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Peter D. Fox

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COMMENT

International Asylum and Boat People: The Tampa Affair and Australia's "Pacific Solution"

PETER D. FOX[†]

I. INTRODUCTION

On August 26, 2001, the Norwegian cargo ship *MV Tampa* rescued 433 "boat people"¹ from the distressed Indonesian fishing vessel *Palapa*, off the coast of Christmas Island, Australia. The Australian government summarily denied the passengers access to its territory. The boat people were mostly refugees² fleeing war-torn Afghanistan.

[†] Executive Notes Editor, *Maryland Journal of International Law* 2009–10; J.D., University of Maryland School of Law, May 2010. The author wishes to thank Sarah Winter, Adam Walkaden, and the staff of the Australian Law Reform Commission for their inspiration.

1. The term "boat people" originated in the 1970s to describe migrants fleeing Vietnam. Investigators use it to describe refugees who, secretly and illegally, depart their countries on overcrowded, unseaworthy vessels. Jacqueline Marie Hall, *Sink or Swim: The Deadly Consequences of People Smuggling*, 12 *IND. INT'L & COMP. L. REV.* 365, 367 n.18 (2002) (citing Josh Briggs, *Sur Place Refugee Status in the Context of Vietnamese Asylum Seekers in Hong Kong*, 42 *AM. U. L. REV.* 433, 437 (1993)).

2. "Refugees" are defined in Article I of the 1951 Convention Relating to the Status of Refugees. Convention Relating to the Status of Refugees art I, July 28, 1951, 189 U.S.T. 150, 189 U.N.T.S. 137 [hereinafter Refugee Convention]. Refugees are persons who, owing to a well-founded fear of being persecuted for their race, religion, nationality, membership in a particular social group, or political opinion, are outside their country of nationality and unable or unwilling to seek

They had sailed from western Indonesia with the help of hired human traffickers, and Australia wanted them returned to their point of embarkation. The result was a standoff at the edge of Australian territorial waters.

After several days in the water, the asylum seekers³ persuaded the *Tampa's* Captain, Arne Rinnan, to attempt a landing in Australia. The Australian government, led by Prime Minister John Howard, never permitted the landing despite Rinnan's August 29, 2001 request for urgent medical attention to a number of passengers. Instead, Australia dispatched its Special Air Service (SAS) to intercept and seize the *Tampa* after the ship disregarded radio warnings and entered Australian territorial waters.⁴

The Australian government's hard-line stance during the *Tampa* affair marked the dawn of a prolonged state policy aimed at deterring future asylum seekers that held sway until a change in political leadership in 2007. Though the Howard government's tough posture drew world-wide condemnation, it galvanized the governing Liberal Party of Australia to harden its stance on immigration in the midst of a re-election campaign.⁵ The seized passengers were confined to the *Tampa* and left on the sea for weeks. The events of September 11, 2001 soon overshadowed news of the standoff and the plight of the refugees and ushered in a general climate of suspicion and vulnerability in Australia.

Australia instituted significant, ad hoc border policy changes in response to the *Tampa* incident that remained in place for years. The Parliament pushed through a series of legislative enactments, now

protection from that country. *Id.*

3. "Asylum"—or "political asylum"—is defined as the "[p]rotection of . . . political refugees from arrest by a foreign jurisdiction; a nation or embassy that affords such protection." BLACK'S LAW DICTIONARY 121 (7th ed. 1999). Asylum usually involves a country providing protection to refugees on its territory. At the least, asylum means protection from "refoulement," the forced repatriation of individuals to countries where their lives or freedoms are threatened. Asylum seekers generally must meet the legal definition of a refugee to be afforded such protection.

4. *MV Tampa* Captain Arne Rinnan was threatened with heavy human trafficking penalties set out in the Migration Act, *see infra* note 7, if he disobeyed Australia's order to not enter its territorial waters. The *Tampa's* chronology reads: "Advised if the vessel enters Australian territorial waters it would be breaking the migration law and will be subject to prosecution and fines up to A\$110,000 and jail." DAVID MARR & MARIAN WILKINSON, DARK VICTORY 31 (2004).

5. *See generally* MARR & WILKINSON, *supra* note 4.

known as the “Pacific Solution,”⁶ to avoid bringing the rescued passengers ashore and triggering the machinery of the 1958 Australian Migration Act (Migration Act).⁷ Whereas in the past, reaching Australian territory would have afforded the refugees the opportunity to access Australian courts of law, under the Pacific Solution, the territories of Christmas Island, Ashmore Reef, and the Cocos Islands were excised from the purview of the Migration Act. This legislative action denied refugees who reached outlying parts of Australia the right to seek asylum. Further, the Pacific Solution directed the Australian Navy to intercept and transport arriving boat people to detention camps on small islands for formal processing and detention.

