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NOTE: The Tampa Incident: The Legality of Ruddock v. Vadarlis Under International Law and the Implications of Australia's New Asylum Policy

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SUMMARY:
... On September 18, 2001, three judges of the Victoria District Registry of the Australian Federal Court issued a two-to-one decision allowing the expulsion of 433 Afghan asylum seekers from Australian territorial waters. ... " While UNHCR and human rights groups have criticized refugee detention, State practice has sanctioned the detainment of refugees in both prisons and refugee camps and, under international law, Australia retains some discretion in deciding whether to detain asylum seekers or refugees. ... For purposes of non-refoulement, it is immaterial how an asylum seeker comes within the territory of the State - if an asylum seeker is forcibly repatriated to a country where he or she has a well-founded fear of persecution or a risk of torture, then refoulement in violation of international law has taken place. ... History shows that solutions to refugee crises depend on the actual circumstances surrounding asylum seekers when determining whether resettlement, repatriation, or temporary protection is appropriate. ... The fact that Nauru could offer adequate protection to asylum seekers, with the assistance of Australia, does not mean that Australia does not need to change its asylum determination system on the Australian mainland, nor does it mean that Australia's detention facilities for asylum seekers on the mainland do not need improvement. ...

HIGHLIGHT: Dorsey & Whitney Student Prize in Comparative and International Law Outstanding Note Award Winner

This Note examines the viability of Australia's new policy towards refugees. It first looks at the facts of an international incident where Afghan refugees were transported by ship through international waters. The Note then considers Ruddock v. Vadarlis, the case that led to a new policy for harboring and processing refugees in Australia. This Note argues that the repercussions of the "Tampa Incident" have far-reaching and potentially advantageous consequences for international refugee policy as a whole.

TEXT:
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I. Introduction

On September 18, 2001, three judges of the Victoria District Registry of the Australian Federal Court issued a two-to-one decision allowing the expulsion of 433 Afghan asylum seekers from Australian territorial waters. n1 This decision

overturned a prior ruling by a single judge, dated September 11, 2001, which held that the expulsion of asylum seekers from the Norwegian container ship MV Tampa ("Tampa") was illegal, and that the asylum seekers should be permitted to debark on Australian territory where, under Australian law, they could subsequently apply for protection visas. n2 This reversal on appeal touched on multiple issues regarding the [*252] intersection of refugee law, maritime law, customary international law, Australian immigration law, the common law writ of habeas corpus, human rights law, and Australian refugee and immigration policy.

Some human rights groups have criticized the Federal Court's reversal and the policies subsequently adopted by the Australian government. This Note attempts to determine whether these criticisms are valid. It starts, in Part II, by briefly outlining the facts surrounding the Tampa incident.

In Part III, the various stages of the Tampa incident are analyzed in chronological fashion, in order to determine whether each phase of Australia's actions comported with international law. First, Part III examines the issue of whether the Tampa rescuees were, in fact, refugees. Then, it investigates the matter of whether Indonesia, Norway, or Australia should have been responsible for the fate of the rescuees. This is followed by an analysis of whether Australia violated international law by sending its soldiers to board the Tampa, and whether Australia's detention of the rescuees was legal under international law. Next, Part III explores the question of whether Australia had the right to return the rescuees to Afghanistan. This is followed by an analysis of whether Australia violated other provisions of international law in its expulsion of the rescuees, and whether the protection offered the Afghan rescuees in Nauru was presumptively inadequate given its temporary basis. Part III concludes by addressing the issue of whether the rescuees were actually offered adequate protection via the Nauru/New Zealand agreement, and the question of whether Australia's actions violated its duties to the United Nations High Commissioner for Refugees.

Part IV examines the implications of Australia's new refugee policy. This Note argues that Australia's new policy of processing asylum seekers abroad is, contrary to popular belief, beneficial on five levels. First, the new policy benefits Nauru and other South Pacific nations without unreasonably threatening the safety of the rescuees. Second, the agreement was perceived as benefiting Australia and was approved by Australia's voters. Third, the agreement reduces the incentives for economic migrants to pose as refugees. Fourth, it deters people-trafficking. Finally, Australia's new refugee policy is beneficial because it encourages international burden-sharing vis-a-vis refugees and asylum seekers.

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II. The Facts of the Tampa Incident

The issues disputed in Ruddock stemmed from an incident that occurred on August 26, 2001, when a wooden fishing boat heading from Indonesia to Australia, carrying 433 individuals, mostly Afghan nationals, began to sink in the Indian Ocean approximately 140 kilometers north of Australia's Christmas Island territory. n3 The Norwegian-registered container ship Tampa was in the area at the time, headed for Singapore, and its Captain answered a call from Australian authorities asking him to rescue the people on the sinking boat. n4 The Captain agreed to perform the rescue, and the Australian Coast Guard guided the Tampa to the sinking boat, the lives of 433 rescuees on board were saved in the process. n5

When the Captain asked the Australian Coast Guard where to take the rescuees, he received no clear response, and so the Captain began heading to Indonesia to disembark the rescuees. n6 Some of the rescuees objected to being returned to Indonesia, however, and threatened to commit suicide unless the Captain deposited them on Australia's Christmas Island territory. n7 In response, the Captain changed the Tampa's course towards Christmas Island, at which point Australian authorities requested him to return the rescuees to Indonesia. n8 At this time, however, the Captain claimed that if he sailed to Indonesian waters, he would expose those on board the Tampa to a number of dangers in the open sea, which

could result in a massive loss of life, and he stated his belief that the safest course was to continue towards Christmas Island. n9

The next day, on August 27, the Cabinet Office asked the Administrator of Christmas Island to ensure that no Australian vessel leave Christmas Island to meet the Tampa and ordered Christmas Island's port to be closed. n10 An officer of Australia's Department of Immigration and Multicultural Affairs ("DIMA") also sent a memo to the Captain of the Tampa, requesting him not to allow the vessel to move closer to Christmas Island than its then-current position (13.5 [*254] nautical miles). n11 In response, the Tampa's shipping agent faxed the DIMA a message indicating that the medical situation on board the Tampa was deteriorating, and that if it were not dealt with promptly, people might die. n12 The shipping agent also stated that if the situation were not resolved quickly, "more drastic action" might have to be taken to prevent loss of life. n13

Due to concerns over the well-being of the rescuees and of the Tampa crew, the Captain violated Australia's request to maintain the Tampa's position. He brought the vessel into Australian territorial waters on the morning of August 29, and stopped approximately four nautical miles from Christmas Island. n14 Within two hours, forty-five Special Armed Services (SAS) troops from the Australian Defence Force were sent from Christmas Island to board the Tampa. n15 These troops boarded the Tampa to render medical and humanitarian assistance to the rescuees, to provide security for the Tampa's crew, and to facilitate departure of the Tampa from Australian waters. n16

The following day, on August 30, the Afghan rescuees gave the Norwegian ambassador a letter claiming that they were refugees and asking that Australia give them the rights associated with refugee status. n17 Australia continued to refuse to let the rescuees be disembarked upon the Australian mainland.

On September 1, while the rescuees remained on-board, an agreement between Australia, New Zealand, and Nauru for the processing of the rescuees was announced on behalf of the Prime Minister of Australia. n18 Under the agreement, the rescuees would be conveyed to Nauru and New Zealand for initial processing. n19 New Zealand agreed to process 150 of those aboard the Tampa, and those determined to be genuine refugees by New Zealand were to have the right to remain there. The remainder of the rescuees would be processed in Nauru, and those assessed as having valid claims to asylum "would have access to Australia and other countries willing to share in the settlement of those with valid claims." n20 According to the [*255] agreement, Australia agreed to bear the full cost of Nauru's involvement in the rescuees' processing. n21 Australia also promised to provide the rescuees with "all necessary humanitarian assistance while these arrangements [were] put in place." n22

The Victorian Council for Civil Liberties, a non-governmental organization committed to advocating for fundamental rights and freedoms, and Eric Vadarlis, a solicitor who offered pro bono representation to the rescuees, initiated a lawsuit against the Australian Minister of Immigration and Multicultural Affairs, the Australian Attorney-General, the Australian Minister of Defense, and the Commonwealth of Australia. n23 The plaintiffs' principal argument was that the defendants were unlawfully holding asylum seekers aboard the Tampa. n24

On September 3, Australia transferred the rescuees onto the large Australian troop ship HMAS Manoora, after reaching an agreement between all parties involved in the suit that such a transfer would not change the legal rights of the parties involved in the Tampa incident. n25 The Manoora was a large, comfortable vessel with extensive medical facilities that could adequately accommodate the Afghan rescuees. n26

While the rescuees waited on board the Manoora, the Victorian Council for Civil Liberties and Vadarlis' suit was heard. On September 11, a single judge serving on the Federal Court of Australia, Judge North, ruled that Australia's intended expulsion of the rescuees from the Tampa was illegal, and that they should instead be disembarked on the mainland of Australia, where they would be able to apply for protection visas. n27 This decision, however, was overturned on appeal on September 18 by three judges of the Australian Federal Court who

ruled, two-to-one, that the expulsion of the 433 Afghan rescuees from Australian territorial waters could proceed. n28

Australia thereafter transported the rescuees via the Manoora to Port Moresby, the capital of Papua New Guinea, where they were [*256] flown to Nauru and New Zealand. n29 In Nauru, the rescuees were housed in Australian-run detention centers, and processing of their asylum applications eventually began with the assistance of the United Nations High Commissioner of Refugees ("UNHCR"). n30

Vadarlis subsequently appealed the decision allowing the expulsion, but his appeal was declined by the Australian High Court because the rescuees had already been transported to New Zealand or Nauru and the relief requested by Vadarlis had therefore become "hypothetical." n31 Given the apparent judicial sanction of Australia's actions with respect to the Tampa rescuees, the Howard government initiated sweeping changes to Australia's refugee policy incorporating the regular use of offshore detention centers.

III. International Law and the Tampa Rescuees

A. Were the rescuees refugees?

On August 30, 2001, the Norwegian ambassador to Australia visited the Tampa and was given a letter signed by the "Afghan Refugees Now [sic] off the coast of Christmas Island." n32 The letter noted the "long time war" in Afghanistan as well as the "genocide and massacres" taking place in the country. The letter also observed that Australia had previously granted asylum to a number of Afghans and made reference to the 1951 Convention Relating to the Status of Refugees (the "1951 Refugee Convention," "1951 Convention," or "Refugee Convention"), stating that the asylum seekers did "not know why [they] have not been regarded as refugees and deprived from rights as refugees according to International Convention (1951)." The letter finished by requesting that Australia not deprive the rescuees of rights enjoyed by other refugees in Australia, along with a plea "to take mercy on the life of (438) [sic] men, women, and children" on [*257] board the Tampa. n33

Australia has legal duties that arise from its ratification of the 1951 Refugee Convention and its ratification of the 1967 Protocol relating to the Status of Refugees. In fact, Australia was one of the first countries to sign the 1951 Refugee Convention, n34 reflecting Australia's status as a supporter of refugee rights. Australia has historically abided by its obligations under the 1951 Refugee Convention and its Protocol, which have been incorporated into its national legislation via the Migration Act of 1958 and the Migration Regulations of 1994. n35

The 1951 Convention does not address actual procedures for determining refugee status, leaving States the choice of means for implementing the Convention at the national level. n36 According to the Convention, a refugee is someone who:

owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable, or owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it. n37

The Federal Court explicitly stated in the second Ruddock decision that the court would not consider the question of whether or not the rescuees were refugees. According to the Federal Court, "the question whether all or any of the rescuees are refugees has not been determined." n38

[*258] It seems certain, however, that many of the Afghan rescuees would have been deemed refugees under Australian law and the Refugee Convention if they had been allowed to file for protection visas in Australia. This fact was recognized by many of the actors involved in the early stages of the Tampa con-

flict. Judge North recognized as much in the first Ruddock decision, when he admitted that it was "probable that a significant number of the rescuees are people genuinely fearing persecution in Afghanistan." n39 The Prime Minister of New Zealand also recognized this, noting that "asylum seekers from Afghanistan flee from one of the world's most repressive regimes," where human rights abuses are common, one quarter of Afghan children die by the age of five, and 3.6 million Afghans have already become refugees. n40 It was also generally recognized that a significant proportion of asylum seekers from Afghanistan processed through the Australian asylum status determination system had, in the past, been found to qualify as refugees under the 1951 Convention. n41

Many of the rescuees, it appears, would have been found to have a well-founded fear of persecution had they been processed as refugees by Australia at the time of the Tampa incident. Furthermore, later refugee status determinations for the rescuees held in Nauru did indeed confirm that some of the rescuees were entitled to refugee status (although it also came to light by late September that a few of the rescuees were probably Pakistanis posing as Afghan refugees). n42

The more pertinent issue, however, is not whether the rescuees were eventually found to be refugees, but whether Australia was obliged to process the rescuees through its asylum status determination system. Given the probability that many of the rescuees would have been considered refugees, it was virtually a foregone conclusion that the country where their asylum applications were processed would also end up assuming the burden of caring for the refugees. Assuming that the burden of caring for refugees is expensive, this point was probably not lost on Australia, Norway, or Indonesia, all of which denied responsibility for processing the rescuees. In Australia, for example, individuals determined to be refugees are entitled to, inter alia, immediate access to health care, social security, English-language training programs, settlement [*259] services, orientation programs, subsidized accommodation, free clothing, free household goods and furnishings for their new homes, free primary and secondary education, employment assistance, and vocational training. n43

This Note seeks to determine which country, under international law, should have borne the responsibility for the processing of the refugees.

