in Australia.\textsuperscript{951} In practice, all of Australian territory would become excised, and all claims by such people for refugee status would have to be made outside of the Australian legal system. It was clear that under the Government offshore processing proposal, the protection of borders prevails over the protection of people. Were all other countries to adopt such policies and practices, the international framework designed to protect refugees would be so seriously undermined as to be rendered ineffective and meaningless. It would, in fact, collapse. And from an ethical standpoint, such practices seemed to


cast our country's commitment to justice, to fairness and to decency out onto the high seas.\(^\text{952}\)

The Pacific Solution has been, by any objective standard, a policy failure. The decision to revisit it was alarming and regressive. The Pacific Solution sent the international community the clear message that countries such as Australia consider it permissible to manipulate the Refugee Convention to suit domestic political agendas. The Australian Government's policy set an appalling example for countries looking to Australia and other developed countries for guidance on acceptable human rights practices. The implementation of the Pacific Solution was, in several aspect, violation of Australia’s International legal obligation.

5.12 Conclusion

It has been suggested that the new provisions are so broad that it is difficult for a refugee not to fall under s 36(3).\(^\text{953}\) This is supported by the fact that since Thiyagarajah,\(^\text{954}\) the case law has broadened the concept of effective protection and, combined with the safe third country provisions, have helped to justify the Government’s mandatory detention policy by branding asylum seekers as “illegal” who have access to another country by any means so-called “safe third countries”. Following commencement of the new provisions the Courts appear to have applied the doctrine of effective protection and/or the statutory safe third country provisions to every situation, even in relation to countries that the applicant has never visited, or traveled through en route to Australia from their country of persecution.\(^\text{955}\)

The problem with ss 36(4) - (5) of the Migration Act is that the provisions do not reflect the general international position that “effective protection” consists of more

\(^{952}\) Ibid.

\(^{953}\) Roz Germov and Francesco Motta, Refugee Law in Australia (South Melbourne, Oxford University Press, 2003) 158.

\(^{954}\) (1997) 80 FCR 543.

than simply protection against refoulement under Article 33(1) of the Refugee Convention.  

Section 36(3) of the Migration Act goes much further than Article 1E of the Refugee Convention in preventing persons from accessing Australia’s protection. Article 1E refers to persons who have ‘taken residence’ in another country. In contrast, s 36(3) refers to persons who have a legally enforceable right to enter and reside in another country, a right which a person may have without ever even physically entering the country. Furthermore, Article 1E requires a person to have ‘the rights and obligations which are attached to possession of the nationality of that country’, whereas s 36(3) only requires a person to have the right to ‘reside’ in the country. As such, s 36(3) has been characterized as an application of the “safe third country” principle rather than an application of Article 1E. It has even been suggested that it pushes the “safe third country” principle beyond what international law considers acceptable. The UNHCR has also expressed its concern in Australia’s application of the “safe third country” principle because it allows Australia to send a person to a country in which he or she has never visited nor has any real connection or link with.  

The situation will only get worse if each and every signatory to the Refugee Convention applies similar provisions and refugees will be left in limbo with every country passing the buck to another. The UNHCR has stated that unilateral actions by States to return asylum seekers or refugees to countries through which they have passed, without the latter country’s agreement, creates a risk of refoulement or the tragic situation of refugees in an endless “orbit” between States. The new provisions also do not effectively consider the so called safe third countries’ inability to

956 Taylor, above n 672, 308.  
957 Ibid 309.  
protect refugees; rather they concentrate on the existence of the right of a refugee to enter any other country other than Australia.\footnote{961}{See, eg, Applicant A (1997) 190 CLR 225.}

As already noted, the purpose of the amendments to the Border Protection Legislation Amendment Bill 1999 was to prevent the misuse of Australia’s asylum processes and to ensure that persons who can access protection in another country avail themselves of that protection.\footnote{962}{See section 5.6 of this thesis.} However, by the amendments, Australia has effectively shifted the burden on other, usually poorer countries, by disregarding its Refugee Convention obligations. This issue will be discussed further in chapter six.

The problem with Australia’s safe third country provisions is that they do not guarantee that a so-called “safe” third country is in fact safe.\footnote{963}{Crock, Saul and Dastyari, above n 6 58, 111.} The provisions do not require agreements between Australia and the “safe” countries, in such circumstances it is feasible that the “safe” country could decide to reject the refugee and send him/her to a place where he/she will be exposed to persecution or even death.\footnote{964}{Ibid.} Without readmission agreements with other States, the safe third country concept as codified in s 36(3) may be impossible to fully implement. Furthermore, the practicality of the provisions is limited because many countries of transit refuse to readmit asylum seekers who have passed through on their way to Australia.\footnote{965}{An example of this is the Tampa case when the Indonesian government refused to readmit the asylum seekers who had transited unlawfully through that country: ABC Television, ‘Indonesia Refuses Asylum Seekers’, Lateline, 29 August 2001 <http://www.abc.net.au/lateline/stories/s354791.htm> at 5 May 2009.}

It is argued that statutory effective protection under the Migration Act is not justifiable. There is no support for the position that the presence of another potential country of refuge absolves Australia of its humanitarian obligations. A close examination of the High Court’s decision in NAG\footnote{966}{(2005) 222 CLR 161.} may reveal that s 36 (3) of the Migration Act has no place in the common law.
In light of the above, and the conclusions reached in the previous Chapters, it is submitted that Australia’s application of the “safe third country” principle, both at statute and common law, is inconsistent with its international protection obligations. As such, it is recommended that Australia change its approach to the “safe third country” principle. On that last point, materials from the ExCom are useful. They identify minimum safeguards which should be incorporated into “safe third country” measures, including:

- States should only return refugees and asylum seekers to a country where they have already found protection if ‘they are protected there against refoulement’ and ‘they are permitted to remain there and to be treated in accordance with recognized basic human standards until a durable solution is found for them’\(^{967}\).

- States should apply notions such as “safe country of origin” and “safe third country” appropriately ‘so as not to result in improper denial of access to asylum procedures, or to violations of the principle of non-refoulement’\(^{968}\).

- A receiving state should not remove an asylum seeker to a third country without sufficient guarantees that the asylum seeker ‘will be readmitted to that country; will enjoy there effective protection against refoulement; will have the possibility to seek and enjoy asylum; and will be treated in accordance with accepted international standards’\(^{969}\).

- “Safe third country lists” should be used with caution noting that “[a] country may be “safe” for asylum-seekers of a certain origin and “unsafe” for others of a different origin, also depending on the individual’s background and profile”\(^{970}\).

The perils of an improper application of the “safe third country” principle have been well documented. As warned by the UNHCR:

\(^{967}\) ExCom, UNHCR, ‘Problem of Refugees and Asylum-Seekers Who Move in an Irregular Manner from a Country in Which They Had Already Found Protection’ Conclusions No 58 (XL) 1989, para (f).

\(^{968}\) ExCom ‘General Conclusion on International Protection’ Conclusions No 87 (L) 1999, para (j).

\(^{969}\) UNHCR, Note on International Protection, 50\(^{th}\) sess, UN Doc A/AC.96/914 (7 July 1999) [19].

\(^{970}\) Ibid [20].
Due to an inappropriate application of this [“safe third country”] notion, asylum seekers have often been removed to territories where their safety cannot be ensured. This practice is clearly contrary to basic protection principles and may lead to violations of the principle of non-refoulement.971

By acceding to the Refugee Convention, the Australian government has ‘pledged’ to ‘respect and observe a special regime for the protection of refugees’; it is imperative that such a regime preserves the right to seek asylum.972

If the safe third country approach is applied as a burden sharing mechanism, then it would be no more than a breach of Article 33. Hathaway argues that it would otherwise be too easy for the developed world to “buy out” its protection obligations, and for less developed host states to profit from the presence of refugees without preserving their rights.973 The focus should be on ensuring refugee autonomy and self-reliance, in line with the rights regime established by the Refugee Convention.974 The next chapter will further examine this issue.

971 Ibid [19].
974 Ibid.
Chapter Six

Regional Instruments Developed to Share Burden in Relation to Refugee Protection

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6.1 Introduction

People become refugees, either on an individual basis or as part of a mass exodus, because of political, religious, military and other problems in their home country. The Refugee Convention was intended to deal with the regional (European) problem of 1.25 million refugees arising out of the postwar chaos, in particular directed at the victims of Nazi and other fascist regimes. The definition of refugee in the Refugee Convention was not designed to tackle root causes, but rather to alleviate their consequences by offering victims a degree of international legal protection and other assistance and eventually to help them begin their lives anew.

In addition to the Refugee Convention, the 1967 Protocol, and the Statute of the Office of the UNHCR, there are a number of regional agreements, Conventions and other instruments relating to refugees, particularly in Africa, the Americas and Europe. Notable examples of regional instruments are the OAU Convention of 1969 and the Cartagena Declaration of 1984. These regional instruments are used to achieve durable solutions for asylum seekers and refugees such as the granting of asylum, travel documents and travel facilities among other matters. In its 2000 Note on International Protection, the UNHCR suggested that:

Harmonised regional protection approaches are important means of strengthening the international refugee protection regime. UNHCR’s active participation in the design of these regional approaches has sought to guarantee consistency with universal standards and to ensure burden sharing and international solidarity, while responding to special regional concerns.975

Some also contain a definition of the term “refugee” or of “persons entitled to asylum”. In Latin America, the problem of diplomatic and territorial asylum is dealt with in a number of regional instruments. These include the Treaty on International

Penal Law\textsuperscript{976}, the Agreement on Extradition\textsuperscript{977}, the Convention Fixing the Rules to be Observed for the Granting of Asylum\textsuperscript{978}, and the Convention on Diplomatic Asylum\textsuperscript{979}.

6.2 Comprehensive Plan of Action “Indo-Chinese Refugees”

The Comprehensive Plan of Action (CPA) for Indo-Chinese Refugees came about to cope with the human fall-out from an ideologically based war with the background of the exodus of Vietnamese boat people following post-collapse of South Vietnamese government in April 1975.\textsuperscript{980} Despite the period of downturn on the global economy and employment opportunity, many asylum seekers were able to seek asylum in the region by countries like Hong Kong, Thailand, Malaysia, Indonesia and the Philippines, interestingly none of these States were signatories to the 1951 Refugee Convention at that point.\textsuperscript{981} However, in later years these countries reached to the intolerable situation by the continuation of the flow of refugees and decided to stop welcoming any additional new asylum seekers. In the background of this crisis, 65 nations at the international conference held, in 1979, in Geneva reached an agreement including the countries of origin: to provide temporary asylum; to resettle in third countries in a accelerated pace and to promote orderly departure by Vietnam.\textsuperscript{982}

This agreement also could not manage and control the problem; rather it created opportunity for economic opportunist and flow of such migrants was in increase. In response to new developments, in 1989, another meeting took place in Geneva where the first asylum and fifty resettlement countries agreed to: introduce individual screening of asylum seeker to determine their status as refugees and return those who failed such screening. This strategy worked. Unlike other regional

\textsuperscript{976} 23 January 1889, 18 Martens (2\textsuperscript{nd} ser) 432.
\textsuperscript{977} 18 July 1911, 23 Martens (3\textsuperscript{rd} ed) 353.
\textsuperscript{978} 20 February 1928, 132 LNTS 323.
\textsuperscript{979} 29 December 1954, Organization of American States, Treaty Series No 18.
\textsuperscript{981} Ibid.
\textsuperscript{982} Ibid.
instruments, this instrument did not try to define or elaborate the definition of Refugee Convention. Many issues raised then are equally important today such as: mixed migrants, ‘irregular’ secondary movement and ‘durable’ solutions in the form of resettlement and repatriation. 983 It was the first burden-sharing arrangement among countries of origin, first asylum and resettlement, and attempted to address the whole problem with concrete solutions. 984 It was not regional in nature but more like a global effort. 985

The current challenge is not only to address the refugee and asylum-seekers problem including secondary movement, burden sharing, responsibility sharing, but also seek to alleviate the plight of refugees living in protracted refugee situation in many regions and to define the role of transit countries. 986 Regional and global cooperation should achieve a durable solution for refugees where the refugees are trapped in refugee camps for very long periods of time. Their lives may not be at risk, but their basic rights and essential economic, social and psychological needs remain unfulfilled after years in exile. A refugee in this situation is often unable to break free from enforced reliance on external assistance’. 987 Protracted refugee situations stem from political action and inaction, both in the country of origin (the persecution and violence that led to flight) and in the country of asylum. 988

6.3 UNHCR’s Convention Plus and Agenda for Protection

The New regionalism Convention plus 2004 and Agenda for Protection has set 6 inter-related goals. These goals reflect lessons learnt from the experience of the
OAU, Convention, the Cartagena Declaration, and above all the CPA. Following are the 5 most relevant goals of Agenda for Protection:

- strengthening implementation of the 1951 Convention and 1967 Protocol;
- protecting refugees within border migration movements;
- sharing burden and responsibilities more equitably and building capacities to receive and protect refugees;
- addressing security-related concerns more effectively;
- rebuilding the search for durable solutions for refugees.

These instruments demonstrate that UNHCR has broadened its thinking about ‘regionalism’ since the 2000 Note on International Protection.

6.4 Africa

On 10 September 1969, the Assembly of Heads of State and Government of the Africa continent established an Organization of African Unity (OAU) Convention as a regional instrument to govern the Specific Aspects of Refugee Problems in Africa. It was a specific response to the massive displacements in Africa during that period and was intended to fill the gaps in the Refugees Convention definition, with its temporal and geographical limits.

There were three broad objectives for the OAU Convention namely: to balance Africa’s traditional hospitality and responsibility to strangers with the need to ensure security and peaceful relationships in the region; to complement the 1951 Convention; and to meet specific needs of African refugee.
This Convention contains a definition of the term “refugee” comprising two parts. The first is identical with the definition in the 1967 Protocol. The second part applies the term “refugee” to:

… every person who, owing to external aggression, occupation, foreign domination or events seriously disturbing public order in either part or the whole of his country of origin or nationality, is compelled to leave his place of habitual residence in order to seek refuge in another place outside his country of origin or nationality.

The second limb of the definition substantially widens the definition of refugee to include circumstances such civil war or even the rule of an oppressive dictator led government.

Article II of the OAU Convention provided provisions related to asylum, non-refoulement and durable solutions. In relation to non-refoulement obligation, it covers persons whose ‘life, physical integrity or liberty’ would be threatened for the reasons set out in both instruments namely Refugee Convention and OAU Convention. The Convention focuses in burden sharing and durable solutions. In relation to burden sharing, it provides

when a Member States finds difficulty in continuing to grant asylum to refugees, such Member States are may appeal directly to other Member States and through the OAU, and such Member States shall in the spirit of African solidarity and international cooperation take appropriate measures to lighten the member of the member states granting asylum.

This may lead to two inferences i.e. a Member State shall give asylum to a person, provided that it is consistent with municipal law of the nation and in case of inability

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995 Convention on Refugee Problems in Africa art 1(1).
996 Convention on Refugee Problems in Africa art 1(2).
997 OAU Convention 1969 art II(3).
998 OAU Convention 1969 art II(4).
to give asylum, the Member State shall proactively find solution by asking help from other Member States. This means in some way it reflects spirit of the ‘safe third country’ notions.

However, many African nations started to move away from the spirit of the OAU Convention from about mid 1980s largely due to the policy of ‘containment’ of refugees and its subsequent affect on host countries.\textsuperscript{999} The effect was that the host countries started disregarding the basic rights of refugees and the implementation of durable solutions other than repatriation thus, influencing the inter-state relations.\textsuperscript{1000}

In 2009, there are more than 2 million refugees and more than twenty five times that many who are IDPs in Africa.\textsuperscript{1001} Many of these refugees are living in protracted refugee situations and facing continuing security risks, and social and economic hardship.

### 6.5 Latin America

Similar to OAU Convention, Latin American governments adopted Cartagena Declaration in response to mass influxes arising from political and military instability in Central America during 1970s and 80s. The primary purpose of this convention was to promote the adoption of national laws to implement the 1951 Refugees Convention and 1967 Protocol, ‘thus fostering the necessary process of systematic harmonization of national legislation on refugees.\textsuperscript{1002} Addressing the regional problem, refugees were defined as:

\[
\text{… the definition or concept of a refugee to be recommended for use in the region is one which, in addition to containing the elements of the 1951 Convention and the 1967 Protocol, includes among refugees persons who}.
\]

\textsuperscript{1000} Ibid.
\textsuperscript{1001} UNHCR, Global Appeal 2010-2011: Population concern to UNHCR <www.unhcr.org/4b04002b9.pdf at 26 June 2010> This figure is as at January 2009.
\textsuperscript{1002} Cartagena Declaration 1984, Para III (1).
have fled their country because their lives, safety or freedom have been threatened by generalized violence, foreign aggression, internal conflicts, massive violation of human rights or other circumstances which have seriously disturbed public order.\textsuperscript{1003}

Thus, the Cartagena Declaration also reflects the changing nature of refugee populations and cause of displacement.\textsuperscript{1004} In relation to non-refoulement obligation, Cartagena Declaration 1984 section III (5) reads:

the importance and meaning of the principle of non-refoulement (including the prohibition of rejection at the frontier) as a corner-stone of the international protection of refugees. This principle is imperative in regards to refugees and in the present state of international law should be acknowledged and observed as a rule of Jus Cogens…”

Although the Declaration itself is not a binding legal instrument, it has repeatedly been endorsed by the Organisation of American States (OAS).\textsuperscript{1005} The Cartagena Declaration has widely been accepted as the refugee protection basis in Latin America and has been incorporated into the national legislation of several Latin American States.\textsuperscript{1006} In 2009, in Latin America there are slightly more than 350,000 refugees which is far less in comparison to the Asian and African nations but the number of IDPs are still alarming at 3 million.\textsuperscript{1007} This region seems to be achieving its goal to solve the refugee related problems slowly and steadily.

\begin{flushleft}
\begin{footnotesize}
\textsuperscript{1003} Cartagena Declaration 1984, para III (3).
\textsuperscript{1006} Ibid.
\textsuperscript{1007} UNHCR, ‘UNHCR Global Appeal 2010-2011: Population concern to UNHCR’ <www.unhcr.org/4b04002b9.pdf> at 26 June 2010; This figure is as at January 2009.
\end{footnotesize}
\end{flushleft}
6.6 Asian-African Legal Consultative Organization (AALCO)

In 1966 the Asian-African Legal Consultative Organization (AALCO) adopted the Principles on the Status and Treatment of Refugees (Bangkok Principles). This is a non-binding intergovernmental agreement which was revisited in 2001. Like regional refugee conventions the Bangkok Principles expand the definition of a refugee beyond the narrow scope of the 1951 Convention. Article III (3) of the Principles concerning the Treatment of Refugees adopted by the Asian-African Legal Consultative Committee at its Eighth Session in Bangkok in 1966, states that:

"No one seeking asylum in accordance with these Principles should, except for overriding reasons of national security or safeguarding the populations, be subjected to measures such as rejection at the frontier, return or expulsion which would result in compelling him to return to or remain in a territory if there is a well-founded fear of persecution endangering his life, physical integrity or liberty in that territory"

There are no refugee conventions of regional scope in South Asia; however some of the nations of this region are members of AALCO.

6.7 The European Union Approach

Glimpse of evolution of policies related to refugees in modern Europe:

The push for a consolidation of refugee law first started from Europe as a result of the massive World War refugee flows. The first such modern attempt was made via League of Nations to protect and benefit displaced people, refugees and asylum seekers in early 19th century. The right to asylum was earlier enshrined in Article 14 of the Universal Declaration of Human Rights (1948) and also in the European Convention for the Protection of Human Rights (1950), which contains a non-refoulement clause. Until 1980s, many European countries had allowed asylum

seekers to work while their applications were being processed. Other benefits were such as welfare benefits and cash benefits as well. However access to the majority of these benefits, such as working right while application was processed was withdrawn in France in 1991 and in Belgium in 1993, were slowly been restricted or limited or withdrawn since 1990s.

Since early 1980s, the number of refugees arriving in Europe increased at an exponential rate. For example statistics from Germany alone show a jump from 121,000 immigrants in 1989, to 438,000 in 1992. Not only from outside the Europe but, inside the Europe as well. In 1989, the collapse of Berlin wall then hardly more than one year later, the disorder in the east sudden flights of Albanians to Greece and Italy following the demise of communism The reasons for such increase, in addition to globalisation include the breakups of Soviet Union and the former Yugoslavia. Moreover, many European states were facing internal problems, mainly economic, consequence of which was rise in unemployment. As a result of this and other evolutions, anti refugee feelings were rising in Europe.