Australia is party to a number of international conventions and protocols designed to protect the rights of refugees and asylum seekers. Foremost among these are the 1951 Convention and Protocol Relating to the Status of Refugees (Refugee Convention),⁸ the 1966 International Covenant on Civil and Political Rights (ICCPR),⁹ the 1989 Convention on the Rights of the Child (CRC),¹⁰ and the 1984 Convention Against Torture and Other Cruel, Inhumane and Degrading Treatment or Punishment (OPCAT).¹¹ These conventions are forms of agreement between nations that are binding in international law. The role of international law, which governs the relationships between countries, is to act as a referee for states that voluntarily agree to adhere to customary principles of behavior that are acceptable to the international community. Although no police

6. Australia’s “Pacific Solution” entailed the interminable displacement of asylum seekers arriving by boat to various Pacific island detention facilities—regardless of the legitimacy of their claims. *See infra* Part IV.

7. Migration Act (1958), No. 62 (Austl.) (amended 2008, No. 85) [hereinafter Migration Act]. Section 4(1) states that: “(1) The object of this Act is to regulate, in the national interest, the coming into, and presence in, Australia of non-citizens.” *Id.* The Migration Act is the primary piece of legislation that incorporates into domestic law Australia’s obligations as a ratifying party to the 1951 United Nations Convention and Protocol Relating to the Status of Refugees. *See infra* note 25 and accompanying text.

8. Refugee Convention, *supra* note 2.

9. International Covenant on Civil and Political Rights, Dec. 19, 1966, 999 U.N.T.S. 171 [hereinafter ICCPR].

10. Convention on the Rights of the Child, Nov. 20, 1989, 1577 U.N.T.S. 3 [hereinafter CRC].

11. Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Dec. 10, 1984, S. TREATY DOC. NO. 100-20, 1465 U.N.T.S. 85.

force exists to punish countries which breach their international legal obligations, the international community may choose to respond to violations through sanctions or military intervention.¹²

In addition, the international community has agreed to customary methods of interpretation of public international law. The fundamental rule of treaty interpretation is expressed in Article 31 of the 1969 Vienna Convention on the Law of Treaties (Vienna Convention): “A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.”¹³

This Comment explores the Australian retreat from its international treaty commitments during the *Tampa* affair through (1) the introduction of applicable international agreements; (2) reflection on the source and justification of government-asserted authority to disregard its international obligations; and (3) an examination of legal issues concerning interdiction of vessels at sea and the practice of indefinite removal of persons to third countries. The Comment contends that the rescued passengers of the *Palapa* were entitled to seek asylum in Australia because they met the definition of a refugee under the Refugee Convention.¹⁴ The *Tampa* proceedings revealed a disturbing lack of justiciability of international norms in Australian courts.

II. INTERNATIONAL CONVENTIONS AND TREATIES APPLICABLE TO ASYLUM SEEKERS ARRIVING BY BOAT

The frequency of human trafficking to facilitate illegal immigration into Western, democratic countries has risen sharply since the 1990s.¹⁵ The United Nations High Commission for

12. AUSTRALIAN LAWYERS FOR HUMAN RIGHTS, AUSTRALIAN LAWYERS FOR HUMAN RIGHTS REFUGEE LAW KIT 2004 ch. 2 (2004), http://www.alhr.asn.au/refugeekit/downloads/chapters_all.pdf [hereinafter HUMAN RIGHTS REFUGEE LAW KIT].

13. Vienna Convention on the Law of Treaties, May 23, 1969, 1155 U.N.T.S. 331. States are further required to carry out their treaty obligations in good faith. *Id.* art. 26 (“Every treaty in force is binding upon the parties and must be performed by them in good faith.”).

14. *See infra* notes 25–32 and accompanying text.

15. In the year 2000, more than 150 million international migrants lived outside their countries, with more than half residing in developing countries. INTERNATIONAL ORGANIZATION FOR MIGRATION, WORLD MIGRATION REPORT 2000 (Susan F. Martin ed., 2000), <http://www.iom.int/jahia/Jahia/cache/offonce/pid/1674?entryId=7279>. The smuggling of human migrants means “the procurement, in order to obtain, directly or indirectly, a financial or other material benefit, of the

Refugees (UNHCR) expects this trend to continue, citing military conflict, poverty, unemployment, and limited opportunities for legal migration as key motivating factors for human trafficking, now a worldwide, multi-billion-dollar industry.¹⁶ By the time the *Tampa* arrived in Australia in 2001, the government was already deeply committed to anti-human-trafficking efforts. Years of diplomatic pressure had resulted in coordinated enforcement initiatives with Indonesia, a well-known point of departure for undocumented migrants arriving in Australia.¹⁷

A. *Sea Rescue*

Australia's obligations to refugees arriving by boat include the granting of basic humanitarian assistance to vessels in distress, the provision of due process rights, and the right to petition for asylum in a court of law.¹⁸ Australia is party to the 1982 United Nations Convention on the Law of the Sea (UNCLOS), which codified formal international rules of sea rescue.¹⁹ Article 98 of UNCLOS pertains to the duty to render assistance to persons and vessels in distress:

1. Every State shall require the master of a ship flying its flag, in so far as he can do so without serious danger to the ship, the crew or the passengers:
 - (a) to render assistance to any person found at sea in danger of being lost;
 - (b) to proceed with all possible speed to the rescue of persons in distress, if informed of their need of assistance, in

illegal entry of a person into a State Party of which the person is not a national or a permanent resident." Protocol against the Smuggling of Migrants by Land, Sea and Air Supplementing the United Nations Convention against Transnational Organized Crime art. 3, Nov. 15, 2000, U.N. Doc. A/55/383 [hereinafter Protocol against the Smuggling of Migrants].