B. Should Indonesia have been responsible for the rescuees?

Asylum seekers have been escaping by sea for many decades. The most publicized cases of such mass escape via sea involve Cubans, Haitians, and Indo-Chinese. n44

One issue of paramount importance in the determination of whether asylum seekers should be deemed refugees is the issue of whether the asylum seeker has crossed an international boundary. As commentators have noted, "[a] claimant to refugee status must be "outside' his or her country of origin, and the fact of having fled, or having crossed an international frontier, is an intrinsic part of the quality of refugee, understood in its ordinary sense." n45

The rescuees on board the Tampa had clearly crossed a number of international boundaries on their journey from Afghanistan to Australia. Although we do not know which countries the rescuees passed through on their way to Indonesia, and although different rescuees may have passed along different routes, it is a fact that the rescuees had been in Indonesia, where they boarded the wooden fishing boat that later sank 140 kilometers north of Australia's Christmas Island Territory. n46

An argument could be made that the rescuees should have been the responsibility of Indonesia, given their prior presence in that country. While refugees are not required to come directly from their country of origin to the country where they request asylum, countries or territories passed through by the asylum seeker are normally required to constitute potential or actual threats to freedom or life if rescuees are to be exempt from return to these countries. n47 Certain [*260] European treaties go so far as to create a presumption that an asylum seeker passing through a third State has an opportunity to claim asylum

in that country. n48 This principle is known as the "safe third country" rule. On the basis of the safe third country rule, it could be argued that since the Tampa rescuees had an opportunity to request asylum in Indonesia before coming to Australia, they were not owed the duty of having an asylum status determination made in Australia. Australia did, in fact, argue that Indonesia should be responsible for the rescuees, thereby weakening diplomatic relations between Australia and Indonesia. n49

Another common criterion used to determine whether individuals have had the opportunity to request asylum is the length of time during which they remain in a country of transit. For instance, some countries require that an asylum seeker spend at least three months in a country before it may be legally presumed that the asylum seeker has had an opportunity to claim asylum in that country. n50 Because we do not know what length of time the rescuees spent in Indonesia, it seems unreasonable to assume that the rescuees had possessed a real opportunity to apply for asylum in Indonesia.

It would also have been problematic to make Indonesia responsible for processing the rescuees, given that the rights of the rescuees qua asylum seekers and potential refugees might not have been adequately guaranteed in Indonesia. Indonesia is neither a party to the 1951 Convention nor to its 1967 Protocol, so the rights attached to refugee status are not guaranteed by law within Indonesia. n51 Nevertheless, Indonesian authorities do allow asylum seekers to remain in Indonesia while UNHCR assesses their claims, and individuals recognized by UNHCR as refugees are permitted to stay in the country pending a durable solution. n52

Thus, while returning the rescuees to Indonesia might not have been tantamount to returning them to a place of persecution, the protection offered to those rescuees who were genuine refugees might [*261] have been inadequate in Indonesia. Still, the rescuees' return to Indonesia would not have been a clear violation of international law, although the actual events and diplomatic disagreements surrounding the Tampa incident precluded this possibility.

C. Should Norway have become responsible for the rescuees?

The duty to rescue those in distress is well established by both general international law and by treaty. n53 The Tampa therefore had a duty to help the rescuees, and its Captain acted within the bounds of this duty when he rescued the passengers from the sinking Indonesian boat.

A claim could be made that Norway should have become responsible for the rescuees under the principle of flag State responsibility, whereby the State of the ship that assumes control of a rescuee becomes responsible for that rescuee's fate. And, indeed, the government of Australia did initially argue that the rescuees should be the responsibility of Norway, along with Indonesia. n54

In the past, flag States have often accepted at least some degree of responsibility for the asylum seekers they have rescued. For instance, when 150 illegal Vietnamese immigrants on their way to Darwin, Australia, were rescued by the British vessel Entalina, the British government initially argued that Australia, which was the first-port-of-call, should therefore accept responsibility for the asylum seekers. n55 When a dispute over responsibility for the rescuees ensued with Australia, however, "the British government ultimately accepted for resettlement in the United Kingdom all refugees not resettled in other countries." n56

The precise boundaries of a flag State's duty have been debated in a variety of international forums. During the 1980 Executive Committee Meeting, for instance, the Greek representative claimed that the rescue of refugees at sea should not impose flag State responsibility and that responsibility for the rescuees should rest with [*262] all signatories of the Refugee Convention and its Protocol, so as to allow for the fair sharing of the burden of caring for the rescuees. n57

A Working Group on problems related to rescue at sea was also set up to analyze flag State responsibility. The Working Group met during July 1982, and its

report was eventually considered by the Executive Committee. n58 During consideration of the report, the duty to rescue those in distress at sea was repeatedly stressed, but it was generally acknowledged that the problem of refugees at sea created a division of responsibilities between the flag States, coastal States, and resettlement States involved in the incident. n59

Commentators have noted that the principle of flag State responsibility has not been established as customary international law. n60 But while the principle is not a rule of international law, it is well-settled that "if a flag State refuses to accept any responsibility for resettlement of refugees, and if the ship's next port of call is in a country where the refugee's life or freedom may be threatened, then the flag State is guilty of refoulement," n61 which is prohibited by international law.

This principle of non-refoulement is one of the most fundamental principles of refugee law. It decrees that "no refugee should be returned to any country where he or she is likely to face torture or persecution." n62 It is codified in Article 33 of the 1951 Refugee Convention, n63 Article 3 of the 1984 UN Convention against Torture, n64 and in a variety of regional instruments. n65 The principle of non-refoulement is accepted by most States, n66 including some States that have not ratified the 1951 Refugee Convention, and it has been [*263] found to apply to both refugees and asylum seekers. n67 Indeed, the principle of non-refoulement is so well accepted that it has become a jus cogens rule of customary international law. n68 In Ruddock, as the rescuees were delivered from a Norwegian-registered vessel to Australia, a country where the asylum seekers' life or freedom would not be placed in jeopardy, Norway was not guilty of refoulement by its actions.

Clearly, the biggest default of the doctrine of flag State responsibility is that it provides incentives for ships to ignore other vessels in distress due to fears that the flag State will become responsible for those rescued. Indeed, this is exactly the type of situation that arose on repeated occasions during the Indo-China refugee crisis, where ships ignored many refugees stranded at sea, leaving them at the mercy of fate, to avoid the expense and delay resulting from the attempt to rescue them. n69

Given the uncertainty of flag State responsibility, and the negative incentives it can produce, it would be unwise to claim that Norway was solely responsible for the fate of the rescuees. It is also clear that Norway did not violate the principle of non-refoulement. Nevertheless, considering Norway's involvement in the Tampa incident, given the fact that it was a signatory to the 1951 Refugee Convention and its 1967 Protocol, n70 and that is has the economic ability to care for the rescuees, it would not necessarily have been unreasonable for Norway to have shouldered some of the burden for the rescuees' care. For instance, Norway could have been expected to consider accepting for resettlement some of the Tampa rescuees who were eventually determined to be refugees on Nauru; and yet, it has not done so. n71

D. Should Australia have become responsible for the rescuees?

Australia was not the intended first port-of-call when the rescuees were initially rescued by the Tampa. After saving the [*264] rescuees from the sinking ship, the Tampa's Captain headed for Indonesia in order to disembark them. n72 But, as previously mentioned, several of the rescuees objected to being returned to Indonesia, however, and threatened suicide unless the Captain deposited them on Australian territory. n73 The Captain subsequently turned the ship to head for Australia's Christmas Island territory, which then became the Tampa's next intended port-of-call. n74 Australia did in fact subsequently become responsible for the rescuees. This outcome is intuitively appealing for a number of reasons. But despite this intuitive appeal, the actual outcome of the Tampa incident was never predetermined by international law.

Arguing against a right of entry into Australia, Judge Beaumont, writing for the majority in the second Ruddock case, cited Musgrove v. Chun Teeong Toy, where the Privy Council held that an alien has no legal right enforceable by action to enter Victoria, except where a statutory right exists. n75 He also cited

the Lord Chancellor that decided Musgrove, who noted that no right to enter Victoria existed, but that "circumstances may occur in which the refusal to permit an alien to land might be such an interference with international comity as would properly give rise to diplomatic remonstrance... ." n76

The Tampa initially stopped 13.5 nautical miles from Australia's Christmas Island territory, as ordered by Australian authorities. n77 Subsequently, when the Captain of the Tampa became concerned about the welfare of the rescuees and the ship's staff, he brought the Tampa within four nautical miles of Christmas Island. n78 According to the United Nations Convention on the Law of the Sea, ratified by Australia in 1994, each nation's sovereign territorial waters may extend up to 12 nautical miles (22 km) beyond its coast. n79 Thus, when the Tampa moved to within four nautical miles of Australia's Christmas Island territory, the Captain had taken the rescuees into Australian's sovereign territorial waters.

It is an accepted principle of international law that "every State enjoys prima facie exclusive authority over its territory and [*265] persons within its territory." n80 With this authority, however, comes responsibility. n81 On a basic level, a State is obliged to ensure and to protect the basic human rights of everyone within its territory. n82 In furtherance of this duty, Australia provided the rescuees with access to health care, basic necessities, and shelter on the Manoora (albeit after some delay and diplomatic wrangling). n83

The necessity of protecting the basic human rights of everyone in a State's territory does not mean, however, that the rescuees had the right to apply for asylum in Australia over Australia's objections. Although an individual's right to seek and enjoy asylum was stated in the 1948 Universal Declaration of Human Rights, this document does not create an unconditional right to asylum. n84 Asylum instead has been limited to asylum from persecution. n85 Indeed, the States that drew up the 1951 Refugee Convention were not prepared to recognize an unconditional right of asylum, and therefore refused to provide for a specific right to such. n86

In the real world, countries that are asked to accept human rights laws have never been willing to give up their discretion about whom to admit within their State. n87 The right of a State to grant asylum, like any other exercise of territorial jurisdiction, is a discretionary power, giving the state a right to determine whom it will favor, as well as the form and substance of the asylum that will be ultimately granted. n88 A State also has the right to narrowly prescribe the conditions of asylum and the asylum that will be enjoyed. n89 As Louis Henkin stated, "it would be nice to have everybody have a right of free entry anywhere, but no country is prepared to agree with that ... there are very few countries who think it ought to be a human right to go ... anywhere." n90 In Ruddock, Judge French aptly noted the prevailing notion that "Australia's status as a sovereign nation is [*266] reflected in its power to determine who may come into its territory and who may not and who shall be admitted into the Australian community and who shall not." n91

According to the UNHCR's Handbook on Procedures and Criteria for Determining Refugee Status, the "assessment as to who is a refugee, i.e., the determination of refugee status under the 1951 Convention and the 1967 Protocol, is incumbent upon the Contracting State in whose territory the refugee applies for recognition of refugee status." n92 In other words, the rescuees must actually have been in Australian territory for Australia to have become obligated to determine their refugee status under the Refugee Convention. Here, although the territorial limits of a State extend to the boundaries of its territorial sea, entry within Australia's territorial sea did not constitute entry within the State, "where "entry' is the juridical fact necessary and sufficient to trigger the application of a particular system of international rules." n93

Australian law determines the juridical fact necessary to trigger the application of its visa protection system. Australia's 1958 Migration Act states that the individuals can apply for protection visas when they are within Australia's "migration zone" - defined at the time of the Tampa incident as "land that is part of a State or Territory at mean low water mark." n94 According to this

definition, although they did enter into Australia's territorial seas, given that they never reached land above the mean low water mark, the rescuees never entered Australia's "migration zone" as defined by Australia's Migration Act.

