

LEGAL ISSUES CONCERNING INTERCEPTION

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I INTRODUCTION

This paper addresses the interception of asylum-seekers and some related questions, such as return or sending on of intercepted asylum-seekers to other places. Although the paper draws on well-known examples of state practice in Europe and the United States, it deals mainly with the Australian experience and the progression (or regression) into ever more far-reaching forms of interception. There are many ways in which interception may occur.¹ The most spectacular is interdiction at sea, a practice adopted by the United States in response to Haitian arrivals during the 1990s and by Australia in response to the arrival of the Tampa

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¹ *Interception of Asylum-Seekers and Refugees: The International Framework and Recommendations for a Comprehensive Approach*, UNHCR, Exec. Comm. of the High Commissioner's Programme, Standing Comm., 18th Meeting, EC/SO/SC/CRP.17 (2000).

in late 2001.² On dry land, closure of a border is the most dramatic form of interception. These strategies will often be accompanied by detention of the asylum-seekers and their return to the country of origin, to an alternative destination where asylum may be sought, or, in some cases, such as the Australian "Pacific Solution" or the United States' "offshore safe havens camps," to a situation of limbo where the final destination for any refugee is left uncertain.

Less visible forms of interception occur every day. For example, many states engage in quiet interception activities offshore. Carrier sanctions imposed on air and shipping lines are aimed at preventing the arrival of asylum-seekers, and many countries now have immigration officials working at airports abroad to assist in the achievement of this goal. A country's visa system may also be used to target potential asylum-seekers by making it more difficult for nationals from refugee-generating countries to obtain a visa. However, the focus of this paper will be on the more spectacular forms of interception and the paper will draw heavily on recent Australian practice in this regard. The legal issues addressed in the paper are:

- whether, in the case of maritime interdictions, interdiction is legal under the law of the sea and other relevant rules concerning extra-territorial exercises of state jurisdiction;
- whether the 1951 Convention Relating to the Status of Refugees, particularly the norm of *non-refoulement*, is upheld;
- related questions such as the legality of, and requisite conditions for sending or returning an asylum-seeker to another country in order to seek asylum; and
- the extent to which interception strategies may involve violations of human rights more generally, for example, rights to liberty and family unity.

2 For analysis of the Australian reaction to the arrival of the Tampa, see Donald R. Rothwell, *The Law of the Sea and the MV Tampa incident: Reconciling Maritime Principles with Coastal Sovereignty*, 13 Pub L Rev 118 (2002); Graham Thom, *Human Rights, Refugees and the MV Tampa Crisis*, 13 Pub L Rev 110 (2002); Jean-Pierre Fonteyne, *Illegal refugees or illegal policy?*, in *Refugees and the Myth of the Borderless World* 16 (Christian Reus-Smit ed., 2002); Michael White, *MV Tampa and Christmas Island Incident, August 2001*, BIMCO Review (2002).

II MARITIME INTERDICTION AND CONSTRAINTS ON THE EXERCISE OF STATE JURISDICTION

We turn first to the question of the extent to which States may investigate, stop and/or remove ships suspected of carrying illegal immigrants. Section 245F(8) of Australia's Migration Act, introduced by the Border Protection (Validation and Enforcement) Powers Act (Cth) 2001, which validated the actions taken in relation to the *Tampa*, provides that in certain situations (essentially involving suspicion of illegal immigration), a ship or aircraft may be detained and brought "to a port, or *to another place* (including a place within the territorial sea or the contiguous zone in relation to Australia)."³ The three situations enumerated in section 245F(8) are:

- (1) a craft in Australia reasonably suspected to be or to have been involved in a contravention of the Act in or outside Australia;
- (2) an Australian ship outside Australia where it is reasonably suspected to be, to have been, or that it will be involved in a contravention, either in or outside Australia, of the Act; and
- (3) a foreign ship outside Australia where it is reasonably suspected to be, to have been, or that will be involved in a contravention of the Act in Australia.⁴

In addition to these legislatively based powers, section 7A of the Migration Act provides that "the existence of statutory powers under this Act does not prevent the exercise of any executive power of the Commonwealth to protect Australia's borders, including, where necessary, by ejecting persons who have crossed those borders."⁵ These powers of removal would extend, literally, to the

³ Migration Act, 2001, § 245F(8) (emphasis added).

⁴ *Id.*

⁵ § 7A seeks to preserve the ruling in *Ruddock v Vadarlis* (2001) 110 FCR 49, the Australian full Federal Court's decision concerning the applications for *habeas corpus* by lawyers acting on behalf of the Tampa asylum-seekers. International law played hardly any role in the decision. The majority in that case found that executive power existed to repel illegal immigrants from the Australian border, despite the enactment of extensive legislative powers.

High Seas,⁶ a zone in which both legislative or prescriptive jurisdiction and law enforcement powers are limited.

This section of the paper outlines possible ways in which States might attempt to justify interdiction and/or removal of boats, particularly when acting beyond the territorial sea or contiguous zone. As will become clear, I do not regard these arguments to be particularly persuasive. In particular, questions are raised concerning the practice of Australia, which has been to intercept boats within Australia's contiguous zone and then to tow them to a point beyond the contiguous zone or to escort them to the edge of Indonesian waters.⁷

The oceans are divided into various sectors over which States have decreasing levels of jurisdiction as the proximity to land recedes. These zones include the territorial sea,⁸ the contiguous zone,⁹ the exclusive economic zone (EEZ),¹⁰ and the High Seas.¹¹ The extent to which powers concerning regulation of

6 See the reference to "another place" in § 245F(8). It should be noted that the Migration Act's somewhat opaquely drafted powers concerning boarding of ships prior to removal try to avoid exorbitant exercises of jurisdiction and to comply with the law of the sea, and Australia's practice has been to remove boats from the contiguous zone. It should also be noted that Australian statutes will be interpreted to comply with international law where possible.

7 Senate Select Committee, "A Certain Maritime Incident," available at http://www.aph.gov.au/senate/committee/maritime_incident_ctte/maritime/report/index.htm. [hereinafter Senate Select Committee]. See chapter 2, particularly the description of the "standard operating procedures" from 2.61-2.85.

8 The territorial sea is defined in the United Nations Convention on the Law of the Sea as an area of up to 12 nautical miles measured from the base line: See United Nations Convention on the Law of the Sea, Dec. 10, 1982, art 2-15, 1833 U.N.T.S. 3 (hereinafter "UNCLOS").

9 The contiguous zone is defined as the area of sea adjacent to the coast which extends up to 24 nautical miles from the same base line used to delimit the territorial sea. UNCLOS, *supra* note 8, at art 33(2).

10 The Exclusive Economic Zone or EEZ is an area extending up to 200 nautical miles from the territorial sea base line which may be used for the purposes of exploring, exploiting, conserving and managing natural resources, UNCLOS, above n 8, art 56, 57.

11 The High Seas are all those areas beyond any of the other zones in which States exercise a certain measure of sovereign power (the territorial sea, contiguous zone, EEZ etc), UNCLOS, above n 8, art 86.

immigration and enforcement of the law may be exercised vary from zone to zone. The territorial sea is in much the same position as State territory, although foreign ships have the right of innocent passage.¹² Beyond this zone, legislative jurisdiction is circumscribed and enforcement powers are limited accordingly.

States may exercise "control" in the contiguous zone to prevent and punish violations of immigration laws within the territorial sea.¹³ The Australian government takes the view that it is permitted to "remove vessels to the edge of the contiguous zone".¹⁴

In the EEZ, the coastal State may exercise "sovereign rights" in relation to natural resources.¹⁵ As a result of the overlap between the contiguous zone and the EEZ (the contiguous zone corresponds with the first 12 miles of the EEZ), Article 56(1)(c) of the 1982 UN Convention on the Law of the Sea ("UNCLOS")¹⁶ refers to "other rights and duties provided for in this Convention" as being exercisable in the EEZ.¹⁷ However, Article 56(1)(c) cannot be used to expand the express references to rights exercisable in the *contiguous zone* to prevent violations of, or to enforce immigration law¹⁸ and enable them to be exercised in the rest of the EEZ. Thus, for present purposes, the EEZ's particular status is of diminished significance. In this zone, interception is primarily governed by the principles that govern the High Seas.

12 See UNCLOS, above n 8, art 21, 25 (concerning the regulation of non-innocent passage in the territorial sea). See also Convention on the Territorial Sea and the Contiguous Zone, April 28, 1958, art 16(1), 516 UNTS 205 (hereinafter "TSC").

13 See UNCLOS, above n 8, at art 33 and TSC, above n 12, at art 24(1) (concerning exercise of control necessary to prevent violations of immigration laws within the territorial sea).

14 Principled Observance of Protection Obligations and Purposeful Action to Fight People Smuggling and Organised Crime - Australia's Commitment 4 (2001) (hereafter "Principled Observance," copy on file with author).

15 UNCLOS, above n 8, art 56, 57.

16 UNCLOS, above n 8.

17 RR Churchill & AV Lowe, *The Law of the Sea* 169 (3rd ed, 1999) (writing that Article 56(1)(c) would appear to include the rights that a State has in relation to its contiguous zone).

18 See UNCLOS, above n 8, art 33.

On the High Seas, of course, the general rule is freedom. Jurisdiction over persons on the High Seas rests with the flag state,¹⁹ with limited exceptions. For example, in cases of piracy, in relation to which there exists universal jurisdiction, the ship may be seized.²⁰

Stateless vessels raise different questions. Warships have the right of visit in relation to ships without a nationality²¹ or whose nationality is uncertain,²² but only in order to verify the right of the ship to fly its flag.²³ Although the freedom of the High Seas attaches to the State and a stateless vessel is therefore lacking an important means of protection,²⁴ a State would have to rely on some positive basis of jurisdiction - for example, the protective principle of jurisdiction, in order to exercise jurisdiction over persons on a stateless ship.²⁵ Some eminent jurists regard the protective principle as well established. However, there are controversies as to its extent and application.²⁶ It is questionable whether an immigration offence could be viewed as a threat to security such that it would bring the principle into play, although the US has asserted that drug smuggling is covered by the protective principle.²⁷

States may exercise the right of hot pursuit onto the EEZ and High Seas from the territorial sea or contiguous zone where there is good reason to believe that the

19 UNCLOS, above n 8, art 6; Convention on the High Seas, April 29, 1958, art 6, 450 UNTS 82 (hereinafter "High Seas Convention" or "HSC").

