

4-5-2016

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### Recommended Citation

Fr. Frank Brennan, S.J., *Human Rights and the National Interest: The Case Study of Asylum, Migration, and National Border Protection*, 39 B.C. Int'l & Comp. L. Rev. 47 (2016), <http://lawdigitalcommons.bc.edu/iclr/vol39/iss1/3>

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# HUMAN RIGHTS AND THE NATIONAL INTEREST: THE CASE STUDY OF ASYLUM, MIGRATION, AND NATIONAL BORDER PROTECTION

FR. FRANK BRENNAN S.J.\*

**Abstract:** Since World War II, Australia has been the destination of hundreds of thousands of migrants from countries all over the world. Throughout this time, the government has engaged in different policies of border monitoring, protection, and enforcement. This Essay contends that the government should not waiver in its enforcement of its border, and it should continue to prevent the illegal entry of migrants into Australia. It, however, must do so fairly and compassionately in order to ensure that it protects the human rights of migrants. This argument is supported by the fact that the current international legal order doesn't provide any further obligations on the state to migrants. Asylum seekers, however, have distinct legal rights from migrants, but distinguishing asylum seekers from migrants is not easy because no bright line exists. By examining the policies of the United States and the European Union while considering the religious discourse of refugees, this Essay concludes that Australia must reexamine its current approach to stopping the boats.

## INTRODUCTION

On my way to Boston, I spent a week in August 2014 on the U.S.-Mexico border visiting the Kino Border Initiative at Nogales (KBI). I visited the spot at the border fence where Cardinal Seán Patrick O'Malley, the Archbishop of Boston, celebrated mass, reaching through the steel girders to give communion to persons on the other side of the border. I heard some of the stories about the desperate attempts of border crossers, many of whom were children fleeing impossibly lawless situations back home heading for the safety of their dreams with relatives already resident in the United States. Fr. Sean Carroll S.J., Director of KBI, told me that the number of people coming to the border has tapered off, in part because of Mexico's southern border plan with Mexican state officials running stricter checkpoints and police activities in origin countries,

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like Honduras, that make it more difficult for children to escape. The Mexican southern border plan could not be implemented without U.S. funding. The cumulative effect is “the externalization of the U.S. border.”<sup>1</sup>

As an Australian, this experience made me consider my own country’s history of externalizing its border.<sup>2</sup> Australia, an island-nation continent, is a nation state first founded on Aboriginal dispossession that has become a very multi-cultural society.<sup>3</sup> Since World War II, it is a nation re-founded on migration from every country on earth.<sup>4</sup> Australia has a generous, ordered, and well-policed immigration policy.<sup>5</sup> Australia has been particularly generous receiving refugees fleeing conflicts across the globe.<sup>6</sup> Refugees come to Australia on business or tourist visas and then claim asylum upon arrival in Australia.<sup>7</sup> Some refugees arrive by boat, uninvited and unscreened.<sup>8</sup> Australian governments of both political persuasions (the conservative Liberal Party and the social democratic Labor Party) have expressed a strong preference for the maintenance of an orderly migration program of all types of refugees, including the reception of an annual quota of refugees chosen from abroad, usually in consultation with the United Nations High Commissioner for Refugees (UNHCR).<sup>9</sup> At the same time, ever since the first boatloads of Vietnamese asylum seekers arrived in Darwin in 1976, the Australian government, regardless of political party, has had a strong commitment to stopping illegal entry of refugees into the country while maintaining programs for the resettlement of proven refugees.<sup>10</sup> Furthermore, the Australian public tends to reward political par-

<sup>1</sup> Interview with Fr. Sean Carroll S.J., Director, Kino Border Initiative, in Nogales, AZ (Apr. 2, 2015).

<sup>2</sup> FRANK BRENNAN, TAMPERING WITH ASYLUM 97–99 (2d ed. 2007) [hereinafter BRENNAN, TAMPERING WITH ASYLUM].

<sup>3</sup> FRANK BRENNAN, SHARING THE COUNTRY 1–13 (2d ed. 2004).

<sup>4</sup> *Id.*

<sup>5</sup> BRENNAN, TAMPERING WITH ASYLUM, *supra* note 2, at 1–14.

<sup>6</sup> *Id.*

<sup>7</sup> *Id.*

<sup>8</sup> *Id.* at 100–01.

<sup>9</sup> See Austl. Labor Party, National Platform: A Smart, Modern, Fair Australia 143–48 (July 2015), [http://parlinfo.aph.gov.au/parlInfo/download/library/partypol/4092234/upload\\_binary/4092234.pdf;fileType=application%2Fpdf#search=%22library/partypol/4092234%22](http://parlinfo.aph.gov.au/parlInfo/download/library/partypol/4092234/upload_binary/4092234.pdf;fileType=application%2Fpdf#search=%22library/partypol/4092234%22) [<https://perma.cc/CYZ8-ALDD>]; The Coalition’s Policy to Clear Labor’s 30,000 Border Failure Backlog 2–9 (Aug. 2013), <http://lpaweb-static.s3.amazonaws.com/Policies/ClearLabor30000BorderFailureBacklog.pdf> [<https://perma.cc/R96P-LCDQ>].