The Migration Act also requires that non-citizens enter Australia by way of the grant of a visa. n95 Provisions relating to visas are found in Part 2, Division 3 of the Migration Act, which includes measures relating to the protection visas sought by the rescuees. n96 A necessary condition for the grant of a protection visa is that the applicant is a "non-citizen in Australia to whom Australia has protection obligations under the Refugees Convention as amended by the [*267] Refugees Protocol." n97 Under Australian law, applications for asylum must be made on a prescribed form (form 842), available from Australian overseas missions, the Department of Immigration and Multicultural Affairs, and the World Wide Web. n98 Although applications must be lodged outside of Australia at a diplomatic or trade mission, there is no application processing fee. n99

The "sovereign competence aspect" of territorial asylum allows each state to be the sole judge of the basis upon which it will extend protection, although other states shall, in a spirit of international solidarity, "consider" measures to lighten the burden of their sister states. n100 Here, Australia eventually performed the reasonable actions required to lighten the burden of other States - it had the rescuees removed from the Tampa and placed on the comfortable Manoora, where their lives were no longer in danger, until a better solution could be found for the rescuees' plight.

It should be noted that the question of whether the rescuees were on Australian territory for the purposes of triggering rights to asylum status determinations has been rendered moot by Australian legislation subsequent to Ruddock. After Ruddock, the Australian government passed legislation exempting Christmas Island and other northern Australian islands from Australia's "migration zone," so that future asylum seekers arriving there would not have the right to apply for protection visas. n101

Although it could be argued that Australia had a moral duty to give the rescuees access to asylum status determination procedures, and although it could be argued that Australia was violating the spirit of the 1951 Refugee Convention, it cannot be said that Australia had a duty according to international law or Australian law to process the rescuees. Australia's acceptance of the burden of caring for the rescuees, via the Nauru/New Zealand agreement and the use of the Manoora, was therefore commendable to the extent that Australia had no binding legal duty to provide such assistance.

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E. Did Australia violate international law by boarding the Tampa?

Australia was acting in accord with international law when it sent forty-five SAS troops onto the Tampa upon the ship's entry into its territorial seas. According to Article 17 of the 1982 United Nations Convention on the Law of the Sea, ships of all States enjoy the right of innocent passage through the territorial sea. n102 According to Article 19 of this convention, however, the unloading of any person contrary to immigration laws does not constitute "innocent passage" and can therefore be excluded. n103

Ships may be boarded under a variety of circumstances, depending on the location of the ship and on the reasons for boarding the ship. n104 Here, because the Tampa was attempting to unload the rescuees contrary to Australia's immigration laws (i.e., the rescuees had no protection visas from Australia), the Tampa did not have a right to enter Australia's territorial waters under the Convention on the Law of the Sea.

The principal aspect of sovereignty - the ability of a country to determine who may and may not enter that country - was threatened by the Tampa's movement. The Tampa entered Australia's territorial sea, an area where "the coastal State exercises full sovereignty and in which, subject to the requirements of innocent passage, all the laws of the coastal State may be made applicable." n105 While

the notion of distress, or force majeure, causing entry into territorial waters, may have given those in charge of the Tampa a limited immunity for having entered territorial waters in this fashion, n106 the notion of distress did not preclude Australia's boarding of the Tampa.

Even on the high seas, where States have more limited authority, some countries have followed policies that allow the boarding of ships carrying suspected illegal immigrants. For instance, under the United States' Haitian interdiction program, Executive Order no. 12,324 specified that United States Coast Guards were to stop and board certain vessels on the high seas, examine those on board, and return them to their country of origin where there was [*269] "reason to believe that an offense is being committed against the United States immigration laws... ." n107

That being said, international law holds that the lawfulness of measures taken to meet an influx of asylum seekers depends on there being proportionality between the means used and the ends sought. n108 Here, insofar as the SAS troops' boarding of the Tampa served valid ends - to provide humanitarian relief to the rescuees and to prevent their illegal entry n109 - and since the means used were not especially severe - the rescuees were, in fact, made better off by the arrival of Australian troops - it is not clear that Australia's actions were disproportional to the ends sought by Australia, and thus Australia's actions were most likely legal under international law.

F. Did Australia violate international law by holding the rescuees indetention?

Although Article 31 of the 1951 Refugee Convention exempts refugees who cross into territorial waters from certain penalties, even when they have entered via illegal means, n110 international law permits "States to take all reasonable measures in the territorial sea to prevent the entry into port of a vessel carrying illegal immigrants, and to require such ships to leave the territorial sea." n111

In the initial Ruddock adjudication, Judge North held that the common law writ of habeas corpus gave rescuees the right to be released from detention onto the mainland of Australia, where statutory rights would be triggered to allow them to apply for protection visas. n112 Judge North relied on the fact that Australia's actions showed it to be "committed to retaining control of the fate of the rescuees in all respects." n113 He emphasized that Australia itself had directed where the Tampa was allowed to go; that Australia had closed the harbor on Christmas Island to isolate the rescuees; that Australia did not allow communication with the rescuees; that Australia did not consult with the refugees about the arrangements [*270] being made for their physical relocation; and that Australia generally took "complete control over the bodies and destinies of the rescuees." n114 As such, argued Judge North, Australia had a habeas corpus-based duty not to subject the rescuees to detention without lawful authority. n115 Based on this reasoning, he ordered that Australia "release the rescuees onto the mainland of Australia." n116

The Australian government initially contended that Australia had no duty to release the rescuees on Australia's mainland, despite their being held in detention, because Australia's custody of the rescuees was self-inflicted. n117 The government pointed out that the rescuees were brought into Australia's territorial seas only because several rescuees had threatened to commit suicide if the Captain returned them to Indonesia. n118 In response, Judge North ruled that the plight of the rescuees was not self-inflicted given the circumstances surrounding their arrival, specifically because only five of the 433 rescuees had threatened to commit suicide, the rescuees had not contemplated the sinking of the vessel that led to their being brought on the Tampa, and the immediate event giving rise to the boarding of the Tampa by the SAS was the Captain of the Tampa's decision to enter Australian territorial waters. n119 Judge North also stated that while people like the Afghan rescuees make decisions about their lives, "those decisions should be seen against the background of the pressures generated by flight from persecution." n120

On separate grounds, the Australian government contended that the rescuees had not been detained because they had three avenues of escape available to them: (1) they could leave with anyone who was prepared to take them from the Tampa to a location other than Australia; (2) they could stay aboard the Tampa and disembark at another location; or (3) they could leave pursuant to the New Zealand/Nauru agreement. n121 Judge North rejected these arguments, holding that the presence of 45 SAS troops on the Tampa controlled the movements of the rescuees on the Tampa, that the rescuees were likely to have been led to believe that they must do as told, and that [*271] the rescuees were consequently not free to escape their detention. n122

The Australian government also argued that the rescuees should not be released from detention onto Australia's mainland because "the purpose of the application [for release] was to procure access to the Australian refugee processing system." n123 Judge North dismissed this complaint, holding that the immediate purpose of the application was merely to procure the release of the rescuees from unlawful detention, and if, "as a result of the release, the rescuees apply for protection visas they would be exercising rights which Australia has provided in conformity with the norms of international law set out in the Refugees Convention." n124

On appeal, the two-to-one majority of the Federal Court overturned Judge North's ruling. The appellate court's rationale was that "the actions of the Commonwealth were properly incidental to preventing the rescuees from landing in Australian territory where they had no right to go." n125 The Court further reasoned that the inability of the rescuees to "go elsewhere derived from circumstances which did not come from any action on the part of the Commonwealth," and that "the presence of SAS troops on board the MV Tampa did not itself or in combination with other factors constitute a detention," as it was "incidental to the objective of preventing a landing and maintaining as well the security of the ship." n126 The Court also noted that the detention "served the humanitarian purpose of providing medicine and food to the rescuees" and that the Nauru/New Zealand arrangements "did not constitute a restraint upon freedom attributable to the Commonwealth given the fact that the Captain of the MV Tampa would not sail out of Australia while the rescuees were on board." n127

While the Australian Federal Court's decision hinged on the intricacies of the doctrine of habeas corpus, this Note is more concerned with Ruddock's legality under international law. It should be noted that while habeas corpus is mainly a common law doctrine, it has, to some extent, been incorporated into international law via the International Covenant on Civil and Political Rights, to which Australia is a party. n128 According to Article 9(4) of the Covenant, [*272] "anyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings before a court, in order that the court may decide without delay on the lawfulness of his detention and order his release if the detention is not lawful." n129 A strict reading of the Covenant might suggest that the detention of the rescuees was not lawful under human rights law.

Under international law as reflected by state practice, however, Australia could, under certain circumstances, detain the rescuees qua asylum seekers before an asylum status determination were made. The United Kingdom routinely detains asylum seekers and places no mandatory time limits on their detention. n130 Since 1996, the United States has detained many asylum seekers who enter by air. n131 Indeed, prior to the Tampa incident, Australia was already practicing a policy of detaining asylum seekers in one of its six mainland detention centers while their asylum applications were being processed. n132

Even if the rescuees had been previously determined to be refugees by a competent authority, States would have some discretion to limit their freedom of movement, pursuant to Article 26 of the 1951 Refugee Convention: "each Contracting State shall accord to refugees lawfully in its territory the right to choose their place of residence and to move freely within its territory subject to any regulations applicable to aliens generally in the same circumstances." n133 While UNHCR and human rights groups have criticized refugee detention, State practice has sanctioned the detainment of refugees in both prisons and refugee

camps n134 and, under international law, Australia retains some discretion in deciding whether to detain asylum seekers or refugees.

[*273]

G. Could Australia have returned the rescuees to Afghanistan?

Several options are open to States when rescuees arrive, including the right to refuse disembarkation and to require ships to remove them from their jurisdiction, or the right to make disembarkation conditional upon satisfactory guarantees of resettlement, care, and maintenance to be provided by other States or international organizations. n135 The receiving State does not, however, have the right to refoule the rescuees to their country of origin if, once returned there, they would be threatened with persecution or torture.

There is no necessary analytic connection between non-refoulement and admission or asylum and, in international law, a State's discretion to grant asylum and its obligation to avoid refoulement of refugees are conceptually distinct, despite the fact that they are joined by the common definitional standards of who qualifies as a refugee. n136 For purposes of non-refoulement, it is immaterial how an asylum seeker comes within the territory of the State - if an asylum seeker is forcibly repatriated to a country where he or she has a well-founded fear of persecution or a risk of torture, then refoulement in violation of international law has taken place. n137

The Australian Federal Court correctly noted that Australia's actions must be in accord with the principle of non-refoulement. Judge Beaumont, writing for the majority of the Court on appeal, noted that, while customary international law imposes an obligation upon coastal States to provide humanitarian assistance to vessels in distress, international law imposes no obligation to resettle those individuals who are rescued. n138 He then referenced Article 33 of the 1951 Refugee Convention, noting that "a person who has established refugee status may not be expelled to a territory where his life and freedom would be threatened for a Convention reason." n139 Judge French, also writing for the majority on appeal, stated that Australia had obligations under international law by virtue of treaties to which it is a party, and that "the primary obligation which Australia has to refugees to whom the Convention applies is the obligation under Article 33 not to expel or return them to the frontiers of territories where their lives or freedoms would be threatened on account of their race, religion, nationality, or membership of a particular social group [*274] or their political opinions." n140

Judge French was correct in noting that "nothing done by the Executive on the face of it amounts to a breach of Australia's obligations in respect of non-refoulement under the Refugee Convention." n141 Australia was not guilty of refoulement, primarily because it was not returning the rescuees to Afghanistan; by making an agreement to send the rescuees to Nauru and New Zealand to be processed, Australia was not returning the rescuees to a country where they would have a well-founded fear of persecution or torture.

If Australia had sent the rescuees to Nauru with the knowledge that Nauru would repatriate the rescuees to Afghanistan, Australia might have violated the principle of non-refoulement. But, as commentators have noted, even a categorical refusal of disembarkation, by itself, is only refoulement if it actually results in the return of refugees to persecution, n142 which is not the case given the Nauru/New Zealand agreement.

Australia's decision to send the rescuees to Nauru and New Zealand to be processed was commendable when compared with other policies that have been established by Western nations. For instance, similar circumstances arose in the United States when Haitians began fleeing to the United States en masse via vessels of doubtful seaworthiness. Starting in 1981, the U.S. Coast Guard regularly intercepted Haitian nationals attempting to flee on the high seas and returned them to Haiti. n143 Initially, the American government provided screening to prevent refugees from being refouled. n144 In May 1992, however, former President George Bush terminated the practice of screening rescuees in order to sepa-

rate out valid refugees, permitting the refoulement of Haitians who might be refugees. A divided United States Supreme Court subsequently upheld this policy in Sale, Acting Commissioner, INS v. Haitian Centers Council, holding that neither the 1951 Refugee Convention nor domestic law limited the power of the President to order the Coast Guard to repatriate undocumented aliens, including refugees, on the high seas. n145 With regard to such individuals, the United States government has also argued that the principle of non-refoulement is [*275] relevant only with respect to refugees already within US territory. n146

While full screening mechanisms for refugees were reinstituted by former President Bill Clinton in 1994, n147 Australia's policy of sending the rescuees to be processed in Nauru and New Zealand clearly did not threaten the potential refoulement of asylum seekers to the same degree as the United States' early policy toward Haitian asylum seekers arriving by boat. This does not mean, of course, that the United States Supreme Court's decision did not violate principles of international law: as commentators have noted, the Sale decision may not comport with international law. n148 Nevertheless, a comparison to the United States' policy regarding the repatriation of Haitian asylum seekers shows the relative harmlessness, in terms of refoulement, of Australia's decision to send the Tampa rescuees to New Zealand and Nauru for processing.