20 UNCLOS, above n 8, art 105; HSC, above n 19, art 19.

21 UNCLOS, above n 8, art 110(1)(d) (The situation of stateless vessels is not provided for in the HSC).

22 UNCLOS, above n 8, art 110(1)(e); HSC, above n 19, art 22(1)(c) (both refer to a ship which "though flying a foreign flag or refusing to show its flag...is, in reality, of the same nationality as the warship.").

23 UNCLOS, above n, art 110(2); HSC, above n 19, art 22(2).

24 See, eg, *Molvan v Attorney-General for Palestine* (1948) A.C. 351.

25 See Churchill and Lowe, above n 17, 214 (stating that "[t]he better view appears to be that there is a need for some jurisdictional nexus in order that a State may extend its laws to those on board a stateless ship and enforce the laws against them.").

26 See, eg, M Akehurst, *Jurisdiction in International Law*, 46 Brit YB Int'l L 145, 158 (1972-1973).

27 See Churchill & Lowe, above n 16, 139 (for a discussion of the US position).

ship has violated the laws of that State.²⁸ Pursuit may begin from the contiguous zone where there has been "a violation of the rights for the protection of which the zone was established,"²⁹ and these encompass the right of preventing violations of immigration laws in the territorial sea.³⁰ Moreover, the right of hot pursuit extends to so-called "mother ships" which have stayed beyond the limits of a State's jurisdiction and deployed smaller boats to ferry people into the territorial sea or contiguous zone.³¹ Perhaps flight of a ship from the contiguous zone after a failed attempt to unload illegal passengers, or where it was clear that illegal entry had been intended, would be an example where hot pursuit may be exercised, particularly if a State's domestic laws prohibit attempts³² or conspiracy to enter unlawfully, or the organisation of unlawful entry.³³

Other than the situation of mother ships, if interdiction occurs when the target ship is outside the contiguous zone and has not been within it, any argument based on hot pursuit must surely fail. Hot pursuit is designed to enable the effective

28 UNCLOS, above n 8, art 111; HSC, above n 19, art 23.

29 See *id.*

30 UNCLOS, above n 8, art 33; HSC, above n 19, art 24(1).

31 UNCLOS, above 8, arts 111(1) and (4). The sections were relied upon when Australia enacted the Border Protection Legislation Amendment Act in 1999. The second reading speech included the imagery of a "mother ship" deploying smaller craft to spawn its "human cargo" into Australia. See Border Protection Legislation Amendment Bill, Second Reading Speech, Hansard, September 22, 1999, House of Representatives, p 10147, available at <http://www.aph.gov.au/hansard/rep/dailys/dr220999.pdf>. The imagery is unfortunate as it inevitably provokes comparison with the racialised imagery used at the turn of the 19th century to describe the "threat" of Asian immigration to Australia. See Penelope Mathew, *Safe For Whom? The Safe Third Country Concept Finds a Home in Australia*, *The Refugees Convention 50 Years On: Globalisation and International Law* 135 (forthcoming Susan Kneebone ed, 2003). Moreover, it should be noted that mother ships are generally not used to ferry illegal migrants to Australia - one decrepit fishing boat is used.

32 But see DP O'Connell *The International Law of the Sea* 1088-89 (IA Shearer ed, 1984) (noting that it is controversial whether hot pursuit relates to attempted offences). The success of an argument based on attempted offences might also depend on whether the attempt to commit the offence may occur outside, rather than within, the state's territorial sea.

33 For example, since 1999, Australia's domestic laws have contained offences for people smuggling. See, eg, Migration Act 1958, § 233. Extradition requests for foreigners in countries such as Thailand have been made.

enforcement of laws, including immigration laws, by ensuring that offenders do not simply escape by fleeing the territorial sea or contiguous zone, rather than to give States the ability to apply their laws upon the High Seas which are free to all States and beyond national jurisdiction. Moreover, regardless of where the ship is intercepted, it does not seem right to characterise preventative action such as interdiction as hot "pursuit", the aim of which is to apprehend offenders and bring them to justice.

It is notable that the new protocol on people smuggling requires that the flag state's cooperation be obtained before action is taken to prevent people smuggling.³⁴ Article 8(7), which deals with ships without a nationality gives States greater powers to board and search vessels but is somewhat ambiguous as to what may be done at the end of the day:³⁵

A State Party that has reasonable grounds to suspect that a vessel is engaged in the smuggling of migrants by sea and is without nationality or may be assimilated to a vessel without nationality may board and search the vessel. If evidence confirming the suspicion is found, that State Party shall take appropriate measures in accordance with relevant domestic and international law.

The reference to "appropriate measures in accordance with relevant domestic and international law" was derived from paragraph 16 of the International Maritime Organisation's circular on interim measures for combating unsafe practices associated with the trafficking or transport of migrants by sea.³⁶

It would appear that the vessels with which Australia has been concerned are Indonesian vessels,³⁷ not stateless vessels. Thus Indonesia's cooperation would be

34 Protocol against the Smuggling of Migrants by Land, Air and Sea, supplementing the United Nations Convention against Transnational Organized Crime, Nov 15, 2000, art 8(2), 40 I.L.M. 335.

35 Above art 8(7).

36 Interim Measures for Combating Unsafe Practices Associated with the Trafficking or Transport of Migrants by Sea, IMO MSC/Circ 896, para 16 (Dec 16, 1998). See Revised draft Protocol against the Smuggling of Migrants by Land, Air and Sea, supplementing the United Nations Convention Against Transnational Organized Crime, UN GAOR, 7th Sess, note 96, Ad Hoc Comm on the Elaboration of a Convention against Transnat'l Org Crime; UN Doc. note 96: A/AC.254/4/Add.1/Rev 4 (1999).

37 See Principled Observance, above n 14, 5 (stating that "the vessels are almost universally Indonesian flag ships").

required in order to interdict its ships on the High Seas under existing international law, as well as under the protocol on people smuggling when it enters into force. The other major example of interdiction, the Haitian interdiction program, was premised on the consent of the flag state as formalised in an exchange of notes.³⁸ Australia, it appears, does not have such an agreement with Indonesia concerning interdiction of Indonesian craft, or with any other flag State.

Australia's practice is described in the report of the Senate Select Committee's inquiry into "a certain maritime incident."³⁹ (The incident referred to concerns an allegation that asylum-seekers on board one vessel had thrown some children overboard -- an allegation which proved to be incorrect.)⁴⁰ The committee's report outlines the process of interception of boats, known by the Australian Defence Force as "Operation Relex." Under this operation, 12 vessels were intercepted, the first being on 7 September 2001, and the last on 16 December 2001.⁴¹ There have been no unauthorised boat arrivals in Australia for over twelve months.

According to the evidence before the select committee, interception did not take place until boats entered the contiguous zone,⁴² where Australia has powers to prevent violations of its immigration law. Prior to this entry, the Australian navy had first contented itself with issuing warnings - without boarding the vessel - which were ignored.⁴³ In a later phase of Operation Relex, the navy stopped warning vessels prior to their entry into the contiguous zone. This was done in order to minimise the chances that asylum-seekers would sabotage their boats or jump overboard, thus requiring rescue⁴⁴ and bringing them within Australian jurisdiction, if not Australian territory. After the boat's entry into the contiguous zone, the navy either towed the boat to a point just beyond the contiguous zone - a

38 See Marian Nash Leich, *Contemporary Practice of the United States Relating to International Law: Aliens*, 76 Am. J Int'l L 374, 374 (1982) (exchange of notes dated September 23, 1981, between the American Ambassador at Port-au-Prince, Haiti, and the Haitian Minister of Foreign Affairs).

39 Senate Select Committee, *supra* note 7.

40 Id xxi-xxii (executive summary).

41 Id para 2.4.

42 Id para 2.65.

43 Id para 2.62.

44 Id para 2.70.

practice which could be questionable from the perspective of safety of life at sea if the boat's engine was not working - or escorted them back to Indonesian waters.

Without the cooperation of the flag state (and there is certainly no formal agreement with any flag state), Australia would be interfering with the freedom of the High Seas by escorting a boat back to another country's maritime zones. Perhaps Australia might argue that the decision to return to Indonesia was "voluntary" in light of the clearly determined effort to prevent entry into Australian waters and the escort was simply to ensure the safe return of the vessel and did not involve interference with freedom of the High Seas. However, this seems a strained construction of events.

The question remains, what has been the level of Indonesian cooperation with Operation Relex, and why would cooperation with returns be forthcoming after entry of vessels into Australia's contiguous zone, if it has not been possible to secure Indonesia's prior consent to interdiction on the High Seas? According to Human Rights Watch, which undertook detailed research into Australia's practices under the Pacific Solution, it appears that Australia has merely notified Indonesia after the return of boats.⁴⁵ Australia may simply be relying on Indonesia not to assert its rights in light of the involvement of people-smugglers.