The issue began to be important as a result of the decision to open up the EU’s internal borders. As compensation to the opening of the internal borders, they decided to harmonize the control of the external border of all nations. Policy changes began to be made in Europe on both an institutional and national level. There have been numerous agreements, and even more proposals discussed, regarding how the EU as an organisation can deal with ‘the refugee problem’. A number of other ways were applied by individual countries that can deter asylum claims: those designed to restrict access to the country’s borders by potential asylum seekers; reforms to the procedures under which applications are processed; those measures relating to the outcome of claims; and changes in the treatment of asylum seekers during processing. The various elements of policy involved differing degrees of coordination between countries: such as Europe was shield as a whole followed from the relaxation of internal borders under the Schengen Convention (1990) and


the Maastricht Treaty (effective 1993); carrier sanctions were first introduced in the UK and Germany in 1987 and by the late 1990s they had become universal; Visa restrictions were gradually extended and by 1993 the Schengen signatories shared a joint list that included 73 countries, a figure that exceeded 150 by 1998.¹⁰¹¹

Western European Countries developed the ‘safe third country’ policy initially to prevent asylum seekers from ‘shopping’ for asylum, that is, being denied in one country, and then trying again in another. A second goal was to address the practice of asylum seekers ‘in orbit’ – which occurs when individuals are moved back and forth between countries that refuse to adjudicate.

The assumption made in there arrangements is that all European Union countries are safe. But even this assumption has proven to be problematic. Until very recently, for example, Germany denied asylum claims where non state agents, such as Taliban, carried out the persecution, concerned that asylum seeker who came to UK via Germany would be returned to their country of origin, the UK House of Lords refused to adjudge Germany to be a safe third country.¹⁰¹²

Some states listed or depicted safe third countries in their municipal asylum laws. For example, Germany considers all EU and European Free Trade Association States, as well as Poland and the Czech Republic as safe third countries. Austrian law states that all countries that signed the 1951 Refugee Convention or its 1967 Protocol are to be considered safe third countries. More than 140 countries have ratified these treaties, including Liberia, Rwanda, Sierra Leone, Afghanistan and Yugoslavia. As the notion of ‘safe’ is expanded to include, for example, any signatory state to the convention or protocol, asylum seekers may be returned to countries experiencing conflict, other kinds of very unstable conditions, may be a state-in-war and even serious human rights problems. At the recent council meeting, EU ministers declared that candidate countries are effectively safe when they accede to the EU.¹⁰¹³

¹⁰¹¹ Ibid.
¹⁰¹² Matthew J Gibney and Randall Hansen (eds), Immigration and Asylum: From 1900 to the Present (ABC-CLIO, 2005) 549.
¹⁰¹³ Ibid 549-50.
The effect of EU enlargement, coupled with the safe third country policy, has also raised serious protection concerns. Many of the asylum seekers returned to safe third countries by EU member states are sent pursuant to readmission agreements to Central and Eastern European states that have only recently adopted the Refugee Convention and established status determination systems. Some of these states have imposed significant access restriction to their asylum system. Slovakia reportedly requires asylum seekers to file application within twenty four hours of arrival and has interpreted this rule such that asylum seekers who first transit Slovakia, and then returned by their ‘first choice’ asylum country, are deemed ineligible for protection.1014 In Ireland, an asylum seeker is granted only 5 days to make such applications and five days to appeal against the unfavourable decision to asylum seeker.1015 Not surprisingly, the Central and the Eastern European states have introduced these very similar policies with their neighbours to the east. However, the standards to select safe country of origin are inconsistent among them and of concern. In such circumstances, some bona fide refugees are not identical and are returned via so-called ‘chain deportation’ to countries of persecution.

In the Resolution on Asylum to Persons in Danger of Persecution, adopted by the Committee of Ministers of the Council of Europe on 29 June 1967, it is recommended that member governments should act in a particularly liberal and humanitarian spirit in relation to persons who seek asylum on their territory to ensure that no one shall be subjected to refusal of admission at the frontier, rejection, expulsion or any other measure which would have the result of compelling him to return to, or remain in, a territory where he would be in danger of persecution for reasons of race, religion, nationality, membership of a particular social group or political opinion.1016

1014 Ibid.
1015 Ibid 549-50.
6.7.1 Resolution on a Harmonised Approach to Questions Concerning Host Third Countries

On 30 November and 1 December 1992, the Ministers of the Member States of the European Communities met in London and passed a Resolution on a Harmonized Approach to Questions Concerning Host Third Countries.\textsuperscript{1017} This represented the first effort by European Union Ministers to define a host third country. The London Resolution adopted the ‘fundamental requirements’ for ‘host third countries’. This outlined the pre-conditions before a country was considered a safe third country. The four fundamental requirements are as follows:\textsuperscript{1018}

1. Life or freedom is not threatened within the meaning of Article 33 of Geneva Convention;
2. There is no exposure to torture or inhuman or degrading treatment;
3. The asylum seeker either has seen protected there or has had an opportunity to make contact with the country’s authorities in order to seek protection; and
4. The third country provides effective protection against return to the country of persecution within the meaning of Geneva Convention.

These fundamental requirements emphasise the primary obligation which arises under Article 33 of the Refugee Convention. This approach has been largely followed in practice, especially in the European States.\textsuperscript{1019} Although legally non-binding, but politically binding, these resolutions have led to an acceleration of asylum procedures, a substantive curtailment of appeal rights and an increasingly restrictive interpretation of the refugee definition of the Geneva Convention.

\textsuperscript{1018} London Resolution [2].
6.7.2 The Maastricht Treaty

The implementation of the Maastricht Treaty in November 1993 provided the European Community with some institutional legitimacy in dealing with the issues of asylum and immigration which are declared of "common interests". Under title VI, the Maastricht treaty transferred work on asylum and immigration from the area of informal cooperation amongst member states (outside any legal framework) to formal intergovernmental cooperation in the frame work of the so-called Third Pillar.\textsuperscript{1020} By doing so, Maastricht established formally an intergovernmental cooperation in the fields of justice and home affairs which was a major step ahead towards a possible integration of these matters into the Competences of the community (First Pillar).\textsuperscript{1021} The drawback of this treaty was that it was not transparent in the decision-making process.

In EU jargon, the Maastricht Treaty “formalised” while the Amsterdam Treaty “communitarised” aspects of immigration and asylum.\textsuperscript{1022}

6.7.3 Schengen Agreement

The main objective of Schengen Agreement was to create a Europe without border. Initially, five EU counties (France, Germany, Holland, Belgium and Luxemburg) signed the agreement on April 14, 1985. The agreement took effect in 1995 and now comprises twelve countries. UK was reluctant/reservation to sign this agreement because it thought free movement across the border will take away its sovereignty and Ireland did not want to spoil its close tie with UK by signing this agreement.\textsuperscript{1023}

The Schengen Agreement reflects the parties' recognition that the protection of refugees, the elimination of the problem of 'refugees in orbit' and the reduction in

\textsuperscript{1021} Ibid.
\textsuperscript{1022} Matthew J Gibney and Randall Hansen (eds), Immigration and Asylum: From 1900 to the Present (ABC-CLIO, 2005) 219.
\textsuperscript{1023} Ibid 551.
multiple or unfounded claims are international concerns which should be addressed among states, particularly those geographically proximate and those whose asylum procedures are similar. Refugee status determination, removal to third countries, securing necessary guarantees of 'safety', and other such obligations contemplated by the Articles of the Schengen Agreement are basic state responsibilities.

6.7.4 Dublin Convention

The 1990 Dublin Convention, which entered into force on 1 September 1997 established a system determining the State responsible for examining the applications for asylum lodged in one of the Member States of the Member States of the European Communities. The basic principle of the ‘Dublin system’ is that State parties mutually recognise each other as ‘safe third countries’, however, the major difference between ‘STC’ notion and ‘Dublin system’ is that the latter is based on a conventional mechanism rather than on the unilateral decision of one State. An asylum seeker will only be sent back after the responsible State has agreed to his or her transfer and to examine his or her application.

The declared objective of the Dublin system is to ensure freedom of movement for persons on the territory of the Member States through the abolition of checks at internal borders. The Convention has a double use: it prevents the lodging of simultaneous or consecutive asylum applications in the Member States by setting out criteria to determine the responsible State, and puts an end to the phenomenon of ‘refugee in orbit’ by obliging the responsible State to complete the examination of the application for asylum.

The State responsible is under the obligation to complete ‘the examination of the asylum application’ which means such examination includes ‘all the measures for examination, decisions or rulings given by the competent authorities on an application for asylum, except the procedures to determine the State responsible for

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1025 See Preamble of Dublin Convention 1990.
examining the application for asylum pursuant to this Convention.\textsuperscript{1026} In addition, Member State shall retain the right pursuant to its national law, to send an asylum applicant to a third state.\textsuperscript{1027} This means the determination of the existence of a STC takes before the determination of the State responsible.

The Dublin Convention applies only where the asylum seeker cannot be sent to a host third country.\textsuperscript{1028} The resolution provides that a Member State may not decline responsibility for examining an application asylum in accordance with the Dublin Convention, by claiming that the requesting Member State should have returned the applicant to a host third country.

The Dublin Convention expressly provides that where an asylum seeker withdraws his or her claim in one Member State to lodge it in another State, the first Member State remains responsible.\textsuperscript{1029} Therefore, there is no risk of expulsion to the country of origin in such case however whether he or she should be granted temporary protection is examined within this procedure.

There were many flaws in the ‘Dublin System’ such as:

- the criteria for determining responsibility was too formal leading to practical difficulties when confronted with family or humanitarian case.
- There was imbalance of burden/responsibility sharing system.
- There was lack of the genuine co-operation between member nations.
- This system was not time efficient.

\textbf{6.7.5 The Treaty of Amsterdam}

It focused on an improved system of responsibility sharing between member states. The signing of the Treaty of Amsterdam might be considered as a fundamental step toward the creation of a dynamic for European immigration and

\begin{footnotes}
\item[1026] Dublin Convention 1990 art 1(d).
\item[1027] Dublin Convention 1990, art 3.5.
\item[1028] European Union Resolution 1992, arts 1(d), 3.
\item[1029] Dublin Convention 1990, arts 3.7, 10.1.
\end{footnotes}
asylum policy. It absorbed the Schengen Convention and increased the role of the EU in home affairs by pushing forward the model of a supranational European Union at the expense of intergovernmental co-operation.

There is no doubt that the Amsterdam Treaty, which came into force on 1 May 1999, represents a key element in the evolution of the EU towards an increasing commitment to human rights and fundamental democratic values. The Treaty in article 6 of the Treaty of the EU solemnly declares the Union to be founded on the principle of liberty, democracy, respect for human rights and fundamental freedoms, and the rule of law.

The Treaty, while transferring the issue relating to asylum immigration to the First Pillar (community competences) creates an imperative for member states to develop a series of community instruments within a short deadline (2 or 5 years) which will govern the lives of many millions of migrants, asylum seekers refugees and other third nationals within and beyond the borders of the Union.\(^{1030}\)

The ‘Plan for Action’ of the ‘Treaty of Amsterdam’ is an ambitious plan but attempted to address some of the issues relating to refugees and asylum seekers. Similarly, it targeted to achieve certain goals within five years such as assess the situation of the country specific integrated approach; adopt minimum standards with respect to the qualification of nationals of third countries as refugees (harmonisation of the criteria); analyse the effectiveness of the implementation of the Dublin Convention including the issue of family reunion and the possible development of a new instrument, implement EUORDAC: European databank of fingerprints for asylum seekers, in order to avoid simultaneous or successive multiple applications in Europe; adopt minimal standards on asylum procedures (inter alia reducing the asylum procedure); limit of the "secondary movement" by asylum seekers between member states; define the minimal standards on the reception of asylum seekers;

undertake a study with a view to establishing the merits of a single European asylum procedure.\textsuperscript{1031}

Therefore this plan also directly or indirectly tries to control movement of asylum seekers in the European Union by taking different measures. For example country specific integrated approach may lead to breach of non-refoulement, if it is not considered merit of each individual asylum seekers’ case individual or at least not given attention to specific case. The assumption adopted in this treaty that, it is impossible for European states to commit violations of human rights which would give ground for an asylum claim is completely based on myth. However this action plan aimed to establish minimum standard for giving temporary protection to displaced persons from third countries who cannot return to their country of origin such as Kosovo.

\textbf{6.7.6 Hague Programme}

In November 2004 the EU adopted the ‘Hague Programme’ which was supposed to strengthen EU cooperation on asylum and immigration issues and specifies actions the EU will take to further coordinate and integrate immigration and asylum policies. It stipulates that by 2010 the EU should have a common asylum policy executed by a single EU body through a single asylum procedure. To avoid deadlock situation, almost all decisions on immigration of the 25 EU members – including in relation to asylum – will no longer require a unanimous vote but will be taken by qualified majority. For the EU a qualified majority is when at least 55\% of EU members, including at least 15 countries and comprising states which make up at least 65\% of the EU’s population, are in agreement.

A single asylum procedure should facilitate applications for protection and save both time and money. It may prove an important deterrent to abuse of existing systems due to:

\textsuperscript{1031} Ibid.
• shorter duration of asylum procedures as a result of the joint examination of both Refugee Convention and subsidiary protection grounds
• fewer administrative resources spent by joining the two examination procedures
• more effective enforcement of negative decisions by denying asylum applicants the chance to postpone deportation by introducing a new procedure on subsidiary protection grounds.
• scope to facilitate protection and integration due to the more rapid granting of protection to those in genuine need.

However, adoption of such an all-inclusive or single asylum procedure policy could affect a bona fide asylum seeker adversely, a risk that might arguably be exacerbated by the xenophobic decision makers and by an accelerated pace of decision making. The existence of separate procedures for examination on Refugee Convention and subsidiary protection grounds provides the opportunity for remedying mistakes in the former. Thus, the introduction of a single asylum procedure eliminates a structural safeguard. In addition, it may involve the risk of undermining the primacy of the Refugee Convention, due to the incentive to opt for the less demanding alternative within the same examination procedure.

6.7.7 Directive on Minimum Standards on Procedures in Member States for Granting and Withdrawing Refugee Status

In 2005, the Council of the EU produced what it called a harmonized policy on qualifications for refugee status or subsidiary protections known as the Directive on Minimum Standards on Procedures in Member States for Granting and Withdrawing Refugee Status. 1032

Directive 2005/85 provides for a minimum common list of third countries regarded as safe countries of origin.\textsuperscript{1033} Article 31 of Directive 2005/85 provides that applications for asylum are deemed unfounded where the third country is designated as safe pursuant to Article 29. In other words, asylum seekers arriving from designated “safe” countries will be denied any opportunity to access the asylum procedure; their claims will not be examined and they will not have the opportunity to rebut the general presumption of safety.

The problem with this approach is that so called “safe third countries” are not all equal in their reputation for human rights violations. Countries such as Albania, Belarus, Bulgaria, Croatia, Macedonia, Romania, the Russian Federation, Serbia \& Montenegro, Norway, Turkey, Ukraine and Switzerland are all being considered as equals.\textsuperscript{1034} The ECRE has criticised this approach by finding that an unrebuttable presumption of safety for all asylum seekers arriving from any of these countries could result in breaches of international law because no country can be labelled as safe unless it was determined so by looking at each individual case.\textsuperscript{1035} The ECRE is a pan-European network of 69 refugee-assisting NGOs that ‘promotes a humane and generous European asylum policy’.\textsuperscript{1036} It has 69 members based in 30 countries.\textsuperscript{1037}

In conjunction with its members, the ECRE promotes the ‘protection and integration’ of asylum-seekers, refugees and IDPs based on ‘values of human dignity, human rights and an ethic of solidarity’.\textsuperscript{1038}

The ECRE has identified the hazards facing asylum seekers that are returned to the Russian Federation to illustrate the dangers of the EU approach.\textsuperscript{1039} Specifically, the ECRE has pointed out that asylum seekers are prevented from accessing the national

\textsuperscript{1033} Directive 2005/85, art 29. 
\textsuperscript{1035} Ibid
\textsuperscript{1036} ECRE, About Us <\texttt{http://www.ecre.org/about_us}> at 8 May 2009.
\textsuperscript{1037} ECRE, Our Members <\texttt{http://www.ecre.org/members}> at 8 May 2009.
\textsuperscript{1038} ECRE, About Us <\texttt{http://www.ecre.org/about_us}> at 8 May 2009.
asylum procedure altogether if they arrive in the Russian Federation without the appropriate documentation (a violation of Article 31(1) of the Refugee Convention) or if their application for asylum is not lodged within 24 hours of entering the country.\(^{1040}\)

In addition, the ECRE is concerned that asylum seekers removed to the Russian Federation could be further removed to another country which the Russian immigration authorities have deemed safe thereby leading to indirect refoulement by virtue of the fact that the authorities can predetermine the return of certain asylum seekers.\(^{1041}\) On that point, the ECRE has pointed out that the current Russian legislation does not set out which factors are to be considered in designating a country as a safe third country.\(^{1042}\) For example, asylum seekers from Afghanistan have had their refugee claims rejected on the basis that they passed through Uzbekistan en route to Russia and thus could have sought asylum in Uzbekistan without taking into consideration the fact that Uzbekistan is not a signatory to the Refugee Convention or the 1967 Protocol.\(^{1043}\) In addition, the ECRE has expressed concern that some of the designated “safe” third countries are not providing adequate protection to asylum seekers, such as Bulgaria.\(^{1044}\) In its Regular Reports of November 2003, the European Commission identified several concerns about Bulgaria. The ECRE summarized some of the key concerns as follows:

These include the lack of compliance of the exclusion and cessation clauses with the UN Refugee Convention and the fact that the right of protection of certain asylum seekers continues to be jeopardised due to the denial of access to the procedure for applicants who have failed to present their asylum application within the required time limit. Furthermore, the Commission notes that the rights and obligations of

\(^{1040}\) Ibid.
\(^{1042}\) Ibid.
\(^{1043}\) Ibid.
\(^{1044}\) Ibid.
recognized refugees and persons granted a humanitarian status are not always applied in practice due to limited financial possibilities.\textsuperscript{1045}

From the above discussion, it appears that European states are ‘moving rapidly toward a system designed to limit the right of refugees to choose their place of asylum’ within Europe.\textsuperscript{1046} However, the added the conditions placed on refoulement are an added safeguard that ought to be implemented into the Australian system. Therefore, after analysis of the developments in European migration policies and different instruments developed, this thesis concludes that these policies have a focus on guarding the borders and making it difficult for people to enter the territory. These policies do not discern between refugees and other migrants. Once they have entered the European territory migrants run the risk of being deported to their country of origin, where they fear to be maltreated.

6.8 Canada-US: STC agreement

Canada-US safe third country agreement is modeled on the Dublin Convention of EU. The Safe Third Country Agreement between Canada and the United States of America is part of the United States of America-Canada Smart Border Action Plan. Prior to concluding STC agreement between these two countries in 2002 in reaction to the 9/11 terrorist attack, early set of negotiation in mid-1990s had failed, principally due to Canadian concerns that the US asylum system did not provide adequate protection to refugees.

It is noteworthy that the Canadian provisions did make reference to the country’s need to and aim of complying with the Refugee Convention. One could read such an inclusion to mean that a prescribed country must be a signatory and also have a reputation for complying with its obligations.

\textsuperscript{1045} Ibid.
\textsuperscript{1046} Hathaway, The Law of Refugee Status, above n 182, 47.
The remainder of this section will examine the bilateral agreement between Canada and the United States of America. On 5 December 2002, Canada and the US entered into a bilateral agreement For Cooperation in the Examination of Refugee Status Claims from Nationals of Third Countries. The Canada-US Agreement came into effect on 29 December 2004.

In 2002, the then Deputy Prime Minister John Manley predicted the Canada-US Agreement would eliminate ‘the practice of asylum shopping by refugee applicants by allowing their return to the last safe country from which they came’. However, it had been suggested that the Canada-US Agreement effectively closed the Canada-US land border to most asylum seekers.