H. Did Australia violate other provisions of international law by expelling the rescuees from its territorial seas?

In Ruddock, the Federal Court disagreed as to whether the power to exclude vested in Australia's executive branch or if legislative authority was required to invoke this power. The four judges responsible for the two Ruddock decisions engaged in a lengthy debate about the nature of parliamentary sovereignty and its relation to an executive prerogative to exclude. n149 As the interpretation of parliamentary sovereignty in Australia is largely independent from international law, this Note focuses on whether Australia breached its international obligations by expelling the rescuees from Australia.

The Federal Court analyzed Australia's ability to expel the rescuees largely in terms of State sovereignty. Judge French, for instance, writing for the majority, cited Privy Council in Attorney-General for Canada v. Cain, which had held that one of the rights "possessed by the supreme power in every State is the right to refuse to permit an alien to enter that State ... and to expel or deport from the State, at pleasure, even a friendly alien ..." n150

[*276] The Australian Federal Court's decision, while not focused on Australia's international obligations, was correct in its conclusion that the rescuees could be expelled. While States are bound by the principle of non-refoulement, they retain discretion as to the grant of durable asylum and the conditions under which it may be terminated. n151 Under Article 32 of the 1951 Refugee Convention, the Contracting States shall not "expel a refugee lawfully in their territory save on grounds of national security or public order." n152 Here, while there was no threat to Australian national security or public order, the rescuees were not lawfully in Australia. Furthermore, as shown below, it is questionable whether the rescuees were actually "in the territory" of Australia in such a way as to trigger the right to an asylum status determination.

Article 32 of the Refugee Convention also states that before a refugee is expelled, he or she should 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." n153 If the rescuees had already entered Australia's migration zone, and if they had been determined to be refugees, Australia would also have had a duty to give them a right of appeal before expelling them from Australian territory. n154 Here, however, the rescuees were only in Australia's territorial seas on a temporary basis, and even if they had been established to be refugees, the rights against expulsion would not accrue for a temporarily admitted refugee, who would remain subject to removal in the same manner as any alien. n155

Judicial decisions from jurisdictions around the globe reflect the reality that States can and do expel refugees and asylum seekers absent a breach of the

refoulement principle. In the Yugoslav Refugee case, the German Federal Administrative Court ruled that a refugee unlawfully within a country could be expelled if he or she was not returned to a country where his or her life or freedom was threatened. n156 A similar conclusion was reached by the United States Court of Appeals for the Second Circuit in Chim Ming v. Marks. n157 In Germany, since a change to its Constitution in 1993, the transfer of [*277] asylum seekers to other countries has been permitted whether or not those countries provided access to refugee determination procedures. n158

Human rights groups have correctly pointed out that the excessive shuttling of refugees and asylum seekers from one country to another can be harmful to asylum seekers. Amnesty International, for instance, "opposes the sending of asylum seekers who are, or may be, in need of protection from serious human rights violations to a third country unless the government sending them has ensured that in that country they will be granted effective and durable protection, which should normally include legal protection against forcible return." n159 The narrowly circumscribed transport of the rescuees to Nauru, however, did not condemn the rescuees to a permanent state of perilous flight.

While it can be argued that Australia had a moral duty not to expel the rescuees from Australia, and that the expulsion of the rescuees violated the spirit of the 1951 Refugee Convention, it is not clear that Australia's expulsion of the rescuees from its territorial seas was illegal under international law.

I. Was the protection offered the Afghan rescuees in Nauru inadequate due to its temporary basis?

Observers have noted that "to pursue an ideal of asylum in the sense of an obligation imposed on States to accord lasting solutions, with or without a correlative right of the individual, is currently a vain task." n160 Not all States have, in the past, granted even temporary protection to asylum seekers and refugees. In South-East Asia, for example, the difficulty of getting States to accept merely temporary asylum for asylum seekers arriving on boats was noted on numerous occasions by the Executive Committee. n161

States have the right to narrowly prescribe the conditions of asylum that will be granted on their territory, including whether [*278] merely temporary asylum is to be granted. n162 A State may determine whether to grant refugees the right to temporary or permanent residence, it may determine the refugees' right to work, and it may sequester refugees in camps pending a lasting solution to the refugee problem. n163

Australia refused to offer permanent asylum to the Afghan rescuees. Rather, it guaranteed their welfare in Nauru until refugee status determinations took place. The protection offered was merely temporary, although those rescuees later found to be refugees had the opportunity to be granted permanent asylum, possibly in Australia. Although finding durable solutions to refugee problems is always a noble goal, temporary protection for asylum seekers can be a reasonable means of coping with asylum seekers in certain circumstances.

During the early 1980's, it was claimed that the notion of temporary refuge was a new concept that unnecessarily eroded the rights of refugees. n164 This assertion notwithstanding, temporary protection has, in fact, been practiced as early as the 1950's n165 and, by the 1990's, temporary protection became firmly established as a permissible State practice. n166 While traditional notions of asylum assist us in understanding past refugee crises, it is questionable whether they offer an appropriate solution to the political and humanitarian problems of the twenty-first century. n167 The notion of temporary protection has also been validated by a number of international instruments as a practical alternative to refoulement. n168 For instance, temporary protection was cited in the 1967 Declaration of Territorial Asylum, the 1969 OAU Convention, and the Council of Europe Resolution 14, and it was also noted by the Committee of the Whole of the 1977 United Nations Conference on Territorial Asylum. n169

[*279] Temporary protection can be useful in a variety of circumstances. In cases of mass influx, for instance, formal determination of status may be im-

practicable due to the numbers of asylum seekers or the absence of appropriate mechanisms for dealing with them. n170 Although a mass influx of asylum seekers was not present in this instance, it would have been difficult for Australia to have made proper refugee status determinations for the 433 rescuees on board the Tampa or the Manoora. n171 In 1981, a group of experts meeting in Geneva to examine the concept of temporary refugee observed that asylum could be temporary or permanent but that, when lives were in danger, States should grant "at least temporary asylum." n172 The Executive Committee, scrutinizing temporary protection regimes, noted that "asylum seekers should be admitted to the State in which they first seek refuge and if that State is unable to admit them on a durable basis, it should always admit them at least on a temporary basis and provide them with protection ... without any discrimination as to race, religion, political opinion, nationality, country of origin or physical incapacity." n173

While receiving States that are asked to grant entry to large numbers of asylum seekers may refuse to do so under international law, the acceptance of temporary protection regimes encourages countries to be more willing to admit asylum seekers initially. As Guy Goodwin-Gill has noted, "the political and legal reality is that States generally have not undertaken, and foreseeably will not undertake, an obligation to grant asylum in the sense of a lasting solution." n174 By admitting individuals in need of protection and scrupulously abiding by the dictates of non-refoulement, the State may be viewed as acting in a way that benefits the entire international community. n175

History shows that solutions to refugee crises depend on the actual circumstances surrounding asylum seekers when determining whether resettlement, repatriation, or temporary protection is [*280] appropriate. In Indo-China, for instance, repatriation and local integration were deemed unworkable for cultural and political reasons although, over time, many Indo-Chinese seaborne asylum seekers were eventually resettled. n176

With respect to Afghan refugees, permanent resettlement has historically been considered inappropriate and repatriation has been the ultimate goal. Through time, non-refoulement has permitted the flow of international aid and assistance to Afghan refugees while solutions to Afghanistan's political, economic, and social problems were sought. n177 Today, with the changing political realities in Afghanistan and the real possibility of future political stability following the defeat of the Taliban regime, repatriation may become justified insofar as Afghan asylum seekers are concerned, if a stable, peaceful Afghanistan becomes a reality. n178

While, as argued above, the Tampa rescuees were probably valid refugees at the time of the incident, they may be at less risk of persecution in the future by the new government of Hamid Karzai; Temporary protection may be a reasonable means to ensure that their basic welfare is protected while it is determined whether they should ultimately be resettled or repatriated. Although at the time of the Tampa incident Australia could not have foreseen the radical changes that were to take place in Afghanistan, those changes serve to illustrate why temporary protection can be a reasonable solution for some refugee crises. In hindsight, it is clear that the vast majority of the Tampa rescuees would no longer be considered to be refugees after the demise of the Taliban government. This is most vividly illustrated by the eventual refugee status determinations of UNHCR itself. As of September 2002, UNHCR had found that only 36 of the asylum seekers it had initieally screened on Nauru were valid refugees, while determining that 176 of the asylum seekers were not, in fact, refugees. n179 An equally small number of valid refugees were found among those asylum seekers screened by Australian officials: Of the 294 asylum seekers on Nauru eventually screened by Australian authorities, 264 were rejected as non-refugees. n180

In the Afghan refugee context, temporary protection may, and [*281] should, be considered a "flexible and pragmatic means of affording needed protection to large numbers of people fleeing human rights abuses and armed conflict." n181 It allows for an adaptable, yet principled approach to the individual circumstances of each refugee crisis. n182 While temporary protection does not rule out the eventual local integration or third-country resettlement of refugees, it does

buy time for durable solutions, specifically affording the opportunity to plan for effective burden-sharing between various States. n183

Considering the doubtful nature of the rescuees' right to apply for asylum in Australia, in accepting responsibility for the welfare of the rescuees while on-board the two ships and in Nauru, Australia behaved responsibly and reasonably. It did not violate its humanitarian obligation as a coastal State to grant temporary protection to the rescuees. n184 The main difference between Australia's policy and established practice is that the camps run by Australia are not located on Australian territory. Given the fact that three of the six mainland Australian detention centers are located in rural Australia, often in desolate locations, and that the conditions in the offshore detention centers appear to be adequate, as detailed below, the actual venue of the centers may not have made a significant practical difference. n185

Finally, it should be noted that Australia's new policy appears to be preferable to other modern methods of dealing with refugees in need of temporary protection, such as the establishment of "safe areas" near or in the country of persecution. For instance, the "safe area" carved out in Northern Iraq required a long and expensive military engagement and, in fact, did not prove to be safe. n186 Similarly, internationally-created "safe havens" in Srebrenica, Zepa, and Gorazde during the Yugoslav conflict of the 1990's fell pretty to brutal massacres following a Bosnian Serb offensive against them. n187 Australian protection in Nauru is almost surely safer for the rescuees than a "safe area" in Afghanistan.

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J. Were the rescuees offered adequate protection via the Nauru/New Zealand agreement?

Australia could not have legally sent the rescuees to Nauru or New Zealand if they would have been in danger of persecution in these countries.

Some of the difficulties in determining whether Nauru is a safe country for asylum seekers revolve around how exactly to define a "safe" country. n188 In practice, the determination of whether a country is "safe" varies according to the length of an asylum seeker's expected stay in the country, the opportunity for independent legal review of denials of entry or asylum, and the types of procedural safeguards applied when rejecting asylum seekers. n189 Moreover, a "safe" country is a country with fair and equitable asylum procedures that comport with the Geneva Convention, n190 as well as a country where asylum seekers' rights under the 1951 Refugee Convention or its 1967 Protocol are not threatened. n191 Today, in order for an expulsion proceeding to comport with due process, the asylum seeker must have the benefit of: (1) knowledge of the case against him or her; (2) an opportunity to submit evidence to rebut the case; (3) reasoned decisions; and, (4) the possibility of appealing an adverse decision to an impartial tribunal that is independent of the initial decisionmaking body. n192

Minimum guarantees of due process with respect to the granting of asylum do not, however, explicitly prescribe the procedures States must use when considering asylum applications. Though States may not refoule, they are permitted to decide the means used to implement the 1951 Refugee Convention. n193

When seeking to expel an asylum seeker, States may rely on informal, ad hoc administrative procedures. n194 Thus, Australia could have chosen to perform a streamlined asylum status determination on board the Tampa or the Manoora, much like what the United States has performed vis-a-vis Haitian seaborne asylum seekers in the past. n195 Such a streamlined asylum status determination would have [*283] been beneficial to the extent that those in need of protection could have been quickly recognized, while those who were not could have been hastily returned. n196 On the other hand, such rapid asylum status determinations have the drawback that they might not allow enough time for all the facts of a particular asylum application to be considered.