16. ADRIENNE MILLBANK, PARLIAMENT OF AUSTRALIA PARLIAMENTARY LIBRARY, BOAT PEOPLE, ILLEGAL IMMIGRATION AND ASYLUM SEEKERS: IN PERSPECTIVE (1999), <http://www.aph.gov.au/library/pubs/cib/1999-2000/2000cib13.htm>.

17. Several hundred boat people had arrived in Australia each year since the 1970's but by 2001, the numbers had risen to several thousand. MARR & WILKINSON, *supra* note 4, at 38. Australians saw arriving boat people as illegal immigrants with no visas, and even as wealthy for making the journey with the help of human traffickers. *Id.*

18. Migration Act, *supra* note 7. Immigration to Australia is controlled by the Migration Act and its regulations. *Id.*

19. United Nations Convention on the Law of the Sea, Dec. 10, 1982, 1833 U.N.T.S. 3, 397 [hereinafter UNCLOS].

so far as such action may reasonably be expected of him.”²⁰

Article 98 was incorporated into Australian domestic law as Section 317A of the country’s Navigation Act, enacted in 1912.²¹

Tampa Captain Arne Rinnan adhered to Article 98’s guidelines when he acknowledged the mayday of the *Palapa* and radioed to advise Australian authorities of his boat’s change of course to head for the “position of distress.”²² As master of a passing cargo ship on the high seas, Rinnan relied on the commitment of Australia to treat boat people according to the international rules of sea rescue, as codified in UNCLOS. More than two hours after Rinnan’s radio communication, Australian authorities continued to evade responsibility for the sea rescue operation. Officials advised Rinnan that “Indonesian search and rescue authorities have accepted coordination of this incident”²³ but did not provide Rinnan with any indication of where he could land survivors.²⁴

B. *Treatment of Refugees*

As a ratifying party to the Refugee Convention,²⁵ Australia bound itself to conform to international law regarding the treatment of arriving refugees. While the Refugee Convention is largely silent on the procedural aspects of application for admission as a refugee,²⁶ Article 33 does prohibit the “refoulement” of a refugee to the border of a country where his “life or freedom would be threatened.” This section of the Refugee Convention states that “[n]o Contracting State

20. *Id.* art. 98.

21. MARR & WILKINSON, *supra* note 4, at 21 n.9.

22. *Id.* at 18 n.1.

23. Documents provided under Freedom of Information legislation by the Australian Maritime Safety Authority related to the *Palapa* rescue. MARR & WILKINSON, *supra* note 4, at 19 n.2.

24. MARR & WILKINSON, *supra* note 4, at 22 n.10.

25. Refugee Convention, *supra* note 2, art. I. The treaty was ratified by Australia on December 13, 1973, with the following reservation: “The Government of Australia will not extend the provisions of the Protocol to Papua/New Guinea.” *Id.* The 1967 Protocol provided a generic international refugee agreement, removing a shortfall in the 1951 Convention where the definition of “refugee” was limited to those who had fled events in Europe occurring before January 1, 1951. *See* Refugee Convention, *supra* note 2, art. 1. When Australia ratified the 1967 Protocol, it became derivatively bound by the 1951 Convention, obligating Australia to respect all refugee rights under the 1951 Convention.

26. Nothing in the 1951 Convention requires any state to admit overseas refugees. STEPHEN H. LEGOMSKY, IMMIGRATION AND REFUGEE LAW AND POLICY 926 (4th ed. 2005).

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."²⁷

In its general provisions, the Refugee Convention grants certain rights to persons that meet the definition of a refugee. Chapter 2 grants "Juridical Status" rights to refugees, including the Article 16 right to "free access to the courts of law *on the territory* of all Contracting States."²⁸ The administrative measures guaranteed in Chapter 5 include the Article 26 right to freedom of movement *once a refugee is lawfully within a Contracting State's territory*.²⁹ Australia made certain that Article 26 could not be invoked when it prevented the *Tampa* from landing the rescued asylum seekers on its territory and concurrently denied them the Article 16 right to access Australian courts.³⁰

Perhaps one of the most important rights granted to refugees under the Refugee Convention is the prohibition against penalizing asylum seekers based on the manner of their arrival to the country where they are seeking protection.³¹ This Comment argues that the rescued passengers of the *Palapa* met the definition of a refugee under the Refugee Convention and its modifying Protocol,³² and therefore they were entitled to seek asylum in countries that have agreed to be bound by its principles.

Still, compliance with the Refugee Convention alone is insufficient if a country is party to additional treaties that protect the general population. Other international agreements provide additional rights to refugees and asylum seekers. For the inhabitants of Australia, the ICCPR, the CRC, and OPCAT provide many essential rights, including: the right to liberty and security of person; freedom from arbitrary arrest or detention; freedom from torture, cruel, inhumane, or degrading treatment; the right to equal protection under the law; the right not to be expelled, returned or extradited to a country where

27. Refugee Convention, *supra* note 2, art. 33.

28. *Id.* art. 16 (emphasis added).