The Canada-US Agreement required an asylum-seeker to lodge his/her asylum claim in the first country they arrive in (either Canada or the US), with certain limited exceptions. Further, any asylum seeker caught attempting to cross the Canada-US border would be returned to their country of first arrival, with certain limited exceptions.

The Canada-US Agreement resulted in a significant fall in the number of protection claims made in Canada. Prior to the commencement of the Canada-US Agreement, the number of asylum seekers arriving in Canada far outweighed the number of asylum seekers arriving in the US. For example, in 2001 approximately 13,000 asylum seekers came to Canada via the US. In the same

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1047 Hereinafter referred to as the “US”.
1053 Ibid. above n 1051.
1054 Ibid.
year, less than 200 asylum seekers left Canada for the US. The objective of the Safe Third Country Agreement is to allow both Canada and the United States to handle refugee claims in an orderly manner, reduce the possibility of multiple claims and share the responsibility for providing protection to those in need.

The Canada-US Agreement does not apply to US citizens or habitual residents of the US who are not citizen of any country (‘stateless person’). This safe third country would apply only to refugee claimants who are seeking entry to Canada from the US:

- At Canada-US land border crossings; or
- By train; or
- At airports, only if the person seeking refugee protection in Canada has been refused refugee status in US and is in transit through Canada after being deported from the US.

There are four types of exceptions to the agreements which are family member exceptions, unaccompanied minors exception, document holder exceptions and public interest exceptions. However, if they qualify for one of these exceptions, refugee claimants must still meet all other eligibility criteria of Canada’s immigration legislation. For example, if a person seeking refugee protection has been found inadmissible in Canada on the ground of security, for violating human or international rights, or for serious criminality, that person will not be eligible to make a refugee claim.

The Canada-US Agreement attracted much criticism. Many right groups in Canada opposed it, one rights group described it as ‘inefficient’ and ‘inhumane’.

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1056 Ibid.
1058 Immigration and Refugee Protection Act 2001 (Canada) s 101 (1)(f).
In 2007, the Canadian Council for Refugees\textsuperscript{1060}, the Canadian Council of Churches, Amnesty International and John Doe, a Colombian asylum seeker in the US, filed an application for judicial review in the Federal Court of Canada challenging the Canada-US Agreement.\textsuperscript{1061} The applicants sought a declaration that the designation of the US as a “safe third country” for asylum seekers, and the resulting ineligibility for refugee protection in Canada of certain asylum seekers, was invalid and unlawful.\textsuperscript{1062}

The Applicants argued that the US asylum regime violates international refugee law, including the Refugee Convention and the Convention Against Torture (CAT), as well as Canadian refugee law. The applicants pointed out that certain asylum seekers would be recognized as refugees under Canadian law but not under US law. The removal of such persons from Canada to the US under the Canada-US Agreement would mean that these people would be unable to obtain refugee status and thus protection in the US; thereby exposing them to the risk of being refouled to a country where he or she may be persecuted for one or more of the Convention reasons, tortured or even killed, in contravention of international law.

On 29 November 2007, Justice Phelan of the Federal Court of Canada handed down his decision accepting the arguments advanced by the CCR; he held that the US refugee law and practice violates both Article 33 of the Refugee Convention and Article 3 of the CAT.\textsuperscript{1063} He subsequently issued the Applicants a declaration that the designation of the US as a “safe third country” for asylum seekers, and the resulting ineligibility for refugee protection in Canada of certain asylum seekers, is invalid and unlawful.\textsuperscript{1064} He also granted the Applicants granted ancillary relief.\textsuperscript{1065} His findings included the following:

\textsuperscript{1060} Hereinafter referred to as “CCR”.
\textsuperscript{1061} CCR, Canadian Council of Churches, Amnesty International and John Doe v The Queen (2007) FC 1262 hereinafter referred to as “CCR v The Queen (2007) 2007 FC 1262”.
\textsuperscript{1062} Ibid [2].
\textsuperscript{1063} Ibid [338].
\textsuperscript{1064} Ibid [339].
\textsuperscript{1065} Ibid.
• The rigid application of the US’ one-year deadline for asylum seekers to initiate asylum claims is inconsistent with the Refugee Convention and the CAT;\footnote{1066}

• The US provisions governing security issues and terrorism ‘cast a wide net which will catch many who never posed a threat’; thus returning asylum seekers to the US under these circumstances creates a serious risk of refoulement and torture which is contrary to the Refugee Convention and the CAT;\footnote{1067}

• The ‘vagaries’ of the US law puts women, particularly those subject to domestic violence, at real risk of refoulement, contrary to the Refugee Convention;\footnote{1068} and

• The US law does not provide adequate protection against returning a person to another State where there are substantial grounds for believing that he or she would be in danger of being subjected to torture, contrary to Article 3 of the CAT.\footnote{1069}

Justice Phelan found that the ‘life, liberty and security of refugees is put at risk’ when Canada returns them to the US under the Canada-US Agreement because the US law violates the Refugee Convention and the CAT.\footnote{1070} Justice Phelan concluded that, under the US law, it is ‘entirely foreseeable’ that genuine claimants would be refouled contrary to the Refugee Convention, with the ‘situation potentially even more egregious in respect of refoulement to torture’.\footnote{1071}

Justice Phelan issued his final order on 17 January 2008. He granted the application for judicial review and ordered that the designation of the US as a “safe third country” be quashed as of 1 February 2008.\footnote{1072} The decision of Justice Phelan was seen as groundbreaking and representing a remarkable victory for refugees.\footnote{1073}
The government swiftly reacted to the decision of Justice Phelan, it filed an application with the Federal Court of Appeal to appeal the decision of the Federal Court. On 27 June 2008, the Federal Court of Appeal allowed the government’s appeal.\textsuperscript{1074} The Court did not make a finding that the US was a safe country for all refugees; rather it held that the Court should not consider the circumstances of refugees in the US.

The decision of the Federal Court of Appeal was appealed to Canada’s highest court, the Supreme Court of Canada. However, on 5 February 2009, the Supreme Court of Canada denied Leave to Appeal.\textsuperscript{1075}

Commenting on the decision of the Supreme Court of Canada, the President of the CCR Elizabeth McWeeny said the following:

\begin{quote}
This decision means that refugees will not have their day in court … The U.S. is not in fact safe for all refugees, so we deeply regret that the Supreme Court has not taken this opportunity to ensure that Canada provides refugees the protection they need from forced return to persecution.\textsuperscript{1076}
\end{quote}

Ms McWeeny has indicated that the CCR, Amnesty International and the Canadian Council of Churches would be pursuing other avenues to challenge through the courts the unjust removal of asylum seekers to the US.\textsuperscript{1077}

The Canada-US Agreement had received much criticism, holistically however Canada appeared to be not only complying with its obligations under the Refugee Convention, but also doing its part in the burden sharing of refugees. Canada receives more than three times the amount of refugees as Australia does and accepts almost twice the number of refugees, per capita, than Australia does and has a highly

\begin{footnotesize}
\begin{itemize}
\item \textsuperscript{1074} Queen v CCR, Canadian Council of Churches, Amnesty International and John Doe (2008) FCA 229.
\item \textsuperscript{1075} See, CCR and Amnesty International and Canadian Council of Churches, ‘Supreme Court Denial of Leave on Safe Third Regretted’ (Press Release, 5 February 2009) for a discussion on the effect of the Supreme Court’s judgment.
\item \textsuperscript{1076} Ibid.
\item \textsuperscript{1077} Ibid.
\end{itemize}
\end{footnotesize}
respected international reputation for its refugee policies. By having agreements with neighbor countries and a strict policy to safe third country refoulement Canada has narrowed their definition of safe third country.

6.9 Australia’s regional cooperation mechanism

Australia’s geographical isolation, lack of land borders and the limited means of gaining access to the country have been the principle reasons for difficulty to access in its territory. However, in the late 1980s and early 1990s, the arrival of boat people from Cambodia, China and from other countries in the region was a key instrument in development of regional cooperation concept. At that time the then government successfully concluded inter-country agreement (most notably with China) that ultimately stopped the flow of would-be asylum seekers at the source. As the activities of people smugglers increased in late 1990s, such targeted flow of boat people increased through Indonesia because of its closeness with Australian border.

In 2000 Australia developed a regional cooperation arrangement with Indonesia, under which Indonesia is paid for hosting asylum seekers before they travel to Australia and Australia was also allowed to intercept boats and force them to return to Indonesia.

Australia also paid International Organisation for Migration (IOM) to manage these people. Those people who wish to make refugee claim were referred to UNHCR and upon recognition as refugees they had to wait in Indonesia until a signatory country to the Refugee Convention accepts them for resettlement. However, the appropriate starting point to discuss about Australian regional cooperation is so-called ‘pacific solution’ which was introduced by Howard government in 2001 post-Tampa. It is to note that the then government persuaded Nauru and Papua New

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1079 Crock, Saul and Dastyari, above n 6 58, 112.
1080 Ibid.
1081 Ibid 113.
Guinea to house asylum seekers in exchange of financial aid on the background of receiving hostile response from Indonesia.\textsuperscript{1082}

Modelled on the USA’s Caribbean Plan, Australia arranged to bring all countries of this region into agreement however only New Zealand, Nauru and PNG entered into agreement with Australia. The crux of this plan was, ‘the processing of the people rescued by the MV Tampa offshore’. Some other significant provisions of this plan/solution were:

- Claim of asylum seekers’ was to be processed within six months;
- Australian government funded and directed the pacific ‘protection’ centres;
- Incidents within the centres were to be dealt under local laws under the terms of MoU.
- MoU had incorporated non-refoulement clause

Thus, the Pacific Solution did not offer long-term solution for refugees. In addition to that its design was conceived as a way of deterring and punishing who had made ‘secondary movements’ from ‘safe first countries of asylum’.\textsuperscript{1083} It neither protects refugee’s rights and nor takes all measures to assure that other states will bind themselves with non-refoulement obligation as the MoU is not itself a legally binding instrument.

It is obvious that Australia’s regional co-operation is focused on preventing asylum seekers from departing their country of origin or from the link countries as well as to prevent them from accessing Australia’s onshore protection visa assessment facility under existing legislations. It is to be noted that asylum seekers can only access this facility if they are in a migration zone.


In an effort to achieve its own objectives, Australia is also trying to address root causes. The government’s policy in this regard can be seen in the speech by Honorable Minister Chris Bowen at the Sydney Institute, where he said:

Our clear long-term priority must be to address the root causes of irregular migration flows. We need to know what to target in our development assistance, peace keeping and other operations to assist in stabilizing populations – in particularly poverty eradication, institution and capacity building and conflict prevention.1084

The government had provided the DIMIA with A$20.8 million over four years starting from June 2000 to support responses to the large numbers of displaced Afghans and Iraqis.1085 Similarly, in Sri Lanka it is investing in de-mining and reconstruction in northern and eastern provinces. It is also assisting the internal resettlement of displaced people; and it is doing its best to foster post-conflict political reconciliation. It is also aware of the fact that countries of first asylum bear a large responsibility for the immediate humanitarian response to refugee outflows and the situation/condition of refugees there have a significant influence on secondary refugee outflow.1086 Therefore, Australia is working with countries of first asylum to assist them in providing temporary protection while durable solutions are found for example in 2000 the government allocated A$ 6 million to the UNHCR 2000 southwest Asia Appeal, which was intended to increase the self-reliance of refugees in Pakistan and Iran.1087

The Australian government promotes regional cooperation by entering into bilateral agreements with surrounding as well as other countries of this region. And also through mechanism such as the Bali Process on People Smuggling Co-chairing it with Indonesia, in which over fifty countries and several international organizations

1084 Chris Bowen, ‘Irregular Migration – The Global Challenge’ (Speech delivered at the Sydney Institute, Sydney, 24 March 2010).
1086 Ibid 100.
1087 Ibid.
participate. However, it is arguable whether Australia’s such attempt is bona fide and responsibility sharing or to tactfully persuade other countries to bear its own loan in exchange of some financial aids.

6.9.1 Bali Process on People Smuggling and Trafficking

The main objective of this platform is to stop people smuggling in this region. To achieve this outcome, it has agreed on more effective sharing of information and intelligence, improve co-operation in identifying asylum seekers. The Third Bali Regional Ministerial Conference emphasis on regional cooperation, information sharing, improving the availability of comprehensive and substantial solutions to reduce the secondary movement and thereby reducing/preventing people smuggling and trafficking and related transitional crimes, etc but also strongly advocated that the encouragement to create opportunities for legal channels of migration will help irregular migration and the activities of people smuggler and human traffickers.

However, the Conference clarified that nothing in this statement was intended to prejudice the legitimate rights of genuine refugees to seek and enjoy asylum in accordance with relevant UN Conventions and Protocols to which States are party, national laws and practices. It also noted that all countries including origin, transit and destination countries, according to their national laws and national policies, could use their endeavours to play a part in ensuring protection and in finding solutions for refugees while providing for return in a dignified and human manner for those not found to be refugees. All forms of transitional crimes including people smuggling and trafficking pose a threat to the integrity of regional border security process and procedures, and undermine the ability of regional States to manage migration as well as to various vulnerable groups.

The reasons for irregular movements in the region were numerous and involved economic, social and political aspects. Poverty, economic disparities, labour market opportunities, conflict, deterioration of human rights situation, and the insecurity

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significantly contributed to the continuing prevalence of people smuggling and human trafficking in the region. Four relevant issues that can be taken into consideration while addressing people smuggling and human trafficking are: prevention; legislation, criminalization and prosecution; protection and victim support; and for common regional responses to address current irregular people movement cases. Continued capacity development would help strengthen governance and provide greater opportunities to address some of the underlying factors which made individuals vulnerable to irregular migration.  

6.9.2 Bilateral agreement with surrounding countries in pacific region  

Australia is acting to ensure that asylum seekers in its en route countries, such as Malaysia, Indonesia, Sri Lanka, are prevented from travelling onwards to Australia. The Department of Immigration has officers in these countries including Airline Liaison Officers, stationed at the international airports of major cities of these countries who are specialist in document verification and whose main function is to assist local authorities and airline authorities to check for false passports and visas. In addition, The Australian Federal Police and these countries security departments have been working together to disrupt people smuggling to Australia via their country and have made interceptions on ocean and deployed many people to prevent them. Thus Australia is pouring millions of dollars into building the border control capacity of countries in its regions and check on onshore illegal entry. In this context, it should also be noted that Australia provides millions of dollars to UNHCR in some these countries such as Indonesia, Malaysia in funding for determining refugee status and providing medical cae and other basic services. Pursuant to an arrangement between the Australian government, the Indonesian government and the International Organization for Migration (IOM), asylum seekers intercepted by Indonesian authorities en route to Australia or New Zealand are referred to IOM for material assistance.  

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In recent years, the Rudd government adopted a new policy: ‘toughness on a border protection but humanity towards asylum seekers.’\textsuperscript{1091} This policy clearly gives at least one massage that the government knows its international obligation. As Immigration Minister Evans once said:

> Our arrangements with Indonesia and the rest of the region are absolutely vital. International responses are at the core of this problem. Once boats enter our waters then our international obligations are involved and have to be accepted.\textsuperscript{1092}

Australia’s regional cooperation can better be understood by the observation of Jessie Taylor, who is a lawyer and refugee activist, who recently travelled to Indonesia observed:

> … The Rudd government has enjoyed widespread praise for closing the Nauru camp quickly. However, through the continued use of Indonesia for warehousing people, Rudd and Evans are emulating the darkest, meanest and most cynical practices of Howard and Ruddock.

> …

> Asylum seekers are being processed in this perfunctory way and many are being rejected and sent back to extreme danger based on information gleaned from a six minute statement. The UNHCR, International Organisation for Migration and Australia are involved in a serious breach of human rights made all the worse because it has the superficial appearance of due process. It is a charade. Australia really can do better than this.\textsuperscript{1093}

Recent positive developments in Australia included:\textsuperscript{1094}

\textsuperscript{1092} Ibid.
\textsuperscript{1093} Jessie Taylor, Australia's ugly secret: we are still warehousing asylum seekers, The Age (Sydney), 16 September 2009.
(i) an end to the "Pacific Solution", whereby asylum-seekers were transported to detention camps on small island nations in the Pacific Ocean;

(ii) the subsequent closure of the offshore processing centres on Nauru and Manus Island, Papua New Guinea;

(iii) the replacement of temporary protection visas with permanent visas; the introduction of a new detention policy, prompting resolution of cases rather than punishment. In this way, alternatives to detention started to be implemented in a more regular manner; and

(iv) the development of a model of complementary protection for those in need of international protection yet who do not fulfill the refugee definition of the 1951 Refugee Convention.

6.9.3 Civil Society Organizations

In the contemporary world, civil society plays vital roles in shaping the government policies. The influence of civil society organizations’ cannot be ignored while discussing Australia’s commitment and practices in protecting refugees.

Before the Rudd Government came into power in 2008, there was a practice to put ‘gag clauses’, the term given to clauses in agreements between Government and civil society stating that they are to not make public comments on Government policies. In January 2008, the then Deputy Prime Minister Julia Gillard abolished such practice supporting the critical debate stating:

We do not want to stifle debate, we want to ensure that this country ends up with best possible policy. This requires us to get the gag off and listen to those who know what’s going on … [Y]ou only get the best possible policy if you have the debate. The former [G]overnment took the view that silence was better. We take the view that debate and hearing everybody’s voices is much better … We want to make sure the not-for-profit sector, the advocacy sector, can do what it does and have a say within the public domain … We think it’s important to a mature democracy that people who have got
expertise in dealing with provision of services with disadvantaged groups in our society aren’t constrained from entering the public debate.  

In 2008, the Asia Pacific Refugee Rights Network (APRRN) was formed which comprises a network of civil society organizations and individuals committed to advancing the rights of refugees in this region. Also, East Asia Working Group was formed within APRRN led by NGOs from Korea, Japan and Hong Kong. East Asia has potential to lead the positive development in the refugee field in the Asia Pacific Region. Japan and Korea are amongst few signatory countries to the Refugee Convention and although it is not a state-party of the Convention yet, Hong Kong has an alternative system to provide partial protection to refugees. East Asian countries have been passive or rather reluctant to receive refugees and their refugee protection system still lags behind the international standard. However, as the most affluent and democratized part of this world, East Asia has both capacity and responsibility to establish a better refugee protection system and to support other countries in Asia to follow the suit.

Thus, APRRN, coordinating with NGOs around the world, brings reports, news, facts about refugees and asylum seekers in front of the public at large. In doing so, it gives opportunity to humanitarians, policy makers and others concerned to asylum seekers and refugees to address the issues promptly and effectively.

Asia Pacific Refugee Rights Network (AAPRRN) has also enhanced the awareness of issues related to refugees globally. Recently it coordinated a statement where 40 NGOs from 16 countries slammed Rudd government’s decision to suspend the processing of asylum claim by Sri Lankan and Afghan nationals for three months and six months respectively. The reason for the decision was given recently improved condition in both countries. The statement released by APRRN was said to be an important international critique of the Australian government’s decision which states that Australia did not respect the binding nature of its international

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human rights obligation as it was based on false impression about the current situation of the two countries.  

The Refugee Council of Australia (RCOA) is a national umbrella body, established in 1981, which has more than 130 organisational members and more than 250 individual members. is actively involved in new research, policy development, information and representation on refugee issues. In 2009 Refugee Council of Australia merged with A Just Australia, bringing together two of the most significant voices on refugee policy.

The priority activities for RCOA involves in many areas of refugee support including:

- assist refugees in countries of first asylum and when they repatriate to their homelands;
- provide settlement support to refugees in Australia;
- provide protection and legal advice to refugees and asylum seekers; and
- advocate on behalf of a particular refugee community

6.10 Summary

Despite the absolute nature of the prohibition of refoulement in international law and its applicability to all states, many states continue to ignore their obligations. Sometimes under the pretext of national security or as a sign of cooperation with others states, refugees, asylum-seekers, and other persons in need of international protection are forcibly returned to countries where they are subjected to various human rights abuses including torture and ill-treatment, incommunicado detention, unfair trials and even the death penalty.  

\[\text{Ibid.}\]

The study of above-mentioned regional mechanism demonstrates that State’s practice still, in most cases, breach non-refoulement obligations. It also shows that the alliance of developed and rich nations such as EU and Canada-USA to some extent manipulate international law obligations. However, alliance of poor or developing nations such as OAU do not take into account international obligations if they cannot bear the refugee load. Apart from such practices, many rich nations are shifting the obligations to bear refugee burden to poorer nations taking advantage of their economic and financial needs.