Could the asylum status determinations carried out under the Nauru/New Zealand agreement ensure that the rescuees had access to fair asylum procedures? By any measure, New Zealand is considered a "safe" country to send asylum seekers. It is also beyond doubt that the rescuees who were to be processed in New Zealand would have access to fair asylum procedures. Nauru, on the other hand, was a more problematic choice as a country to carry out asylum status determinations, especially since it is not a party to the 1951 Refugee Convention or its 1967 Protocol. n197

Judge North, highlighting the questionable nature of Nauru's asylum status determination procedures in the initial Ruddock opinion, noted that, at the time of the decision, the legal regime applicable in processing the refugee claims of the rescuees under the Nauru/New Zealand agreement remained to be determined. n198

Regardless of the initial uncertainty concerning the asylum status determination procedures to take place in Nauru, the actual procedures in Nauru appear to have comported with due process rights: Australia worked closely with the International Organisation for Migration and the United Nations High Commissioner, and it was eventually agreed that the UNHCR itself would screen asylum seekers from the Tampa who were sent to Nauru, along with Australian immigration officials. n199 Screening by UNHCR came officially at the request of the government of Nauru, although it is difficult to ascertain whether Australia was exerting behind-the-scenes influence to urge Nauru to request a UNHCR screening regime. n200 In any event, in response to Nauru's request, UNHCR [*284] established a fully operational office in Nauru, which included "refugee status determination" specialists, and began screening the rescuees. n201 Eventually, Australian and UNHCR officials, working in tandem, screened all of the Tampa rescuees. n202 Those rescuees refused refugee status were then allowed to appeal these initial status determinations. n203 The Australian government has taken great pains to reasonably accommodate the rescuees in Nauru, under intense international scrutiny by human rights groups. The Australian government's initial plans to accommodate asylum seekers were thrown into a state of confusion when local landowners revoked their permission for the use of vacant housing. The government was ultimately forced to build shelters for the asylum seekers; n204 the Australian military constructed a camp for the asylum seekers and provided guards to maintain security. n205 According to the terms of Australia's agreement with Nauru, Australia agreed to meet all costs associated with the "transfer, processing and accommodation of the asylum seekers," as well as meeting the operating costs of the processing centers. n206 Australia also guaranteed that "no persons would remain in Nauru after the appropriate processing procedures" were completed, n207 and made arrangements with the International Organisation for Migration and the UNHCR to ensure that the rescuees received appropriate counseling and assistance. n208 According to the terms of the agreement with Nauru, "Australia will ensure that all persons taken by Nauru will have left within as short a time as is reasonably necessary to complete the humanitarian endeavors referred to in this statement of principles." n209 As of September 2002, Australia has strictly abided by its promises, and the majority of the asylum seekers processed on Nauru have been [*285] resettled in other countries or repatriated to Afghanistan. n210

The fact that Nauru could offer adequate protection to asylum seekers, with the assistance of Australia, does not mean that Australia does not need to change its asylum determination system on the Australian mainland, nor does it mean that Australia's detention facilities for asylum seekers on the mainland do not need improvement. Many sources indicate that Australia's refugee screening system on the Australian mainland is too slow, and that sometimes it takes an appalling two years for asylum applications to be processed. n211 The bleak conditions in mainland Australian detention centers for illegal immigrants and asylum seekers have been thoroughly criticized by human rights watchdogs, such as Australia's Human Rights and Equal Opportunity Commission. n212 For instance, poor conditions led to a two-week hunger strike in early 2002 by over 200 Afghan asylum seekers at the remote mainland detention center at Woomera. n213

The shortcomings of mainland Australian detention centers, however, do not mean that asylum seekers could not obtain adequate protection in Nauru. Rather, they suggest that equal, or better, levels of protection for asylum seekers could be achieved outside of Australia's mainland.

K. Did Australia's actions violate its responsibilities to the United Nations High Commissioner for Refugees?

When the rescuees initially were taken aboard the Tampa, UNHCR brokered a three-part plan that would have allowed for: (1) temporary disembarkation for humanitarian reasons of the rescuees on Christmas Island; (2) immediate screening of asylum applicants carried out by UNHCR screening teams; and (3) eventual transfer to third countries, including New Zealand and Norway, which had [*286] indicated that they were ready to help. n214 While East Timor initially made a generous offer to take the Tampa and its passengers, UNHCR rejected this offer in consideration of the fact that the Tampa had moved close to Christmas Island and that the island was therefore the most logical place for the rescuees to go. n215

UNHCR expressed optimism that Judge North's initial Ruddock decision would grant "speedy access to fair and effective procedures for determining [the rescuees'] status and protection needs in Australia, without further delay." n216 After the second Ruddock decision, however, and the expulsion of the Tampa rescuees from the Australian territorial sea, UNHCR criticized Australia's decision to send the asylum seekers to be processed in Nauru. n217

UNHCR has a mandate to coordinate the U.N. response to refugees and their problems. n218 It is entrusted by the U.N. General Assembly with the international protection of refugees, and States have formally agreed to cooperate with UNHCR to "facilitate its duty of supervising the applications of the provisions" of the 1951 Convention and its 1967 Protocol. n219 UNHCR could have asked the General Assembly to issue an advisory opinion on the Tampa incident, when Australia acted contrary to its recommendations, but it did not do so.

While Australia's actions subsequent to the Tampa incident were criticized by UNHCR, Australia did work in tandem with UNHCR to ensure an effective solution to the international imbroglio concerning the rescuees. It cooperated with UNHCR to ensure that rescuees received counseling and assistance, n220 and it similarly cooperated during the asylum status determinations that eventually took place on Nauru. n221 While Australia may be guilty of a political violation, or a potential violation of international human rights law, its [*287] actions vis-a-vis UNHCR did not constitute a legal violation of its obligations.

IV. The Benefits of Australia's New Refugee Policy

I turn now to the five reasons discussed in the Introduction for why Australia's policy of processing asylum seekers on Naura and other South Pacific islands is a positive development.

A. The Nauru/New Zealand agreement benefited Nauru greatly while protecting the rescuees from persecution or torture.

New Zealand appears to have agreed to process Tampa rescuees out of sheer altruism and a spirit of international burden-sharing. The governments of Nauru and Australia, however, appear to have acted strictly out of their perceived self-interests.

Because providing for refugees and asylum seekers is expensive and usually a significant burden on countries, transfer agreements of rescuees to other countries have often necessitated some form of assistance to the admitting country. Such assistance has often come in the form of the lifting of visa requirements between the contracting States or the provision of material on the part of wealthy Western States. n222 For example, Germany transferred 120 million DM to Poland in return for Poland's agreement to assume care for asylum seekers passing through Poland on their way to Germany. n223

Wealthy Western States have also funded temporary protection regimes during the Indo-Chinese exodus of seaborne asylum seekers, n224 even though the asylum seekers were housed far from these donor nations. While such agreements may suggest paternalism on the part of wealthy Western States, they also reflect the realities that asylum seekers generally tend to gravitate toward wealthy States, that wealthy States are ready to pay to send them elsewhere, and that poorer nations are willing to be paid to assume this burden. Australia's agreement with Nauru was premised on the promise of substantial economic assistance to Nauru, a small, impoverished country.

[*288] Nauru is a country in grave financial straits. n225 Its tropical vegetation has been largely cleared, and its supply of phosphate, the foundation of its economy, has been largely depleted. Although, in the 1970's, Nauruans were among the richest people on earth due to their phosphate-mining, phosphate production peaked in the 1980's and has since diminished by two-thirds. n226 The price of phosphate on the world markets has also decreased, reducing Nauru's revenues and contributing to a government deficit that reached eighteen percent of GDP in 2000. n227 Strip-mining in Nauru has also devastated the island's environment, reducing the economic opportunities available in the country. n228

To generate revenue, the government of Nauru has resorted to a variety of schemes with little success. n229 For instance, Nauru has permitted offshore banking with little or no regulation. n230 This source of income, however, is being threatened as large Western banks have started to refuse to handle transactions in Nauru due to fears of money-laundering. In addition, the Group of Seven n231 has threatened to impose severe financial sanctions on Nauru for its encouragement of money-laundering. n232

The agreement with Australia was a massive economic boon to Nauru. Australia agreed to pay Nauru $ 20 million Australian dollars (approximately $ 10 million U.S. dollars) to house and process the rescuees. n233 This assistance came in the form of a promise to pay off the island's accumulated medical bills, eight months' worth of free fuel, two new electrical generators for the country, and ten scholarships for Nauruan students to attend Australian universities. n234 This financial assistance by Australia represented a sum valued at a massive twenty percent of Nauru's GDP. n235 The agreement also brought a good deal of foreign wealth into Nauru indirectly, as high- [*289] spending diplomats, journalists, immigration officials, and contractors arrived in Nauru in the wake of the rescuees' transfer.

There are inevitably certain drawbacks to such an agreement. Arguably, if the asylum seekers were to remain in Nauru on a long-term basis, they could put an unreasonable strain on Nauru's ability to provide social services to its citizens. This argument, however, fails in light of Australia's promise that no asylum seeker would remain in Nauru after the appropriate processing procedures were completed. n236

It could also be argued that the agreement with Australia was little more than an attempt by Australia to economically coerce Nauru into accepting responsibility for asylum seekers for whom Australia should have been responsible. The fact that Nauruans greeted the Tampa rescuees with flowers and songs when they arrived, however, suggests a lack of coercion on the part of Australia. n237 It also seems clear that the government of Nauru believed the transfer to be in its own self-interest: since Nauru first accepted the Tampa rescuees, its government has sought out further opportunities to accept asylum seekers for processing, accepting a second boatload carrying 237 asylum seekers, and a third carrying 262 individuals. n238 The fact that, one year after the Tampa incident, Nauru continues to allow Australia to hold asylum seekers on its territory also suggests that the agreement was in Nauru's interest. n239 Finally, as argued above, it is not clear that Australia should have been solely responsible for the rescuees in the first place.

While it seems likely that future transfers of asylum seekers to offshore facilities in States such as Nauru will generate less incidental revenue as they become more commonplace, and while it seems possible that future competition between other South Pacific States for the right to process asylum seekers could

reduce the value of such agreements, Australia's agreement with Nauru can be seen as a beneficial economic transaction that greatly increased direct foreign assistance to Nauru in an environmentally-friendly manner.

A country such as Nauru, with few remaining natural [*290] resources, should be allowed to profit from the resources that it possesses, including non-economically-productive land that can be used to house asylum seekers. This benefit will not necessarily be ephemeral or limited to Nauru. To illustrate, Australia has sought out further agreements to process asylum seekers with poor Pacific nations, including Papua New Guinea, Tuvalu, Palau, Fiji, and Kiribati, and further arrangements with Nauru are not out of the question. n240 Papua New Guinea struck a deal with the Australian government, and intercepted illegal immigrants are currently being processed on Papua New Guinea's Manus Island. n241 In a world where the vast bulk of wealth rests in the hands of developed countries, such indirect economic transfers between wealthy and poor countries may indeed be quite beneficial. Currently, the wealthy countries that comprise the Organization for Economic Development contribute a paltry 0.22 percent of their GNP to foreign aid, and the amount of foreign aid given by all major countries has declined since 1991. n242 Commentators have posited that this decline is attributable to the end of the Cold War and the corresponding reduction in strategic motives for the dispersal of foreign aid. n243

Given the paltry amount of foreign aid meted out by developed nations to developing countries, expenditures that represent a tiny percentage of a developed nation's GDP may result in large increases in absolute levels of foreign assistance. Many developing nations have crushing debt burdens, and agreements such as the Nauru/New Zealand agreement permit politically acceptable methods of increasing foreign aid.

Up to this point, Australia has not been paying for its offshore refugee processing system from its aid budget, n244 and hopefully it will continue to refrain from doing so. Thus, while Western nations such as Australia already provide the vast majority of funds for UNHCR and the U.N. system, the Nauru/New Zealand agreement and similar arrangements in the South Pacific effectively increase foreign aid to developing countries while protecting the rights of asylum seekers, killing two birds with one stone.

[*291]

B. The agreement was perceived as benefiting Australia.

As reflected in John Howard's comfortable re-election as prime minister soon after the adoption of the offshore asylum seeker processing policy, the agreement with Nauru was perceived by Australian voters as benefiting Australia. n245

This does not mean that Australia's policy was based on admirable motives - it reflects an anti-immigration stance that may have been taken merely to curry favor with voters. It may also reflect Australian voters' confusion between economic migrants and refugees. Furthermore, while it is true that the number of illegal immigrants arriving in northern Australia since 1999 has drastically increased, n246 it is not clear that Australia is receiving more than its fair share of asylum seekers. Still, in a democracy, voters are allowed to play a role in government decisions, and Australians showed their support for the Nauru/New Zealand agreement at the polls.