III THE REACH OF THE REFUGEE CONVENTION AND THE RELEVANCE OF "ENTRY"

In addition to adopting the new interdiction powers, Australia has designated a number of its outlying territories as "excised offshore places"⁴⁶ within which unauthorised arrivals (known as "offshore entry persons")⁴⁷ may not make an application for a protection visa - the normal means by which Australia meets its obligations under the Refugee Convention - unless the Minister for Immigration exercises a non-compellable discretion in their favour.⁴⁸ Offshore entry persons

45 Human Rights Watch, *"By Invitation Only": Australian Asylum Policy*, December 2002, Vol 14, No 10(C), 14, 45 [hereinafter Human Rights Watch]. The report also contains disturbing accounts from the asylum-seekers of their treatment during interception and raises questions concerning the seaworthiness of the vessels. Interestingly, it also notes that in some cases women and children asylum-seekers were transported back to the edge of Indonesian waters on board Australian vessels.

46 See Migration Act, 1958, § 5 (containing the definition of "excised offshore places." A bill seeking to excise further territories has been defeated in Parliament).

47 See *id.* (containing the definition of an "offshore entry person").

48 See *id.* § 46A.

may be taken to countries which the Minister declares to meet certain minimum criteria: namely protection from refoulement, access to asylum procedures and protection of "relevant" human rights.⁴⁹ Asylum-seekers intercepted at sea may also be taken to declared countries by virtue of section 245F(9) of the Migration Act which provides that where a ship has been detained under the section, persons on board the ship may be taken "to a place outside Australia."⁵⁰

The interdiction program and the excision of territories from the Migration Zone for certain purposes reflect Australian Prime Minister John Howard's determination that no unauthorised asylum-seeker should set foot on Australian soil. This kind of analysis has received support from some international lawyers. Recently, Piotrowicz and Blay wrote that: "...the [Refugee] Convention does not dictate or determine what constitutes entry into a contracting state for the purposes of claiming its benefits or privileges. This is crucial because Articles 31 and 32 and, more significantly, the Article 33 provisions are dependent upon entry into the territory of a party."⁵¹

However, one should be wary of reading too much into the recognition of states' ability to control entry into their territories for the purposes of determining the "reach" of the Refugee Convention. In relation to Article 33, the plain language of the Convention does not support the argument concerning the relevance of entry at all. Article 33(1) provides that:⁵²

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.

The provision says nothing about entry. Rather, expulsion or refoulement in "any manner whatsoever" is prohibited.⁵³ This clearly extends to chain refoulement. If this were not so, the parties to the Convention could simply avoid their obligations by sending an asylum-seeker to another country which was not

49 Id § 198A.

50 Id § 245F(9).

51 Ryszard Piotrowicz & Sam Blay, *The Case of MV Tampa: State and Refugee Rights Collide at Sea*, Austl. LJ, Jan 2002, 12, 15.

52 Convention Relating to the Status of Refugees, 24 April 1954, art 33, 189 UNTS 2545.

53 Id.

party to the Refugee Convention and which would not observe the obligation of non-refoulement. In turn, this would make a mockery of the ordinary meaning of the words "return" and "in any manner whatsoever". The obligation of non-refoulement is both an obligation of result and an obligation of conduct, and there is no break in the chain of causation when a State has failed to ensure that an asylum-seeker receives protection from refoulement elsewhere. Accordingly, the State will bear joint responsibility for the fate of the asylum-seeker as a matter of international law.⁵⁴

It is a short step from the proposition that chain refoulement is prohibited to the idea that rejection of asylum-seekers at the frontier is impermissible. Consequently, the idea that States may simply extend their jurisdiction in order to protect their territories from the arrival of asylum-seekers also falls foul of the principle of non-refoulement. Yet, the United States and Australia have adopted the view that entry to State territory is crucial to the reach of the Convention.

In *Sale v Haitian Centers Council*, an 8-1 majority of the United States Supreme Court accepted that the interdiction of Haitians on the High Seas was permissible because the Court thought that neither the relevant US statute nor the Convention extended to persons outside the territory of the United States.⁵⁵ Reliance was placed on the *travaux préparatoires*, particularly assertions by the Swiss and Dutch delegates that the Convention was only to apply to persons within State territory and that closure of borders was permissible.⁵⁶

While it is undoubtedly the case that the framers of the Convention were concerned with refugees already in State territory, rather than refugees attempting to enter, these two tendentious passages from the *travaux* cannot outweigh the

54 See James Crawford & Patricia Hyndman, *Three Heresies in the Application of the Refugee Convention*, 1 Int'l J. Refugee L 155, 171 (1989).

55 *Sale v Haitian Ctrs Council, Inc.*, 113 S. Ct. 2549 (1993). For criticism of the case, see Guy S Goodwin-Gill, *The Refugee in International Law* 143 (2d ed, 1996); Arthur C Helton, *The United States Government Program of Intercepting and Returning Haitian Boat People to Haiti: Policy Implications and Prospects*, 10 NYL Sch J Hum. Rts. 325, 339-342 (1993).

56 *Sale*, 113 S Ct 2565-66. See also Marian Nash Leich, *US Practice*, 83 Am J Int'l L 905 (1989) (summarizing the evidence given by Alan J Kreczko, Deputy Legal Adviser of the Department of State, before the Subcommittee on Immigration, Refugees and International Law of the House Committee on the Judiciary concerning the compatibility of the Haitian interdiction program with international law).

ordinary meaning of the words of Article 33, which refers to expulsion or return "in any manner whatsoever." The *travaux* may be resorted to in order to confirm the meaning obtained by reference to the ordinary meaning of the terms of the treaty read in their context and in light of the object and purpose of the treaty,⁵⁷ or in cases of ambiguity or where the primary means of treaty interpretation have absurd or unreasonable results.⁵⁸ In this case the passages from the *travaux* relied upon are scant; they are contradicted by other passages;⁵⁹ they make clear words unclear; and they lead to the absurd proposition that States may exercise jurisdiction extra-territorially to ensure return of refugees to a place of persecution, contrary to the ordinary meaning of the treaty language. As the dissenter in *Sale v Haitian Centres Councils*, Justice Blackmun, said derisively of the majority decision, apparently "'return' does not mean return."⁶⁰

Against the examples of state practice of interdiction, which include the US interdiction program, the Australian interdiction program, and the pushbacks by some South East Asian countries, notably Malaysia and Thailand, during the Vietnamese exodus,⁶¹ stand the constant assertions of *opinio juris* to the effect that interdiction is impermissible. Numerous conclusions of the executive committee of the programme of the United Nations High Commissioner for

57 See Vienna Convention on the Law of Treaties, May 23, 1969, art 31, 1155 UNTS 331 (stating the primary means of treaty interpretation). Furthermore, art 31 codifies customary international law and may be referred to when construing the Refugee Convention.

58 Vienna Convention on the Law of Treaties, *supra* note 57, art 32. Article 32 codifies customary international law and may be referred to when construing the Refugee Convention.

59 James C Hathaway, *Refugee Law is Not Immigration Law*, 2002 World Refugee Surv 38, 41 (2002).

60 *Sale*, 113 S. Ct, 2565-66.

61 See UNHCR, *The State of the World's Refugees: Fifty Years of Humanitarian Action* 83 (2000).

Refugees (ex com)⁶² and the General Assembly's Declaration on Territorial Asylum⁶³ all state that rejection at the frontier is impermissible. Although state officials have sometimes asserted that this soft law is worthless, when it confirms the ordinary meaning of the hard law and stands against reasonably sparse state practice, it holds great weight.⁶⁴

The fact is that forcing ships back out to sea may result in refolement, or "refugees in orbit"⁶⁵ - that is refugees travelling around, trying to secure entry to countries and being turned away, which may itself amount to a violation of human rights. Without a determination of status, it is impossible to be sure that a State is merely preventing violations of its domestic immigration laws, rather than violating the prohibition on refolement. This was the fundamental problem with the Haitian interdiction program. In some phases of the program, there were no

62 Ex com has recognized the "fundamental importance of the observance of the principle of non-refoulement - both at the border and within the territory of a State": See *Non-Refoulement*, UNHCR, Exec. Comm., Exec. Comm. Conclusions, No 6 para CXXXVIII (1977). It has also stated that "[i]n all cases the fundamental principle of non-refoulement including non-rejection at the frontier must be scrupulously observed." See *Protection of Asylum-Seekers in Situations of Large-Scale Influx*, UNHCR, Exec. Comm, Exec Comm Conclusions, No 22 para 2 (XXXII) (1981). Finally, ex com has recalled "the need to admit refugees to the territory of States, which includes no rejection at frontiers without access to fair and effective procedures for determining status and protection needs." See *Conclusion on International Protection*, UNHCR, Exec. Comm., Exec. Comm. Conclusions, No 85 para q (XLIX) (1998). See also *Safeguarding Asylum*, UNHCR, Exec. Comm., Exec. Comm. Conclusions, No 82 para diii (XLVIII) (1997). Ex com conclusions are available at UNHCR's website <http://www.unhcr.ch/cgi-bin/texis/vtx/home/>.

63 GA Res. 2312, UN GAOR, 22nd Sess, Supp No 16, 81, UN Doc A/6716 (1967).

64 Jerzy Sztucki, *The Conclusions on the International Protection of Refugees Adopted by the Executive Committee of the UNHCR Programme*, 1 Int'l J Refugee Law 285 (1989) (Ex com conclusions are part of the soft law used to interpret the Refugee Convention). Volker Turk, *The Role of UNHCR in the Development of International Refugee Law, in Refugee Rights and Realities: Evolving International Concepts and Regimes* 165 (Frances Nicholson & Patrick Twomey eds, 1999) (ex com conclusions are an indication of consensus on particular questions of refugee protection).