Despite these problems, international communities now understand that if these durable solutions are not sought by co-operating with each other, it could easily be a cause for regional chaos, disturbance and instability. This thesis strongly suggests that unlike arbitrary methods to declare a country a “safe third country”, there should be one uniform policy, a standard one, to declare a ‘safe country’. In so doing, the practice of breaching non-refoulement obligation will at least be reduced.
Chapter Seven

The “Safe Third Country” in other Western Signatory States: A Comparative Analysis

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7.1 Introduction
7.2 The Approach of the United Kingdom
7.3 The Canadian Approach
7.4 The New Zealand Approach
7.5 The UNHCR and the Safe Third Country
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7.1  Introduction

The notion of a safe third country is certainly not exclusive to Australia. Western signatories such as countries in the European Union\textsuperscript{1099}, Canada and New Zealand\textsuperscript{1100} have also incorporated the concept of a “safe third country” in a variety of ways.\textsuperscript{1101}

This Chapter will analyze the effectiveness of the safe third country policy when implemented in Australia, the EU, Canada and NZ. These countries are some of Australia’s closest allies and in particular NZ is our close neighbor. In many ways these Western countries represent influential countries in the international community. For these reasons, the implication of Western signatories to the Refugee Convention breaching the non-refoulement principle by implementing similar safe third country provisions to that of Australia will also be considered to establish if there is a trend of restricting access to refugees by means of the ‘safe third country’ and ‘effective protection’ policies. Examination will be made of how this shift has been justified by governments and what are the implications for the other signatory countries.

7.2  The Approach of the United Kingdom

One of the super powers of the EU is undoubtedly the United Kingdom\textsuperscript{1102} and therefore it is instructive to view the development of the EU approaches by examining the development of the safe third country principle in the UK. In the United Kingdom, the Secretary of State determines asylum applications. Section 6 of the Asylum and Immigration Appeals Act 1993\textsuperscript{1103} provides as follows:

During the period beginning when a person makes a claim for asylum and ending when the Secretary of State gives him notice of the decision on the claim, he may not be removed from, or required to leave, the United Kingdom.

\textsuperscript{1099} Hereinafter referred to as the “EU”.
\textsuperscript{1100} Hereinafter referred to as “NZ”.
\textsuperscript{1101} Legomsky, above n 13.
\textsuperscript{1102} Hereinafter referred to as the “UK”.
\textsuperscript{1103} (UK) c 23 (hereinafter referred to as the “Asylum and Immigration Appeals Act 1993”).
Section 2 of the Asylum and Immigration Act 1996 deals with the removal of asylum seekers to countries which have been certified as “safe third countries” by the Secretary of State. It provides inter alia:

(1) Nothing in section 6 of the 1993 Act … shall prevent a person who has made a claim for asylum being removed from the United Kingdom if-
(a) the Secretary of State has certified that, in his opinion, the conditions mentioned in subsection (2) below are fulfilled;

(2) The conditions are—
(a) that the person is not a national or citizen of the country or territory to which he is to be sent;
(b) that his life and liberty would not be threatened in that country or territory by reason of his race, religion, nationality, membership of a particular social group, or political opinion; and
(c) that the government of that country or territory would not send him to another country or territory otherwise than in accordance with the Convention.

(3) This subsection applies to any country or territory which is or forms part of a member State …

There is a right to appeal against a certificate issued under section 2(1) of the Asylum and Immigration Act 1996. However, if the “safe third country” is a member state, an asylum seeker can only exercise his or her right to appeal after

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1104 (UK) c 49 (hereinafter referred to as the “Asylum and Immigration Act 1996”).
1105 Asylum and Immigration Act 1996, s 3.
1106 Statutory Instruments, 2000 No. 2245, Immigration, The Asylum (Designated Safe Third Countries) Order 2000, The Secretary of State, in exercise of the powers conferred upon him by section 12(1)(b) of the Immigration and Asylum Act 1999(a), hereby makes the following Order:
1. This Order may be cited as the Asylum (Designated Safe Third Countries) Order 2000 and shall come into force on 2nd October 2000.
2. The Asylum (Designated Countries of Destination and Designated Safe Third Countries) Order 1996(b) is hereby revoked. The following countries are designated for the purposes of section 12(1)(b) of the Immigration and Asylum Act 1999 (designation of countries other than EU Member States for the purposes of appeal rights): Canada, Norway, Switzerland United States of America
departing the UK.1107 A member state with which there are standing arrangements is to be regarded as a place from which a person will not be sent to another country otherwise than in accordance with the Refugee Convention.1108 There is a right of appeal on the basis that removal to the member state breaches the Human Rights Act 19981109.1110 However, if the Secretary of State certifies that an asylum seeker’s allegation that removal to the member state breaches s 6(1) of the Human Rights Act 1998 is manifestly unfounded, the asylum seeker is not, whilst in the UK, entitled to appeal.1111

Also relevant in this discussion are the Immigration Rules which are made by the Home Secretary pursuant to the powers inhering in the Immigration Act 1971 (UK).1112 Despite the controversy surrounding the legal status of the Immigration Rules, it ‘has been made clear that they have the force of law in Appeal Tribunals or even in the High Court’.1113 However, ‘[t]hey give no rights other than those which are subject to an immigration appeal’.1114 Paragraph 345 of the Immigration Rules 1993 provides, that the where Secretary of State is satisfied that the particular conditions pursuant to the Asylum and Immigration (Treatment of Claimants, etc.) Act 2004 are fulfilled he will normally decline to examine the asylum application. Provided that he is satisfied that a case meets the ‘Safe third country’ criteria, the Secretary of State is under no obligation to consult the authorities of the third country or territory before the removal of an asylum applicant to that country or territory. Asylum seekers can only be return in circumstances where they have passed through a so called safe third country or a signatory country.1115

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1107 Asylum and Immigration Act 1996, s 3(2).
1108 Immigration and Asylum Act 1999 (UK) c 33 s 11. Section 11(4) defines “standing arrangements” as ‘arrangements in force as between member States for determining which state is responsible for considering applications for asylum’.
1109 (UK) c 42 (hereinafter referred to as “Human Rights Act 1998”).
1110 Immigration and Asylum Act 1999, s 65.
1111 Immigration and Asylum Act 1999 s 72(2)(a).
1112 Immigration Act 1971 (UK) c 77 ss 1(4), 3(2).
1115 Asylum and Immigration (Treatment of Claimants, etc.) Act 2004 Paragraphs 4 and 5(1), 9 and 10(1), 14 and 15(1) or 17 of Schedule 3.
Sections 33 and Schedule 3 of the Asylum and Immigration (Treatment of Claimants, etc.) Act 2004\textsuperscript{1116}, which came into force on 1 October 2004, set out further situations where UK authorities could remove people from the UK to third countries without considering their asylum claims.\textsuperscript{1117} Furthermore, it empowered the Home Office to declare a country as “safe” for the purpose of removing the asylum seeker even though the country may not a party to the Refugee Convention.\textsuperscript{1118}

Although seemingly inequitable, the UK approach is not as harsh as the new Australian provisions, which allow deportation of refugees to countries that they have never been to.\textsuperscript{1119} The UK provisions focus on returning asylum seekers to the country where they have come from only if effective protection is available in that country.\textsuperscript{1120} In addition and in contrast to the Australian provisions, an asylum seeker has no right to apply for refugee status if he or she did not come directly from the country where they have a Convention fear.

### 7.3 The Canadian Approach

The primary federal legislation regulating immigration to Canada is the Immigration and Refugee Protection Act\textsuperscript{1121}. In Canada, Refugee protection extends to the following persons:\textsuperscript{1122}

- A person determined to be a UN Convention refugee;\textsuperscript{1123}
- A person who faces a substantial risk of torture within the meaning of Article 1 of the Convention Against Torture (CAT);\textsuperscript{1124}

\textsuperscript{1116} (UK) c 19 (hereinafter referred to as “Asylum and Immigration Act 2004”).
\textsuperscript{1117} Asylum and Immigration Act 2004, sch 3, pts 2, 3, 4 and 5.
\textsuperscript{1119} See, eg, NAEN [2004] FCAFC 6.
\textsuperscript{1120} See, eg, NAEN [2004] FCAFC 6.
\textsuperscript{1121} See, eg, NAEN [2004] FCAFC 6.
\textsuperscript{1122} Audrey Macklin, ‘Asylum and the Rule of Law in Canada: Hearing the Other (Side)’, in Susan Kneebone (ed) Refugees, Asylum Seekers and the Rule of Law: Comparative Perspective (Cambridge University Press, 2009) 79.
\textsuperscript{1123} IRPA, s 96.
\textsuperscript{1124} IRPA s 97 (1)(a).
• A person who faces a risk of life, or of cruel and unusual treatment, or who
risks punishment that is not faced generally by other individuals in that
country, is not the result of lawful sanctions, and is not caused by a country’s
inability to supply adequate health care.\footnote{IRPA s 97 (1) (b).}

\textit{Section 101 (1) (d) and (e) of the IRPA incorporates the “safe third country”
principle. It states, inter alia, that:}

(1) A claim [for refugee protection] is ineligible to be referred to the Refugee
Protection Division if:

(a) ...
(b) ...
(c) refugee claim previously rejected or found ineligible in Canada;
(d) the claimant has been recognized as a Convention refugee by a
country other than Canada and can be sent or returned to that
country;
(e) the claimant came directly or indirectly to Canada from a country
designated by the regulations, other than a country of their
nationality or their former habitual residence;
(f) ...

Subsection 102(2) of the IRPA outlines the criteria for designating a country as a
“safe third country”:

The following factors are to be considered in designating a country under paragraph
(1)(a):

(a) whether the country is a party to the Refugee Convention and to the
Convention Against Torture;
(b) its policies and practices with respect to claims under the Refugee
Convention and with respect to obligations under the Convention Against
Torture;
(c) its human rights record; and
(d) whether it is party to an agreement with the Government of Canada for the purpose of sharing responsibility with respect to claims for refugee protection.

The Canadian provisions restrict the application of the “safe third country” principle, in the practical processing of asylum claims. As pointed out in a 2003 report, “Article 102(2)(a) of the IRPA requires the government to ‘consider’ whether a ‘responsibility-sharing’ agreement exists between Canada and the transit country before a refugee claim can be considered ‘ineligible’ for determination in Canada”. The United States of America is the only country under the IRPA designated as a “safe country”. Canada has also incorporated its international non-refoulement obligation in its legislation which also protected Convention Refugee from cruelty and torture.

7.4 The New Zealand (NZ) Approach

The Immigration Amendment Act 1999 was NZ’s first statutory incorporation of the Refugee Convention into its domestic legislation although NZ ratified the Refugee Convention in 1960 and the 1967 Protocol in 1973. However, even well before enactment of the Immigration Amendment Act 1999, NZ has been respecting its obligations under the Refugee Convention by complying with the non-refoulement principle and most certainly with more conviction than its neighboring countries. In addition to the country’s annual refugee quota of 750 people, refugees enter under NZ under ‘humanitarian visa’ and ‘refugee family support category visa’. The current annual intake for refugee family support category visa is 300.

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1128 See, eg. Immigration and Refugee Protection Regulations 2002 (Canada) reg 159.3.
1129 Immigration and Refugee Protection Act 2001 (Can) s 115(1); see also Immigration and Refugee Protection Act 2001 (Canada), C 27 (3)(2).
1130 (NZ).
In general, NZ has a strong record for protecting refugees.\textsuperscript{1133} All claims are considered, in the first instance, by the Refugee Status Branch of the NZ Immigration Service. Unsuccessful claimants have the right to appeal to the independent Refugee Status Appeal Authority\textsuperscript{1134} and judicial review is also available within three months of a decision.\textsuperscript{1135} RSAA is a statutory body established to determine appeal from decisions of the Refugee Status Branch of NZ Immigration Service declining refugee status.

The Immigration Amendment Act 1999 provides the first statutory incorporation of the Refugee Convention. One of its stated purposes was to "create a statutory framework for determining refugee status under the Refugee Convention"; it thus scheduled the Refugee Convention and the amending protocol to the principal act, the Immigration Act 1987. However, there is no express provision incorporating these provisions into NZ domestic law. The Immigration Act does refer indirectly to the Refugee Convention though, requiring refugee status officers and the RSAA to act consistently with NZ's obligations under the Refugee Convention. Section 129D provides that Refugee Convention provides that the statutory body shall act in consistence with New Zealand's obligations under the Refugee Convention.\textsuperscript{1136} The Immigration Act 1987\textsuperscript{1137} prohibits the removal of an asylum seeker from NZ while his/her asylum claim is being processed.\textsuperscript{1138} This is done to comply with the obligation of non-refoulement in the Refugee Convention and the CAT.\textsuperscript{1139}

Two examples demonstrate New Zealand’s commitment to protect refugees: the Ahmed Zaoui case and the Tampa boat people.

\textsuperscript{1133} Crock, Saul and Dastyari, above n 658, 225.
\textsuperscript{1134} Hereinafter referred to as the “RSAA”.
\textsuperscript{1135} Crock, Saul and Dastyari, above n 658, 225-9.
\textsuperscript{1136} Immigration Act 1987 (NZ) s 129D(1).
\textsuperscript{1137} Immigration Act 1987 (NZ) s 129D(1).
\textsuperscript{1138} Immigration Act 1987 (NZ) s 129X.
\textsuperscript{1139} Crock, Saul and Dastyari, above n 658, 225.
The case of Ahmed Zaoui, a national of Algeria, concerned a leading member of the banned political group Front Islamique du Salut. Mr Zaoui fled Algeria and sought asylum in Belgium. That application was subsequently refused on the grounds that he was ‘excluded from the protection of the Refugee Convention because of links to the GIA and other armed groups’. In 1995, he was convicted on a charge of being the head of a criminal association (although a subsequent Deportation Review Tribunal ruled that there was insufficient evidence to make such a finding). In late 1998, whilst in Switzerland and awaiting the outcome of his refugee application, he and his family were deported to Burkina Faso, without warning and before a decision on his refugee application had been made. Burkina Faso accepted Mr Zaoui in return for development aid from the Swiss. In January 2000, he left Burkina Faso and travelled with his family to Malaysia. While in Malaysia, a French court issued a suspended sentence against him, but did not seek his extradition.

Mr Zaoui departed Malaysia and sought asylum in NZ in December 2002. That application was refused on 30 January 2003 by virtue of Article 1F(b) of the Refugee Convention, namely that ‘there were serious reasons for considering that he has committed serious terrorist or non-political crimes’. Mr Zaoui lodged an appeal of that decision with the Refugee Status Appeal Authority. In a 223 page decision, and after 6 months of investigation, the RSAA panel, comprised of 3 experts, found that Mr Zaoui had a well founded fear of being persecuted (torture, imprisonment, possible execution) if returned to Algeria, as per Article 1A of the Refugee Convention. The RSAA panel held there were no serious reasons for considering that Mr Zaoui had committed a crime against peace, a war crime, or a crime against humanity, or a serious non-political crime outside NZ, in terms of the exclusion provisions of Article 1F of the Refugee Convention. After assessing all allegations and proceedings against Mr Zaoui in Belgium, Switzerland and France, the RSAA panel found that by a ‘demonstrable margin’ that there was ‘no probative or reliable evidence’.

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1141 Refugee Appeal No 74540, [2].
1142 Ibid [9].
evidence’ of his involvement in acts of terrorism or any other non-political crimes.\textsuperscript{1143} On 1 August 2003, the RSAA granted Mr Zaoui refugee status.

Mr Zaoui also attracted the attention of the NZ Security Intelligence Service.\textsuperscript{1144} In March 2003, the NZSIS issued a Security Risk Certificate against Mr Zaoui under s114D of the Immigration Act 1987.\textsuperscript{1145} The definition of national security includes a threat to NZ trade or diplomatic relations. Although the NZ Government detained him on the basis of his threat to national security, it did not attempt to send him to a so called safe third country. The NZ High Court refused to grant Mr Zaoui and his family declaratory relief from detention.\textsuperscript{1146} Positively though, the Minister of Immigration and the NZ Immigration Service did not uphold the Security Risk Certificate, which would have resulted in Mr Zaoui being deported to Vietnam, his last port of embarkation. Vietnam is not a Refugee Convention signatory and has a poor human rights record. Furthermore, Vietnam has close diplomatic and trade relations with Algeria. Subsequently, deportation from NZ was seen as almost certainly resulting in deportation to Algeria, raising concerns of indirect refoulement.

A second, and more famous example of NZ’s commitment to refugees, was in 2001 with the case of the Tampa boat people. As has been noted in previous Chapters, the Tampa incident is a well documented case of a serious breach of Australia’s international refugee obligations. However, it stands as an example of NZ’s commitment to its obligations under the Refugee Convention. Overall, NZ accepted 208 refugees from the Tampa, including 131 people straight from the Tampa and 77 who underwent refugee status determination on Nauru by the UNHCR.\textsuperscript{1147} In addition, NZ agreed to accept some of the family members of those asylum seekers

\begin{footnote}{1143}{Ibid [979].}
1144 Hereinafter referred to as “NZSIS”.
1145 Generally, see, NZSIS, ‘Statement by Director of Security Concerning Mr Ahmed Zaoui’ (Press Release, 13 September 2007).
\end{footnote}
were granted permission to settle in NZ. This is an example of how a commitment of one signatory country can be a shining light compared with a dark policy of Australia who decides to send these refugees away.

NZ has most certainly been criticised for its detention policy, which has been described as being a reflection of the Australian model. Holistically, however, the refugee policy of NZ cannot be criticised considering the size and isolation of the country. NZ’s commitment to their refugee obligations can best be illustrated by comments made by a UNHCR spokesperson at a Press Briefing in 2004:

The High Commissioner has sent a letter to Prime Minister Helen Clark thanking her and the people of New Zealand for their strong humanitarian tradition. Mr Lubbers said he wanted to convey his personal appreciation for the welcome New Zealand has shown persons in need of international protection over the years, including its reception of individuals recently recognized as refugees in Nauru by UNHCR. He said this generous gesture is a testament to New Zealand’s exemplary humanitarian tradition and said he agreed with Prime Minister Clark’s view that recognized refugees enrich the fabric of society as they become productive members of their new communities.

It can be said from the above that the common thread of a better non-refoulement policy has been adopted in NZ. That common thread is, pursuant to the UNHCR’s recommendations, the NZ government has restricted refoulement to signatory countries with good human rights records and has offered access to the legal system for a fair hearing to all asylum seekers. Australia should look to the NZ example and consider how a country that is smaller and with fewer resources remains committed to its international obligations.

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7.5 The UNHCR and the Safe Third Country

The UNHCR has expressed concern at the considerable confusion in the “transposition” of the “safe third country” concept into the domestic legislation of countries in Central, Eastern and South-eastern Europe.\footnote{UNHCR, Global Consultations on International Protection, Background Paper No 2, The Application of the ‘Safe Third Country’ Notion and its Impact on the Management of Flows and on the Protection of Refugees (2001), [4].} For instance, the mere existence of a “safe third country” has, in particular states, been sufficient to refuse a claim for asylum on the ground that it is an abuse of process or unfounded in law.\footnote{Ibid.} According to the UNHCR:

[t]his constitutes a grave confusion between two fundamentally distinct aspects of the asylum procedure, namely: a decision on admissibility of the claim, which is made on purely formal grounds; and a decision on the substance of the claim, i.e., on the well-founded character of the fear of persecution or other harm invoked by the claimant.\footnote{Ibid.}

To ‘collapse’ these two steps effectively denies the asylum seeker the chance to present his or her refugee claims, a right which he or she is entitled to.\footnote{Ibid.}

ExCom Conclusion No 15 (XXX) stated that in identifying the country responsible for examining an asylum request, regard ‘should be had to the concept that asylum should not be refused solely on the ground that it could be sought from another State’.\footnote{ExCom, ‘Refugees Without an Asylum Country’ Executive Committee Conclusions No 15 (XXX) (1979) para (iv).} However, where an asylum seeker already has a ‘connection or close links with another State, he may if it appears fair and reasonable be called upon first to request asylum from that State’.\footnote{Ibid.}

There may be legitimate reasons that prompt an asylum seeker to claim asylum in a particular country such as family connections or linguistic, cultural, historical or
political ties. Article 7 of the Dublin II Regulation enables unification of family members where an asylum seeker has been accorded refugee status. This article provides that where an asylum seeker has a family member who has been allowed to reside as a refugee in a Member State, that Member State will be deemed responsible for examining the asylum application, provided that the persons concerned so desires. Further, Article 8 of the Dublin II Regulation enables asylum seekers to be united with family members who have not yet had a first decision on their application for asylum. Under this article, if an asylum seeker has a family member in a Member State whose asylum application has not yet been the subject of a first decision, that Member State will be deemed responsible for examining the asylum application, provided that the persons concerned so desire.