That the agreement was perceived to be in the interest of Australians does not mean that the Nauru agreement was economically rational for Australia. The high price tag of the agreement has been noted by a number of observers n247 who argue that a policy whereby seaborne asylum seekers are intercepted at sea and sent to offshore facilities is expensive, both in terms of providing for the rescuees and in terms of maintaining stringent border controls at sea. Additionally, in certain wealthy Western States, low birthrates and aging populations make the importation of labor necessary for economic growth. n248

Although the Australian government may not have been making the wisest economic choice by establishing its policy of offshore screening of rescuees, ordinary Australians have expressed their overwhelming support for the policy of

rescuee-processing in offshore facilities. n249 If Australia's citizens choose to make such a questionable financial investment, and such an investment does not harm asylum seekers or the nations that process them, they should be [*292] free to do so. n250

Although Australia's new policy may prove to be unsustainable in the long run, the consequences of the policy remain to be seen and will largely depend on whether the Tampa rescuees can be safely repatriated to Afghanistan or resettled in other countries. If Australia's perceived self-interest can be invoked to justify increased foreign aid and does not significantly diminish the protection offered to asylum seekers, why should Australia's new asylum-seeker policy be disavowed by the international community?

C. The Nauru/New Zealand agreement and similar policies reduce incentives for economic migrants to pose as refugees while ensuring the protection of legitimate asylum seekers.

Australia could, of course, use its economic clout to accept more asylum seekers on mainland Australia. This solution, however, would not increase foreign assistance and would not deter economic migrants from misusing asylum procedures.

Care should be taken to distinguish economic migrants from refugees. An economic migrant, as opposed to a refugee, is moved solely by economic considerations, n251 although the distinction can sometimes become blurred. n252 In countries where conditions are desperate, individuals have and continue to attempt to emigrate through any means possible. n253 Thousands of migrants whose aims are a better standard of living, for instance, ask for asylum in order to outflank restrictive immigration policies. n254 As Ruud Lubbers, the United Nations High Commissioner for Refugees, has recently noted, economic migrants pose a major problem for the adequate functioning of the international refugee system. n255

Australia's humanitarian visa system currently focuses on the protection of certain groups deemed to be most in need of assistance. Australia gives the highest priority in resettlement to "emergency cases" referred by UNHCR, whose asylum requests are normally [*293] decided in only two days. n256 Australia also gives priority consideration to "survivors of violence and torture," as well as to "women at risk." n257 It is important that economic migrants not displace such categories of asylum seekers through their misuse of the asylum system. Abuse of the asylum status determination system erodes the perceived validity of asylum procedures in general, wastes resources that could be better spent protecting "true" refugees, and contributes to the overburdening of the system.

Despite its many failings, the Nauru/New Zealand agreement does, however, send a clear message to illegal immigrants that they may end up in a safe country, but one with fewer economic opportunities available than Australia and other Western nations. For refugees who are genuinely fleeing persecution or torture, temporary protection in a country like Nauru can provide respite from the persecution that induced their flight. For economic migrants posing as refugees, however, offshore temporary protection regimes send the clear message that while they may end up in a safe territory, but one where their economic opportunities will not necessarily be greater than in their country of origin.

D. The Nauru/New Zealand agreement and similar policies should help reduce people-trafficking.

The majority of asylum seekers attempt to enter Western states with the help of people-traffickers or smuggling rings because of the difficulty of using other procedures. n258 While Article 31 of the 1951 Refugee Convention forbids signatories from punishing asylum seekers for illegal entry, states do have the right to fight people-trafficking and the concomitant illegal activities that surround the practice. n259

Indonesian people-smuggling syndicates appear to be the main conduit for Middle Eastern asylum seekers attempting to enter Australia. n260 In 2001, more

than 5,000 asylum seekers, most of them from the Middle East and Afghanistan, attempted the dangerous ocean crossing from Indonesia to Australia with the aid of people- [*294] traffickers. n261

It has been estimated that the business of illegal migrant trafficking is worth between five and seven billion U.S. dollars a year.People-trafficking is associated with various crimes, such as the procurement of individuals for the sex industry. n262 People-trafficking also poses other threats to migrants, whose lives may be at risk when transported via dangerous means. For instance, just two months after the Tampa incident, only 44 of 350 Iraqi illegal immigrants survived when their ship, controlled by an Indonesian-based smuggling syndicate, sank on its way to Australia. n263

People-traffickers can also gouge asylum seekers in return for transport. Some evidence suggests that Tampa rescuees paid people-traffickers large sums to be brought to Australia. n264 One Tampa rescuee, for instance, left his wife and job as an English teacher in Afghanistan, sold his house, and paid people-traffickers 5,000 U.S. dollars to take him to Australia. n265

According to Australian Defense Minister Peter Reith, who criticized the initial Ruddock ruling, "as defense minister, I get reports out of Indonesia where people smugglers are saying that the North decision is a green light for them to send boats to Australia." n266 While this might have been a politically self-serving statement, in theory, if people smugglers in Southeast Asia are not able to guarantee passage to Australia, the market for people-trafficking will be reduced.

Of course, there are other measures Australia could use to deter people-trafficking in its region. Australia should, for instance, become a signatory to the 2000 Protocol to Prevent, Suppress and Punish Trafficking in Persons, as well as the 2000 Protocol against the Smuggling of Migrants by Land, Sea and Air, which supplement the United Nations Convention against Transnational Organized Crime. n267 Australia should also work with regional leaders to reduce [*295] people-trafficking, as it has been doing. n268

Finally, it should be noted that there is evidence suggesting that Australia's new refugee policy has actually deterred people-traffickers: as of September 2002, no new boats had reached the Australian mainland. n269 Furthermore, for the past nine months, there has not been any attempt to illegally smuggle migrants by boat to Australia. n270

E. The Nauru/New Zealand agreement and similar policies encourage international burden-sharing.

While there has been past support for giving primary responsibility for refugees to the country of first refuge, experience with refugees in Southeast Asia, Central America, Western Asia, Africa, and Europe, where multiple States have declined to permit refugees to remain within their borders or regularize their status, points to the necessity of a new burden-sharing paradigm that promotes effective, durable solutions. n271

Finding durable solutions to refugee problems has historically been viewed as the responsibility of the international community. n272 As noted in the Preamble to the 1951 Refugee Convention, "the grant of asylum may place unduly heavy burdens on certain countries," and satisfactory solutions to international problems require international cooperation for solution. n273 Recommendation D of the Final Act reiterated these concepts, asking for governments to continue to receive refugees and to cooperate, so that refugees may "find asylum and the possibility of resettlement." n274

In an ideal world, all countries possessing adequate resources would offer to assume responsibility for some of the refugees. To the extent that Papua New Guinea, Australia, Nauru, New Zealand, and [*296] Ireland n275 offered to share the burden of assuming responsibility for the Tampa rescuees, their actions were commendable. In the real world, however, generous admission policies have become a reality only when generous resettlement policies have been maintained by other countries. n276

Perhaps it is time to create a wider regime of resettlement guarantees, such as the temporary burden-sharing regime put in place to deal with the Indo-Chinese refugee crisis, in which a U.N. meeting was held that resulted in substantially increased resettlement offers and financial aid. n277 Another meeting in 1979 suggested a pool of resettlement places, which became available to UNHCR in its effort to secure disembarkation. n278 Also, a resettlement program named DISERO (Disembarkation Resettlement Offers), which involved Australia, Canada, France, the Federal Republic of Germany, Italy, Japan, the Netherlands, the U.K., and the U.S., as participating States, was implemented to institutionalize resettlement guarantees and disembarkation procedures. n279 Such efforts make international co-operation concrete while increasing the level of protection given to those in flight. n280

While the solutions created in response to the Indo-Chinese refugee problem were limited in place and time, the institutionalization of burden sharing is appropriate today, when certain States continue to receive the majority of asylum seekers in their region and when the Cold War no longer constrains refugee policy. Collective action through resettlement sharing and international cooperation would help both refugees and states, by increasing the probability of eventual resettlement when necessary and through an even distribution of burdens.

Currently, the sharing of refugee burdens is anything but equitable. In Europe, for instance, Germany has hosted more than fifty percent of asylum seekers in the region over a long period. n281 Other European States have been consequently able to evade their [*297] responsibilities under the 1951 Refugee Convention. n282 Although Australia hosts significantly fewer asylum seekers than other Western countries, Australia, like Germany, has been a magnet for both legitimate and illegitimate asylum seekers, especially in the South Pacific region. It should be noted that Germany's refugee burden has been reduced in the 1990's through new burden-sharing regimes instituted by the European Union on a collective basis. n283

Unfortunately, few countries have been willing to open their doors to asylum seekers in the South Pacific region, without the benefit of an institution like the European Union. Only Ireland and New Zealand expressed initial interest in accepting Tampa rescuees who were determined to be refugees for resettlement, n284 although Australia itself later resettled some of the Tampa rescuees. n285 The difficulty of finding countries for permanent resettlement of the refugees, however, indicates the necessity of reinforcing international burden-sharing regimes, rather than a failure of Australia to live up to its duties under the 1951 Refugee Convention.

The difficulty of finding countries to accept refugees also reflects the failure of UNHCR to effectively promote burden-sharing in a spirit of international cooperation. To some extent, Australia's policy can be viewed as an effort by one State to implement a policy of burden-sharing in the South Pacific, albeit a temporary one, in response to UNHCR's failure to perform such a task adequately. While such unilateralism should be avoided when alternatives exist that effectively promote burden sharing, in the absence of an effective burden-sharing regime, the right of Australia to make its own burden-sharing agreements with other States, particularly when such agreements are clearly in the interest of these other States, should not be precluded. As Ruud Lubbers himself recently noted, a "Convention Plus" approach is needed to deal with today's refugee crisis, based on special agreements fostering international cooperation, and modeled on the solutions to the Indo-Chinese refugee crisis. n286

Australia currently abides by its agreement to accept 12,000 [*298] asylum seekers per year via the UNHCR-sponsored resettlement program. n287 While Australia, fiscally speaking, has resources that would allow it to provide for more than 12,000 asylum seekers annually, a well-managed system should be devised by UNHCR and other international actors that effectively institutionalizes burden-sharing. Until that time, Australia, in response to its citizens' pressure, should be allowed to implement a regional burden-sharing regime in the South Pacific.

V. Conclusion

Australia's actions, although grounded in questionable motives, were not illegal under international law. Some of the Tampa rescuees were refugees, although this was irrelevant at the time of the Tampa incident, and Australia correctly assumed partial responsibility for the fate of the rescuees. Other States, such as Norway, should also have assisted Australia in a spirit of international burden-sharing and cooperation.

Australia did not violate international law by boarding the Tampa, and the detention of the rescuees was probably also legal under international law. Refoulement of the Tampa rescuees would be illegal under international law, as the Australian Federal Court recognized, and no other international laws were patently violated by Australia when the rescuees were expelled from Australia's territorial seas.

The level of protection given to the Tampa rescuees in Nauru appears to be sufficient, especially when compared to conditions at other Australian detention centers. While UNHCR disagreed with some of Australia's actions, this fact alone does not amount to a breach of a legal duty on the part of Australia.

In terms of policy, the Nauru agreement and similar agreements that have or will be negotiated are positive in many respects. The agreement greatly benefited Nauru economically, and similar agreements have the potential to spread wealth to other developing nations throughout the South Pacific if Australia's policy is continued. The policy was also perceived by Australian voters as being beneficial to Australia, although the truth of this assertion can be debated on both economic and moral grounds.

Australia's new refugee policy is also beneficial insofar as it [*299] removes incentives for economic migrants to pose as refugees, while deterring people-traffickers from illegally and hazardously transporting asylum seekers to Australia via Indonesia. Finally, the agreement is salutary, because it encourages international burden-sharing vis-a-vis refugees, while vividly highlighting the need for UNHCR to facilitate the creation of a more effective burden-sharing regime.

Although Australia's new refugee policy may have come about because of short-sighted actions of a political nature taken by Prime Minister John Howard's government, the benefits of such a policy outweigh the costs, and such regimes should be tolerated by the international community, if not actively encouraged.