<sup>10</sup> See INFORMATION AND RESEARCH SERVICES, AUSTRALIA AND REFUGEES, 1901–2002: ANNOTATED CHRONOLOGY BASED ON OFFICIAL SOURCE: SUMMARY 9 (2003), [http://parlinfo.aph.gov.au/parlInfo/download/library/prspub/90N96/upload\\_binary/90N96.pdf;fileType=application%2Fpdf#search=%22library/prspub/90N96%22](http://parlinfo.aph.gov.au/parlInfo/download/library/prspub/90N96/upload_binary/90N96.pdf;fileType=application%2Fpdf#search=%22library/prspub/90N96%22) [<https://perma.cc/4JE4-PKHX>].

ties that can deliver on the election pledge to stop refugees entering the country illegally.<sup>11</sup>

When last at Boston College ten years ago, I worked on the second edition of my book *Tampering with Asylum*.<sup>12</sup> That book and my advocacy made a modest contribution, along with the efforts of many others, to convince the newly elected Labor government under Prime Minister Kevin Rudd to wind back the so-called “Pacific Solution” instituted by the Howard Government in 2001, as boatloads of asylum seekers started arriving in Australian territorial waters from Indonesia.<sup>13</sup> This time these refugees did not originate in Southeast Asia but came mainly from faraway Afghanistan, Iraq, and Iran.<sup>14</sup> They had not fled Indonesia fearing persecution but had continued their global journey towards Australia seeking protection, recognition as refugees, and a new life.<sup>15</sup> In 2008, the reforms instituted by the Rudd government resulted in refugees arriving by boat in numbers not previously experienced.<sup>16</sup> These results proved that commentators like myself were wrong. In *Tampering with Asylum*, I provided a checklist of legal and policy reforms—most of which were enacted by the Rudd government.<sup>17</sup> I wrote: “There is no reason to think that our onshore caseload will increase exponentially given the improved regional arrangements, the virtual offshore border and the tighter controls within Australian territory.”<sup>18</sup> During seven years of the Rudd and Gillard Labor governments, over 50,000 asylum seekers arrived by boat.<sup>19</sup> There were at least 1100 lives lost at sea.<sup>20</sup> By the time the Rudd government was voted out of office, government intelligence sources advised that the number could rise to 60,000 per annum.<sup>21</sup> For a country of nearly 23,000,000 people with an annual migra-

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<sup>11</sup> See Wayne Errington, *The Empire Strikes Back: Mainstream Media Still Matters*, in ABBOTT’S GAMBIT: THE 2013 AUSTRALIAN FEDERAL ELECTION 67, 69 (Carol Johnson et al. eds., 2013); James Jupp, *Ethnic Voting and Asylum Issues*, in ABBOTT’S GAMBIT, *supra*, 323, 325–26.

<sup>12</sup> See generally BRENNAN, TAMPERING WITH ASYLUM, *supra* note 2.

<sup>13</sup> See *Australia’s “Pacific Solution” Draws to a Close*, UNHCR (Feb. 11, 2008), <http://www.unhcr.org/47b04d074.html> [<https://perma.cc/5B4D-4V67>]; *Flight from Nauru Ends Pacific Solution*, SYDNEY MORNING HERALD (Feb. 8, 2008), <http://www.smh.com.au/national/flight-from-nauru-ends-pacific-solution-20080207-1qww> [<https://perma.cc/Y5GM-9HNC>].

<sup>14</sup> BRENNAN, TAMPERING WITH ASYLUM, *supra* note 2, at 48.

<sup>15</sup> See *id.*

<sup>16</sup> See JANET PHILLIPS & HARRIET SPINKS, PARLIAMENT OF AUSTRALIA: DEPT’ OF PARLIAMENTARY SERVS., BOAT ARRIVALS IN AUSTRALIA SINCE 1976, at 22–23 (2013); *Australia’s “Pacific Solution” Draws to a Close*, *supra* note 13.

<sup>17</sup> BRENNAN, TAMPERING WITH ASYLUM, *supra* note 2, at 260–61.

<sup>18</sup> *Id.* at 261.

<sup>19</sup> See PHILLIPS & SPINKS, *supra* note 16, at 22–23.

<sup>20</sup> See Mary Anne Kenny, *FactCheck: Did 1200 Refugees Die at Sea Under Labor?*, THE CONVERSATION (Mar. 3, 2015, 2:27 PM), <http://theconversation.com/factcheck-did-1200-refugees-die-at-sea-under-labor-38094> [<https://perma.cc/BB7K-V6HP>].