Unfortunately, the definition of “family members” in the Dublin II Regulation is limited to a spouse or unmarried partner (where the legislation of the Member State allows this), unmarried and dependent minor children, and parents/guardians where the applicant is a minor and unmarried.\footnote{ECRE, ‘Memorandum to SCIFA - Improving the functioning of the Dublin System’, Doc No AD/7/8/2006/EXT/CN/RW (August 2006) 3 <http://www.ecre.org/files/ECRE%20Memo%20to%20SCIFA%20on%20Dublin%20-%20final1.pdf> at 23 May 2009.} ECRE has found that that this definition is restrictive and results in families remaining separated.\footnote{ExCom, ‘Refugees Without an Asylum Country’ Executive Committee Conclusions No 15 (XXX) (1979) para (h)(iii).}

By contrast, s 36(2) of the Migration Act does not allow for the consideration of connection or ties with Australia or the prospective safe third country. As such, an asylum seeker with family members living in Australia could be removed to a safe third country in accordance with s 36(3) of the Migration Act. However, this could amount to a violation of the right to family unity enshrined in the ICCPR and CROC.

ExCom Conclusion No 15 (XXX) states, inter alia, that the ‘intentions of the asylum-seeker as regards the country in which he wishes to request asylum should as far as possible be taken into account’.\footnote{Dublin II Regulation art 2.} Section 36 of the Migration Act fails to
take into account such factors. This is particularly significance given the factual circumstances in NAGV\textsuperscript{1160}. Section 36(3) of the Migration Act did not enable the intentions of the appellants in NAGV\textsuperscript{1161}, with regard to their objection to removal to Israel or their motivation for claiming asylum in Australia, to be taken into consideration.

In an attempt to eliminate uncertainty for the asylum seeker, the UNHCR has suggested that the consent of the third state be secured prior to sending an asylum seeker to the third state, and further that the third state provide an assurance that the asylum seeker will have access to the asylum procedure in the third state.\textsuperscript{1162}

Furthermore, the UNHCR has recommended that the appropriate authorities of the third country are advised that an asylum seeker is going to be removed to the third country prior to the actual removal in order to ensure that sufficient notice is provided to the immigration and border officials and the requisite protection is assured.\textsuperscript{1163}

In addition, the UNHCR has suggested that States ought to take into consideration any connections which the asylum seeker has with the country in which he or she has sought asylum and that same should be compared with the asylum seeker’s lack of connection in any purported safe third country.\textsuperscript{1164}

7.6 Conclusion

After considering the safe third country policy and experiences of the England, Canada and NZ one can conclude that Australia is far from meeting its obligations of burden sharing. Given Australia’s geographical isolation and relatively low

\begin{footnotesize}
\textsuperscript{1160} (2005) 222 CLR 161.
\textsuperscript{1161} Ibid.
\textsuperscript{1164} Ibid [54].
\end{footnotesize}
population density, it could do considerably more to meet its international obligations of burden sharing and finding a durable solution to the refugee problem.

Goodwin-Gill considered the varying practices adopted by a number of countries and found that:

There is certainly no consistent practice among ‘sending’ and ‘receiving’ States as would permit the conclusion that any rule exists with respect to the return of refugees and asylum seekers to safe third countries, simply on the basis of a brief or transitory contact. Equally, it cannot be said that, in relation to the 1951 [Refugee] Convention, there is ‘any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation’. In the absence of agreement, returns run the risk of violating international law in its prescriptive sense, that is, the principle of non-refoulement, where the receiving State fails to provide protection … 1165

At a minimum, Australia should adopt the recommendations of the UNHCR and attempt to sign agreements with other signatory countries. It is thus recommended that refoulement under the safe third country principle should only occur upon satisfaction of the following four conditions, (as recommended by UNHCR and discussed above):

- Bilateral agreement by sending and receiving country including guarantees against refoulement form the receiving country;
- After authorities are satisfied that the receiving country is a signatory and has a good humanitarian record;
- When the receiving country has guaranteed that the asylum seeker will have his or her refugee claims considered; and
- If an asylum seeker has some compelling connection with Australia, that connection should be respected.

Chapter Eight

The “Safe Third Country” in Non Signatory States:
A Brief Overview

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8.1 Introduction

To better understand the success or failure of the Refugee Convention in addressing the global refugee problem, one should ask a typical question: Are signatory states doing it better than non-signatory states? With respect to states who are not parties to any of the relevant refugee law instruments, it seems that the question of refugee law is circumvented in practice. Instead the focus appears to be on the need for international protection, recourse is usually rules of customary international law such as non-refoulement obligation, to secure protection of refugees in those states.\textsuperscript{1166} This Chapter will briefly compare and contrast the effectiveness or failures of non-signatory states in addressing the refugee problem in order to ascertain whether the Refugee Convention is essential and whether the “safe third country” principle ought to be protected. Although it could be suggested that non-signatory states are not necessarily ideal targets as safe havens for refugees and therefore not relevant to the safe third country argument, one only needs to consider the relative proximity of these countries to refugee applicants. This Chapter will not analyze the actual situation of the some Asian (South and South-east) countries in protecting and refouling the refugee in depth, rather it will attempt to give some highlights only, as it is beyond the scope of this thesis to do more.

There are a host of non-signatory states and it is beyond the scope of this thesis to critique each and every one. In earlier Chapters, the record of signatory countries has been examined, in particular Australia, NZ, Canada and members of the EU. This Chapter will attempt to compare and contrast the effectiveness of non-signatory states in addressing the refugee problem; specifically it will discuss the approaches of the South Asian Region and some countries of South East Region. This analysis shall support the earlier contention that developing countries are being made to wear the brunt of the refugee problem and that it is a fantasy that Australia and other developed countries are the main targets of refugees.

8.2 Background of the South Asian Region

Although none of the countries in the South Asia region have ratified the Refugee Convention or the 1967 Protocol (except the newly joined member Afghanistan), it can be seen from the statistics that this Region (the regional group is known as SAARC and the members are India, Pakistan, Bangladesh, Sri Lanka, Nepal, Bhutan and Afghanistan) hosts the largest number of refugees worldwide. This may be because of the soft policies and entry procedures on entry of asylum seekers adopted by countries of this region. However, there is no uniform policy adopted by the countries of this region. Each influx of refugees receives a separate treatment depending on political motivations and ethnic and religious associations/linkages. Therefore, a country might welcome one group of asylum seeker but it may not be so generous towards other groups. In most of the countries of this region, the power to grant residential permit is regulated by the administrators at the local or district level such powers are discrentional and mostly dictated by the politics of kinship and inter-state relations. This is also influenced by socio-politics, economic and administrative elements. The nepotism to a particular group is also reason of dirty politics in this region and so called ‘vote bank’ where special treatment to particular class of people (because the family ties are extended beyond the national borders in many cases) gives political parties better chance to retain the parliament seats. Similarly, the availability of very low cost labour is also another for governments of this region to turn blind eye on this issue. The corrupt bureaucracy is another reason as they shut their eyes to control illegal and unlawful movements in exchange of some personal benefits.

Accurate and up to date information concerning this region is often not available due to lack of collection and restrictions. However, the trace of refugees in modern sense emerged from aftermath of the partition of the Indian subcontinent in 1947, when more than 15 million people were forced to flee their homes and become refugees and when Burma (presently Myanmar) evicted about half a million people.

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mercilessly after its independence in 1947. The exodus continued in an unprecedented scale; threatening the peace and security of the entire region.

The major issues of such behaviour towards, Dr. Siwakoti, makes the following observations:

“It has resulted in the ‘four-way traffic’ in the flight of refugees: movement within the region; movement from the region; movement into the region and movement within the country of domicile. The primary source of this mass movement is ‘ethnic strife and zero tolerance to secessionist projects. The process of decolonization and the emergence of the modern state system of South Asia ‘witnessed fresh forced movements of people on an unprecedented scale’. The definition of the term “refugee” itself is controversial; in many cases leading to refoulement.”

China’s entry into Tibet (presently Autonomous Region of China) in 1959 also forced more than 130,000 people into exile in India and Nepal and this flow is not stopped yet. During 1971, India alone hosted a total of 9,544,012 officially recorded refugees from East Pakistan, the present Bangladesh.

Dr. Siwakoti further observes that:

Tension between India and Pakistan since 1947, the ongoing Kasmiris violence, Soviet invasion of Afghanistan then followed by Taliban rule on Afghanistan and ongoing war-in-terror, ‘Burmanisation’ in Burma, racial (bihari muslim) civil war in Sri Lanka and ethnic cleansing in Bhutan are some of the reasons that made millions and millions people to flee in neighbouring countries or live as IDPs within the country. Although many countries in the South Asia region have witnessed forced population

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1169 Ibid.
1170 Edward M Kennedy, U. S Committee on the Judiciary, Crisis in South Asia, Senate (Report on 1 November 1971) 5.
movement, a distinction can be drawn between countries which produce refugees and those that receive refugees from other countries; however the empirical experiences indicates that some countries are in fact both refugee producing and refugee hosting. As a result of political violence and developmental policies, many countries in this region have produced large numbers of internationally displaced persons (IDPs). Following the political liberation in 1971 Bangladesh Liberation left some 300,000 Pakistanis stranded in Dhaka, the capital city of Bangladesh. They were primarily Bihari Muslims who migrated to East Pakistan (as it was then) from India in 1947. Between 1948 and 1961, some 31 million people migrated from East Pakistan (presently Bangladesh) to India.

The above observations made by Dr Siwakoti reflects the fact that those countries in South Asian Region not only creating refugees but are also hosting most of them within their region. One of the reasons for hosting the refugees within the region, as discussed in this thesis, is the obstacles erected by the Western countries to prevent them from entering their territories.

Refugees in this part of the world are usually dealt with as a matter of inter-state policy, and are liable to be subject to the real politik manipulations that invariably characterize bilateral relations in the region within the framework of national security, therefore it might have been ignored at the regional level and also within the framework of the SAARC charter. Since late 1990s, there has been a rise in regional process of consultation and meetings, many of which have been initiated by UNHCR in partnership with NGOs and eminent personalities of the region, which were a valuable part of ongoing efforts, both formal as well as informal, to promote common international standards of refugee protection in South Asia. The objective of the First Informal Consultation on Refugee and Migratory Movements in South Asia, which was held in November 1994 in Geneva, was to find ways of reconciling the narrow power-political interests of states with their international humanitarian

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responsibilities.¹¹⁷³ The participation of eminent persons group, the first consultation also seek to raise public awareness of refugee issues in the region. A regional Consultation entitled ‘Refugees and Forced Migration – Need for National Laws and Regional Co-operation’ was established in 1997. Its second meeting in Delhi in 1998 focused on the definition of refugees in the South Asian Context, recognizing the limitations of current international protection instrument. The following paragraphs will briefly discuss approach of a few countries within South Asian Region:

8.3 The Approach of Nepal

Nepal is a relatively small country with a population of almost 28 million people.¹¹⁷⁴ It is a third world country which is now controlled by a Communist Party of Nepal, Unified Marxist-Leninist (CPN-UML) led coalition Government.¹¹⁷⁵ Despite mounting international pressure, Nepal has not ratified the Refugee Convention or the 1967 Protocol. Notwithstanding same, Nepal’s neighbor, China, has provided it with a multitude of Tibetan refugees who make the trek to Nepal to seek asylum. Nepal is currently hosting almost 110,000 Bhutanese and more than 20,000 Tibetan asylum seekers and refugees.¹¹⁷⁶

Nepal does not have refugee law. According to the USRI World Refugee Survey 2008, Section 14 of the Immigration Act 1992 of Nepal, however, did allow the Government to exempt “any class, group, nationality or race from any or All of [its] provisions”¹¹⁷⁸ which repealed the 1958 Foreigners Act¹¹⁷⁹ and administrative

¹¹⁷⁷ Ibid.
directives which used to determine refugees’ legal rights. Section 12 of Extradition Act 1988 of Nepal prohibited extradition for “political crimes.”

Nepal appears to have maintained a refugee status determination process for Bhutanese asylum seekers only, although it had suspended it in 2006, when it launched a census of Bhutanese refugees. It applied international standards in these determinations, allowing UNHCR an observer role in first instance cases and a full vote in appeals cases. UNHCR recognized non-Tibetan, non-Bhutanese refugees under its mandate in Kathmandu until March, when Nepal requested that it stop. In 2008, it had registered 45 asylum seekers before March and granted mandate refugee status to 14. Although UNHCR-recognized refugees and asylum seekers were technically in violation of immigration laws, the Government generally did not prosecute them.

According to UNHCR, Nepal has restricted Bhutanese refugees to seven camps in the Jhapa and Morang districts in the east. Camp rules required Bhutanese refugees to obtain prior permission and passes if leaving the camp for more than 24 hours and generally to return within a week. Refugees could, however, obtain renewable six month passes for educational purposes. Authorities generally granted requests for passes but temporarily suspended ration cards if refugees were absent without permission for an extended period.

To obtain documents for international travel, Bhutanese refugees had to apply to camp officials, supplying an invitation letter and bank balance. Minors and women under 35 also needed a letter of consent. Camp officials passed those they recommended to the Refugee Coordination Unit in Jhapa, which recommended them to the National Unit for Coordination of Refugee Affairs in the Ministry of Home Affairs. Home Affairs recommended the refugee to the Ministry of Foreign Affairs, which issued the necessary documents.

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1182. Ibid.
Camp rules restricted Bhutanese refugees from engaging in almost any income-generating activity aside from small cottage industries, such as making sanitary napkins, chalk, blankets, and jute roofing materials. Authorities tolerated some illegal work where there were shortages, such as teaching in remote schools. District authorities shut down some activities the central government permitted, such as soap making, when they competed with locals.

Approximately 20,000 Tibetans refugees, who had arrived before 1990, are living in urban areas and enjoying freedom of movement. They could live where they wished if they had refugee cards. Other Tibetan refugees had stayed at the Tibetan Refugee Transit Center in Swayambhu before continuing to India. The Nepalese government’s laissez-faire approach toward Tibetan refugees began to change and tighten in 1986. In that year Nepal and China executed a new treaty that significantly restricted the ability of Tibetans to travel through or into Nepal.

In 1989, pressure from the Chinese government and the growing number of new arrivals led Nepal to initiate a strict border-control policy. The Nepalese government made clear that it would henceforth refuse to accept or recognize new Tibetan refugees. However, the influx of refugees from Tibet to Nepal continues. The Government even allowed Tibetans who entered the country prior to 1990 to run small handicrafts in the informal sector, such as carpet weaving. Some refugees in urban areas formed informal partnerships with locals, paid bribes, or obtained Nepali citizenship through false documents so they could hold title to property. The 1992 Labor Act heavily restricted the employment of foreigners, without exception for refugees. If no Nepali was available for a skilled post after national advertising, managers could apply to the Labor Department for permission to hire foreigners. After investigation, the Labor Department could grant two year permits but for no more than five years in total. Managers had to arrange to replace the foreigners by training Nepalese and, according to the 1993 Labor Rules, lay off foreigners first in case of retrenchment. Penalties could be as high as 10,000 rupees (about $159) per instance and 100 rupees (about $1.59) per day. Nepal’s labor legislation or social

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1183 Labour Act 1992 s 4A.
1184 Labour Act 1992 s 4A.
security did not protect refugees and they often had to pay bribes or use false documents. Refugees could not legally operate businesses, own property, open bank accounts, or obtain drivers' licenses.\textsuperscript{1185}

Unemployed and mostly unable to speak the language, Tibetan refugees are seen as a burden in such a small, resource scarce country. For a Country that was due to receive $14.8 million from its neighbor China in aid in 2008, that is a significant contribution.\textsuperscript{1186} It is interesting to note here that China considers Tibetan refugees in Nepal as illegal immigrants.\textsuperscript{1187} Nepal is contributing to some extent in protecting refugees even if it is relying on foreign aid.

Under the 1990 “Gentlemen’s Agreement”, thousands of Tibetans have left Tibet seeking asylum abroad, and Kathmandu had routinely handed them over to the United Nations High Commission for Refugees (UNHCR) who would then be relocated mainly to India.\textsuperscript{1188} Between 1996 and 2006, Nepal endured a bloody civil war between government forces and Maoist rebels. During the decade-long conflict, many countries (including Australia) listed Nepal as an unsafe tourist destination. Notwithstanding this, thousands of Tibetan refugees entered Nepal in a desperate attempt to escape persecution in China. This highlights the awful truth that in most cases refugees that face constant persecution are better off in a war torn country provided their particular group is not specifically targeted.

Some European Counties and America criticizes its Tibetan refugee policy because despite its commitment to protect asylum seekers, in April 2003, the Government of Nepal deported 18 Tibetan refugees breaching its non-refoulement obligation.\textsuperscript{1189} Preventing Tibetan refugee from entering the territory of Nepal is considered breach

\textsuperscript{1189} Ramtanu Maitra, ‘Nepal bows to China's demands’ South Asia Times (online) 17 June 2003 < http://www.atimes.com/atimes/South_Asia/EF17DI04.html > at 10 January 2010.
of non-refoulement obligation but further is observed that it is done by Nepal because of fear of China’s retaliation.\textsuperscript{1190} It can be observed that, despite its limited resources, in some cases of breach of international protection and deprivation of some rights to refugees, Nepal has been attempting to protect refugees’.

### 8.4 The Approach of Bangladesh

Bangladesh has a long history of hosting Rohingya refugees from the Northern Rakhine State of Myanmar. The Rohingya are natives of Arakan (also known as ‘Rakhine’), in the Western Province of Burma, where their existence can be traced back many centuries. The Rohingya are an ethnic and religious minority group that has been subjected to particularly severe and systematic human rights violations under the current Burmese military regime. As a result, significant numbers of Rohingyas have been living in deplorable conditions within neighbouring countries for decades, as both documented and undocumented refugees.

Bangladesh is the first country of asylum for most Rohingya refugees. There are approximately 28,000 Rohingyas from Burma living as recognized refugees in camps in southern Bangladesh, dependent on the UN and the international community.\textsuperscript{1191} There have been two major exoduses of Rohingyas from Burma to Bangladesh. The first occurred in 1978 and the second in 1991-1992. Around 250,000 Rohingya crossed into the Chittagong area of Bangladesh during each exodus.\textsuperscript{1192} Although many were repatriated involuntarily to Burma, some later returned to Bangladesh, along with new groups fleeing persecution and harsh taxation. Those living in Bangladesh contend with severe poverty and strained relations with the local community. Rohingyas continue to flee from Burma.

Although the living conditions in the remaining refugee camps in Bangladesh have improved marginally over the past two years, living standards are still primitive and

\textsuperscript{1190} Hathaway, The Rights of Refugee under International Law, above n 102, 360.
\textsuperscript{1192} Ibid.
options for resettlement are slim.\textsuperscript{1193} Thousands more Rohingya desperately try to survive along the Bangladesh coastline and border with Burma. The Bangladeshi authorities refuse to register the Rohingyas as refugees if they are outside of the camps, leaving them without protection and without access to basic services. The government considers them illegal migrants. An estimated $100,000 \textendash 200,000$ Rohingya refugees are living outside the camps.\textsuperscript{1194} Recently, Bangladesh government rejected a UN proposal to grant refugee status to them.\textsuperscript{1195} Unable to return to their own country and with limited options in Bangladesh, the situation of the Rohingya is desperate. Between 1991 and 1992, more than 250,000 Rohingya refugees from Myanmar fled to Bangladesh; the majority have returned to Myanmar, two Rohingya camps remain collectively housing 26,000 refugees.\textsuperscript{1196} The refugees have lived in the camps for over 16 years; they do not have freedom of movement or work rights, and they have limited access to education.\textsuperscript{1197} In recent times, the Government of Bangladesh has been working with the international community in an effort to find long lasting solutions for these Rohingya refugees.\textsuperscript{1198}

Above that, there are Biharis who were stranded and became refugee in the process of Bangladesh emerging as a separate nation in early 1970s. They are Urdu-speaking people, mainly from the Indian state of Bihar, who moved to Bengal at the time of partition. During the Bangladesh war of independence they supported Pakistan, but were denied permission to emigrate.\textsuperscript{1199} As a result, they faced widespread discrimination in Bengali-speaking Bangladesh.\textsuperscript{1200}


\textsuperscript{1197} Ibid.