65 Goran Melander, *Refugees in Orbit* (1978).

hearings. At other stages, the hearings were inadequate, being held at sea and with few procedural safeguards.⁶⁶

While it appears that Australia's interdiction program has not lead to the direct return of an asylum-seeker to a place of persecution, there are insufficient safeguards against chain refoulement. If States are going to adopt measures that prevent the arrival of asylum-seekers, they must take measures to ensure that refoulement does not occur.⁶⁷ Interception of boats headed for Australia has occurred on a number of occasions, and the boats have been forced to return to Indonesia⁶⁸ - a country that is not party to the Refugee Convention. Although it is strongly arguable that Indonesia is bound by a customary obligation of non-refoulement,⁶⁹ Australia should assure itself that Indonesia will abide by that obligation. Thus, at the very least, Australia should have a readmission agreement with Indonesia and there should be communications concerning particular individuals in order to prevent misunderstandings and refoulement.⁷⁰ It appears that Australia does not have such an agreement, although it does have an arrangement concerning interception by Indonesian authorities of asylum-seekers

66 For descriptions of the interdiction program and concerns about refoulement, see Harold Hongju Koh, *America's Offshore Refugee Camps*, 29 U Rich L Rev 139, 139-158 (1995); Carlos Ortiz Miranda, *Haiti and the United States during the 1980s and 1990s: Refugees, Immigration, and Foreign Policy*, 32 San Diego L Rev 673, 693-694 (1995).

67 Sir Elihu Lauterpacht & Daniel Bethlehem, *The Scope and Content of the Principle of Non-Refoulement*, UNHCR paras 76, 83 (2001), available at <http://www.unhcr.ch/cgi-bin/texis/vtx/home> (Lauterpacht and Bethlehem write that conduct amounting to rejection at the frontier, including that which occurs on the High Seas, will call into play this obligation). But see Guy S Goodwin-Gill, above n 55, 166, who distinguishes between denial of entry of ships to territorial waters and programs of interdiction which return passengers to the place of origin.

68 See Senate Select Committee, above n 7, para 2.4. See also Press Release, Minister for Immigration and Multicultural and Indigenous Affairs, Philip Ruddock, MP, Suspected Illegals Turned Back, December 21, 2001, at http://www.minister.immi.gov.au/media_releases/media01/r01193.htm.

69 For the argument that non-refoulement is not only customary international law, but a norm of *jus cogens*, see Jean Allain, *The jus cogens nature of non-refoulement*, 13 Int'l J Refugee L. 533 (2001).

70 Concerning such safeguards, see Reinhard Marx, *Non-Refoulement, Access to Procedures, and Responsibility for Determining Refugee Claims*, 7 Int'l J Refugee L 383, 404-405(1995).

in Indonesia who are likely to go on to Australia.⁷¹ Further, rather than considering the conditions in Indonesia in general terms, the position of the individual should be considered, as is the case before Australian courts when they consider whether protection elsewhere is available.⁷² A hearing, even if only to determine whether Indonesia is a safe third country for a person who is a refugee, should be required. This is consistent with the view that the Convention's obligation of non-refoulement requires access to refugee status determination procedures in some form in order to safeguard against refoulement.⁷³

IV TRANSFER OF ASYLUM-SEEKERS TO "SAFE THIRD COUNTRIES"

In addition to returning asylum-seekers to Indonesia, which Australia apparently regards as a safe third country because of the presence of the UNHCR,⁷⁴ Australia has transferred asylum-seekers to countries participating in the "Pacific Solution," namely Nauru and Papua New Guinea. This can occur in two ways. A person may be transferred at sea pursuant to section 245F(9) of the Migration Act,⁷⁵ as was the case with asylum-seekers on board the *Tampa* and the *Aceng* prior to the enactment of that section.⁷⁶ Section 245F(9) does not mention

71 Principled Observance, above n 14, 5-7. For further information about the arrangement, see US Committee for Refugees, *Paying the Price: Australia, Indonesia Join Forces to Stop "Irregular Migration" of Asylum Seekers*, 22/8 Refugee Reports (2001), available at http://www.refugees.org/world/articles/australia_rr01_8.htm. For a description of the "disruption" of people smuggling under this protocol, see Senate Select Committee above n 7, chapter 1. It is particularly pertinent that the agreement was suspended for around nine months during Operation Relex: Id para 1.50.

72 The Courts may do this under Migration Act, 1958 § 36(2), where the test (a test that is open to criticism in the way that it has been applied) is whether protection will be forthcoming as a matter of "practical reality and fact." See V872/00 *A v Minister for Immigration and Multicultural Affairs* (2002) 190 ALR 268. Alternatively, the Courts are required to consider the possibility of protection elsewhere by virtue of Migration Act, 1958 § 36(3) (referring to a right to enter and reside in a third country and interpreted by the Courts to refer to a legally enforceable right). See *Minister for Immigration and Multicultural Affairs v Applicant C* (2001) 66 ALD 1.

73 As Marx notes, the obligation to have determinations flows from the principle of good faith. See Marx, above n 65, 401.

74 Principled Observance, above n 14, 6.

75 Migration Act, 1958 § 245F(9).

76 The *Aceng* was an Indonesian vessel stopped shortly after the *Tampa* incident.

"declared countries", but it can be used in order to take people to those countries. Alternatively, an "offshore entry person" may be taken to a "declared country" under section 198A of the Migration Act.⁷⁷

There are two issues raised here. First, is there protection from refoulement? Second, is it the case that asylum-seekers can simply be carted off to another country without their consent?

Unlike the situation with respect to Indonesia, agreements negotiated between Australia and Nauru, and between Australian and Papua New Guinea may serve as some protection from refoulement,⁷⁸ although it should be noted that Australia may take the view that the agreements have less than treaty status,⁷⁹ and that Nauru is not party to the Refugee Convention. As far as "offshore entry persons" are concerned, section 198A of the Migration Act requires the Minister to declare that countries to which offshore entry persons are removed meet certain minimum criteria. Apparently, the Minister has made declarations in relation to Nauru and Papua New Guinea,⁸⁰ although he is not required to table his declaration before Parliament and the texts of the declarations in relation to Nauru and Papua New Guinea do not appear to have been made public. In any event, these ministerial declarations are not necessarily a satisfactory guarantee of an asylum-seeker's protection, as they do not consider the position of the individual. In addition, questions may be raised as to the standard of processing in Papua New Guinea and Nauru given that it is not open to the independent merits review which is

77 Migration Act, 1958 § 198A.

78 Australia has concluded "agreements" with Nauru and Papua New Guinea concerning admission to these countries. See Statement of Principles, Sept 10, 2001, Austl.-Nauru (signed by the President of Nauru and Australia's Minister for Defence) (copy on file with author) [hereinafter Statement of Principles]. Memoranda of Understanding were subsequently entered into with both Nauru and Papua New Guinea.

79 The relevant documents are generally entitled "memoranda of understanding" and Australia usually treats these as non-binding.

80 Department of Immigration and Multicultural and Indigenous Affairs, *Migration Legislation, Regulations: Declared Countries*, available at: <http://www.immigration.gov.au/legislation/refugee/03.htm> (last modified April 15, 2002). It is stated that "currently, Nauru and Papua New Guinea are declared countries under § 198A of the [Migration] Act." See also Senate Select Committee, above n 7, para 11.4.

available in Australia.⁸¹ Indeed, the lack of standardised determination procedures has been one of the most powerful arguments against reliance on "safe third countries."

The second question, whether persons may be taken to another country without their consent, requires us to examine two distinct scenarios - the case of transfer of asylum-seekers at sea, and the transfer of asylum-seekers from territory. In the case of those transferred at sea, a number of human rights may condition the exercise of state jurisdiction. In particular, asylum-seekers have the right to seek asylum,⁸² as well as the right to leave their own country⁸³ and the right to liberty.⁸⁴ The law of the sea, discussed earlier, is also relevant.

It is up to the State of origin to control exit in a manner that conforms with the right to leave the country, rather than other States who fear the possibility of illegal entry. However, there is no right to be granted asylum in a particular state and no right of entry guaranteed either under the Refugee Convention or general human rights treaties, only the obligation not to refoule refugees. Thus it could be argued that, so long as the interdicting State ensures that non-refoulement is respected, sending asylum-seekers interdicted at sea on to another country without the asylum-seekers' consent is permissible as a matter of refugee law unless there is a right to choose the country of asylum in lieu of returning home.

Bill Frelick, an early proponent of what might be termed a "Caribbean Solution" to the Haitian boat-people outflow as an alternative to the policy of

81 Processing is performed by Australian immigration officials in some instances, but instead of the independent merits review which is available in Australia through the Refugee Review Tribunal, review by another Australian immigration official is all that is available. This is modelled on UNHCR's own practice, and UNHCR has undertaken some of the status determination under the Pacific Solution. However, UNHCR has a different philosophy to national immigration departments and is not in a position where it can easily establish independent merits review. In any event, UNHCR is not immune from criticism. See generally Michael Alexander, *Refugee Status Determination Conducted by UNHCR*, 11 Int'l J Refugee L. 251 (1999). See also Human Rights Watch, above n 45, 57-59.

82 Universal Declaration of Human Rights, G.A. Res. 217A, U.N. GAOR, 3rd Sess., art 14, at 71, U.N. Doc. A/810 (1948).

83 See, eg, International Covenant on Civil and Political Rights, Dec 16, 1966, art 9, 999 UNTS 171, 6 ILM 368.

84 See *id.* I argue later in this paper that the right to liberty is a customary international norm.

interdiction, argued that any movement to other countries must be voluntary, but that the choices were clearly constrained.⁸⁵

In contrast to the way in which Guantanamo has been operated thus far...a safe haven camp must be predicated on voluntariness. The Haitians' camp would be for those who have chosen Guantanamo either by willingly allowing themselves to be rescued at sea and staying in Guantanamo awaiting screening, or those who chose Guantanamo over being deported to Haiti...

Those who continued to harbor genuine fears would stay and be provided for, but would know that there was no "future" for them at Guantanamo. Their situation would be essentially the same as a majority of the other 19 million refugees around the world, most of whom live in first asylum camps, with no prospect of third-country resettlement.