<sup>21</sup> Personal Communication from Kevin Rudd, Prime Minister of Austl., to author (July 20, 2013).

tion intake of 190,000 for skilled migrants and family reunion purposes and an additional 13,750 places available for humanitarian cases, this was a projected arrival rate which would skew the composition of the migration program very significantly—removing all prospect of offering places to offshore refugees or other persons in desperate humanitarian need.<sup>22</sup> At its most generous, Australia recently has provided 20,000 humanitarian places per year.<sup>23</sup>

Still, several organizations have called for increased acceptances due to the increased flow of refugees.<sup>24</sup> Community groups supportive of refugees have asked the government to “increase the annual humanitarian intake to a minimum of 25,000, or no less than 15 per cent [sic] of the annual migration intake, whichever is higher.”<sup>25</sup> In 2012, an expert panel on asylum seekers recommended that Australia increase its humanitarian intake to 27,000 places per annum by 2017.<sup>26</sup> There is a modest Community Proposal Project in place allowing community groups to sponsor up to 500 refugees per year who would not otherwise be chosen to come to Australia.<sup>27</sup> But 500 places are then deducted from the existing annual refugee quota, and the visa fees are prohibitive for the most recently arrived refugee groups.<sup>28</sup>

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<sup>22</sup> See *Migration Programme Statistics*, AUSTL. GOV'T DEP'T OF IMMIGRATION & BORDER PROT., <http://www.border.gov.au/about/reports-publications/research-statistics/statistics/live-in-australia/migration-programme> [perma.cc/M765-KFEC] (last updated May 2014); *The World Factbook: Australia*, CENT. INTELLIGENCE AGENCY LIBRARY, <https://www.cia.gov/library/publications/the-world-factbook/geos/as.html> [perma.cc/29C5-PNSL] (last updated Jan. 28, 2016). A full 68% of people migrating to Australia are skilled migrants and 32% are from family-visa streams. *Migration Programme Statistics*, *supra*. These groups can be further broken down: skilled migrants (38% employer sponsored; 34% skilled independent; 22% state, territory, and regional nominated; and 6% business) and family reunion (79% partner, 14% parent, 6% child, and 1% other). *Id.*

<sup>23</sup> See Elibritt Karlsen, Parliamentary Library, *Refugee Resettlement to Australia: What Are the Facts?* 8 (2015). The number in program year 2012–13 was 20,019 and has since decreased to about 13,750. *See id.*

<sup>24</sup> See, e.g., BOB DOUGLAS, CLAIRE HIGGINS, ARJA KESKI-NUMMI, JANE MCADAM & TRAVERS MCLEAD, *BEYOND THE BOATS: BUILDING AN ASYLUM AND REFUGEE POLICY FOR THE LONG TERM* 16 (2015).

<sup>25</sup> *Id.*

<sup>26</sup> Paris Aristotle, *People Who Are Waiting Assessment in Australia Should Be Able to Apply for Work Rights*, in *BEYOND THE BOATS: BUILDING AN ASYLUM AND REFUGEE POLICY FOR THE LONG TERM* 60, at 61 (2015); ANGUS HOUSTON, PARIS ARISTOTLE & MICHAEL L'ESTRANGE, *REPORT OF THE EXPERT PANEL ON ASYLUM SEEKERS* 14 (2012).

<sup>27</sup> See AUSTL. GOV'T, *COMMUNITY PROPOSAL PILOT 1* (2015).

<sup>28</sup> *See id.* at 2. The 2015 fee schedule set a base fee of AUD 2680 per applicant and a second installment of AUD 16,444 for the primary applicant and AUD 2680 for each secondary applicant. *See Fees and Charges for Visas*, AUSTL. GOV'T DEP'T OF IMMIGRATION & BORDER PROT., <http://www.border.gov.au/Trav/Visa/Fees> [<https://perma.cc/67DH-SUU6>] (scroll to “Current visa pricing table,” select “other,” select “Humanitarian program applications,” and scroll to “Refugee and Humanitarian visa applications made under the Community Proposal Pilot in the offshore component of the Humanitarian Program”).

The current government has cut the humanitarian caseload from 20,000 places to a mean 13,750 places.<sup>29</sup> This provides for a minimum of 11,000 places offshore (including up to 1000 places for women at risk).<sup>30</sup> In 2014 and 2015, a full 4400 of these places went to Syrian and Iraqi refugees.<sup>31</sup> There are over 70,000 processed applications for these 11,000 places.<sup>32</sup> Most of these places are for refugees, but there are some places for persons in special humanitarian need who can be sponsored by community members.<sup>33</sup> The remaining allocation is for onshore asylum seekers who entered Australia on a visa and then successfully claimed refugee status.<sup>34</sup> Those asylum seekers arriving without a visa are eligible only for a temporary protection visa should they establish their refugee claim.<sup>35</sup> There are more than 30,000 onshore asylum seekers without visas who arrived by boat during the years of the Labor government whose applications for onshore refugee status are still to be processed.<sup>36</sup> Clearly, Australia and other countries around the world are faced with the dilemma of receiving more refugees on their border than they are prepared to handle.<sup>37</sup>

On World Refugee Day, June 20, 2014, the UN High Commissioner for Refugees (UNHCR) reported “that the number of refugees, asylum-seekers and internally displaced people worldwide has, for the first time in the post-World War II era, exceeded 50 million people.”<sup>38</sup> At the end of 2013, 51,200,000 people were forcibly displaced, an increase of more than 6,000,000 from the previous year.<sup>39</sup> In 2014, the number of applications for asylum in 44 industrialized countries increased by 45% to 866,000 from the previous year.<sup>40</sup>

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<sup>29</sup> See Karlsen, *supra* note 23, at 6.