Legal Topics:

For related research and practice materials, see the following legal topics: International LawSovereign States & IndividualsHuman RightsGenocideImmigration LawAsylum & Related ReliefEligibilityImmigration LawAsylum & Related ReliefConvention Against Torture

FOOTNOTES:

n1. SeeRuddock v. Vadarlis (Sept. 18, 2001) *183 A.L.R. 1, 23.*

n2. SeeVadarlis v. Ruddock (Sept. 11, 2001) 1297 FC.A (Austl. Vict. Dist.) (WL, AU-ALLCAS database), at http://www.fedcourt.gov.au/judgments/judgmts.html.

n3. SeeRuddock v. Vadarlis (Sept. 18, 2001) *183 A.L.R. 1, 33.*

n4. Id.

n5. Id.

n6. Id.

n7. Id.

n8. *Id.at 34.*

n9. Id.

n10. Id.

n11. Id.

n12. Id.

n13. Id.

n14. *Id.at 35.*

n15. Id.

n16. Id.

n17. Id.

n18. *Id.at 36-37.*

n19. *Id.at 37-38.*

n20. *Id.at 36.*

n21. Id.

n22. *Id.at 37.*

n23. *Id.at 36.*

n24. *Id. at 39.*

n25. *Id.at 38.*

n26. *SeeVadarlis v. Ruddock (Sept. 11, 2001) 1297 F.C.A. para. 40* (Austl. Vict. Dist.).

n27. SeeRuddock v. Vadarlis *(2001) 183 A.L.R. 1, 38.*

n28. *Id. at 32, 58.*

n29. UNHCR News Stories, Screening to Start for Refugees on Nauru (Sept. 21, 2001), at http://www.unhcr.ch.

n30. Id.

n31. *SeeRuddock v. Vadarlis (Dec. 21, 2001) 1865 F.C.A. para. 5* (Austl. Vict. Dist.), at http://www.fedcourt.gov.au/judgments/judgmts.html ("So far as Vadarlis sought mandamus, he had pointed to no present duty the performance of which could be compelled by that remedy.").

n32. Ruddock v. Vadarlis (Sept. 18, 2001) *183 A.L.R. 1, 35.*

n33. Id.

n34. SeeUnited Nations Treaty Collection, Status of Multilateral Treaties Deposited with the Secretary-Generale, at http://untreaty.un.org/ENGLISH/bible/englishinternetbible/partI/chapterV/chapterV.asp.

n35. Government of Australia, Country Chapter: Australia (Jan. 2002), at http://www. unhcr.ch.

n36. Guy S. Goodwin-Gill, The Refugee in International Law 34 (2d ed. 1996).

n37. 1951 Convention Relating to the Status of Refugees, adopted July 28, 1951, 189 U.N.T.S. 150 [hereinafter 1951 Refugee Convention]; see also 1967 Protocol Relating to the Status of Refugees, entry into force October 4, 1967, 606 U.N.T.S. 267 [hereinafter 1967 Protocol]. Australia became a State Party to the 1951 Refugee Convention in 1954 and its 1967 Protocol in 1973. While Australia originally maintained reservations to the Convention, these were later withdrawn. See189 U.N.T.S. 202 for a list of Australia's reservations. See also United Nations Treaty Collection, Status of Multilateral Treaties Deposited with the Secretary-General, at http://untreaty.un.org/ENGLISH/bible/englishinternetbible/partI/chapterV/chapterV.asp.

n38. Ruddock v. Vadarlis (Sept. 18, 2001) *183 A.L.R. 1, 55.*

n39. *Vadarlis v. Ruddock (Sept. 11, 2001) 1297 F.C.A. para. 66* (Austl. Vict. Dist.).

n40. Id.

n41. *Id. at para. 67.*

n42. SeeAgence France Presse, Australia Finds Evidence Tampa Boatpeople Includes Bogus Refugees (Sept. 24, 2001), at http://www.unhcr.ch.

n43. Government of Australia, supra note 35, at 9-12.

n44. Goodwin-Gill, supra note 36, at 157.

n45. Id. at 40.

n46. Ruddock v. Vadarlis (Sept. 18, 2001) *183 A.L.R. 1, 33.*

n47. Goodwin-Gill, supra note 36, at 152.

n48. SeeSandra Lavenex, Safe Third Countries: Extending the EU Asylum and Immigration Policies to Central and Eastern Europe 77 (1999) (discussing the London Resolution).

n49. SeeAgence France Presse, Australian PM to Visit Indonesia Early Next Year (Dec. 4, 2001), at http://www.unhcr.ch.

n50. Lavenex, supra note 48, at 77.

n51. SeeUnited Nations Treaty Collection, Status of Multilateral Treaties Deposited with the Secretary-General, at http://untreaty.un.org/ENGLISH/bible/englishinternetbible/partI/chapterV/chapterV.asp.

n52. U.S. Committee for Refugees, Sea Change: Australia's New Approach to Asylum Seekers 11 (Feb. 2002), at http://www.refugees.org/downloads/Australia.pdf.

n53. SeeGoodwin-Gill, supra note 36, at 157 (citing the 1910 Brussels International Convention with respect to Assistance and Salvage at Sea, art. 11, *1 Bevans 780 (1968);* the 1929 International Convention on the Safety of Life at Sea, art. 45, para. 1, 136 L.N.T.S. 82; 1958 Convention on the High Seas, art. 12; 1982 Convention on the Law of the Sea, art. 98; U.N. Doc. A/3179 (1956)).

n54. *Vadarlis v. Ruddock (Sept. 11, 2001) 1297 F.C.A. para. 84* (Austl. Vict. Dist.).

n55. Goodwin-Gill, supra note 36, at 159.

n56. Id. at 159.

n57. UNHCR Executive Committee Meeting, at para. 4, U.N. Doc. A/AC.96/SR.319 (1982).

n58. See Report of the Working Group on problems related to the rescue of asylum seekers in distress at sea, U.N. Doc. EC/SCP/21; U.N. Doc.EC/SCP/24 (1982).

n59. Id.

n60. Goodwin-Gill, supra note 36, at 160.

n61. Id. at 156.

n62. See Id. at 117.

n63. 1951 Refugee Convention, supra note 37, art. 33.

n64. Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, entered into force June 26, 1987, G.A. Res. 39/46, U.N. GAOR, 39th Sess., Annex, art. 3, Supp. No. 51, at 198, U.N. Doc. A/39/51 (1984).

n65. See, e.g., Convention Governing the Specific Aspects of Refugee Problems in Africa, entered into force June 20, 1974, art. II, para. 3, 1001 U.N.T.S. 45.

n66. See, e.g., Non-Refoulement, UNHCR Executive Committee Conclusion No. 6, 28th Sess., (1977), at http://www.unhcr.ch.

n67. Goodwin-Gill, supra note 36, at 137.

n68. Id. at 143.

n69. Id. at 157.

n70. SeeUnited Nations Treaty Collection, Status of Multilateral Treaties Deposited with the Secretary-General, at http://untreaty.un.org/ENGLISH/bible/englishinternetbible/partI/chapterV/chapterV.asp.

n71. See, e.g., Inter Press Service, Australia Set to Back Down on Restrictive Refugee Policy (Dec. 12, 2001), at http://www.unhcr.ch.

n72. SeeRuddock v. Vadarlis (Sept. 18, 2001) *183 A.L.R. 1, 33.*

n73. *Id. at 33-34.*

n74. Id.

n75. *Id. at 31* (citing Musgrove v. Chun Teeong Toy [1891] A.C. 272).

n76. Id.

n77. *Id. at 10.*

n78. *Id. at 11.*

n79. Breadth of the Territorial Sea, United Nations Convention on the Law of the Sea, art. 3, U.N. Doc. A/CONF.62/122 and Corr. 1 to 11 (1982).

n80. Goodwin-Gill, supra note 36, at 145.

n81. Id.

n82. Id. at 146.

n83. *SeeVadarlis v. Ruddock (Sept. 11, 2001) 1297 F.C.A. para. 40* (Austl. Vict. Dist.).

n84. UNHCR, The State of the World's Refugees: Fifty Years of Humanitarian Action 24 (Oxford 2000).

n85. Arthur C. Helton et al., Protecting the World's Exiles: The Human Rights of Non-Citizens, 22 Hum. Rts. Q. 280, 286 (2000).

n86. UNHCR, supra note 84, at 24.

n87. Helton, supra note 85, at 285.

n88. SeeGoodwin-Gill, supra note 36, at 202.

n89. Id.

n90. Helton, supra note 85, at 286.

n91. Ruddock v. Vadarlis (Sept. 18, 2001) *183 A.L.R. 1, 52.*

n92. UNHCR, Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees para. 192(i) (Reedited, January 1992) (1979), U.N. Doc. HCR/IP/4/Eng/REV.1 (emphasis added).

n93. Goodwin-Gill, supra note 36, at 163, citing Daniel P. O'Connell, The International Law of the Sea 80-81 (Ivan A. Shearer ed., 1982).

n94. Ruddock v. Vadarlis (Sept. 18, 2001) *183 A.L.R. 1, 25-27.*

n95. *Id. at 46* (citing Migration Act, 1958, c. 29).

n96. Id.

n97. Id. (citing Migration Act, 1958, c. 36).

n98. Government of Australia, supra note 35, at 3.

n99. Id.

n100. See G.A. Res. 2312, U.N. GAOR, 22d Sess., Supp. No. 16, at 81, U.N. Doc. A/67/16/16 (1967). See also P. Weis, The United Nations Declaration on Territorial Asylum, 7 Can. Y.B. Int'l L. 92 (1969).

n101. Inter Press Service, Australia Set to Back Down on Restrictive Refugee Policy (Dec. 12, 2001), at http://www.unhcr.ch.

n102. United Nations Convention on the Law of the Sea, 2, art. 17, U.N. Doc. A/CONF.62/122 and Corr. 1 to 11 (1982).

n103. Id. at 2, art. 19(2)(g).

n104. SeeGoodwin-Gill, supra note 36, at 161-62.

n105. See id. at 163.

n106. Goodwin-Gill, supra note 36, at 164.

n107. Exec. Order No. 12,324, *46 Fed. Reg. 48,109* (Sept. 29, 1981).

n108. Goodwin-Gill, supra note 36, at 162.

n109. This goal, as noted supra, is explicitly validated under Article 19 of the 1982 United Nations Convention on the Law of the Sea.

n110. Goodwin-Gill, supra note 36, at 164.

n111. Id.

n112. SeeVadarlis v. Ruddock (Sept. 11, 2001) 1297 F.C.A. (Austl. Vict. Dist.)

n113. Id. at para. 81.

n114. Id.

n115. Id., Statement, at para. 19.

n116. Id., Statement, at para. 20.

n117. Id. at para. 64.

n118. Id. at para. 64.

n119. Id. at para. 65.

n120. Id. at para. 67.

n121. Id. at paras. 70-73.

n122. Id. at para. 80.

n123. Id. at para. 100.

n124. Id.

n125. Ruddock v. Vadarlis (Sept. 18, 2001) *183 A.L.R. 1, 57.*

n126. Id.

n127. Id.

n128. SeeUnited Nations Treaty Collection, Status of Multilateral Treaties Deposited with the Secretary-General, at http://untreaty.un.org/ENGLISH/bible/englishinternetbible/partI/chapterIV/treaty5.asp.

n129. International Covenant on Civil and Political Rights, entered into force Mar. 23, 1976, art. 9(4), G.A. Res. 2200A, U.N. GAOR, 21st Sess., Supp. No. 16, at 52, 999 U.N.T.S. 171, U.N. Doc. A/6316 (1966).

n130. Randall Hansen et al., Report on the Workshop on Refugee and Asylum Policy in Practice in Europe and North America, *14 Geo. Immigr. L.J. 801, 806 (2000).*

n131. Id.

n132. Prisoners of the Outback, The Economist, June 30, 2001, available at LEXIS, Nexis Library, News Group File.

n133. 1951 Refugee Convention, supra note 37, art. 25.

n134. Goodwin-Gill, supra note 36, at 153.

n135. Id. at 157.

n136. Id. at 203.

n137. Id. at 137.

n138. Ruddock v. Vadarlis (Sept. 18, 2001) *183 A.L.R. 1, 32.*

n139. Id.

n140. *Id. at para. 55.*

n141. Id.

n142. Goodwin-Gill, supra note 36, at 138.

n143. Id. at 142.

n144. Id.

n145. *Sale v. Haitian Ctrs. Council, 509 U.S. 155, 187 (1993).*

n146. Goodwin-Gill, supra note 36, at 142.

n147. Id. at 142 (citing 16 Refugee Reports, Feb. 28, 1995, at 11).

n148. Id. at 143.

n149. See, e.g., Ruddock v. Vadarlis (Sept. 18, 2001) *183 A.L.R. 1, 13, 30.*

n150. *Id. at 50* (citing Privy Council in Attorney-General (Can.) v. Cain [1906] AC 542 at 546).

n151. Goodwin-Gill, supra note 36, at 151.

n152. 1951 Refugee Convention, supra note 37, art. 32(1).

n153. Id.

n154. Goodwin-Gill, supra note 36, at 151.

n155. See id. at 151.

n156. Yugoslav Refugee, *26 I.L.R. 496* (BVerwGE, 1958).