\textsuperscript{1198} Ibid.


\textsuperscript{1200} Ibid.
There are about 300,000 Biharis, also known as “stranded Pakistanis”, located in camps in Dhaka and across the country. But ironically, the most humiliating blow for them is that simply by admitting they live in Geneva Camp, residents are shut off from the basic rights such as going to school and university, getting a driver’s license or finding a decent job. The authorities have recommended that Bihari/Urdu speakers not living in one of the 116 settlements, and persons aged less than 55 years who live in the settlements, be deemed Bangladeshi; this is yet to be approved by the Ministry of Law but nevertheless represents a positive evolution.

Even though in May 2008 High Court of Bangladesh recognized them as citizen ending legally their nearly for decades statelessness and socio-economic exclusion, these are still facing difficulties in accessing civil benefits, including obtaining passports, despite holding valid cards.

Refugees in Bangladesh live with rudimentary shelter, poor water and sanitation systems, and inadequate education and health facilities. Sexual and gender-based violence are endemic throughout the refugee population. Refugees outside the camps also live in impoverished Bangladeshi communities. Due to these prevailing situations, refugees are trapped by traffickers for secondary movement leading to developed countries, where there hope to get better livelihood opportunities. Therefore, Bangladesh, Pakistan and international communities shall make comprehensive programs to support the integration of both the Bihari and Rohingya communities into Bangladeshi society, and assist Biharis to reunite with family members in Pakistan and India, if they wish so.

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1205 ExCom, UNHCR, NGO Statement on Asia and the Pacific (Standing Committee, 44th Meeting, 3-5 2009).
8.5 The Approach of India

Article 51 (1) of the Constitution of India provides that, ‘the State shall endeavour to foster respect for international law and treaty obligations in the dealings of organized people with one another’.

In India, the UNHCR protects and supports approximately 11,000 urban refugees, the majority of whom are from Afghanistan and Myanmar. The UNHCR actively pursues sustainable long term solutions for these refugees, with resettlement its main focus.

The UNHCR has achieved local integration via naturalization for Hindu and Sikh refugees from Afghanistan. The UNHCR encourages refugees to become self-sufficient to improve their coping abilities and to decrease their reliance on external assistance.

The UNHCR runs a Women’s Protection Clinic in West Delhi which offers a safe and confidential place for refugee women requiring counselling for sexual abuse, domestic violence and gender violence.

Although India is not a signatory to the Refugee Convention or the 1967 Protocol, a UNHCR report states that India has been ‘continuously broadening the humanitarian space for people of concern to UNHCR with solutions-oriented arrangements’. The UNHCR is working to ‘formalise’ these arrangements and promote the conclusion of a country agreement.

There are some landmark decisions by the Supreme Court of India with regard to refugee protection in a country where there is no specific legislation relating to

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1207 Ibid.
1208 Ibid.
1209 Ibid.
1210 Ibid.
1211 Ibid.
1212 Ibid.
refugees.\footnote{Vegrabhadran Vijaykuiar, ‘Judicial Response to Refugee Protection in India’ (2000) 1 International Journal of Refugee Law 235, 235-6.} Chakma case\footnote{State of Arunachal Pradesh v. Khudhiram Chakma AIR 1994 SC 161.} illustrates the refugee rights situation in India. In this case, a large number of Chakmas were displaced from former East Pakistan (Now Bangladesh) in 1964 and took shelter in the Indian Provinces of Assam and Tripura. Subsequently at the request of the State of Assam, the Government of India resettled in Arunachal Pradesh and also sanctioned ‘rehabilitation assistance’ at the rate of Indian currency rupees 4,200 per family. Initially, there were 4,012 Chakmas which reached to 65,000 by 1992. One local raja donated land which they developed and started getting good returns from that land. The issue before Supreme Court of India was whether the State can direct the refugees to vacate the present land and move to other allocated land within stipulated time. Supreme Court of India which held that while foreigners are entitled to fundamental rights under the Constitution including Article 21 (right to life and liberty), however, it does not include right to reside and resettle in India as provided under Article 19(1)(d) and (e) which are granted to only citizens. In case of compensation, the court in light of fact of case held that the land was acquired by the Chakmas against the provision of existing laws, this was not a fit case for awarding compensation.

However, during the period of case at Supreme Court, state’s student union threatened to all foreigners to quit the state by stipulated time otherwise be responsible for the consequences. This threat was effective as they started economic blockade on refugee camps which came to notice of National Human Rights Commission (NHRC) established under the Protection of Human Rights Act 1993. NHRC issued appropriate directives to concern parties and also filed an application to Supreme Court against state of Arunachal Pradesh. The Supreme Court, in National Human Rights Commission v State of Arunachal Pradesh\footnote{(1996) 1 SCC 742.} held that the clear and present danger to the lives and personal liberties of Chakmas makes them entitle to protection of Article 21 of the Constitution. It also issued the writ of mandamus directing the state of Arunachal Pradesh to ensure each and every Chakma’s life and personal liberties are protected. The Court had observed that ‘the Chakmas have been residing in Arunachal Pradesh for more than three decades,
having developed close social, religious and economic ties. To uproot them at this stage would be both impracticable and inhuman.

In another case\textsuperscript{1216}, the Supreme Court stayed the deportation order issued against a Burmese refugee (Myanmar) and allowed time to enable the refugee to seek ‘refugee status’ from the UNHCR office in New Delhi.

There are some landmark decisions also delivered by the Supreme Court of India in an attempt to bridge the gap between international law and municipal law. In \textsuperscript{1217}Gramophone, the Supreme Court observed that ‘there can be no question that nations must march with the international community and the municipal law must respect rules of international law just as nations respect international Conventions. The comity of nations requires that rules of international law may be accommodated in the municipal law even without express legislative sanction provided they do not run into conflict with the Acts of the Parliament. In another case\textsuperscript{1218}, the Supreme Court declared that the customary principle of international law, if there is nothing against it in the domestic sphere, would be part of the domestic law of the land.

In a regional (state) court case\textsuperscript{1219}, the High Court of Gujarat held that the principle of non-refoulement of Article 33 of Refugee Convention is encompassed in Article 21 (right to life and liberty) of the Indian Constitution. It decided, therefore, that the two refugees from Iraq could not be sent back to that country as long as they had fear there for their life and security.


\textsuperscript{1218} People’s Union for Civil Liberties v Union of India (1997) 2 SCC 301.

At the end of 2005, India was hosting 139,283 refugees mostly from China, Sri Lanka, Afghanistan, Mynmar and Somalia. Based on the above facts, it is clear that India is also contributing to protect refugee without being a part to the Refugee Convention.

8.6 The Approach of Pakistan

Over 25 per cent of present day refugees enjoy asylum in Pakistan, most of them having been there for more than 25 years. It is not a signatory to the Refugee Convention or the 1967 Protocol, therefore the legal status of refugees in Pakistan is not obvious, even though the Afghan refugees were considered to be refugees on a prima facie basis during the first two decades of their exile in Pakistan. A view of prima facie recognition means that collective recognition results in the same entitlement as the status of refugees, which may only be terminated when circumstances justify its cessation, cancellation or revocation. However, a UNHCR report states that Pakistan has ‘generally respected the principles of international protection’. According to this report, between March 2002 and November 2007, almost 3.2 million Afghans repatriated with the help of the UNHCR. UNHCR records indicate that approximately 2.1 million Afghans remain in Pakistan. The UNHCR is continuing to work closely with the Pakistan authorities to seek adequate solutions for these people. Although voluntary repatriation is the UNHCR’s ‘preferred’ solution, its application is hindered by the limited absorption capacity of Afghanistan.

Afghan refugees in Pakistan are not a homogeneous group. They fled to Pakistan in several waves starting with the Soviet invasion of their country in 1979. They came from different parts of Afghanistan and have various ethnic backgrounds. Conditions

1222 Ibid.
1223 Ibid 256; See also UNHCR’s ‘Guidelines on International Protection: Cessation of Refugees Status under Article 1C(5) of the 1951 Convention relating to the Status of Refugees
for Afghan refugees in Pakistan differ greatly. Some live in tents, others in mud house settlements. In urban areas, few Afghan refugees are fully integrated and well-off but the majority of urban refugees are in slum areas of Pakistan’s major cities, barely surviving on casual labour. Those in the camps established after the 11 September attacks receive food assistance through the World Food Programme while all the camps receive medical and education support.\textsuperscript{1225}

Pakistan’s tenuous political and security situation remains. Uncertainty and limited entry into some regions of the country have hindered the UNHCR’s efforts to help refugees.\textsuperscript{1226}

In recent times, the pace of repatriation has increased due to the adoption of an improved return package and new return procedures connected to the registration of Afghans. A Tripartite Agreement between Pakistan, Afghanistan and the UNHCR governs the voluntary repatriation of Afghan refugees from Pakistan. More than 2.15 million Afghan citizens are registered in Pakistan.\textsuperscript{1227} Those who are over five years of age have been granted, by the Pakistani government, the right to live in Pakistan until the end of 2009.\textsuperscript{1228}

The governments involved and the UNHCR are continuing their efforts to find durable solutions for these people. So also Pakistan, a non signatory, provides considerable support to refugees.

8.7 The Approach of Malaysia

Malaysia is not party to the 1951 Refugee Convention or its Protocol. There is currently no legislative or administrative framework for dealing with refugees. This challenging protection environment is situated within a migration context Malaysia

\textsuperscript{1228}Ibid.
is host to 90,000 refugees and asylum seekers. By law, refugees are not distinguished from undocumented migrants therefore, they are therefore vulnerable group. Malaysia does not have well reputation for treatment offered to the refugees and asylum seekers because without proper authorization, new arrivals face fines, jail, caning and eventual deportation, even they have sought asylum. While Malaysia permits the UNHCR to conduct refugee status determination within its territory and sometimes complies with UNHCR requests, it does not consider itself in any way bound to do so. As a result, there have been many documented cases in which it has engaged in refoulement, sending asylum seekers back into danger. In addition, there are other serious human rights violation by bureaucrats and government officials.

However, many now choose to try to reach Malaysia by sea rather than seeking refuge in Bangladesh. There are more than 15,000 Rohingya refugees registered in Malaysia, many of whom have been there for nearly 20 years. As Malaysia does not recognize refugees seeking protection in its country, Rohingyas are targeted by Malaysian authorities for detention and deportation, regardless of whether they hold UNHCR registration cards. Malaysian authorities routinely hand over Rohingya deportees to human traffickers at the Thai-Malaysian border, who then demand payment from them for their release. This vicious cycle of detention, deportation, exploitation and re-entry has been experienced by the majority of Rohingya refugees in Malaysia.

Despite the incredible engagement of UNHCR with the plight of the Rohingya in Bangladesh and Burma since 1978, the UNHCR Regional Office in Kuala Lumpur has regrettably taken a far less attentive approach to Rohingya refugees in Malaysia. The Rohingya comprise over a third of the 47,600 registered refugees in Malaysia. A total of 6,000 refugees were resettled from Malaysia to safe third

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1231 Ibid.
1232 ExCom, UNHCR, NGO Statement on Asia and the Pacific (Standing Committee, 44th Meeting, 3-5 March 2009).
countries over the last year alone. However, as at end of 2008, a total of only 45 Rohingya refugees had been referred for resettlement from Malaysia since 2007. UNHCR has sidelined Rohingya refugees for a decade, during futile consultations with the Malaysian Government, seeking a separate solution. Throughout this process, the Rohingya have been excluded from consideration for resettlement, despite this being an option that remains available to other Burmese refugees within Malaysia. UNHCR Malaysia has not registered new Rohingya as refugees, except for the most vulnerable, since December 2005.

In addition to Rohingya, there are thousands of Tamil, Afghani, Iraqi and Somali refugees who are living there in constant fear of arrest by the highly feared People’s Volunteer Corps (RELA), a paramilitary group which has the power to apprehend refugees and undocumented migrant workers and have them jailed or deported. In many cases, even if refugee have identity card provided by UNHCR, they are not provided basic entitlements. Refugees are not allowed to work under Malaysian law. Although the government assures international community to cooperate with the UNHCR in addressing refugee issues on humanitarian grounds, in reality, Malaysian authorities often do not differentiate between refugees and economic migrants.

According to Amnesty International: ‘Malaysia is a dangerous place for refugees who are often abused, arrested and treated like criminals, particularly women and children are often at risk of arrest, prosecution, detention and deportation.’

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1234 Ibid.
1235 Ibid.
8.8 The Approach of Indonesia

Indonesia is a host, receiver and the transit country for asylum seekers and refugees. At the time of a downturn in their economy, when the currency was losing its value, and political instability accompanied unemployment and historical changes in society, Indonesia saw an unprecedented influx of thousands of asylum seekers from Iraq, Afghanistan, Palestine, and Iran. This undoubtedly added further to unease in Indonesian society.

The protection situation in Indonesia cannot be characterized as affording effective protection. Indonesia is not signatory to the 1951 Convention relating to the Status of Refugees nor to the 1967 Protocol; neither does it have any legislative framework for the protection of refugees. The country thus lacks a legal foundation for international protection of refugees based on which the minimum requirements could be reliably guaranteed.

Asylum seekers and refugees in Indonesia do not have lawful residence in the country, and are tolerated by the authorities, thus risking arbitrary detention by local law enforcement agencies, and even refoulement under the Immigration Law. Despite UNHCR’s intervention, legal regularisation of the status of asylum seekers and refugees with the authorities had so far been unsuccessful. There is no lawful access for these persons to the labour market and thus they are not able to work legally, which obviates and adequate and dignified means of existence. There is no possibility of exercising any civil, economic, social or cultural rights. Durable solutions are not guaranteed either, and there are considerable numbers of UNHCR recognized refugees who are rejected for resettlement, and who remain without any prospects of a durable solution. Furthermore, there are no options for family reunification, nor any systematic means, established by the State, of identifying

specific protection needs of refugees, including those with special vulnerabilities, nor of addressing them.  

Indonesia is terribly when it comes degraded treatment to asylum seekers. One such incidence is enough to prove is that - it held more than 100 Sri Lankan based asylum seekers in a tiny boat near Merak Port for more than seven months since 11 October 2009 before moving them to the Tanjung Pinag detention centre where the victims suffered from malnutrition, skin conditions etc.  

The presence of UNHCR in a country cannot be equated with the provision of effective protection. International protection is afforded by States and not by an international organization. The protection activities to be carried out by NHCR in exercising its mandate as elaborated in Art. 8 of its Statute, which are primarily promotional in nature, reflect that UNHCR does not itself afford protection. It may also be added that UNHCR in Indonesia has a limited presence, and does not have field offices outside the capital city, Jakarta, in a country that consists of many thousands of islands.  

However, Indonesia played leadership role in Rohingya refugee crisis when a flood of thousands of Rohingyas came to its shores. “Compared to other regional governments, the Indonesians have responded very well, especially since they have engaged international organizations.  

The process of status determination and the negotiations between Myanmar and Indonesia could take a long time. Meanwhile, the Rohingyas were greeted generously by the local Acehnese, many of whom live in abject poverty themselves but can relate to the Rohingyas’ situation. But the generosity of the Acehnese and the local  

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1239 Ibid.  
government is nowhere near enough. Several of the refugees are also suffering from serious health problems, like tuberculosis, but the camp lacks qualified doctors and money for health care.

Ms. Henderson said:

The local community and the government do not have the funds to support a refugee camp of 198 men. They barely, and rarely, have the funds to take care of themselves.\(^{1243}\)

If authorised by UNHCR, its Indonesian implementing partner, Church World Service Indonesia (CWS) can presently pay a monthly living allowance to asylum seekers identified as having specific needs, such as children. The asylum seekers are left to look after themselves for the most part, though UNHCR’s implementing partner can provide assistance in life threatening or similar emergency situations.\(^{1244}\) However, other Asylum seekers in Indonesia usually do not qualify for assistance from IOM. Asylum seekers who do not receive assistance from UNHCR or IOM can find themselves in quite straitened circumstances unless they have brought a lot of money with them, receive money from family overseas or manage to work illegally,\(^{1245}\) A Somali refugee called Mustafa, who waited three years for UNHCR recognition, was forced to live in the streets and sleep in mosques during that time.\(^{1246}\)

A political factor is also a reason for its fault play as there was some level of unhappiness with the Australian government policies regarding East Timor, which made Indonesian authorities reluctant to control the so-called illegal migration. Well organized international smuggling rings to south-east Asia has well established connections at many levels of Indonesian society who on the exchange of some


\(^{1245}\) Ibid.

\(^{1246}\) Ibid.
thousand dollars turn a blind eye favouring the people smugglers. No wonder then, that criminal people smugglers could competitively purchase the services of poor local fishermen to navigate their often unseaworthy boats towards Australia.\textsuperscript{1247}

Recently, the Australian Government’s suspension of the processing of all new applications for protection by people from Sri Lanka and Afghanistan is likely to put more pressure on Indonesia.\textsuperscript{1248}

\textbf{8.9 The Approach of Thailand}

Thailand has not ratified the 1951 Convention, nor has it created domestic legislation that would provide the framework for the determination of refugee status and the corresponding body of rights that accrue to bona fide refugees. Thailand has provided a shelter/asylum for massive numbers of asylum-seekers particularly since the 1970s. There was temporarily a status determination procedure set up under the Comprehensive Plan of Action and although for the Burmese, there has been a system of Provincial Admission Boards to determine their status, albeit in an ad hoc manner.\textsuperscript{1249} Things started to change and Thailand also showed their hostile treatment to (Rohingyas) asylum seekers as the Thai military towed and abandoned many boats at sea before halting so-called push-backs under extensive criticism by international news medias.\textsuperscript{1250} In 2007, UNHCR was stopped by the Thai government to conduct individual status determination interviews in Bangkok as it once did on a limited basis which resulted urban asylum-seekers extremely vulnerable to arrest and deportation and violations of their economic, social and cultural rights.\textsuperscript{1251}

\begin{flushleft}
\textsuperscript{1249} Vinit Munarbhorn, ‘Refugee Law and Practice in the Asia and Pacific Region: Thailand as a Case Study’ (Research Paper, Thailand: UNHCR, March 2004)
\textsuperscript{1250} ExCom UNHCR, NGO Statement on Asia and the Pacific (Standing Committee, 44th Meeting, 3-5 March 2009).
\textsuperscript{1251} UNHCR’s Standing Committee, NGO Statement on the Note on International Protection Agenda Item 3 (i) 39th Meeting, 25-27 June 2007.
\end{flushleft}
Although the government permitted the establishment of rudimentary camps along its border of Burma and Laos, very few are able to access the camps. In addition, such camps exclude certain minority groups altogether, and lack a fair and fully functioning admissions board to screen and admit newly arriving asylum seekers who qualify. An estimated 145,000 are in camp, there are over two million people in Thailand who were forcefully displaced from Burma. Though Thai military had denied accusations of pushing the refugees out to sea, but the Prime Minister of Thailand said in February that some boats had been towed out to sea and that he intended to investigate. 1252 About 1,200 men are known to have been pushed out to sea, more than 300 of whom drowned, according to the Arakan Project, a nongovernmental human rights group. 1253

In addition to Burmese, there are many refugees from Laos also. An estimated 4,500 ethnic Hmong asylum-seekers have been forced to return to Laos without having the opportunity to have their asylum claims processed. 1254 The Lao Hmong refugees also receiving same ill treatment as the Rohingyas by the Government of Thailand and still has detained more than 150 asylum seekers in detention centre. 1255

In recent days, Thailand and Laos have stated that the rights of refugees to effect their resettlement will be granted from Laos and that UNHCR will have unfettered access to assess the protection needs of the other returnees. 1256 In addition, it is providing a mechanism to register refugee children born in camps. 1257 However, Thailand’s action is undermining its international reputation as a generous host country because they run counter to its efforts to accommodate other refugees who have fled from Burma. 1258

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1253 Ibid.
1254 ExCom UNHCR, NGO Statement on Asia and the Pacific (Standing Committee, 47th Meeting, 2-4 March 2010).
1255 Ibid. ExCom UNHCR, NGO Statement on Asia and the Pacific (Standing Committee, 44th Meeting, 3-5 March 2009).
1256 ExCom UNHCR, NGO Statement on Asia and the Pacific (Standing Committee, 47th Meeting, 2-4 March 2010).
1257 Ibid.
1258 Ibid.
The 1997 Constitution Article 4 of the Constitution proclaims human dignity, which is synonymous with human rights and should apply to all persons irrespective of their origins, as one of the key principles of the Constitution. Part VIII provides the Courts system equally applicable to all persons irrespective of origins. Thus a person who seeks refuge in Thailand and who is harmed along the way by a criminal act may seek redress under these laws and is accorded due process of law, although the quality of the Courts varies in practice. Thai Courts have followed the traditional approach of regarding international law in the form of treaties as not binding locally unless Thailand is a party thereto and unless there is national law to transform them (into national law) so as to be applicable in the Courts; this follows the “dualist” approach on the relationship between municipal law and international law. There is a national Immigration Act which dates from 1979 which provides that those persons who enter without the relevant papers such as passports and visas are classified as illegal immigrants, and they are , in principle, subject to deportation. However under Section 17, with the consent of the Cabinet, the Minister of Interior has the discretion to allow people to enter the country.