<sup>30</sup> See *id.* at 11, 13.

<sup>31</sup> See *id.* at 12.

<sup>32</sup> AUSTL. GOV'T DEP'T OF IMMIGRATION & BORDER PROT., AUSTRALIA'S OFFSHORE HUMANITARIAN PROGRAMME: 2013–14, at 8.

<sup>33</sup> See Karlsen, *supra* note 23, at 11.

<sup>34</sup> See *id.*

<sup>35</sup> *Australian Parliament Backs Migrant Reforms*, BBC (Dec. 5, 2014), <http://www.bbc.com/news/world-australia-30340579> [<https://perma.cc/Z8HW-E9H9>]. They may then be eligible for a Safe Haven Enterprise Visa, which requires them to move to a rural area for work. See AUSTL. GOV'T DEP'T OF IMMIGRATION & BORDER PROT., SAFE HAVEN ENTERPRISE VISAS 2, 3 (2015). In time they might be eligible for a permanent visa. See *id.*

<sup>36</sup> *Australian Parliament Backs Migrant Reforms*, *supra* note 35.

<sup>37</sup> See Patrick Boehler & Sergio Peçanha, *The Global Refugee Crisis, Region by Region*, N.Y. TIMES (Aug. 26, 2015), <http://www.nytimes.com/interactive/2015/06/09/world/migrants-global-refugee-crisis-mediterranean-ukraine-syria-rohingya-malaysia-iraq.html> [<https://perma.cc/WK6X-NSG2>].

<sup>38</sup> UNHCR, WORLD REFUGEE DAY: GLOBAL FORCED DISPLACEMENT TOPS 50 MILLION FOR FIRST TIME IN POST-WORLD WAR II ERA, (June 20, 2014), <http://www.unhcr.org/53a155bc6.html> [<https://perma.cc/G27D-HG7Y>] [hereinafter UNHCR, WORLD REFUGEE DAY].

<sup>39</sup> *Id.*

<sup>40</sup> UNHCR, ASYLUM TRENDS 2014: LEVELS AND TRENDS IN INDUSTRIALIZED COUNTRIES 2 (2015), <http://www.unhcr.org/551128679.pdf> [<https://perma.cc/B5FX-2XZG>].

It was the second-highest number of annual applications on record.<sup>41</sup> During 2014, over 218,000 people seeking asylum crossed the Mediterranean Sea to access Europe, which almost triplicates the previous record high of approximately 70,000 during the 2011 “Arab Spring.”<sup>42</sup> The United States received 121,200 asylum claims, an increase of 44% on the previous year.<sup>43</sup>

What is to be done when asylum seekers come knocking on our doors in such numbers? Is there a right of entry? If not, what is our obligation to the asylum seeker presenting to officials of our governments whether at our embassies, on the high seas, within our territorial waters, or on our shores? Are we entitled to stipulate a gradation of obligation depending on where an asylum seeker presents? Are we entitled to set up an antechamber with an offshore entry door at some considerable distance from our border? Those of us who live in prosperous, secure countries that receive migrants need to answer these questions: Who has a right to enter my country? What are the preconditions for my government being able to decently and fairly deny a right of entry to someone seeking entry to my country?

## I. THE INTERNATIONAL LEGAL ORDER AND REFUGEES

The international legal order has provided states with an ability to deal with refugees at their borders.<sup>44</sup> Most of the world’s population is made up of citizens of a nation state. It is the nation state that primarily has the duty to protect our human rights. The governments of many nation states have voluntarily ratified an increasing raft of international human rights instruments, which in part limit the untrammelled sovereignty of the nation state, providing a framework for enhanced protection of the human rights of all persons within its jurisdiction.<sup>45</sup> An international legal order which accords ongoing recognition to national sovereignty is sustainable only if there is an international legal regime ensuring the protection of the human rights of refugees—those whose rights are most flagrantly violated by the government of their own nation state and likely cannot expect any protection from their own government.<sup>46</sup> At the very least, the *quid pro quo* for national sovereignty and the security of national borders is the international community’s commitment to protect those who are refugees—those who have fled their home country fearing persecution and

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<sup>41</sup> *Id.*

<sup>42</sup> *Id.* at 5.

<sup>43</sup> *Id.* at 3.

<sup>44</sup> MATTHEW GIBNEY, THE ETHICS AND POLITICS OF ASYLUM: LIBERAL DEMOCRACY AND THE RESPONSE TO REFUGEES 229–33 (2004).

<sup>45</sup> GUY GOODWIN-GILL & JANE MCADAM, THE REFUGEE IN INTERNATIONAL LAW 7–12 (3d ed. 2007).

<sup>46</sup> GIBNEY, *supra* note 44, at 83–84.

abuse of their human rights by their own government.<sup>47</sup> Nation states are entitled to secure their borders, but they must not expel their own nationals nor deny their own nationals entry to their country.<sup>48</sup> But what are the moral and legal considerations when it comes to those who are not nationals seeking admission, especially those seeking asylum? Does the asylum seeker have a right to enter? If not, what is the duty of the nation state to the asylum seeker presenting at the border?