29. *Id.* art. 26 (emphasis added).

30. When the Norwegian ambassador to Australia was permitted to board the *Tampa* the refugees passed him a letter, addressed to the people of Australia, appealing for asylum. MARR & WILKINSON, *supra* note 4, at 151–54 n.16.

31. Refugee Convention, *supra* note 2, art. 31.

32. *See supra* note 25.

the person would be in danger of being tortured; the right of children to have their best interests considered by welfare institutions, courts of law, or administrative authorities; the right of children to apply to enter or leave a country for the purpose of family reunification; and the right of children to express their own views in any judicial or administrative proceedings.³³

On December 10, 1948, the UN General Assembly ratified a catalog of the “inalienable rights of all members of the human family” in the Universal Declaration of Human Rights (UDHR).³⁴ Although the UDHR was conceived as a statement of objectives to be pursued by all governments, the Declaration is not technically part of legally binding international law, and there are no signatories.³⁵ The principles upheld by the Declaration, however, wield power in the form of moral and diplomatic pressure on members of the international community.³⁶ Among the list of civil, political, economic, social and cultural rights entitled to all peoples is the right to seek asylum from persecution.³⁷ Australia spurned its obligations under the UDHR when it failed to provide the *Palapa* refugees the right to a legal avenue to petition for asylum.

III. EXERCISE OF EXECUTIVE POWER

Australia’s intolerant stance towards boat people reached a climax in 2001 because of the politically sensitive timing of the *Tampa*

33. HUMAN RIGHTS REFUGEE LAW KIT, *supra* note 12. Canberra frustrated efforts by the International Red Cross, who had assembled a civilian doctor, nurse, and translator team, to board the *Tampa* to address basic humanitarian needs. MARR & WILKINSON, *supra* note 4, at 151.

34. Universal Declaration of Human Rights, G.A. Res. 217A, para. 1, U.N. Doc. A/810 (Dec. 10, 1948) [hereinafter UDHR].

35. Tai-Heng Cheng, *The Universal Declaration of Human Rights at Sixty: Is it Still Right for the United States?*, 41 CORNELL INT’L L.J. 251, 251–53 (2008).

36. See Nat’l Coordinating Comm. for UDHR50, Questions and Answers about the UDHR (1998), <http://www.udhr.org/history/question.htm> (“While the record shows that most of those who adopted the UDHR did not imagine it to be a legally binding document, the legal impact of the Universal Declaration has been much greater than perhaps any of its framers had imagined.”). In 1968, the United Nations International Conference on Human Rights in Tehran met to review the progress made in the twenty years since the adoption of Universal Declaration of Human Rights. Final Act of the International Conference on Human Rights, Teheran, Iran, April 22–May 13, 1968, *Proclamation of Tehran*, at 3, U.N. Doc. A/Conf. 32/41. They declared that the Declaration “constitutes an obligation for the members of the international community” to protect the rights of their citizens. *Id.*

37. “Everyone has the right to seek and enjoy in other countries asylum from persecution.” UDHR, *supra* note 34, art. 33.

incident. It occurred during the run-up to the Liberal Party of Australia's re-election campaign.³⁸ The Howard government launched a massive public relations campaign vilifying refugees who arrive by boat as undeserving of admission into Australia. The Liberal Party of Australia also stoked a growing public fear that allowing unwanted refugees to access the country's legal immigration scheme would overrun the system and disadvantage its citizenry economically.³⁹ Legally, the government invoked its executive power under Australia's Commonwealth Constitution⁴⁰ to justify the forcible seizure of the *Tampa* as well as the removal and detention of the refugees aboard.

Australia's seizure of the *Tampa* and prevention of boat people from accessing Australian territory were challenged in *Victorian Council for Civil Liberties Inc. v. Minister for Immigration & Multicultural Affairs*.⁴¹ The Victorian Council for Civil Liberties, a leading Australian human rights and civil liberties organization, initially secured the refugees' release by filing a writ of habeas corpus. Justice North ordered that "the respondents release those persons rescued at sea who were brought on board MV Tampa on or about 26 August 2001 . . . and bring those persons ashore to a place on the mainland of Australia."⁴²

On appeal, Chief Justice Michael Eric John Black, Justice Bryan Beaumont, and Justice Robert Shenton French of Australia's Federal Court directly considered the issue of the federal government's authority to seize the *Tampa*.⁴³ The legitimacy of the seizure under Australian law, as they framed the issue, involved two secondary questions: (1) did the Commonwealth government have the authority to seize the *Tampa* to prevent boat people from landing in Australia

38. MARR & WILKINSON, *supra* note 4, at 151 ("The Liberal poster in 2001 showed a resolute John Howard with his fists clenched, flanked by flags. The message was: 'WE DECIDE WHO COMES TO THIS COUNTRY AND THE CIRCUMSTANCES IN WHICH THEY COME' . . . Huge advertisements showing the same determined Howard defending his country against invading boat people appeared that morning in all the major newspapers of Australia.").

39. Widespread fear of illegal immigration was easily stoked, and often carried racist overtones: "Nascent racism, ancient fears of invasion by immigration and talkback radio ranting against Asian crime were about to fuse into a new extraordinarily potent political force." *Id.* at 123.