The responsibility of the United States would be to assist them so that they could live in safety in temporary asylum pending a durable solution."⁸⁶

Whether there is a right to choose the country of asylum is a matter on which the Refugee Convention says relatively little. The one provision which touches on the question is Article 31, which will be analysed in detail later as it may have limited applicability in cases of interdiction. Article 31 refers to people present in state territory, and while the territorial sea is assimilated to State territory, this is not the case with other maritime zones, and while flag vessels are under the flag state's jurisdiction (this is relevant to Australia's practice of using naval vessels to transfer asylum-seekers), they are not floating territory. Australia's practice does, however, raise good faith issues concerning the avoidance of Article 31, particularly in relation to the discrimination inherent in the Australian visas subsequently issued to those asylum-seekers eventually resettled in Australia, which could constitute a prohibited "penalty" pursuant to Article 31 given that the asylum-seekers were initially within Australian jurisdiction and that Australia retains ultimate responsibility unless another country resettles the transferred

⁸⁵ Bill Frelick, *Haitian Boat Interdiction and Return: First Asylum and First Principles of Refugee Protection*, 26 *Cornell Int'l LJ* 675 (1993).

⁸⁶ *Id.* 693-694.

asylum-seekers.⁸⁷ There are also questions concerning Australia's jurisdiction to transfer to another country foreign nationals on board a foreign-flagged vessel.

As to the question of seeking a country of asylum enshrined in Article 14 of the Universal Declaration on Human Rights, and which is contemplated by Article 31 of the Refugee Convention and reiterated in numerous *ex com* conclusions, Australia could argue that this is effectively what occurs when people are sent to the countries participating in the Pacific Solution. On the other hand, what really happens in those countries is that asylum-seekers are detained.⁸⁸ If screened in, the asylum-seekers may be accepted for resettlement elsewhere. However, this depends on a state of resettlement voluntarily coming forward. The asylum-seekers' destination is left uncertain, except for the fact that the agreements with the Pacific Solution countries state that Australia will take eventual responsibility for removing any asylum-seekers remaining in those countries.⁸⁹ To use Frelick's words, it does not appear that the asylum-seekers have a future anywhere, at least for the time being.⁹⁰

According to the strict letter of the law, durable solutions are not required by the Refugee Convention so that an uncertain future is permitted to some degree. However, other human rights may condition the time for which States may continue with such a policy. While States generally retain the power to control immigration, the Human Rights Committee has stated that there may be a right to enter a country in cases involving torture or considerations of family life.⁹¹

87 See Penelope Mathew, *Australian Refugee Protection in the Wake of the Tampa*, 96 Am J Int'l L 661, 673 (2002) (dealing with the visa category for offshore entry persons, but the arguments would be similar for persons intercepted before they could become offshore entry persons).

88 For the situation in Papua New Guinea, see Human Rights Watch Briefing Paper, *"Not for Export": Why the International Community Should Reject Australia's Refugee Policies*, Sept. 2002, available at <http://www.hrw.org/press/2002/09/ausbrf0926.htm> (last visited Jan. 20, 2003).

89 See, eg, "Statement of Principles", above n 79, para 6.

90 Frelick, above n 85, 694.

91 Human Rights Committee, General Comment 15, para 5: *reprinted in* Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies, HRI/GEN1/Rev.5, April 26, 2001, available at [http://www.unhchr.ch/tbs/doc.nsf/\(Symbol\)/26bd1328bee3bd13c1256a8b0038e0a2?Opendocument](http://www.unhchr.ch/tbs/doc.nsf/(Symbol)/26bd1328bee3bd13c1256a8b0038e0a2?Opendocument).

Furthermore, the conditions in which refugees are "warehoused"⁹² under the Pacific Solution are also governed by general human rights law. The right to liberty is particularly significant, in this regard. To use the words of the European Court of Human Rights in *Amuur's* case, to detain people until such time as the "vagaries of international relations"⁹³ dictate that they are received somewhere else is unacceptable. The negotiations concerning the Tampa left asylum-seekers on board for a week or so, and now many of them have had to wait for prolonged periods in detention on Nauru. Even if future agreement with the countries participating in the Pacific Solution to accept more asylum-seekers is forthcoming,⁹⁴ new boat arrivals may similarly be subject to the "vagaries of international relations." Clearly, this treatment is not adequate "refugee protection," and I will argue later that Australia retains liability as a matter of international law for this treatment.

V THE MEANING AND RELEVANCE OF ARTICLE 31 AND ITS RELATIONSHIP WITH ARTICLE 32

Where the transfer of asylum-seekers takes place from Australian territory, there are questions concerning the rights due to asylum-seekers who are present in state territory: to what extent does illegal entry condition their rights? Two provisions are relevant here - Articles 32 and 31. Even in relation to these provisions, the relevance of "entry" may be overstated.

The application of Article 32 is premised, at least in the first instance, upon entry as defined by national immigration law. The text of Article 32 reads as follows:

Article 32. Expulsion

- (1) The Contracting States shall not expel a refugee lawfully in their territory save on grounds of national security or public order.

92 This term is used by Hathaway and Neve: James C Hathaway & R Alexander Neve, *Making International Refugee Law Relevant Again: A Proposal for Collectivised and Solution-Oriented Protection*, 10 Harv Hum Rts J 115, 130-131 (1997).

93 *Amuur v France*, 22 Eur Ct HR 533, para 48 (1996).

94 Papua New Guinea and Nauru agreed initially to accommodate specific boatloads of asylum-seekers. For discussion of the way in which the agreements have been extended to further groups of asylum-seekers, see Peter Mares *Borderline: Australia's Response to Refugees and Asylum Seekers in the Wake of the Tampa* 127-130 (2d ed. 2002).

- (2) The expulsion of such a refugee shall be only in pursuance of a decision reached in accordance with due process of law. Except where compelling reasons of national security otherwise require, the refugee shall be allowed to submit evidence to clear himself, and to appeal to and be represented for the purpose before competent authority or a person or persons specially designated by the competent authority.
- (3) The Contracting States shall allow such a refugee a reasonable period within which to seek legal admission into another country. The Contracting States reserve the right to apply during that period such internal measures as they may deem necessary.⁹⁵

Article 32 extends to a person "lawfully" in State "territory". The term "lawfully" probably does describe someone who has been permitted to enter the State as a matter of ordinary domestic legal procedures.⁹⁶ "Territory" surely refers to the concept as defined in international law. The fact that Australia has redefined its national territory, through the excision of territories from the migration zone for certain purposes does not mean that asylum-seekers have not entered State territory. But it does mean that they are not lawfully within State territory, thus they do not benefit, initially, from the protection against expulsion in Article 32.

Article 31 is relevant to the situation of asylum-seekers unlawfully present in state territory. According to Article 31, penalties are not to be applied for illegal entry or *presence* on refugees "who enter or are present in [State] territory *without authorization*."⁹⁷ Again, "territory" must refer to the concept as defined in international law. The plain language clearly applies to persons fictionally excluded from entry because they are intercepted in excised offshore places by law-enforcement personnel or immigration officials. Thus, persons described as "offshore entry persons" are entitled to such protection as Article 31 provides.

Article 31 provides protection against "penalties" for unlawful entry, but expulsion as the ultimate course of action in relation to a particular asylum-seeker

95 Convention Relating to the Status of Refugees, Apr 24, 1954, art 32, 189 UNTS 2545.

96 Gunnel Stenberg, *Non-expulsion and Non-refoulement: The Prohibition against Removal of Refugees with Special Reference to Articles 32 and 33 of the 1951 Convention relating to the Status of Refugees* 87-92, 121 (1989).

97 Convention Relating to the Status of Refugees, July 28, 1951, art 31, 189 UNTS 150 (emphasis added).

does not constitute a penalty. Nor does Article 31 grant, directly, a right to be lawfully admitted to State territory as a matter of national immigration law. The wording of Article 31 is as follows:

Article 31. Refugees unlawfully in the country of refuge

- (1) The Contracting States shall not impose penalties, on account of their illegal entry or presence, on refugees who, coming directly from a territory where their life or freedom was threatened in the sense of article 1, enter or are present in their territory without authorization, provided they present themselves without delay to the authorities and show good cause for their illegal entry or presence.
- (2) The Contracting States shall not apply to the movements of such refugees restrictions other than those which are necessary, and such restrictions shall only be applied until their status in the country is regularized or they obtain admission into another country. The Contracting States shall allow such refugees a reasonable period and all the necessary facilities to obtain admission into another country.⁹⁸

The language "coming directly" and "good cause" is construed broadly. Article 31 does not refer solely to refugees coming directly from their country of origin. If a refugee is unable to secure protection in a country through which he or she has travelled after leaving the country of origin, the protection of Article 31 will still apply.⁹⁹ Moreover, it is generally accepted that mere transit in another country is not sufficient to deflect the protection of Article 31. It is notable that in relation to returns to countries through which an asylum-seeker has sojourned, the executive committee of UNHCR has referred to cases in which protection has already been secured in that country.¹⁰⁰ Ex com has also referred to the possibility of requesting persons to seek asylum from countries to which they

98 Id.

99 Guy S Goodwin-Gill, *Article 31 of the 1951 Convention Relating to the Status of Refugees: Non-penalization, Detention and Protection*, prepared for the UNHCR Global Consultations (Oct 2001), available at <http://www.unhcr.ch/cgi-bin/texis/vtx/home>.