Joseph Carens, professor of political science at the University of Toronto, has been a lifetime scholar on the ethics of immigration.<sup>49</sup> In 2013, he published a book with that very title, *The Ethics of Immigration*, concluding that “the conventional view that states are morally entitled to exercise discretionary control over immigration” is wrong.<sup>50</sup> He argues that “our deepest moral principles require a commitment to open borders (with modest qualifications) in a world where inequality between states is much reduced.”<sup>51</sup> He thinks that our inherited citizenship in rich states, like the United States, his home country of Canada, and my home country, Australia, functions as “a form of illegitimate privilege.”<sup>52</sup> He believes his ideal would not wreak the havoc you might imagine because greater equality between states would provide less incentive for people to leave the state where they grew up and established their roots.<sup>53</sup> But absent that equality, what is to be done?

Carens expresses the fear that “there is now . . . a deep conflict between what morality requires of democratic states with respect to the admission of refugees and what democratic states and their existing populations see as their interests.”<sup>54</sup> He concedes that the principle of *non-refoulement* might create disproportionate burdens for rich democratic states, all of which design systems for excluding unwelcome applicants.<sup>55</sup> But he rightly insists that this is only a potential problem, not a real one.<sup>56</sup> He notes, “[R]efugees might reasonably say to themselves that if they have to start life over somewhere new it would be better to do so in a place with more long-term opportunities for

<sup>47</sup> *Id.* at 241–43.

<sup>48</sup> International Covenant on Civil and Political Rights art. 12, Dec. 16, 1966, S. Treaty Doc. No. 95-20, 6 I.L.M. 368 (1967), 999 U.N.T.S. 171.

<sup>49</sup> See JOSEPH H CARENS, *THE ETHICS OF IMMIGRATION*, at ix (2013); POLITICAL SCI., UNIV. OF TORONTO, FACULTY: JOSEPH CARENS, <http://politics.utoronto.ca/faculty/profile/22/> [<https://perma.cc/33PM-CNKC>] (last visited Feb. 12, 2016).

<sup>50</sup> CARENS, *supra* note 49, at 288.

<sup>51</sup> *Id.*

<sup>52</sup> *Id.* at 289.

<sup>53</sup> *Id.*

<sup>54</sup> *Id.* at 223–24.

<sup>55</sup> *Id.* at 209. The principle of *non-refoulement* encompasses the refugee’s right to not be expelled from a state, particularly to another state where his life or liberty would be threatened. *Nonrefoulement*, BLACK’S LAW DICTIONARY (10th ed. 2014).

<sup>56</sup> *Id.*



themselves and especially for their children.”<sup>57</sup> He continues, “Many refugees would not have the resources to act upon this sort of calculation, but the principle of non-refoulement creates incentives for refugees to seek asylum in a rich democratic state rather than somewhere else.”<sup>58</sup> If rich democratic states were to have an open border policy, no doubt this principle would become a problem.<sup>59</sup> There is no prospect of any politician who advocates an open border policy being elected in any of these countries.<sup>60</sup> There is no prospect of the congress or parliament in any of these countries legislating for open borders.<sup>61</sup> Given that the rich democratic states will provide only a limited number of spaces for refugees outside their jurisdiction and given that the limited number of spaces will only ever be a miniscule percentage of those who are bona fide refugees in our troubled world, how should those lucky persons in the lottery of resettlement in a rich democratic country be chosen? Carens speaks of “the moral wrong involved in the use of techniques of exclusion to keep the numbers within bounds,” describing “[v]isa controls, carrier sanctions, and the other techniques of exclusion” as “indiscriminate mechanisms.”<sup>62</sup> His main suggestion for such democratic countries avoiding the need for the use of these morally questionable techniques is to break the link between claim and place, noting:

People have incentives to seek asylum in places where they will be better off economically than they were at home, regardless of the strength of their refugee claims. If there were no connection between the place where one requests asylum and the place where one receives protection, however, these incentives would disappear.<sup>63</sup>

Of late, Australian governments have experimented with this approach, denying asylum seekers arriving by boat any prospect of resettlement in Australia, but offering them, on proof of refugee status, resettlement in less desirable countries like Nauru and Papua New Guinea.<sup>64</sup> Most community leaders and advocates regard these experiments as costly, inhumane failures.<sup>65</sup>

<sup>57</sup> *Id.*

<sup>58</sup> *Id.* (emphasis added).

<sup>59</sup> *See id.*

<sup>60</sup> *See id.* at 223–24.

<sup>61</sup> Frank Brennan, *The Politics of Popular Evil and Untrendy Truth*, EUREKA STREET (Aug. 31, 2015), <http://www.eurekastreet.com.au/article.aspx?aeid=45413#.VjGLFq6rQdU> [https://perma.cc/SAM4-PM3E].

<sup>62</sup> CARENS, *supra* note 49, at 209.