40. Commonwealth of Australia Constitution Act, 1974 (Austl.).

41. (2001) 182 A.L.R. 617 (Austl.).

42. *Id.* at 655.

43. Ruddock v. Vadarlis (2001) 183 A.L.R. 1, 6 (Austl.).

in the absence of a federal statute granting such power, and (2) if the authority existed, was it abolished and/or superseded by the country's Migration Act?⁴⁴

Ultimately, the Federal Court reversed the trial court decision and denied the writ of habeas corpus, holding that the Migration Act had neither extinguished nor limited the government's executive power.⁴⁵ Central to the court's decision was the scope and capacity of the Commonwealth's executive power.

Although Section 61 of the Commonwealth Constitution provides that "the executive power of the Commonwealth is vested in the Queen and is exercisable by the Governor-General," the scope of the executive power is never expressly defined.⁴⁶ Justices French and Beaumont, writing for the majority, concluded that the executive power was a separate concept from the old prerogative power.⁴⁷ They differentiated it and asserted the right to exclude aliens as a necessary implication that can only be abrogated by "clear [statutory] intent," which was not made apparent by the Migration Act.⁴⁸ Justice Black, in his dissent, argued that any Commonwealth executive power was limited to a defunct common law prerogative power,⁴⁹ now superseded by the Migration Act.⁵⁰

Two positions can be taken to resolve the meaning of executive

44. Bradley Selway, *All at Sea—Constitutional Assumptions and "The Executive Power of the Commonwealth"*, 31 FED. L. REV. 495, 496 (2003). Selway argues that Australia's Commonwealth Constitution includes an inadequately defined legal concept of executive power, and therefore the decision in *Ruddock v. Vadarlis* rested on an assumption as to what considerations are relevant in determining its scope and meaning. *Id.* at 506.

45. *Ruddock*, 183 A.L.R. at 27.

46. Commonwealth of Australia Constitution Act, 1974, c. 2, § 61.

47. *See infra* note 49.

48. *Ruddock*, 183 A.L.R. at 49. The court asserted that "[t]he executive power of the Commonwealth under [Section] 61 cannot be treated as a species of the royal prerogative . . . [w]hile the executive power may derive some of its content by reference to the royal prerogative, it is a power conferred as part of a negotiated federal compact expressed in a written Constitution distributing powers between the three arms of government . . ." *Id.*

49. *Id.* at 19 (Black, J., dissenting). The Prerogative Power, or the Royal Prerogative, is the concept that various powers rest exclusively with the Crown, such as the power to declare war or make treaties. TONY BLACKSHIELD & GEORGE WILLIAMS, *AUSTRALIAN CONSTITUTIONAL LAW AND THEORY* 261 (2006). Prerogative powers were derived from common law, and can be superseded by statute or lost over time from lack of use. *Id.*

50. *Ruddock*, 183 A.L.R. at 19 (Black, J., dissenting).

power under Section 61 of the Australian Commonwealth Constitution. First, the executive power may be understood in comparison with its U.S. counterpart because Section 61 was derived from Article II of the U.S. Constitution.⁵¹ Additionally, Australia adopted a separation of powers model of government similar to that of the U.S.⁵² Under the American model, the executive power of the president is an implied power; it is the power necessary to execute the laws and check the powers of the other branches of government. The American governmental structure contains no lingering prerogative powers of the British Crown that need to be considered when the executive takes action, an intended consequence of the American Revolution.⁵³ Applied to Australia's Commonwealth Constitution, this understanding justifies the holding in *Ruddock v. Vadarlis* and frees the court from the need to investigate any prerogative powers held at common law by "constitutionalizing" an implied executive power.⁵⁴

A second, divergent understanding of the executive power under Section 61 is through the lens of British and colonial history. The basic constitutional structure of the British Empire was established by the mid-nineteenth century with an "Imperial Parliament" as sovereign, the monarch acting on the advice of her UK ministers, and each minister represented in each colony by a governor with delegated authority.⁵⁵ Therefore, at the time of federation, all prerogative powers were "Imperial prerogative powers" exercised by the Queen unless they were abrogated by legislation.⁵⁶ Under this framework, the common law prerogative was intended to form part of the executive power of the Commonwealth and cannot be separated or "constitutionalized" as previously suggested. Accordingly, executive power would not enjoy immunity from judicial or legislative restraint as embodied in the Migration Act.⁵⁷ Adopting this interpretation of the nature of executive power could have altered the majority's opinion.

51. U.S. CONST. art. II, § 1, cl. 1 ("The executive Power shall be vested in a President of the United States of America.").

52. Selway, *supra* note 44, at 500.

53. *Id.*

54. *Id.*

55. *Id.* at 501.

56. *Id.* at 505–06.

57. *Id.* at 506.

Following the federal court decision, the Australian Parliament enacted the Border Protection (Validation and Enforcement Powers) Act of 2001.⁵⁸ This Act sought to retroactively validate any government actions in relation to the *Tampa* affair and effectively deny its passengers the right to claim asylum.⁵⁹ Vadarlis' application for special leave to appeal to the High Court was rejected on November 27, 2001;⁶⁰ by that time the Howard government had transferred the refugees from temporary detention on the *Tampa* to more permanent detention camps in third countries.