100 See *Problem of Refugees and Asylum-Seekers who move in an irregular manner from a country in which they had already found protection*, UNHCR, Exec Comm., Exec Comm Conclusions, No 58 (1989).

have some sort of connection, if fair and reasonable.¹⁰¹ Otherwise, many would accept that there is an element of choice left open to asylum-seekers.¹⁰² It should also be noted that the idea that asylum-seekers on State territory may simply be moved involuntarily from state territory to another country, particularly one to which the asylum-seeker has no links and through which she has not previously sojourned, is certainly not uniformly accepted in State practice. Even in cases of mass influx, such as the flight of Albanian Kosovars, the practice has been to secure asylum-seekers' consent before their transfer.¹⁰³ A recent EU directive on temporary protection confirms that consent of both the proposed safe third country and the asylum-seeker is required before transfer occurs.¹⁰⁴

On the other hand, Article 31 clearly contemplates that some refugees might be required to seek admission to other countries. It should also be noted that a number of delegates at the drafting conference stated their views that expulsion did not constitute an impermissible penalty.¹⁰⁵ Given that the provision relating to expulsion (Article 32) is applicable only to refugees "lawfully" in State territory, a prima facie case can be made for the legality of sending an asylum-seeker elsewhere.¹⁰⁶

101 See *Refugees without an asylum country*, UNHCR, Exec Comm, Exec Comm Conclusions, No 15 para h i-iv. (1979).

102 See, eg, *Ex parte Adimi*, 4 All ER 520, 527-28 (1999). See also *id.* at 537; and Ex. Comm. Conclusion No 15, above n 92, para h. iii. (referring to the asylum-seeker's wishes).

103 UNHCR, Skopje, *Guidelines for the Humanitarian Evacuation Programme of Kosovar Refugees in the Former Yugoslav Republic of Macedonia*, Apr 11, 1999, available at <http://refugees.atvirtual.net/en/evacuations.html>. Australia's regulations speak of asylum-seekers accepting offers of temporary stay in Migration Regulations, 1994, 2.07AC.

104 Council Directive 2001/55/EC of 20 July 2001 on Minimum Standards for Giving Temporary Protection in the Event of a Mass Influx of Displaced Persons and on Measures Promoting a Balance of Efforts Between Member States in Receiving Such Persons and Bearing the Consequences Thereof, art 26(1), 2001 O.J. (L 212) 12.

105 See Nehemiah Robinson *Convention Relating to the Status of Refugees: Its History, Contents and Interpretation* 153 (1953); Paul Weis *The Refugee Convention 1951: The Travaux Préparatoires Analysed, with a Commentary* 302 (1995).

106 Thus Hathaway argues that there was no impediment to sending asylum-seekers to New Zealand. See Hathaway, above n 59, 43.

In practice, the unwillingness of other States to accept expelled refugees and the danger of refoulement often means that the option of requiring a person to seek admission elsewhere is impractical. The reality is that absent some connection between the State and the asylum-seeker or some prior agreement such as the Dublin Convention,¹⁰⁷ no other State will take the person, meaning that the asylum-seeker has effectively chosen the place of asylum. In this situation, the two options mentioned in Article 31 as being relevant to the period for which necessary restraints upon movement of refugees can be imposed - regularisation of status or admission to another country - may be seen as exclusive alternatives. Thus, Grahl-Madsen opined that if a refugee unlawfully within the territory of a State was unable to gain admission to another state, rather than refusing to regularize the refugee's status, the State concerned would have to regard the refugee as being lawfully on state territory and entitled to the rights owed to refugees "lawfully" and "lawfully staying" in State territory.¹⁰⁸

Australia managed to secure agreement with New Zealand to take some Tampa asylum-seekers, thus creating the unusual situation where expulsion to a non-persecutory country through which the asylum-seeker had not transited could be effected. However, even here, I would urge a cautious approach concerning the relationship between Articles 32 and 31. It should not necessarily be assumed that because Article 32, which deals expressly with expulsion, only refers to refugees lawfully present, that all illegal entrants can simply be expelled at the earliest opportunity. Article 32 specifies serious grounds for expulsion of refugees lawfully in the territory of a State and it gives those refugees protections against expulsion that are not granted to refugees unlawfully in State territory. However, both lawful arrivals and unauthorised arrivals who have "come directly" are entitled to a "reasonable period" within which to seek legal admission into

107 Convention Determining the State Responsible for Examining Applications for Asylum Lodged in One of the Member States of the European Communities, June 15, 1990, 30 ILM 425 (1991).

108 Atle Grahl-Madsen *The Status of Refugees in International Law* Vol. II 436-37 (1972). See also JJ Bolten, *From Schengen to Dublin: the New Frontiers of Refugee Law, in Internationalisation of Central Chapters of the Law on Aliens, Refugees, Privacy, Security and the Police* 8, 21 (H Meijers et al eds, 1991). Weis argued that there is no obligation to regularise status, although refugees should not be kept "behind barbed wire." Weis, above n 105, 303. However, Grahl-Madsen argued that it was never envisaged that there would be a category of "unprivileged refugees". Grahl-Madsen, above n 108, 437.

another country.¹⁰⁹ Thus, the idea that any refugee unlawfully in state territory may be sent immediately to another country regardless of the asylum-seekers' wishes has a weak foundation in the express language of the Convention.

In cases of previous sojourn in another country, and where the asylum-seeker may properly be viewed as not "coming directly" from a place where life and freedom are threatened, it is possible to argue that the Convention imposes obligations primarily on that other country.¹¹⁰ Even if this logic can be extended to the case of a country through which an asylum-seeker has not travelled and to which there is no other connection, but which is nevertheless willing to accept the asylum-seeker, it appears that Australia gave no consideration as to whether the asylum-seekers shipped to New Zealand, Nauru or Papua New Guinea had "come directly" from places where life or freedom was threatened before deciding to ignore the last clause of Article 31(2).

There is also very little scope for consideration as to the reasons for asylum-seekers' routes of escape - the often compelling reasons for which are well-documented in the Human Rights Watch report¹¹¹ - under the new legislative arrangements in relation to the Pacific Solution. All unauthorised arrivals to the excised offshore places are treated as offshore entry persons. Unless the Minister uses his non-compellable discretion to lift the ban on applications for protection visas,¹¹² there is little scope to consider whether a person came "directly" to Australia or had "good cause" for unlawful entry into Australia, and there is certainly no consideration of this question before the person is shipped off to declared countries.

Nor does it appear that there is much consideration of these issues after the fact - that is, once asylum-seekers have been transferred to Nauru or Papua New Guinea. Changes to Australia's visa regime preclude persons from applying for

109 See Convention Relating to the Status of Refugees, July 28, 1951, art 31, 189 UNTS 150; Convention Relating to the Status of Refugees, Apr 24, 1954, art 32, 189 UNTS 2545.

110 Thus Grahl-Madsen distinguished between "unwanted" and "migrant" asylum-seekers: Grahl-Madsen, above n 108, 438-441. Similarly, ex com has distinguished between asylum-seekers receiving "protection" (dealt with in ex com conclusion no 58, above n 100) and asylum-seekers without a country of asylum (in ex com conclusion no 15, above n 101).

111 Human Rights Watch, above n 43, 15-29, 34-38.

112 Migration Act, 1994 §46A(2).

permanent protection under the three major categories of offshore visas if they have stayed for as few as 7 days in a country in which they could have obtained "effective protection" from either the State concerned or UNHCR.¹¹³ This means that asylum-seekers may only apply for the visa category for offshore entry persons - a rolling three year temporary visa¹¹⁴ - or, if they were intercepted before they could become an offshore entry person, a 5 year temporary protection visa,¹¹⁵ the terms of which do permit an application for a permanent visa subsequently.¹¹⁶ It is uncertain how the terms "effective protection" will be construed, although there is case-law concerning the application of these terms in relation to the availability of protection visas under section 36(2) of the Migration Act to which reference might be made.¹¹⁷ The reliance on UNHCR to provide "protection" is particularly disturbing when UNHCR must rely on States to provide protection: states that, in many cases, are not party to the Refugee Convention which is why Australia seeks to rely on UNHCR's presence in the first place. As the fourth panel of experts meeting for the global consultations in the context of the 50th anniversary of the Refugee Convention stated: "the mere fact of UNHCR being operational in a certain country should not be used as a decisive argument for the availability of effective protection in that country."¹¹⁸

Of course, if there was in fact no other place to which the asylum-seekers could have secured admission through their own efforts (as seems likely in the case of the Tampa asylum-seekers), the argument just outlined may push Article 31 beyond its limits, turning it into a right of entry into Australia, even though, at least in the case of New Zealand, there was a satisfactory place to which many asylum-seekers could go. (Asylum-seekers with family members in Australia would be in a different position, of course.) We are back at the point of arguing about the right to choose, versus the absence of a right of entry.

113 See Migration Regulations 1994, sched 2, clauses 200.212, 202.212 and 204.213.

114 See Migration Regulations 1994, sched 2, part 447.

115 Senate Select Committee, above n 7, para 11.55.

116 See Migration Regulations 1994, sched 2, part 451.

117 See V872/00 *A v Minister for Immigration and Multicultural Affairs*, above n 67.

118 Geneva Expert Round Table, *Summary Conclusions on Article 31 of the 1951 Convention Relating to the Status of Refugees-Revised* para 10c, October 8-9, 2001, available at <http://www.unhcr.ch>.