<sup>63</sup> *Id.* at 216 (citation omitted).

<sup>64</sup> JANET PHILLIPS, PARLIAMENT OF AUSTL.: DEP’T OF PARLIAMENTARY SERVS., THE ‘PACIFIC SOLUTION’ REVISITED: A STATISTICAL GUIDE TO THE ASYLUM SEEKER CASELOADS ON NAURU AND MANUS ISLAND 2–3 (2012).

<sup>65</sup> *See id.* at 5–8.

Hiroshi Motomura, the author of *Americans in Waiting*, has recently published the book *Immigration Outside the Law*.<sup>66</sup> In part, he is investigating how we might extend the rule of law to immigration and border protection, applying the rule of law at the border, inside the border, and after the border crossing.<sup>67</sup> To what extent are our governments justified in excluding the rule of law other than the minimal agreed international safeguards beyond the border? And what are those safeguards? Motomura's main focus is not on asylum seekers outside or at the border but on the 15,000,000 long-term residents inside the U.S. border who are noncitizens without lawful status.<sup>68</sup> He espouses "a nation with borders, but also a nation committed to a sense of equality and human dignity," where "humanitarian obligations recognized by international conventions can override immigration violations."<sup>69</sup> These ideals have relevance to government behavior outside the border as well as inside and at the border.<sup>70</sup> Admittedly, the rule of law is more readily applied or invoked when those seeking it already have strong links to the citizenry or a legitimate expectation that they soon will be citizens.<sup>71</sup>

## II. REFUGEES AND THE POINT OF ENTRY

How can international law help us mitigate the problem of human rights abuse when nation states, like Australia and the United States, are considering how to deal with asylum seekers whether beyond our borders or when presenting at our borders? Mine, I hope, is a principled and pragmatic approach.

Before delving into my views, I invite you to imagine the scene on Saturday, July 20, 2013. I had been out of reach in Myanmar for a week. On the previous afternoon, the Australian Prime Minister Kevin Rudd announced his Papua New Guinea Solution to the increased flow of boat people heading to Australia seeking asylum.<sup>72</sup> He declared that all boat people headed for Australia would be moved to Papua New Guinea for processing and ultimate resettlement with the guarantee that they would never reach Australia.<sup>73</sup> Landing in Sydney, my first telephone conversation was with Paris Aristotle, a refugee advocate who has been an adviser to Australian governments of all political persuasions. Knowing that I was a friend of Rudd, Paris said to me, "Frank,

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<sup>66</sup> See HIROSHI MOTOMURA, *IMMIGRATION OUTSIDE THE LAW*, at ix (2014).

<sup>67</sup> See *id.* at ix–xi.

<sup>68</sup> *Id.* at x.

<sup>69</sup> *Id.* at 195, 235.

<sup>70</sup> See *id.* at 234–35.

<sup>71</sup> See *id.* at 87–89.

<sup>72</sup> See Frank Brennan, *PNG Move Proves Australia Is Not Special*, EUREKA STREET (July 19, 2013), <http://www.eurekastreet.com.au/article.aspx?aeid=36870#.Vi1amhCrSqC> [<https://perma.cc/QE6C-A5D7>].

<sup>73</sup> *Id.*

you are never to leave the country again without permission.” Afterward, I spent a few hours writing a critical assessment of the government’s proposal, publishing it immediately on the internet.<sup>74</sup> I then boarded another plane and flew to Brisbane for a social event at the Prime Minister’s home. Being ushered into the Prime Ministerial study, I was able to say that I had already published my view on the new policy. Rudd and I, being friends, agreed that we had our distinctive tasks and duties to perform.

Ever since, I have continued asking, “What are the ethical and legal pre-conditions for Australia being able to turn back the boats?”<sup>75</sup> Prime Minister Rudd issued a challenge to all refugee advocates and social justice groups when he appeared on national television in the lead up to the last Australian election, saying:

The challenge that I put out to anyone who asks that we should consider a different approach is this: what would you do to stop thousands of people, including children, drowning offshore, other than undertake a policy direction like this? What is the alternative answer?

. . . .

I think you heard a people smuggler interviewed by a media outlet the other day say that this was a fundamental assault on their business model. Well, that’s a pretty gruesome way for him to put that, but the bottom line is this, I challenge anyone else looking at this policy challenge for Australia to deliver a credible alternative policy.<sup>76</sup>

There is much confusion about the ethical and legal considerations that apply when asylum seekers show up at the borders of developed countries. For example, in what, if any, circumstances does or ought an asylum seeker have the right to enter a country not her own in order to seek protection? To be blunt, no asylum seeker should be refouled or sent back to the country where they claim to face persecution unless their claim has been assessed and found wanting; while waiting, no asylum seeker has a right to enter any particular country.<sup>77</sup> In the event that asylum seekers unlawfully gain access to a country, they should not be penalized for such an unlawful entry or presence provided only that they came in direct flight from the alleged persecution. All lawyers would agree with these blunt propositions. Some, especially those schooled in international law, would go further. They would point not just to a country’s

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<sup>74</sup> *See id.*

<sup>75</sup> I first raised the issue earlier at a national summit on asylum issues in June 2013. It is fair to say that the international lawyers were horrified.