n157. *Chim Ming v. Marks, 505 F.2d 1170 (2d Cir. 1974).*

n158. Arthur C. Helton, Forced Displacement, Humanitarian Intervention, and Sovereignty, 20 SAIS Rev. 61, 68 (2000).

n159. Amnesty International, The Dublin Convention (Apr. 2001), at http://www.amnesty.ie/act/refug/dc.shtml.

n160. Goodwin-Gill, supra note 36, at 203.

n161. See Report of the 28th Session, para. 53.3(b), U.N. Doc. A/AC.96/5 (1977); See also Report of the 29th Session, 1978, para. 68.1(d), U.N. Doc. A/AC.96/559 (1978).

n162. Goodwin-Gill, supra note 36, at 202.

n163. Id. at 203.

n164. Id. at 196.

n165. For instance, refugees fleeing Hungary in 1956 were ultimately given what was de facto temporary protection in Yugoslavia and Austria, prior to their onward movement to other States for resettlement. See id. at 197.

n166. Id. at 196.

n167. Id.

n168. See Id. at 197.

n169. Declaration on Territorial Asylum, art. 3(3), G.A. Res. 2312, U.N. GAOR, 22d Sess., Supp. No. 16, at 81, U.N. Doc. A/6716 (1967); Convention Governing the Specific Aspects of Refugee Problems in Africa, entered into force June 20, 1974, art. II(5), 1001 U.N.T.S. 45; Council of Europe Res. 14, para. 3; Committee of the Whole, United Nations Conference on Territorial Asylum, art. 3(3) (1977).

n170. Goodwin-Gill, supra note 36, at 197.

n171. It should be noted, however, that if Australia could have arranged for streamlined asylum status determinations to take place on the Manoora or the Tampa, such asylum status determinations might have comported with international law. Cf. 16 Refugee Reports, Feb. 28, 1995, at 11 (analyzing the United States' regime for processing Haitian seaborne asylum seekers).

n172. See id. at 198l; see also para. 21, U.N. Doc. EC/SCP/16.

n173. Executive Committee Conclusion No. 2, para. II(A) (1981).

n174. Goodwin-Gill, supra note 36, at 201-02.

n175. See id. at 202.

n176. Id. at 199.

n177. Id.

n178. SeeKate Clark, Afghanistan: After the Storm, B.B.C News, Dec. 31, 2001, at http://news.bbc.co.uk.

n179. Financial Times Asia Africa Intelligence Wire, Australian Immigration Department Says Just 66 of 506 Nauru Detainees are Refugees (Sept. 10, 2002), at http://www.unhcr.ch.

n180. Id.

n181. Note on International Protection, UNHCR, para. 25, U.N. Doc. A/AC.96/815 (1993); see also Note on International Protection, UNHCR, paras. 45-51, U.N. Doc. A/AC.96/830 (1994).

n182. SeeGoodwin-Gill, supra note 36, at 200.

n183. Id. at 201.

n184. Id. at 198.

n185. Prisoners of the Outback, supra note 132.

n186. Helton, supra note 158, at 74.

n187. Lavenex, supra note 48, at 76.

n188. Id.

n189. Id.

n190. See id. at 76-77.

n191. See id. at 78.

n192. SeeGoodwin-Gill, supra note 36, at 307.

n193. See id. at 306.

n194. Id.

n195. See16 Refugee Reports, Feb. 28, 1995, at 11.

n196. SeeGil Loescher, Beyond Charity: International Cooperation and the Global Refugee Crisis 365 (1993) (citing Dennis McNamara, Refugees, Politics and the Press, Keynote Address to British Refugee Council, Annual General Meeting, London (Nov. 6, 2001)).

n197. SeeUnited Nations Treaty Collection, Status of Multilateral Treaties Deposited with the Secretary-General, at http://untreaty.un.org/ENGLISH/bible/englishinternetbible/partI/chapterV/chapterV.asp.

n198. *SeeVadarlis v. Ruddock (Sept. 11, 2001) 1297 F.C. A. para. 79* (Austl. Vict. Dist.).

n199. UNHCR News Stories, Screening to Start for Refugees on Nauru (Sept. 21, 2001), at http://www.unhcr.ch.

n200. See id.

n201. See id.

n202. Financial Times Asia Africa Intelligence Wire, Australian Immigration Department Says Just 66 of 506 Nauru Detainees are Refugees (Sept. 10, 2002), at http://www.unhcr.ch.

n203. BBC Monitoring, Some Nauru Asylum-seekers Win UN Refugee Status on Appeal (July 17, 2002), at http://www.unhcr.ch.

n204. Inter Press Service, Australia: In New Twist, Ruling Allows Asylum Seekers' Expulsion (Sept. 18, 2001), at http://www.unhcr.ch.

n205. Agence France Presse, Asylum Seekers Prepared to Stage Take-over of Nauru, Guard Claims (Oct. 15, 2001), at http://www.unhcr.ch.

n206. Kyodo News International, Australia Strikes Deal with Nauru on Asylum Seekers (Dec. 11, 2001), at http://www.unhcr.ch.

n207. Id.

n208. SeeRuddock v. Vadarlis (Sept. 18, 2001) *183 A.L.R. 1, 36.*

n209. Inter Press Service, Australia: Canberra Backtracking on Accepting Refugees (Jan. 12, 2002), at http://www.unhcr.ch.

n210. Associated Press, Second Group of Refugees Arrives in Australia from Pacific Detention Camp (Sept. 17, 2002), at http://www.unhcr.ch.

n211. Agence France Presse, Australia: Asylum Seekers Languish in Detention Centres as Howard Savours Victory (Nov. 11, 2001), at http://www.unhcr.ch.

n212. Associated Press, Australian Detention Center Criticized (Feb. 23, 2002), at http://www.unhcr.ch.

n213. Id. The Woomera detention center is housed at a former missile testing site and may not provide adequate educational opportunities for child asylum seekers. It has even been noted that the center's dearth of educational opportunities for asylum seekers may be a breach of Australia's duties under the United Nations Convention on the Rights of the Child.

n214. UNHCR, Australia/Tampa: UNHCR Brokering 3-point Plan (Aug. 31, 2001), at http://www.unhcr.ch (quoting UNHCR spokesperson Ron Redmond, Geneva (Aug. 31, 2001)).

n215. Id.

n216. UNHCR, Australia: "Tampa' Court Ruling (Sept. 11, 2001), at http://www.unhcr.ch (quoting UNHCR spokesperson Kris Janowski, Geneva (Sept. 11, 2001)).

n217. Associated Press, United Nations Refugees Commissioner Criticizes Australia's New Policy on Boat People (Nov. 15, 2001), at http://www.unhcr.ch.

n218. SeeG.A. Res. 428, 5th Sess. (1950).

n219. 1951 Refugee Convention, supra note 37, art. 35.

n220. See supra note 208, (quoting announcement by Prime Minister John Howard, (Sept. 1, 2001)).

n221. UNHCR News Stories, Screening to Start for Refugees on Nauru (Sept. 21, 2001), at http://www.unhcr.ch.

n222. Lavenex, supra note 48, at 82.

n223. Id. at 82 (quoting Schieffer 194 (1997)).

n224. Goodwin-Gill, supra note 36, at 200 n.146.

n225. See Paradise Well and Truly Lost, The Economist, Dec. 22, 2001, at 39-41.

n226. Id. at 39.

n227. Id. at 41.

n228. Id. at 39.

n229. See id.

n230. Id. at 41.

n231. The seven leading industrial nations outside the communist bloc are: United States of America, Japan, Germany, France, United Kingdom, Italy, and Canada.

n232. Id.

n233. Id.

n234. Id.

n235. Inter Press Service, Australia Set to Back Down on Restrictive Refugee Policy (Dec. 12, 2001), at http://www.unhcr.ch.

n236. Kyodo News International, Australia Strikes Deal with Nauru on Asylum Seekers (Dec. 11, 2001), at http://www.unhcr.ch. It is estimated that Australia's new refugee policy will cost Australian taxpayers A$ 287,000,000 (US$ 156,000,000) over the next five years. SeePatrick Barkham, Australia: Howard's Way is the Wrong Way, The Guardian (May 30, 2002), at http://www.unhcr.ch.

n237. Paradise Well and Truly Lost, supra note 225, at 41.

n238. Associated Press, Nauru Accepts Another 262 Asylum Seekers (Sept. 29, 2001), at http://www.unhcr.ch.

n239. SeePAC News, UNHCR Calls for Humane Repatriation of Asylum Seekers on Nauru (Sept. 12, 2002), at http://www.unhcr.ch.

n240. Id.

n241. Agence France Presse, Australia Accepts First Refugees from Controversial Island Camp (July 30, 2002), at http://www.unhcr.ch.

n242. Int'l Bank for Reconstruction and Dev./World Bank, Policy Research Report: Assessing Aid - What Works, What Doesn't, and Why 7 (1998).

n243. Id.

n244. SeeAgence France Presse, Oxfam Blasts Australia's Pacific Detention Centres (Feb. 4, 2002), at http://www.unhcr.ch.

n245. SeeInter Press Service, Australia: Anti-Refugee Rhetoric Gives Premier a Third Term (Nov. 12, 2001), at http://www.unhcr.ch.

n246. Prisoners of the outback, supra note 132.

n247. SeeInter Press service, Australia: Canberra Backtracking on Accepting Refugees (Feb. 17, 2002), at http://www.unhcr.ch.

n248. Loescher, supra note 196, at 367.

n249. Inter Press Service, Australia Set to Back Down on Restrictive Refugee Policy (Dec. 12, 2001), at http://www.unhcr.ch.

n250. Id.

n251. UNHCR, supra note 84, at para. 63.

n252. Id. at para. 62.

n253. Loescher, supra note 196, at 352.

n254. Jeremy Harding, The Uninvited: Refugees at the Rich Man's Gate 10 (2000).

n255. See Statement by Mr. Ruud Lubbers, United Nations High Commissioner for Refugees, at an informal meeting of the European Union Justice and Home Affairs Council (Sept. 13, 2002), at http://www.unhcr.ch.

n256. Government of Australia, supra note 35, at 2.

n257. Id.

n258. Loescher, supra note 196, at 352.

n259. 1951 Refugee Convention, supra note 37, art. 31.

n260. Agence France Presse, supra note 211.

n261. Associated Press, Australia: Senate Inquiry to Look at Government's Use of Refugee Policy During Election (Jan. 9, 2002), at http://www.unhcr.ch.

n262. Harding, supra note 254, at 20.

n263. Agence France Presse, Indonesia to Host Conference on People Smuggling in February (Dec. 6, 2001), at http://www.unhcr.ch.

n264. Associated Press, Refugees Lament Pacific Island Camp (Sept. 19, 2001), at http://www.unhcr.ch.

n265. Id.

n266. Inter Press Service, Australia: In New Twist, Ruling Allows Asylum Seekers' Expulsion (Sept. 18, 2001), at http://www.unhcr.ch.

n267. SeeUnited Nations Treaty Collection, Status of Multilateral Treaties Deposited with the Secretary-General, at http://untreaty.un.org.

n268. Australia has taken some steps in this direction. It co-sponsored a conference with Indonesia on regional people smuggling in 2002, bringing together countries from which illegal immigrants come, those used as transit points, destination countries, and international organizations concerned with people smuggling. SeeAgence France Presse, supra note 263.

n269. Agence France Presse, Australian Minister Says Tough Stance has Stopped People-smugglers (Sept. 1, 2002), at http://www.unhcr.ch.

n270. Id.

n271. Goodwin-Gill, supra note 36, at 204.

n272. Id. at 196.

n273. 1951 Refugee Convention, supra note 37, Preamble.

n274. Goodwin-Gill, supra note 36, at 196.

n275. Inter Press Service, supra note 71.

n276. Goodwin-Gill, supra note 36, at 197.

n277. Id. at 158.

n278. Id.

n279. See Executive Committee Conclusion No. 38, Rescue of Asylum-Seekers in Distress at Sea (XXXVI) (1985), at http://www.unhcr.ch; UNHCR Executive Committee Report of the 36th Session, para. 115(3), U.N. Doc. A/AC.96/673.

n280. Goodwin-Gill, supra note 36, at 197.

n281. Id.

n282. Id.

n283. Lavenex, supra note 48, at 80-82.

n284. Inter Press Service, supra note 266.

n285. SeeAgence France Presse, Another 16 Refugees from Nauru Arrive in Australia (Sept. 4, 2002), at http://www.unhcr.ch.

n286. Statement by Mr. Ruud Lubbers, United Nations High Commissioner for Refugees, at an informal meeting of the European Union Justice and Home Affairs Council (Sept. 13, 2002), at http://www.unhcr.ch.

n287. Government of Australia, supra note 35.

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