As seen above, the answer to this circular argument depends, at least in part, on the materialisation of another country willing to take asylum-seekers. In the case of New Zealand's participation, Australia was lucky. Its luck does not appear to be holding. The available figures show that Australia has taken the greatest numbers of asylum-seekers intercepted on the Tampa and under the Pacific Solution, with New Zealand taking the second-largest number, and few other countries showing any interest.¹¹⁹ By contrast with the position in relation to New Zealand, it seems that Australia has, at best, deferred its responsibilities in the case of countries participating in the Pacific Solution. Under the terms of the "agreements" with Nauru and Papua New Guinea, Australia takes responsibility for the eventual removal of all asylum-seekers because those countries will not take responsibility for them.¹²⁰ If no other country comes forward to resettle refugees, Australia would have to take responsibility for them. Realities, rather than the mantra of "no right of entry" must determine the position. Grahl-Madsen's point that asylum-seekers unlawfully present in State territory must eventually be treated as refugees lawfully present on State territory seems applicable to this scenario.¹²¹ Moreover, it is important to remember that the refugee is also owed the human rights set out in the International Covenant on Civil and Political Rights¹²² and the International Covenant on Economic, Social and Cultural Rights,¹²³ as these generally depend not on lawful status, but on the fact that the refugee is a human being. Indeed, these broader human rights obligations may compel the conclusion that there is an element of choice on the part of asylum-seekers as to their place of refuge, and a right of entry. In particular, obligations concerning the family and children in Articles 17, 23 and 24 of the International Covenant on Civil and Political Rights may compel the

119 Megan Saunders, *Refugee Policy "a life saver,"* The Australian, Oct 2, 2002, 7; Human Rights Watch, above n 43, 74.

120 See Statement of Principles, above n 78.

121 Grahl-Madsen, above n 108, 437.

122 International Covenant on Civil and Political Rights, Dec. 16, 1966, 999 UNTS 171.

123 International Covenant on Economic, Social and Cultural Rights, Dec 16, 1966, 999 UNTS 3.

admission of asylum-seekers who are unable to re-establish family life anywhere other than the place of refuge or the place of persecution.¹²⁴

VI INADEQUATE REFUGEE PROTECTION AND AUSTRALIA'S CONTINUING LIABILITY

Given that Australia in most cases will only have deferred its responsibilities by sending asylum-seekers to Nauru or Papua New Guinea, it then becomes important to question whether Australia may send asylum-seekers to places which are not required by the Refugee Convention to observe all the rights set out therein¹²⁵ and which are holding the asylum-seekers in detention.¹²⁶ What is the standard of protection to be observed in "safe third countries?" Often it is the lack of protection in a country of first asylum which compels an asylum-seeker to move on from the first port of call. Given that such persons are considered to have come "directly" for the purposes of Article 31, refugees could be regarded as having acquired rights under the Convention that cannot be "traded" away by sending them to non parties.¹²⁷ The Refugee Convention is a human rights convention after all, and the rights set out therein are owed to refugees themselves, not merely to the State parties, all of whom, theoretically, should take an interest in the adherence by other parties to these rights. However, the absence of an express right to enter, along with the gradation of Convention rights

124 See Human Rights Committee, General Comment 19, reprinted in *Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies*, HRI/GENI/Rev.5 (Apr 26 2001) available at [http://www.unhcr.ch/tbs/doc.nsf/\(Symbol\)/26bd1328bee3bd13c1256a8b0038e0a2?Opendocument](http://www.unhcr.ch/tbs/doc.nsf/(Symbol)/26bd1328bee3bd13c1256a8b0038e0a2?Opendocument). See also Geneva Expert Round Table, Global Consultations, *Summary Conclusions on Family Unity* para 5 November 8-9, 2001, available at <http://www.unhcr.ch>; Geneva Expert Round Table, *Summary Conclusions on Article 31 of the 1951 Convention Relating to the Status of Refugees-Revised* para 10d, October 8-9, 2001, available at <http://www.unhcr.ch>.

125 Papua New Guinea maintains significant reservations to the Refugee Convention, while Nauru is not even a party.

126 For the situation in Nauru, see John Pace *Amnesty International, Report of Mission to the Republic of Nauru* Nov 8-13, 2001, at para 49.

127 Hathaway raises this argument, although on balance he does not find it a convincing basis upon which to criticise Australia's reallocation of its responsibilities to Nauru or Papua New Guinea. Hathaway, above n 59.

according to links established in a particular state's territory¹²⁸ may necessitate further consideration of the question. Clearly, the principle of non-refoulement must be observed. But what is required beyond that?

An extreme, theoretical view is that providing non-refoulement is guaranteed - the answer to which is rendered doubtful by virtue of the fact that if a country is not party to the Convention, nothing prevents eventual expulsion to a non party that will observe few other human rights. Unless we are dealing with human rights which carry with them an explicit or implicit non-refoulement guarantee, as is the case with Article 3 of the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment,¹²⁹ or Article 7 of the International Covenant on Civil and Political Rights, it could be argued that nothing prevents a State which is party to the Refugee Convention from sending a refugee to a place where human rights are not observed in fact.

The executive committee of the programme of the United Nations High Commissioner for Refugees has not taken this view. Ex com Conclusion 58 states that "irregular" movement of refugees and asylum-seekers from countries where a person has already been given "protection" (though not necessarily a durable solution such as local integration) is undesirable.¹³⁰ It provides that return of such asylum-seekers is permissible if the refugee/asylum-seeker is:

- (1) protected [in the safe third country] against *refoulement* and
- (2) they are permitted to remain there and to be treated in accordance with recognized basic human standards until a durable solution is found there...¹³¹

Furthermore, "favourable consideration" should be given to cases where a refugee or asylum-seeker "may justifiably claim that he has reason to fear

128 Compare the terminology in Article 26 relating to freedom of movement ("lawfully in") with art 28 relating to travel documents ("lawfully staying") and art 16(2) relating to legal assistance ("habitual residence").

129 Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Dec 10, 1984, art 3, 1465 UNTS 85.

130 *Problem of Refugees and Asylum-Seekers who move in an irregular manner from a country in which they had already found protection*, UNHCR, Exec Comm, Exec. Comm. Conclusions, No 58 (1989).

131 Id para f.

persecution or that his physical safety or freedom are endangered in the country where he previously found protection."¹³² Similarly, general conclusion no. 85, which would apply to the situation of a person who has not found a country of asylum, for example, stipulates that any country to which a person is sent must protect the person from refoulement, permit the opportunity to seek asylum and treat the person in accordance with international standards.¹³³

The status of the conclusions as a reflection of *lex lata*, particularly in the face of some conflicting state practice, may be open to question. However, reiteration in ex com of the principle that human rights must be observed in places to which asylum-seekers are sent may indicate that States accept this is a legal criterion.¹³⁴ This is particularly true when the contrary state practice is contradictory,¹³⁵ self-serving and far from universal. Moreover, it should be noted that, like so many others, these conclusions are designed to clarify situations of uncertainty in the application of the Convention and therefore carry weight as interpretative tools.¹³⁶ It has been argued on the basis of relevant ex com resolutions, and human rights norms - which of course are relevant to the interpretation of the Convention¹³⁷ - that Article 33 forbids return not only to persecution for Convention reasons, but to any place where life or freedom would be threatened.¹³⁸

Certainly, the conclusions set out the essential elements of refugee protection, and they are realistic. The conclusions recognise that it is unrealistic and inhumane to expect refugees to remain in, return or go to places where they receive inadequate protection, meaning rights-regarding protection which gives

132 Id, para g.

133 See ex com conclusion No 15, above n 101.

134 Jens Vedsted-Hansen, *Non-Admission Policies and the Right to Protection: Refugees' Choice versus States' Exclusion?*, in Frances Nicholson & Patrick Twomey, *Refugee Rights and Realities: Evolving International Concepts and Regimes* 269 (1999). Contrast with analysis of Stenberg, supra note 96, at 128.

135 Australia, for example, is a member of ex com and in many cases was involved in drafting the relevant ex com conclusions.

136 See Vienna Convention on the Law of Treaties, May 23, 1969, art 31, 1155 UNTS 331 (stating the primary means of treaty interpretation).

137 See id (opened for signature May 23, 1969 and entered into force January 27, 1980), art 31(3)(c), 1155 UNTS 331.

138 See Lauterpacht & Bethlehem, above n 67, paras 127-141.

them a basis for moving on with their lives, rather than a precarious existence in which non-refoulement alone is guaranteed. They are also premised on the fact that generally one would not expect States to tolerate the presence of persons whose rights they were not willing to respect. However, Australia, through the use of financial incentives, has managed to secure exactly that result.

In Nauru, for example, asylum-seekers transferred from Australia are held in detention.¹³⁹ Moreover, it should be noted that children are among those detained.¹⁴⁰ While every state has the right to control entry, detention which is not reasonably related to the facilitation of entry or exclusion will be arbitrary.¹⁴¹ The detention of asylum-seekers has constantly been decried by *ex com* and is clearly one of the human rights which should be protected according to the *ex com* conclusions on safe third countries referred to earlier.

Quite apart from the requisite standard of protection from a so-called "safe third country", both Nauru and Australia are responsible for this violation of international law. Nauru, though not party to any major human rights treaties other than the Convention on the Rights of the Child,¹⁴² is bound by that treaty

¹³⁹ See Pace, above n 126.

¹⁴⁰ According to Peter Mares, "in May 2002 there were 351 children in the camps in Manus [in Papua New Guinea] and Nauru, and they had been detained for between six and nine months." Mares, above n 94, 133.

¹⁴¹ In certain instances, treaty provisions will be violated. For example, see Article 9 of the International Covenant on Civil and Political Rights as interpreted by the Human Rights Committee in *A v Australia*, UN Human Rights Comm, Communication No 560/1003, UN Doc CCPR/C/59/D/560/1993 (1997). See also Convention on the Rights of the Child, November 20, 1989, art 37, 1577 UNTS 3 (opened for signature and entered into force September 2, 1990). According to the Human Rights Committee, the right to liberty is also protected by customary international law. UN Human Rights Comm., General Comment No 24, at paragraph 8, reprinted in *Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies*, HRI/GEN1/Rev.5 (Apr 26 2001), available at [http://www.unhchr.ch/tbs/doc.nsf/\(Symbol\)/26bd1328bee3bd13c1256a8b0038e0a2?Opendocument](http://www.unhchr.ch/tbs/doc.nsf/(Symbol)/26bd1328bee3bd13c1256a8b0038e0a2?Opendocument) [hereinafter General Comment No 24].