<sup>76</sup> *Today Show*, (NBC television broadcast July 23, 2013).

<sup>77</sup> *See infra* notes 84–88 and accompanying text.

ratification of the 1951 Refugee Convention, which guarantees the rights of refugees.<sup>78</sup> They would claim that those countries that have ratified the Convention against Torture and the International Covenant on Civil and Political Rights cannot *refouler* an asylum seeker until there has been a determination of any claim that they face torture or cruel, inhuman, or degrading treatment or punishment in their home country.<sup>79</sup> Some of these lawyers would then take the next leap in human rights protection to assert that all persons have a right to enter any state of their choice provided only they claim to face the risk of persecution, torture, cruel, inhuman or degrading treatment or punishment back home.<sup>80</sup> They translate the right not to be refouled into a right of entry to any state unless and until the state determines that there is no real risk of any of these adverse outcomes either back home or in a transit country.<sup>81</sup> Either the state is able to determine all such claims at the border or else the state must grant entry at least for the purpose of a complete human rights assessment.<sup>82</sup>

Much to the consternation of some refugee advocates, the Australian Government continues to claim that while international law recognizes the legal right of people at risk of persecution to flee their country and seek refuge elsewhere, it does not provide them with a right to enter or remain in the territory of a country of which they are not a national.<sup>83</sup> Further, it does not grant people at risk of persecution the right to choose their preferred country of protection.<sup>84</sup>

<sup>78</sup> See Convention Relating to the Status of Refugees, July 28, 1951, 188 U.N.T.S. 137.

<sup>79</sup> See Convention Against Torture and Other Cruel, Inhuman Treatment or Punishment, Dec. 10, 1984, S. TREATY DOC. 100-20, 1465 U.N.T.S. 85; International Covenant on Civil and Political Rights, Dec. 16, 1966, S. EXEC. DOC. E, 95-2, 999 U.N.T.S. 171.

<sup>80</sup> Cf. UNHCR, UNHCR NOTE ON THE PRINCIPLE OF NON-REFOULEMENT n.5, Nov. 1997, <http://www.refworld.org/docid/438c6d972.html> [<https://perma.cc/83UU-AY95>] (last visited Jan. 23, 2016) (“The European Human Rights Convention does not foresee a right of entry or asylum. The interpretation of Article 3 can, however, be seen as a limit to the power of States to expel aliens.”)

<sup>81</sup> See *id.*

<sup>82</sup> See *id.*

<sup>83</sup> See COMMONWEALTH OF AUSTRALIA, DEP’T OF IMMIGRATION AND MULTICULTURAL AFFAIRS, INTERPRETING THE REFUGEES CONVENTION—AN AUSTRALIAN CONTRIBUTION 46 (2002).

<sup>84</sup> See *id.*; Guy Goodwin-Gill, *The Right to Seek Asylum: Interception at Sea and the Principle of Non-Refoulement*, 23 INT’L J. OF REFUGEE L. 443, 444 (2011). Guy Goodwin-Gill says that,

It is not yet unlawful to move or to migrate, or to seek asylum, even if the criminalisation of ‘irregular emigration’ by sending states seems to be desired by the developed world. Even so, the range of permissible restrictions on freedom of movement and the absence of any immediately correlative duty of admission, other than towards nationals, make the claim somewhat illusory. Perhaps Article 13(2) of the 1948 Universal Declaration of Human Rights was just a political gesture; perhaps the world today has in fact moved closer to what was then the Soviet position, that the right to freedom of movement should be recognized as *only* exercisable in accordance with the laws of the state.

Guy Goodwin-Gill, *The Right to Seek Asylum*, *supra*, at 444.

Australian governments (of both political persuasions, Labor and Liberal) have long held the defensible view:

The condition that refugees must be “coming directly” from a territory where they are threatened with persecution constitutes a real limit on the obligation of States to exempt illegal entrants from penalty.

In the Australian Government’s view, a person in respect of whom Australia owes protection will fall outside the scope of Article 31(1) if he or she spent more than a short period of time in a third country whilst travelling between the country of persecution and Australia, and settled there in safety or was otherwise accorded protection, or there was no good reason why they could not have sought and obtained protection there.<sup>85</sup>

The right to seek and enjoy asylum in the international instruments must be understood as purely permissive. As noted by Justice Gummow of the Australian High Court:

[The] right “to seek” asylum [in the Universal Declaration of Human Rights] was not accompanied by any assurance that the quest would be successful. A deliberate choice was made not to make a significant innovation in international law which would have amounted to a limitation upon the absolute right of member States to regulate immigration by conferring privileges upon individuals. . . . Nor was the matter taken any further by the International Covenant on Civil and Political Rights (“the ICCPR”). . . . Article 12 of the ICCPR stipulates freedom to leave any country and forbids arbitrary deprivation of the right to enter one’s own country; but the ICCPR does not provide for any right of entry to seek asylum and the omission was deliberate.<sup>86</sup>

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<sup>85</sup> INTERPRETING THE REFUGEES CONVENTION—AN AUSTRALIAN CONTRIBUTION, *supra* note 83, at 172.