IV. THE PACIFIC SOLUTION

Australia's plans for dealing with an escalating number of boat people attempting to enter their territory took shape in response to the *Tampa* affair. On September 1, 2001, while the refugees lingered outside Australian territorial waters on the *Tampa* for a seventh day, Prime Minister John Howard held a press conference to announce a resolution to the standoff:

Ladies and Gentlemen, Mr[.] Ruddock and I have called this news conference this morning to announce that an agreement has been reached so that all of the people on board the MV Tampa can be processed in third countries, not in Australia or in an Australian Territory, to have their claims for refugee status determined and then dealt with under the normal processes applying to refugees around the world.⁶¹

58. The Australian Minister of Immigration and Multicultural Affairs, Philip Ruddock, MP, circulated an explanatory memorandum of the Border Protection Bill in the House of Representatives that plainly stated the purpose of the Act: "The Bill seeks, for more abundant caution, to ensure that there is no doubt about the Government's ability to order ships to leave Australia's territorial waters. Provision is also made to avoid the possibility of legal action being taken in Australian courts as a result of any action taken under the Act." Memorandum from Philip Ruddock, MP, The Parliament of the Commonwealth of Australia (2001), http://www.austlii.edu.au/cgi-bin/sinodisp/au/legis/cth/bill_em/bpb2001212/memo1.html?query=border%20protection%20act%202001.

59. BARRY YORK, DEP. OF THE AUSTRALIAN PARLIAMENTARY LIBRARY, AUSTRALIA AND REFUGEES, 1901–2002 ANNOTATED CHRONOLOGY BASED ON OFFICIAL SOURCES: SUMMARY 54 (2003), <http://www.apl.gov.au/library/pubs/chron/2002-03/03chr02.htm>. This specific Act was ultimately rejected in the Senate, but some of its key provisions were introduced through various other measures. See *infra* note 64.

60. Transcript of Refusal of Special Leave to Appeal, *Vadarlis v. MIMA* (High Court of Australia, Gaudron, Gummow, and Hayne JJ., Nov. 27, 2001) (Austlii).

61. John Howard, Prime Minister of Australia, Joint Press Conference with the

The government resolved to transfer the refugees from their vessel to detention centers on small pacific islands for “processing” rather than admit them and evaluate their refugee status claims within the ordinary Australian legal framework.

What came to be known as the Pacific Solution was accomplished in three phases: (1) the excision of thousands of islands from Australia’s Migration Zone to prevent the granting of due process rights under the Migration Act to boat people who physically reached these locations; (2) the interception of vessels containing asylum seekers by the Australian Defense Force under Operation Relex;⁶² and (3) the removal of persons to third countries for processing and refugee status determinations.⁶³

On September 26, 2001, the Australian Senate passed a series of legislative enactments that formally launched the Pacific Solution.⁶⁴ The six Acts aimed to secure Australia’s borders and deter unlawful arrivals of noncitizens. In addition to the Migration Zone changes, the legislation dealt with the validation and enforcement of new border protection measures, a new humanitarian and refugee visa regime, new refugee assessment criteria, mandatory sentencing for human traffickers, and a restrictive clause relating to judicial review of migration decisions.⁶⁵

Minister of Immigration the Hon. Philip Ruddock MP (Sept. 1, 2001), *available at* <http://www.sievx.com/articles/psdp/20010901HowardRuddockConf.html>.

62. At a joint press conference with the Minister of Immigration Prime Minister Howard stated, “Commencing immediately the Australian Defence Force will conduct enhanced surveillance, patrol and response operations in international waters between the Indonesian archipelago and Australia. This will involve five naval vessels and four P-3C Orion aircraft.” *Id.* The Prime Minister described Operation Relex as an “intensification” of existing practice designed to deter people smuggling operations originating from Indonesia. *Id.* See also MARR & WILKINSON, *supra* note 4, at 161.

63. Pursuant to the Migration Act, persons could henceforth be transferred at sea to detention centers in Nauru and Papua New Guinea. Penelope Mathew, *Legal Issues Concerning Interception*, 17 GEO. IMMIGR. L.J. 221, 232–33 (2003).

64. York, *supra* note 59, at 54–55. The six Acts included the Migration Amendment (Excision from Migration Zone) Act 2001, the Migration Amendment (Excision from Migration Zone) (Consequential Provisions) Act 2001, the Migration Legislation Amendment (Judicial Review) Act 2001, the Migration Legislation Amendment Act (No. 1) 2001, the Migration Legislation Amendment Act (No. 6) 2001, and Border Protection (Validation and Enforcement Powers) Act 2001. *Id.*

65. *Id.*

A. *Excision of Territory from the Migration Zone*

The Australian government first excised Christmas Island, the Ashmore and Cartier Islands, and the Cocos Islands from Australia's Migration Zone.⁶⁶ This action disqualified unlawfully arriving noncitizens from applying for visas.⁶⁷ The Migration Amendment (Excision from Migration Zone) (Consequential Provisions) Act of 2001 further allowed for the detention of unlawful noncitizens in excised offshore locations, the transfer of unlawful noncitizens from Australia to a third country, and the preclusion of unlawful noncitizens from taking legal action against the government in an Australian court.⁶⁸