¹⁴² Convention on the Rights of the Child, above n 130. On 12 November, 2001, Nauru signed the International Covenant on Civil and Political Rights, the International Convention on the Elimination of All Forms of Racial Discrimination and the Convention against Torture and Cruel, Inhuman or Degrading Treatment or Punishment, meaning that it has an obligation not to defeat the object and purpose of these treaties prior to becoming a party: Vienna Convention on the Law of Treaties, above n 126, art 18.

not to detain children unless as a last resort and then only for the shortest appropriate time,¹⁴³ as well as by the customary international law protection of liberty.¹⁴⁴ Australia is bound by the Convention on the Rights of the Child and by Article 9 of the International Covenant on Civil and Political Rights not to detain asylum-seekers for the duration of their status determination,¹⁴⁵ as well as the customary protection against arbitrary detention. Given that Australia has an agreement with Nauru concerning the asylum-seekers it may be responsible for assisting the violation of their rights in Nauru, in accordance with the International Law Commission's Articles on State Responsibility.¹⁴⁶

Articles 16 and 17 of the Articles on State Responsibility provide that a State which aids or assists, or, alternatively, which directs and controls another State in the commission of an internationally wrongful act is responsible in part (Article 16) or for the entire act (Article 17) where the act would be wrongful if committed by the first State. The basic idea is that while each State is independently responsible for violations of international obligations, a State "should not be able to do through another what it could not do itself."¹⁴⁷

143 Convention on the Rights of the Child, above n 143, art 37.

144 Concerning this customary norm, see UN Human Rights Comm., General Comment No 24, above n 142.

145 *A v Australia*, above n 142.

146 See UNGA Res 56/83 "Responsibility of States for internationally wrongful acts" UN Doc A/RES/56/83. See also *ILC, Draft Articles on State Responsibility for Internationally Wrongful Acts, Report of the International Commission to the General Assembly*, UN GAOR, 56th Sess., Supp. No. 10 (A/56/10), ch IV.E.1. It should be said that the topic of complicity was included in the first draft of the Articles in 1980 in recognition of the existing state practice on the topic and that the final text of the relevant articles has met with general approval by states. Although there may be elements of progressive development, it is submitted that these articles should be viewed largely as an exercise in codification and the logical application of first principles.

147 See *The International Law Commission's Articles on State Responsibility: Introduction, Text and Commentaries* 149, 154 (James Crawford ed., 2002) [hereinafter *International Law Commission's Articles on State Responsibility*]. The quoted language refers to Article 17, but similar language is used in relation to Article 16 at p 149.

It may be questionable whether Australia's actions in relation to Nauru could be characterised as direction and control.¹⁴⁸ At the very least, however, I would argue that Australia should be held to account for the treatment of the asylum-seekers because it is aiding and assisting in their detention. The facts concerning the detention of the asylum-seekers are that the asylum-seekers would not be on Nauru if not for Australia's actions, and they are there under circumstances where Nauru is not to take final responsibility for the asylum-seekers and, indeed, where Australia will take final responsibility if no other State comes forward.¹⁴⁹ This distinguishes the situation from the usual case of reliance on a safe third country where it may be possible to argue - depending on whether or not we accept conditions concerning human rights as a prerequisite for relying on a country as a safe third country - that what happens to asylum-seekers is entirely a matter for that state. The asylum-seekers are on Nauru pursuant to an MOU. The original "Statement of Principles" concluded with Nauru spells out that Australia is to pay for all activities conducted under the "Statement of Principles"¹⁵⁰ and specifically refers to the two sites where the asylum-seekers are to be "received and accommodated,"¹⁵¹ making clear that Australia pays for the establishment and operation of the sites.¹⁵² Thus, while the detention centres are operated on Nauruan territory, and are run in practice by the International Organisation of Migration (IOM),¹⁵³ Australia is footing the bill.

It should be noted before embarking on the analysis of state responsibility that while international organisations such as the IOM have international personality¹⁵⁴ and may therefore bear liability for breaches of international law, a

148 For discussion of the meaning of "direction and control", see the commentary on the Articles. *Id.*

149 Indeed, officers from the Australian Department of Immigration and Multicultural Affairs perform the status determinations in some cases, but this fact will not be fully explored from the perspective of state responsibility here since it is not a feature of all cases and may be a question which is distinct from the act of detention. Pace, above n 126, para 5.

150 Statement of Principles, above n 78, para 1.

151 *Id.* para 7.

152 *Id.* para 8.

153 Pace, above n 126, para 8.

154 See *Reparations for Injuries Suffered in the Service of the United Nations*, 1949 ICJ Rep 174 (Apr. 11).

subject on which the ILC's Articles on State Responsibility expressly do not take a position,¹⁵⁵ countries such as Nauru retain their own obligations to ensure the human rights of persons within their territory and jurisdiction. They cannot avoid this obligation by contracting out detention to an international organisation, thus it is unnecessary to undertake a detailed examination of IOM's responsibilities here. In any event, that is a subject complicated by the fact that IOM is not bound by relevant human rights treaties, it operates under a service agreement with Australia (a factor which points the finger back at Australia when determining responsibility), and the fact that the special purpose visa issued by Nauru regulates the movement of asylum-seekers (which bolsters the case concerning Nauruan responsibility).¹⁵⁶

The requirements for liability under Article 16 of the Articles on State Responsibility are, first and foremost, that both States must be bound by the same obligation under international law. This is the case with respect to children who are detained against Article 37(b) of the Convention on the Rights of the Child, and with respect to adults under the customary law prohibition of arbitrary detention, which it is submitted applies in exactly the same way as the treaty prohibition in Article 9 of the International Covenant on Civil and Political Rights.¹⁵⁷ Even on a more conservative view of the customary right to liberty, the large-scale and prolonged arbitrary detention of persons would be a violation of customary international law.¹⁵⁸

In order to demonstrate that a State is aiding or assisting another State, there are further requirements as summarised in the commentary on the Articles:¹⁵⁹

First, the relevant State organ or agency providing aid or assistance must be aware of the circumstances making the conduct of the assisted State internationally wrongful; secondly, the aid or assistance must be given with a view to facilitating the commission of that act, and must actually do so; and thirdly, the completed act

155 See International Law Commission's Articles on State Responsibility, above n 149.

156 Pace, above n 126, para 53.

157 The Human Rights Committee appears to take this view. See General Comment No. 24, above n 142, para 8.

158 Restatement (Third) of Foreign Relations Law of the United States §702 cmt h (1987).

159 International Law Commission's articles on State Responsibility, above n 149, 149.

must be such that it would have been wrongful had it been committed by the assisting State itself.

There is little doubt in my mind that these requirements are met here. Of course, it might be possible for the Australian government to argue that it had not contemplated detention. When questioned about the treatment of asylum-seekers in Nauru, government officials have attempted to rely on an assertion that the IOM's Charter does not permit it to run detention centres.¹⁶⁰ However, it is highly likely that Australia always knew and contemplated that the asylum-seekers would be held in detention, particularly given that this is the practice it adopts itself and it would want detention to act as a deterrent on Nauru. Moreover, given that it is now apparent that the asylum-seekers are being detained¹⁶¹ - a fact of which Australia must be aware if only because Australian immigration officials are involved in the processing of some of the asylum-seekers¹⁶² - Australia may not simply avoid all responsibility by refusing to acknowledge that its money is being used in this way. Of course, a State "should not be required to assume the risk that [the aided State] will divert...aid for purposes which may be internationally unlawful."¹⁶³ However, given the ongoing relationship established by the memoranda of understanding with Nauru, it is difficult to see how Australia can escape all responsibility. Indeed, one wonders whether this situation is best characterised not merely as one where Australia aids and assists other countries, but one in which both States are jointly responsible for a single course of conduct.

160 *Hearing on Migration Legislation Amendment (Further Border Protection Measures) Bill 2002 Before the Senate Legal and Constitutional References Comm.*, Australian Senate. 163 (Aug. 19, 2002) (testimony of Mark Andrew Zanker, Acting First Assistant Secretary, Office of International Law, Attorney-General's Department). Mr Zanker stated that the asylum-seekers "are not in what are called detention centres. The International Organisation for Migration, which runs these places, does not have it in its charter to operate a detention centre, and it would not do so. They are processing centres").

161 Pace, above n149, paras 51-56.

162 Australian immigration officials interview asylum-seekers at the "State House" site in Nauru. UNHCR interviews those at the "Topside" site in Nauru. Id para 5.

163 UN International Law Commission, above n 137, 147.

Refugee Convention. The latter aim could arguably be achieved by greater participation in the Convention, whether or not there are supplementary agreements on burden sharing. Greater participation in the Convention could itself help to share refugee-sheltering responsibilities. However, it is doubtful that such participation will be secured when states like Australia ignore their existing obligations.

Perhaps burden-sharing agreements might serve to recommit Australia to its existing obligations, and of course they might serve to share resources, financial or otherwise, thereby achieving higher standards of refugee protection. However, I cannot help but be cautious about the benefits that will flow for refugees and developing countries, as opposed to responsibility-shirkers like Australia. As has been pointed out by Anker, Fitzpatrick and Shacknove,¹⁶⁸ talk of burden-sharing may be used by "sophisticated Northern governments" to abrogate their own international obligations while neglecting to provide financial assistance to other states¹⁶⁹ who are then forced to continue to host most of the world's refugees.¹⁷⁰

¹⁶⁸ Deborah Anker et al, *Crisis and Cure: A Reply to Hathaway/Neve and Schuck*, 11 Harv. Hum Rts J 295 (1998).

¹⁶⁹ Id 304.

¹⁷⁰ According to Papademetriou, the West takes about 18% of the total refugee population. DG Papademetriou, *Migration*, 109 Foreign Policy, Winter 1997-98, 15, 23.