There is a Deportation Act 1946, which provides if necessary in the interests of public peace and order and morals, the Minister has power to order the deportation of aliens temporarily as found proper and such person should leave the country within 15 days from the notice of the deportation.

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1260 Constitution of the Kingdom of Thailand 1997.
1263 Immigration Act B.E. 2522 (1979) s 17.
This means if this deportation law is applied too strictly, it would have impact on international refugee law, especially the principle of non-refoulement. This serious gap in refugee protection must come to an end. No individual who is at risk of serious human rights violations should be forcibly returned to that country. Thai authorities should immediately halt any deportations to people who are seeking asylum in Thailand and whose refugee status has not been determined. Those who are found to be refugees under international law must be provided with protection inside Thailand or allowed to resettle in third countries.

The continued use of detention of asylum-seekers including detaining asylum-seekers in penal institutions, specialised detention centres, restricted movement arrangements as well as in closed camp settings directly contradict Thailand’s obligation to International laws.

8.10 Conclusion

In analyzing the above countries’ situations, some recent developments in refugee treatment are signaling an optimistic future but overall the present scenario is not durable or plausible.

The poor human rights situation of countries in the South Asian region has been well documented. Furthermore, South Asia is known for having a very low per capita income. Despite this, developing countries in the South Asian region (none of whom are parties to the Refugee Convention or the 1967 Protocol) have shown their humanitarian gesture to protect refugees whether voluntarily or under compulsion. Perhaps they may have been compelled to allow the refugees or IDPs to remain in these countries because they have no other options to send them away.

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1266 UNHCR’s Standing Committee, NGO Statement on the Note on International Protection Agenda Item 3 (i) 39th Meeting, 25-27 June 2007.
A comparison of the contribution made by non-signatory states in accepting and protecting refugees and the Australia’s statistics speaks volumes: it clearly flags out Australia’s political unwillingness to do so despite having enough resources to accommodate more refugees. Not only that, it also shows the inequality on burden/responsibility sharing to host refugees in relation to economic capacity between developed and developing nations for example where Pakistan hosts 733 refugees per US dollar of gross domestic product per capita (at purchasing power parity), the first developed country on the list is Germany with 16 refugees for each dollar of per-capita GDP.\footnote{Peter Mares, ‘The fifth ripple: Australia’s place in the global refugee crisis’, Inside Story (Online), 12 November 2009 <http://inside.org.au/the-fifth-ripple-australias-role-in-the-global-refugee-crisis/> at 1 July 2010.}

It is also interesting to note that, in this globalization era when every nation is trying for open border (for free movement of capital and technology), they are barring the main resource (labour / human resource) and trying their best to control the movement which is depriving them from their right of freedom of movement.\footnote{Global Commission on International Migration, Governing International Migration in City of the South (September 2005) <www.gcim.org/attachments/GMP%20NO%2038.pdf> at 20 July 2010; Elsa Ramos, Director, Equality and Youth Department, International Confederation of Free Trade Unions (ICFTU), Migration: Industrialised Countries are the main Winners’ (Undated) <library.fes.de/pdf-files/gurn/00068.pdf> at 20 July 2010.}

On top of that, sending refugees to a third country in the absence of any agreement in the name of “safe third country” is no more than a breach of Article 33 of the Refugee Convention. As indicated in the decision of NAGV\footnote{2005} 222 CLR 161, Australia will not be relieved from its obligations under the Refugee Convention merely because a safe third country option is available.

It is submitted that the major root of the difference between countries’ ways of handling, managing or ‘governing’ the issue of refugees lies in their status of ‘receiving’ or ‘transiting’ refugees. As discussed above, the poorer SEA coutries are forced to take a huge burden in terms of number of refugees and IDPs within the region. These countries truly cannot cope economically with this burden compared with developed countries such as Australia. Australia, therefore, should consider this
imbalance before rigidly implementing STC provisions in the name of border protection. In light of this imbalance, it is unjustified for the Australian Government to claim that STC provisions are necessary to stop the ‘flood’ of refugees or to prevent them from forum shopping.
Chapter Nine

Proposed Amendments to Australia’s “Safe Third Country” Policy

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9.3 Violation of International Obligations
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9.1 Introduction

The foregoing Chapters have identified deficiencies in Australia’s application of the “safe third country” principle. This Chapter recommends ways in which the existing “safe third country” policies could be amended in a manner which preserves the principle of non-refoulement and Australia’s international obligations to refugees and asylum seekers, while still allowing Australia to refuse unwarranted claims for refugee status.

This Chapter also addresses the prevention of asylum forum shopping. It looks at the role of readmission agreements in the effective return of asylum seekers, and it emphasizes the importance of providing asylum seekers with access to fair and efficient refugee determination procedures.

9.2 Have “Safe Third Country” Policies Achieved their Goals?

The “safe third country” notion has been incorporated into the refugee law of most Western States. It has become a ‘powerful mechanism’ for returning asylum seekers to other countries. 1272

There exists abundant debate about whether the objectives of the practice, that is ‘to instill a measure of order in the movements of asylum seekers … while also ensuring that each asylum seeker is protected against refoulement and can exercise his/her right to seek and enjoy asylum’, have in fact been realized. 1273 According to the UNHCR, it is doubtful that these objectives have been achieved. On that point, the UNHCR has stated the following:

(1) it is hard to predict where the chain of return through application of the “safe third country” notion can possibly stop …

1273 Ibid.
only a fraction of those asylum seekers that are returned … actually apply for asylum in “safe third countries” … It is probable - though statistics on this point are, by necessity, lacking - that many of those thus returned make further attempts at crossing the border westwards, but do not present themselves to the authorities when they succeed. This situation risks creating a “hidden” population of asylum seekers falling outside, both the migration control and the protection mechanisms that States have painstakingly developed.\textsuperscript{1274}

\section*{9.3 Violation of International Obligations}

Lack of international monitoring mechanisms and penalty provisions in place to regulate and examine the implementation of a State’s obligations under international refugee law is also one of the reasons for State’s arbitrary practice of defining refugee that suits them.

Apart from the threat this poses to the asylum seeker, the stakes for States are high: they risk a violation of the principle of non-refoulement codified in Article 33 of the Refugee Convention, since the asylum seeker they are returning to a “second” or “third” host country, without ensuring that access can be obtained to the territory and to a fair refugee determination procedure, may well be sent onwards immediately to another country or even to the country of origin.

The principle of non-refoulement lies at the heart of the international humanitarian refugee protection regime. It is of fundamental character\textsuperscript{1275} and fundamental importance\textsuperscript{1276}. Furthermore, it is a ‘cardinal’ principle of refugee protection and as such must be strictly observed at all times.\textsuperscript{1277} The fact that the “safe third country”

\textsuperscript{1274} Ibid.
\textsuperscript{1275} ExCom, ‘Problems of Extradition Affecting Refugees’ Executive Committee Conclusions No 17 (XXXI) 1980, para (b).
\textsuperscript{1276} ExCom ‘General Conclusion on International Protection’ Executive Committee Conclusions No 79 (XLVII) 1996, para (j).
\textsuperscript{1277} ExCom ‘General Conclusion on International Protection’ Executive Committee Conclusions No 65 (XLII) 1991, para (c).
concept threatens the principle of non-refoulement should be of concern to the whole of the international community.

9.4 Prevention of “Asylum-Shopping”

The “safe third country” approach was initially introduced to prevent the so-called phenomenon of “asylum-shopping” as the asylum seeker would no longer be able to choose the country in which he or she wished to lodge an application and, through the use of data exchange systems, only one country would examine a claim.1278 On that point, EXcom Conclusion No 15 (XXX) states that ‘[t]he intentions of the asylum-seeker as regards the country in which he wishes to request asylum should as far as possible be taken into account’ and that ‘asylum should not be refused solely on the ground that it could be sought from another State’.1279

By introducing restrictive measures such as “safe third country” measures, State practice appears to be running contrary to the declared intentions in the conclusions reached by the inter-governmental Executive Committee of the UNHCR Program.

9.5 Readmission Agreements

It is vital that an asylum seeker / refugee have some right of entry into any “safe third country”.1280 In the absence of readmission agreements with other States, there is the danger that direct or indirect refoulement could occur, or at the very minimum, that situations of refugees in “orbit” could arise, if Australia returned asylum-seekers and/or refugees to purported “safe third countries”.1281 Therefore, unless Australia enters readmission agreements with other States, the notion of a safe third country codified in s 36(3) of the Migration Act ‘may be impossible to fully implement’.1282

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1278 See, eg, Matthew J Gibney and Randall Hansen, Immigration and Asylum: From 1900 to the Present (ABC-CLIO, 2005) 549.
1279 ExCom, ‘Refugees Without an Asylum Country’ Executive Committee Conclusions No 15 (XXX) 1979, paras (h)(iii), (h)(iv).
1281 Ibid.
1282 Ibid.
The UNHCR has repeatedly urged States to enter readmission agreements which not only cover the readmission of third country nationals and stateless persons, but also contain criteria for the allocation of responsibility for receiving and examining asylum applications. According to the UNHCR, readmission agreements should only be explored in circumstances where the asylum seeker has substantial ties with the prospective third state. This is particularly problematic for Australia because the majority of its neighbouring countries have not acceded to the Refugee Convention and/or the 1967 Protocol. There is an inherent concern that such non-signatory States may not have the requisite procedures in place to process refugee claims and, furthermore, that they may not have sufficient legal and procedural safeguards to prevent the direct or indirect refoulement of refugees.

9.6 Access to Asylum Determination

The UNHCR has repeatedly insisted that an asylum seeker should not be sent to a third country unless the third country provides the asylum seeker with access to a fair refugee status determination (or provides effective protection without such a determination). As part of this obligation, Australia should provide the asylum seeker with the details of the appropriate authorities in the third State and provide the asylum seeker with written notification that his or her asylum application has been refused on the basis of a “safe third country” and that his or her claims have not been examined on its merits. Although not mandatory under existing international law, it is preferable that such document be written in the official script of the third State. Australia’s existing domestic laws do not provide this. Section

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1284 See UNHCR Global Consultations in Budapest, Background Paper No 3, Inter-State Agreements for the Re-admission of Third Country Nationals, Including Asylum Seekers, and for the Determination of the State Responsible for Examining the Substance of an Asylum Claim (May 2001), 4.
1285 For example, Indonesia, Malaysia, Singapore and Vietnam are not signatories to the Refugee Convention or the 1967 Protocol.
1287 Legomsky, above n 13.
1288 Ibid.
1289 Ibid.
36(3) of the Migration Act merely requires that the asylum seeker not be refouled, either directly or indirectly, by the third State.\textsuperscript{1290}

Various member States of the European Union have signed readmission agreements. Unfortunately, the readmission agreements and the model for future readmission agreements do not take into consideration the unique circumstances of asylum seekers as well as the obligation of States to provide them with full access to fair and efficient refugee determination procedures.\textsuperscript{1291} They also fail to guarantee that refugees are not exposed to refoulement.\textsuperscript{1292}

### 9.7 Recommendations

Former Minister for Immigration and Citizenship Chris Evans, on his forewords in Refugee and Humanitarian Issues: *Australia’s Response* (June 2009) said:

> Immigration is central to the nation’s identity. How we develop and manage our immigration policies reflects what we as a people and how we think of ourselves as a nation. How we welcome and support people on arrival – particularly those who have come to Australia as refugees – speaks to our humanity.\textsuperscript{1293}

But, the current practice does not depict the influence of the above statement. In order to guarantee the fair treatment to recognised refugees, Australia shall reconsider and revise its policies and practices with adequate regard to refugee convention and other international treaties that it has signed. Moreover, there is need of strong commitment from the government of the day to tell the truth, and stop manipulating public thoughts by exaggerating myths. In addition to the government, the civil societies and politicians are also required to involve in building awareness in public.

It is recommended that Australia’s existing safe third country provisions be abolished or amended to restrict refoulement to refugees who can be guaranteed “effective

\textsuperscript{1290} Migration Act ss36(4), 36(5).


\textsuperscript{1292} Ibid.

\textsuperscript{1293} DIAC, Refugee and Humanitarian Issues: *Australia’s Response* (Attorney-General’s Department, June 2009).
“protection” in a safe third country and only after their claim of being a refugee has been heard. To achieve this, the Migration Act would require amendment including the insertion of the following definitions:

1. Effective Protection

A refugee is taken to have effective protection in another country if:

a) He or she has an existing right or guarantee to enter and reside in that country;
b) He or she is able to enter that country as a matter of practical reality;
c) He or she has access to a fair and efficient refugee determination procedure or is entitled to some other permanent residency in that country;
d) He or she is entitled to travel documentation in that country and will be afforded the same rights as the citizens of that country; and
e) He or she will not be subject to refoulement to any country where he or she has a Refugee Convention fear.

2. Definition of a Safe Third Country

A country can only be considered a safe third country if it:

• fully implements the provisions of the Refugee Convention;
• has a reputation of compliance with the Refugee Convention and human right instruments; or,
• has an existing agreement whereby it accepts refugees from Australia; and
• it has the means to protect against Refugee Convention fears and provide basic needs for refugees.

If the above definition is met, then it is less likely that the refugee will be considered refouled.
The UNHCR has highlighted the need to develop strategies to address the root causes and effects of movements of refugees and other displaced persons, the strengthening of emergency preparedness and response mechanisms, the provision of effective protection and assistance, as well as the achievement of durable solutions, primarily through the preferred solution of dignified and safe voluntary repatriation. The World Conference on Human Rights, held in Vienna in 1993, urged the international community to take forceful and decisive steps with a view to ‘extending immediate humanitarian assistance to the millions of refugees and internally displaced persons’.  

In 1995, the ECRE conducted the Safe Third Country Monitoring Project. Shortly thereafter, it released a report of its findings. In that report, the ECRE documented cases in which asylum seekers, due to the practice of returning asylum applicants to other States, had been exposed to “orbit situations”, chain-deportations and even refoulement. The report concluded that States should discontinue the practice of returning asylum applicants to other States until minimum safeguards (which were outlined) are implemented into a States safe third country policy. Unfortunately, the recommendations made by the ECRE in that report have not been taken into account. Thus, it is recommended that Australia cease sending asylum seekers to so-called “safe third countries” until and unless the following minimum safeguards are adopted:

1. A refugee with family ties in Australia not be sent to another State unless the refugee so desires.
2. Prior to sending a refugee to another State, Australia should:
   (a) Take into account the intentions of the refugee as regards the country in which he or she wishes to request asylum; and

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1296 Ibid.
1297 Ibid.
1298 Ibid.
(b) Obtain the explicit written consent of the third country to admit the refugee and ensure that the following conditions are satisfied:

(i) The third country is a signatory to both the Refugee Convention and the 1967 Protocol and has a reputation for compliance with ExCom Conclusions;¹²⁹⁹

(ii) The refugee will be safe and treated with respect in the third State;

(iii) The third country provide a written guarantee that it will not refoul the refugee within the meaning of Article 33 of the Refugee Convention;

(iv) The third State will provide the refugee with full access to a fair and efficient refugee determination procedure; and

(v) The third country will treat the refugee in a manner which is consistent with internationally recognized human rights standards and principles of refugee protection.

3. If a decision has been made to send a refugee to another country, Australia should:

(a) Provide the refugee with written notification of such decision in a language he or she nominates;

(b) Provide the refugee with the right to lodge an appeal within 28 days of notification of the decision, to an independent body, against the decision to be sent to another country; and

(c) Provide the refugee with a document, in the official language of the third country, stating that the refugee’s application has been refused solely on third country grounds.

9.8 Conclusion

When we consider the international practices of nations who have adopted “safe third country” provisions, the major problem is apparent: there is no clear justification of what constitutes a “safe third country”. In other words, the definition of a “safe third country” can vary greatly between States. On one end of the

¹²⁹⁹ See also chapter 5.12.
spectrum, there are States which have incorporated a list of “safe third countries” into their domestic legislation; some States even provide asylum seekers with the right to appeal on the question of whether a certain country is actually “safe” in their particular circumstances. On the other end of the spectrum, there are States that have not incorporated the “safe third country” concept into their domestic legislation at all however have well-established practices of sending asylum seekers to other countries arbitrarily.

Australia has introduced politically motivated legislation based on unfounded border protection fears, and has done so at the cost of its international reputation. The new provisions are in breach of Australia’s Refugee Convention obligations and should be amended to reflect Australia’s true obligations under international law. If the Australian government really intends to ignore its international obligations and turn its backs on refugees, the Government should be honest about it and denounce the Refugee Convention altogether or at least withdraw from some of its articles. The current policies that have been implemented by the Australian Government are endangering the principle of non-refoulement and the refugee regime itself. It should be realised that refugees enrich and enhance the social and cultural fabric of their new communities. They become self-sufficient, contributing members of society. This fact has been widely accepted by States, humanitarian organizations and the UNHCR. Therefore the justification for applying the safe third country principle in a broad sense, that of border protection and preventing a flood of immigrants, is simply not justified.

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Chapter Ten

Concluding Observations

Currently, there are 147 countries that are signatories to the Refugee Convention or the 1967 Protocol or both. As mentioned in previous chapters, Australia is a signatory to both the Refugee Convention and the 1967 Protocol and was one of the first countries to sign them. As such, as stated before, Australia has an obligation to not return someone to their country if they satisfy the United Nations criteria of having a well founded fear of persecution. Australia has signed and ratified both these international instruments, the Refugee Convention and 1967 Protocol, and consequently has assumed certain obligations towards people who meet the definition of a refugee. The most important is the requirement that refugees not be returned, or “refouled”, to a country where they face persecution on any of the five Refugee Convention grounds.

Prof. Hathaway argues that,

“The more comprehensive model I advocate is clearly attentive to state interests — but, I must add, to the interests of all states, not just the powerful minority. More fundamentally, however, it is anchored in a recognition that most refugees today do not enjoy the rights which refugee law formally guarantees them — either because they have no access to a safe state, or the safe state to which they are able to travel is either not really safe or forces them to languish without hope of regaining any meaningful measure of autonomy in their lives. That is the reality that must end.”

1302 The instruments have been ratified by enactment of the Migration Act.
1303 The grounds are race, religion, nationality, political opinion or membership of a particular social group.
Although Australia played a key role in adopting the Refugee Convention and endorsing it in its domestic laws, unfortunately, Australia appears to be undermining its obligations and the spirit of the Refugee Convention. This results in making an already difficult process even more difficult for refugees who are usually migrating to save their lives. Firstly, a refugee must make the sometimes dangerous trip to enter Australia’s boarders. Secondly, a refugee applicant must jump through all the necessary hoops of establishing that they are a refugee according to Australian law and as discussed this process is challenging. Then finally, because of s 36(3) of the Migration Act the applicant may still be subject to refoulement to another country on the basis of the “safe third country” principle. Thus, this is a unique protection system nowhere evident to assist refugees where refugees seeking protection are granted protection under SHP (introduced in 1981 to provide resettlement in Australia for people in humanitarian need, but beyond Refugee Convention definition) is itself a barrier for international protection required for refugees to satisfy additional elements such as that those protection seeking people has family or community ties to Australia. In 2007–08, only 46 per cent of the initial applicants were successful to enjoy protection in Australia. It is important to note that this figure varies across nationalities and can also vary at different times for applicants of the same nationality depending on country circumstances.