B. *Interdiction at Sea*

Under phase two of the Pacific Solution, the Australian navy physically intercepted and boarded the *Tampa*. In contrast to less visible forms of interception, such as carrier sanctions, visa procedures, or airport immigration inspection procedures that prevent the arrival of asylum seekers, interdiction at sea is one of the most far-reaching and spectacular forms of interception possible.⁶⁹

UNCLOS divides the world's oceans into sectors of decreasing levels of state jurisdiction as the distance from land increases.⁷⁰ While the territorial sea is akin to state territory, the zones beyond that area allow for limited legislative jurisdiction and enforcement in regards to immigration powers.⁷¹ Outside of the territorial sea, states may exercise "control" in the contiguous zone to punish or prevent infringement of their immigration frontiers within the territorial sea.⁷² In the adjoining Exclusive Economic Zone (EEZ), UNCLOS does not extend immigration law powers.⁷³ Finally, on the High Seas, with

66. *Id.*

67. *Id.*

68. *Id.*

69. Mathew, *supra* note 63, at 221–22.

70. UNCLOS, *supra* note 19, arts. 2–15, 33(2), 56, 57, 86. These demarcations include the territorial sea (up to twelve nautical miles from the sea baseline), the contiguous zone (up to twenty-four nautical miles from the sea baseline), the Exclusive Economic Zone (EEZ) (up to 200 nautical miles from the sea baseline) and the High Seas (all areas beyond the zones in which states may exercise sovereign power). Mathew, *supra* note 63, at 223.

71. Mathew, *supra* note 63, at 223–24.

72. UNCLOS, *supra* note 19, art. 33.

73. *Id.* art. 56(1)(c) (granting to states only "sovereign rights" over natural resources).

certain exceptions for piracy, jurisdiction of persons rests with the vessel's flag state only.⁷⁴

In a situation where a state seeks to combat the trafficking of illegal migrants and has reasonable grounds to suspect that a vessel is smuggling people by sea "and is without nationality or may be assimilated to a vessel without nationality," the state may board and search the vessel as long as it "take[s] appropriate measures in accordance with relevant domestic and international law."⁷⁵ This is particularly applicable during anti-human-trafficking operations. However, Australia concerned itself with Indonesian vessels at this time, not stateless vessels.⁷⁶ Australia needed to secure Indonesia's cooperation (the vessel's flag state) in order to interdict the *Tampa* on the High Seas, but no agreement of this kind existed at the time of the incident.⁷⁷ Without Indonesia's prior consent, the interdiction operation amounted to unlawful interference with the passengers' freedoms under international law.⁷⁸

C. *Evasion of the Refugee Convention*

For Australia, circumventing the reach of the Refugee Convention was the obvious advantage of an offshore interdiction policy.⁷⁹ The Howard government understood the Refugee Convention's protective provisions to be dependent upon an individual's entry into Australia's physical borders.⁸⁰ In fact, Article 33 offers no express language concerning entry.⁸¹ Article 33 affirms that expulsion or refoulement of refugees in "any manner whatsoever" is prohibited in order to protect refugees from being sent to countries that are not party to the Refugee Convention and might not respect the principle of nonrefoulement.⁸² If the nonrefoulement responsibility is understood

74. *Id.* art. 6.

75. Protocol against the Smuggling of Migrants, *supra* note 15, art. 8(2).

76. *See supra* note 17 and accompanying text.

77. Mathew, *supra* note 63, at 226–27.

78. A Humans Rights Watch study of Australia's Pacific Solution policies indicated that Indonesia was merely notified when Australia began intercepting and returning boats to Indonesia. *Id.* at 227–28 (citing HUMAN RIGHTS WATCH, BY INVITATION ONLY: AUSTRALIAN ASYLUM POLICY 45 (2002)). Australia apparently relied on Indonesia not to assert its rights under international law, perhaps because of the involvement of human traffickers. Mathew, *supra* note 63, at 228.

79. Mathew, *supra* note 63, at 228–29.

80. *Id.*

81. Refugee Convention, *supra* note 2, art. 33.

82. Mathew, *supra* note 63, at 229.

as an obligation of conduct as well as result, then a country may be in breach of the Refugee Convention if it fails to ensure that the refugees it discharges will not be protected from refoulement elsewhere in third countries.⁸³ During the *Tampa* incident, Australia adopted a position that entry into its territory was essential to the reach of the Refugee Convention, but the practice of potential chain-refoulement that it engaged in may be a separate and independent violation of international law.⁸⁴

D. *Indefinite Detention in Third Countries*

Under phase three of the Pacific Solution, the Australian navy transferred the refugees aboard the *Tampa* to the *HMAS Manoora*, a Royal Australian Navy vessel. The refugees were transported by the navy, processed, and housed in detention centers in Nauru and Papua New Guinea.

A crucial question is whether detained persons may be transferred to a third country without their consent. The UDHR affirms the right of every human being to seek asylum,⁸⁵ and the ICCPR grants the right to liberty⁸⁶ and the right to leave one's own country.⁸⁷ Neither general human rights treaties nor the Refugee Convention, however, grant a person an exclusive right of entry or the right to be granted asylum in a *particular* country.⁸⁸ As a matter of international refugee law, relocating asylum seekers intercepted at sea to third countries—even without their consent—might be permissible as long as the Refugee Convention's bar against refoulement has been met.⁸⁹ Australia took this posture as an issue of sovereign right.

Whether a right exists to choose the country of asylum is an issue on which the Refugee Convention is also silent. Australia's actions, however, raise good faith issues regarding the circumvention of Article 31 of the Convention. This Article prohibits a state from penalizing refugees "on account of their illegal entry or presence" or

83. *Id.*

84. *Id.* But see *Sale v. Haitian Centers Council, Inc.*, 509 U.S. 155 (1993) (holding that the interdiction of Haitian boat people on the High Seas was permissible because neither the Refugee Convention nor the relevant U.S. statute extended to persons outside U.S. territory).

85. UDHR, *supra* note 34, art. 14.

86. ICCPR, *supra* note 9, art. 9.

87. *Id.* art. 12.

88. Mathew, *supra* note 63, at 234.

89. See Refugee Convention, *supra* note 2, art. 33.

from applying “to the movements of such refugees['] restrictions.”⁹⁰ Article 31 applies to persons present within state territory.⁹¹ Thus, if the territorial sea where the *Tampa* was seized is assimilated to state territory,⁹² then the refugees were arguably penalized in violation of the Refugee Convention, and their freedom of movement unlawfully restricted under international law. Alternatively, Australia might argue that a transfer to a third country participating in its Pacific Solution fulfilled the requirements of Article 31 and the right to seek asylum protected under Article 14 of the UDHR⁹³ because the refugees were delivered to a safe haven. The reality, however, is that the refugees were detained in Nauru or Papua New Guinea with their final destinations left uncertain, and any hope for resettlement in a third country was unclear.⁹⁴ At minimum, Pacific Solution agreements with third countries did state that Australia would take responsibility for any asylum seekers ultimately left unsettled.⁹⁵

Even if the Refugee Convention does not expressly prohibit this manner of open-ended, indefinite detention of asylum seekers, other international human rights that supersede domestic legal decisions may check a state policy of this kind. For example, there may be a right of entry into a country in cases involving torture or family ties considerations, or a right to humane conditions in the detention facilities themselves.⁹⁶ Finally, the right to individual liberty under the UDHR appears particularly threatened. The detention of persons until such time as the “vagaries of international relations” dictate their reception somewhere else is an unacceptable proposition.⁹⁷

V. CONCLUSION

Australia's 2001 Howard government decided that the primary function of its refugee policy was not to provide humanitarian assistance and relieve the suffering of refugees fleeing far off war-torn countries but to protect its nation's borders against unwanted migrants. No evident policy goal of deterring human rights violations was apparent. Quite the reverse: Australia's ad hoc policy towards

90. *Id.* art. 31.

91. UNCLOS, *supra* note 19, art. 31.

92. *See supra* notes 70–71 and accompanying text.

93. UDHR, *supra* note 34.

94. Mathew, *supra* note 63, at 235.

95. *Id.*

96. *Id.* at 235–36.

97. *Id.* at 236 (citing *Amuur v. France*, 22 Eur. Ct. H.R. 533, para. 48 (1996)).

arriving boat people, reflected in the handling of the *Tampa* affair and the hastily prepared Pacific Solution, indicated a policy of national self-interest above all other concerns and election politics pursued in the name of sovereignty.⁹⁸ More importantly, the *Tampa* proceedings revealed a lack of justiciability of international norms in Australian courts. The government's refusal to allow asylum seekers to access its borders likely violated its international legal obligations to the principle of nonrefoulement.

The future of international refugee protection depends upon a reaffirmation of the Refugee Convention and efforts to address restrictive interpretations placed on its principles by individual states.⁹⁹ Remaining gaps can be filled through the protections provided to vulnerable refugees in additional international agreements, such as the UDHR, ICCPR, CRC, and OPCAT. These and other international conventions should be strengthened through continued adherence to their standards and equally severe condemnation and sanction of states that fail to meet their obligations. The purpose of international law is to govern relations between sovereign states and disallow individual national interests to countermand obligations entered into with the international community.

The story of Australia's experience with boat people is replete with occurrences that fall short of good sense and civilized expectation in the area of human rights and international refugee law. The Howard government was unapologetic about its goals of deterring unwanted boat people and the denial of access to domestic asylum rights. It took six more years, but following the election of the Australian Labor Party in 2007, the notorious Pacific Solution was quietly abandoned.

98. See James C. Hathaway, *A Reconsideration of the Underlying Premise of Refugee Law*, 31 HARV. INT'L L.J. 129, 167–68 (1990) (arguing that the responsibility for protecting refugees under the 1951 Convention was formally placed in the hands of individual states, and not the UNHCR, thus allowing “political and strategic interests to override humanitarian concerns in the determination of refugee status . . . undercutting the universality of the protection mandate”).

99. See Erika Feller, *The Evolution of the International Refugee Protection Regime*, 5 WASH. U. J.L. & POL'Y 129 (2001).