One may ask, without ignoring Australia’s contributions, why is it continuing to be a member given the ongoing and extensive efforts to restrict the operation of the Refugee Convention.

Under Article 44 of the Refugee Convention, any contracting State may denounce or request revision of the Refugee Convention at any time. It is not inconceivable that the Australian government would be subject to international condemnation were they to denounce or request the revision of the Refugee Convention. As it stands, the apparently more politically advantageous stance is to continue to pay lip service to the Refugee Convention while at the same continuing to create loop holes to avoid compliance with its principles.

1305 DIAC, Refugee and Humanitarian Issues: Australia’s Response (Attorney-General’s Department, June 2009) 22.
1306 Ibid 30.
1307 Ibid.
Article 14 of the UDHR states that ‘everyone has the right to seek and to enjoy in other countries asylum from persecution’. Article 14 has been read down to mean that each person has a right to ‘seek’ asylum only, there is no right to asylum per se, and due to the overriding principle of State sovereignty each State has the right to refuse asylum seekers in any way it sees fit. By refusing to even consider a refugees application, is Australia breaching Article 14? The Full Federal Court and the High Court of Australia has held that Australia is not required to consider an asylum seekers application where Australia does not owe protection obligations under its migration laws. One might argue that Australia has breached Article 14 in this regard. An asylum seeker ought, in the least, be given the right to seek and have their application considered.

In NAGV, the High Court held that as a signatory to the Refugee Convention, Australia, could not simply refoul a refugee on the basis that he or she has a right to apply to another country. However, since the amendment to the Migration Act and the introduction of s 36(3), the ruling of the High Court in NAGV has been neutered because the judgment was made on the basis of the provisions of the Migration Act prior to the introduction of s 36(3). This judgment would not have any bearing in terms of binding precedent on any application made after the amendment. The Australian Government now has the right by virtue of s 36(3) to refoul a refugee if they have a safe third country destination. The important determination then becomes whether a third country is safe and what precautions should be taken.

Australia has been a ‘key regional exponent’ of the global trend by States to devise and implement sophisticated strategies which attempt to prevent asylum seekers and refugees from accessing protection in the territory in which they are seeking it. A fundamental element of this “protection elsewhere” policy attempts to remove asylum seekers and refugees to third countries where they already have obtained or

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1308 See, eg, Minister for Immigration & Multicultural Affairs v Khawar (2002) 210 CLR 1, [42].
1311 (2005) 222 CLR 161.
could seek protection.\textsuperscript{1313} Fundamental to the protection of refugees is the principle of non-refoulement, in that, nobody should be forcibly returned to a country where his or her life or freedom would be at risk. It can be observed that the commitment to refugees is declining increasingly. Western countries have introduced ways to hinder asylum seekers and refugees such as fines for airlines, visa controls and detention centers for asylum seekers. In addition to the measure to prevent people from reaching borders which are dubbed ‘non-\textit{entrée}’, the use of the “safe third country” principle is increasing.

A number of other Conventions and agreements establish non-refoulement as a rule of international customary law, such the CAT and the ICCPR, ExCom Conclusions, as well as regional agreements e.g. the Mexico Declaration and Plan of Action to Strengthen the International Protection of Refugees in Latin America.\textsuperscript{1314}

It is clear that international refugee law does not require a refugee to seek asylum in the first country whose territory he or she reaches. It is the country where he or she applies for asylum which is obliged to consider the application substantively and to ensure that the refugee is not directly or indirectly returned to face persecution.

The UNHCR has also noted, with concern, confusion in the application of the “safe third country” notion into the legislation of some States in Central, Eastern and South-eastern Europe.\textsuperscript{1315} For instance, in some countries the mere existence of a “safe third country” is alone sufficient to deny an asylum claim on the ground that it is abusive or manifestly unfounded.\textsuperscript{1316} This represents confusion between two separate components of the asylum procedure, namely, a decision on the admissibility of the claim and a decision on the substance of the claim.\textsuperscript{1317} A collapse of these two steps effectively denies the asylum seeker from presenting the

\begin{itemize}
\item \textsuperscript{1313} Ibid.
\item \textsuperscript{1314} See sections 6.5 of this thesis.
\item \textsuperscript{1316} Ibid 2.
\item \textsuperscript{1317} Ibid.
\end{itemize}
grounds on which he or she seeks protection as a refugee, a right which he/she is entitled to under the Refugee Convention.\textsuperscript{1318}

In the previous Chapters, the need to adopt the Refugee Convention, motive and intention of the drafters, obligation of the state parties etc. has been discussed at length. However, for refugees to be able to benefit from the standards of treatment provided under the Refugee Convention, or by other relevant international instruments, it is essential that they have physical access to the territory of the State where they are seeking admission as refugees, followed by access to a procedure in which the validity of their claims can be assessed. The United Nations General Assembly and ExCom have consistently affirmed that the duty of non-refoulement encompasses the obligation not to reject asylum seekers at frontiers and that all asylum seekers must be granted access to fair and effective procedures for determining their protection needs.

The principle of non-refoulement, as set out in Article 33 of the Refugee Convention, applies to all persons coming within the refugee definition of Article 1 of the Refugee Convention. Respect for the principle of non-refoulement therefore requires that asylum seekers (persons who claim to be refugees pursuant to the definition of Article 1 of the Refugee Convention) be protected against return “in any manner whatsoever” to a place where their life or freedom would be threatened until their status as refugees has been finally determined. Recognition of refugee status under international law is essentially declaratory in nature, formal recognition of a person’s refugee status does not make the person a refugee but only declares him or her to be one. The duty to observe the principle of non-refoulement therefore arises as soon as the individual concerned fulfils the criteria set out in Article 1 of the Refugee Convention, and this would necessarily occur prior to the time at which the person’s refugee status is formally determined.

The direct removal of a refugee or an asylum seeker to a country where he or she fears persecution is not the only form of refoulement. States are responsible for the application of this principle so as to do everything in their power to avoid asylum

\textsuperscript{1318} Ibid.
seekers being returned to their countries without an exhaustive examination of their claims. Indirect removal of a refugee from one county to a third country which subsequently will send the refugee onward to the place of feared persecution constitutes refoulement, for which both countries would bear joint responsibility. It is very crucial to note that once a refugee is refouled and persecuted, no matter what the refouler does to take responsibility, there will be no remedy for the refugee, or no remedy that can compensate the loss suffered.

Therefore, a reliable assessment as to the risk of chain refoulement needs to be undertaken in each individual case, prior to considering removal to a third country considered to be safe. Underlying the notion of “safe third country” is agreement on the allocation of responsibility among States for receiving and examining an asylum request. The preamble to the Refugee Convention expressly acknowledges that refugee protection is the collective responsibility of the international community: ‘the grant of asylum may place unduly heavy burdens on countries, and that a satisfactory solution of a problem of which the United Nations has recognised the international scope and nature cannot therefore be achieved without international co-operation’.

Two ExCom Conclusions address the issue of apportioning responsibilities for examining an asylum claim: ExCom Conclusion No 15 (XXX) and ExCom Conclusion No 58 (XL). 1319

These two Conclusions set out a clear distinction between these two notions. A “first country of asylum” is a country where a person has already been granted some legal status allowing him or her to remain in the territory either as an asylum seeker or as a refugee, with all the guarantees which international standards attach to such status. A country where the person could have found protection is not automatically a first country of asylum unless some legal right exists for the person to remain in that country.

Access to a substantive procedure can legitimately be denied to a person who has already found protection in a first country of asylum provided that such protection continues to be available. When it comes to the issue of return to a “safe third country” of an asylum-seeker whose claims have yet to be determined, ExCom Conclusion No 15 (XXX)\textsuperscript{1320} and ExCom Conclusion No 85 (XLIX)\textsuperscript{1321} have laid down three basic rules. The UNHCR has summarized these rules as follows:\textsuperscript{1322}

(i) the circumstance that the asylum-seeker has been in a third State where he could have sought asylum does not, in and by itself, provide sufficient grounds for the State in whose jurisdiction the claim has been submitted to refuse considering his/her asylum request in substance and return him/her instead to the third country;

(ii) the transfer from one State to another of the responsibility for considering an asylum request may only be justified in cases where the applicant has meaningful links or connections (e.g. family or cultural ties, or legal residence) with that other State; and

(iii) when effecting such a transfer there must be, in each individual case, sufficient guarantees that the person will:

\begin{itemize}
  \item be readmitted to that country;
  \item enjoy effective protection against refoulement;
  \item have the possibility to seek and enjoy asylum; and
  \item be treated in accordance with accepted international standards.
\end{itemize}

\textsuperscript{1320} ExCom, ‘Refugees Without an Asylum Country’ Executive Committee Conclusions No 15 (XXX) 1979.
\textsuperscript{1321} ExCom, ‘Conclusion on International Protection’ Executive Committee Conclusions No 85 (XLIX) 1998.
UNHCR has often pointed out that the question of whether a particular third country is “safe” for the purpose of returning an asylum seeker is not a generic question, which can be answered for all asylum seekers in any circumstances. This is why UNHCR insists that the analysis of whether the asylum seeker can be sent to a third country for determination of his or her claim must be done on an individualised basis, and has advised against the use of “safe third country lists”.

Therefore, there should be a requirement that the safe third country should consent, on a case-by-case basis, and must sign an agreement with Australia, ensuring that it will assume responsibility to protect the refugee. Again, this responsibility cannot be presumed; it must therefore be the subject of mutual agreement between the States concerned.

Without pre-existing agreement, unilateral actions by States to return asylum seekers or refugees to countries through which they have passed, without the latter country’s agreement, creates a risk of refoulement or the tragic situation of refugees in an endless “orbit” between States. Since the purpose of the “safe third country” concept is to fairly allocate State responsibility for receiving and determining asylum claims, it is argued that bilateral or multilateral arrangements should be put in place on the basis of agreed criteria for fairly apportioning such responsibilities.

It appears that almost every country including Australia who has ratified the Refugee Convention has been erecting one barrier after another in their attempt to prevent persons seeking refuge in their country, not only in the name of “border control/state sovereignty” but also in the name of “safe third country”. First, very strict requirements for a visa were introduced for nationals of countries from which the refugees normally come and thereafter airlines were sanctioned with heavy fines if they carried an undocumented asylum seeker; even officials were placed in airports abroad to conduct “pre-boarding checks” on passengers who wished to go to their country.

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1323 Ibid 4.
1324 Ibid.
Australia needs to ensure through bilateral or multilateral Agreement that in any third country, the life or freedom of the refugee must not be threatened, within the meaning of Article 33 of the Refugee Convention as well as other human rights instruments; the refugee must also not be exposed to torture or inhuman or degrading treatment in the third country.

Australia appears to be following the burden-sharing mechanisms introduced in European countries.\textsuperscript{1325} It is not clear if s 36(3) of the Migration Act provides some kind of system for “burden-sharing” or at least the beginnings of a burden-sharing arrangement. However, the “safe third country” notion and practice, based entirely, as it is, on countries’ geographical location in relation to refugee movements and travel routes, does not imply any element of equity or fair distribution of refugees. If the issue of burden-sharing were a consideration, this practice on its own does not provide any means to that end, since in reality the so called recipient countries are most likely to be the first stop for most refugees seeking protection in Australia. On the contrary, it could well be argued that it constitutes a system of “burden-adding”, since the same refugee first has to go through admissibility procedures in one or more countries until he or she, in principle, finds a country willing to examine the substance of the application. For the refugee, the psychological effect of such uncertainty and worry as to which country, if any, in the end is going to “take responsibility”, constitutes an inhumane, additional and avoidable strain. For the States concerned, the total cost is that of possibly several admissibility procedures, examinations, accommodations, detentions and airfares before that moment may be reached where the refugee’s claim is examined on its merits. In addition to being inhumane, the system is thus potentially very costly, as stated in Chapter 5.12 above, and seems clearly futile in the cases where the final decision on the merits of the case in a fair determination procedure results in the conclusion that the person is recognised as a refugee.

This thesis strongly argues that s 36 (3) of the Migration Act is contrary to Article 33 of the Refugee Convention thereby negating the spirit of the Refugee Convention. In

\textsuperscript{1325} See section 6.7 of this thesis.
order to rectify this deficiency, Australia needs to amend s 36(3) by inserting a provision requiring to have a bilateral agreement as per Appendix “A”, a draft bilateral Agreement. As indicated in earlier chapters, the following are basic requirements to be covered in the Agreement:

- there is no risk to the life of the refugee or his family members in the third country
- the refugee has no well-founded fear of persecution in the third country
- there will be respect for fundamental human rights in the third country
- there is no risk that the refugee would be subjected to torture or to cruel, inhuman or degrading treatment or punishment in the third country;
- there is no risk that the refugee would be deprived of his or her liberty in the third country without due process
- the refugee will have right of family reunion
- there is no risk that the refugee would be sent by the third country to another country in which he or she would not receive effective protection or would be at risk of being sent from there on to any other country where such protection would not be available
- the refugee has access to means for living

If the concept of the Agreement is materialized, it would meet the fundamental objections to the “safe third country” approach to refugees.

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1326 The format if Appendix “A” is based on the Canada-US Agreement which was discussed in section 6.8 of this thesis. It contains substantially different provisions that of the Canada-US Agreement.
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DRAFT BILATERAL AGREEMENT
BETWEEN
COMMONWEALTH OF AUSTRALIA
AND
THE GOVERNMENT OF THE “ABC “
FOR ACCEPTING REFUGEES
FROM COUNRTY “XYZ”

THE GOVERNMENT OF AUSTRALIA;

HAVING CONFIRMED that Australia being a party to the 1951 Convention relating to the Status of Refugees, done at Geneva, July 28, 1951 (the “Convention”), and the Protocol Relating to the Status of Refugees, done at New York, January 31, 1967 (the “Protocol”), and reaffirming its obligation to provide protection for refugees in its jurisdiction and territory in accordance with these instruments;

ACKNOWLEDGING in particular the international legal obligations under principles of non-refoulement set forth in the Article 33 of the Convention and Protocol, as well as the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, done at New York, December 10, 1984 (the “Torture Convention”) and reaffirming its obligations to promote and protect human rights and fundamental freedoms;

RECOGNIZING and respecting the obligations under its domestic laws;

PROMISING to uphold asylum as an indispensable instrument of the international protection of refugees, and resolved to strengthen the integrity of that institution and the public support on which it depends;
NOTING that refugee status claimants may arrive at Australian borders directly from the other Party, where they could have found effective protection, or Country “XYZ” where they have a well-founded fear of persecution;

CONSULTING AND OBTAINING APPROVAL, in keeping with advice from the United Nations High Commissioner for Refugees (UNHCR) and its Executive Committee, that agreements among states may enhance the international protection of refugees by promoting the orderly handling of asylum applications by the responsible party and the principle of burden-sharing;

AWARE that such sharing of responsibility must ensure in practice that persons in need of international protection are identified and that the possibility of indirect breaches of the fundamental principle of non-refoulement are avoided, and therefore determined to safeguard for each refugee status claimant eligible to pursue a refugee status claim who comes within their jurisdiction, access to a full and fair refugee status determination procedure as a means to guarantee that the protections of the Convention, the Protocol, and the Torture Convention are effectively afforded;

AND

THE GOVERNMENT OF THE “ABC”
Being a party to the 1951 Convention relating to the Status of Refugees, done at Geneva, July 28, 1951 (the “Convention”), and the Protocol Relating to the Status of Refugees, done at New York, January 31, 1967 (the “Protocol”), and reaffirming its obligation to provide protection for refugees on its jurisdiction and territory in accordance with these instruments;

OR

Although not a party to the Convention relating to the Status of Refugees, done at Geneva, July 28, 1951 (the “Convention”), and the Protocol Relating to the Status of Refugees, done at New York, January 31, 1967 (the “Protocol”), it accepts the obligation under this agreement (hereinafter referred as “the parties”) HAVE AGREED as follows:
ARTICLE 1

1. In this Agreement,
   a. “Country where the refugee status is determined” means that country, being Australia, in which the refugee was physically present and found to be a refugee by Australian authorities.
   b. “Country ABC” means the country which accepts the refugees sent by Australia under this agreement.
   c. “Country XYZ” means the Country where the refugees cannot be sent by the parties.
   d. “Family Member” means the spouse, children, parents, legal guardians, siblings, grandparents, grandchildren, aunts, uncles, nieces, and nephews.

2. Each Party shall apply this Agreement in respect of family members consistent with its domestic laws.

ARTICLE 2

1. This Agreement applies to refugees from Country “XYZ” who have already been determined by the Australian authorities as refugees.

ARTICLE 3

1. The Parties shall not remove refugees to the Country ‘XYZ’ pursuant to any other safe third country agreement or regulatory designation.

2. The parties agree not to enter into agreement with any other countries with regards to the refugees from Country “XYZ”.

ARTICLE 4

1. The Parties agree to be monitored by the UNHCR in terms of compliance issues contained therein.
ARTICLE 5

The Parties agree to:

a. Exchange such information as may be necessary for the effective implementation of this Agreement subject to domestic laws and regulations;

b. No information shall be disclosed by the Party of the receiving country except in accordance with its domestic laws and regulations.

c. The Parties shall endeavor to ensure that information is not exchanged or disclosed in such a way as to place refugees or their families at risk in their countries of origin.

d. Exchange on a regular basis information on the laws, regulations and practices relating to their respective refugee status determination system.

ARTICLE 6

1. Australia agrees to:

   • provide necessary information to Country “ABC” in relation to the refugees’.
   • allow the refugees back to Australia in the event that Country “ABC” is likely to breach its obligation under this Agreement.
   • be monitored by mutually agreed international humanitarian organization, such as, UNHCR
   • remain a signatory to the Convention and shall not enter into any kind of agreement with any other country which is not a signatory to, and have not ratified, the Convention in relation to the refugees from Country “XYZ”.

2. Country “ABC” agrees to:

   • be monitored by Australian authorities or any international humanitarian organizations mutually agreed in relation to the compliance issues as per this agreement
   • provide information to Australian authorities regarding the status of the said refugees
• be monitored by International Humanitarian Organization in relation
to any other issues that will substantially compromise the safety of
the refugees

ARTICLE 7

1. The Parties agree to create standard operating procedures to assist with the implementation of this Agreement.
2. These procedures shall include mechanisms for resolving differences with respect to the interpretation and implementation of the terms of this Agreement. Issues which cannot be resolved through these mechanisms shall be settled through arbitration by UNHCR.
3. The Parties agree to review this Agreement and its implementation. The first review shall take place no later than 12 months from the date of entry into force and shall be jointly conducted by representatives of each Party. The Parties shall invite the UNHCR to participate in this review. The Parties shall cooperate with UNHCR in the monitoring of this Agreement and seek input from non-governmental organizations.

ARTICLE 8

Both Parties shall, upon request, endeavor to assist the other in the resettlement of the refugees determined to require protection in appropriate circumstances.

ARTICLE 9

1. This Agreement shall enter into force upon signing and exchanging it along with memorandum between the Parties indicating that each has completed the necessary domestic legal procedures for bringing the Agreement into force.
2. Either Party may terminate this Agreement upon 12 months written notice to the other Party; however, both parties agreed to ensure that the termination
will not have any adverse effect on the refugees who have already resettled to the Country ABC.

3. The Parties may agree on any amendments of or addition to this Agreement in writing. When so agreed, and approved in accordance with the applicable legal procedures of each Party, an amendment or addition shall constitute an integral part of this Agreement and no amendments will prejudice the safety of the refugees.

4. The parties accept that the International Court of Justice (ICJ) will have the jurisdiction to determine disputes that may arise in relation to this agreement.

**IN WITNESS WHEREOF**, the undersigned, being duly authorized by their respective governments, has signed this Agreement.

**DONE** at ................................., this.................................................., in duplicate in the English and “EFG” languages, each text being equally authentic.

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