<sup>86</sup> *Minister for Immigration and Multicultural Affairs v. Hussein Mohamed Haji Ibrahim*, [2000] HCA 55, 138, 204 CLR 1 (Austl.). Justice Gummow adds,

[I]t has long been recognised that, according to customary international law, the right of asylum is a right of States, not of the individual; no individual, including those seeking asylum, may assert a right to enter the territory of a State of which that individual is not a national.

... Over the last 50 years, other provisions of the Declaration have, as Professor Brownlie put it, come to “constitute general principles of law or [to] represent elementary considerations of humanity” and have been invoked by the European Court of Hu-

Nation states that have signed these international instruments rightly are obliged not to expel peremptorily those persons arriving on their shores, legally or illegally, in direct flight from persecution.<sup>87</sup> That is the limit of the legal obligation.<sup>88</sup> In the future, there may be circumstances in which Australia would be entitled to return safely to Indonesia persons who, when departing Indonesia for Australia, were no longer in direct flight but rather were engaged in secondary movement to seek a more favorable refugee status outcome or a more benign migration outcome.<sup>89</sup> We Australians could credibly draw this distinction if we co-operated more closely with Indonesia in providing basic protection and fair processing for asylum seekers there. Until we do that, there is no way of decently stopping refugees seeking the best status.

The United States has attempted numerous mechanisms.<sup>90</sup> Thirty-three years ago, U.S. President Ronald Reagan, frustrated by the flow of asylum seekers across the sea from Haiti, signed Executive Order 12324 on the “Interdiction of Illegal Aliens.”<sup>91</sup> President Reagan characterized “the continuing illegal migration by sea of large numbers of undocumented aliens into the southeastern United States” as “a serious national problem detrimental to the interests of the United States.”<sup>92</sup>

Guy Goodwin-Gill, the Oxford don and guru of international jurisprudence on refugee issues, has opined that the United States’ position became “the model, perhaps, for all that has followed.”<sup>93</sup> I think he is right. Following the military coup in Haiti in 1991, repatriations were suspended for 7 weeks.<sup>94</sup> Then in May 1992, “President [George H.W.] Bush decided to continue interdiction and repatriation, but without the possibility of screening-in for those who might qualify as refugees.”<sup>95</sup> When inaugurated as President in January 1993, Bill Clinton maintained the interdiction practice, putting paid to the claim that this was just the initiative of the Republicans.<sup>96</sup> It turned out that

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man Rights and the International Court of Justice. But it is not suggested that Art 14 [of the UDHR] goes beyond its calculated limitation.

*Id.* at 137–38 (citing IAN BROWNLIE, *PRINCIPLES OF PUBLIC INTERNATIONAL LAW* 575 (5th ed. 1998)).

<sup>87</sup> *See id.*

<sup>88</sup> *See id.*

<sup>89</sup> *See id.*; Goodwin-Gill, *supra* note 84.

<sup>90</sup> *See, e.g.*, Exec. Order No. 12324, 3 C.F.R. 180 (1982).

<sup>91</sup> *Id.*; Goodwin-Gill, *supra* note 84, at 443.

<sup>92</sup> Proclamation No. 4865, 3 C.F.R. 50 (1982).

<sup>93</sup> Goodwin-Gill, *supra* note 84, at 443.

<sup>94</sup> *See* Howard W. French, *U.S. Starts to Return Haitians Who Fled Nation After Coup*, N.Y. TIMES (Nov. 19, 1991), <http://www.nytimes.com/1991/11/19/world/us-starts-to-return-haitians-who-fled-nation-after-coup.html> [<https://perma.cc/8TYU-DYHS>].

<sup>95</sup> GOODWIN-GILL & MCADAM, *supra* note 45, at 247.

<sup>96</sup> *See id.*

both major political parties were committed to doing whatever it took to stop the boats.<sup>97</sup>

The U.S. Supreme Court described the matter thus:

With both the facilities at Guantanamo and available Coast Guard cutters saturated, and with the number of Haitian emigrants in unseaworthy craft increasing (many had drowned as they attempted the trip to Florida), the Government could no longer both protect our borders *and* offer the Haitians even a modified screening process. It had to choose between allowing Haitians into the United States for the screening process and repatriating them without giving them any opportunity to establish their qualifications as refugees. In the judgment of the President's advisers, the first choice not only would have defeated the original purpose of the program (controlling illegal immigration), but also would have impeded diplomatic efforts to restore democratic government in Haiti and would have posed a life-threatening danger to thousands of persons embarking on long voyages in dangerous craft. The second choice would have advanced those policies but deprived the fleeing Haitians of any screening process at a time when a significant minority of them were being screened in.

On May 23, 1992, President Bush adopted the second choice. After assuming office, President Clinton decided not to modify that order; it remains in effect today. The wisdom of the policy choices made by Presidents Reagan, Bush, and Clinton is not a matter for our consideration.<sup>98</sup>

It took months of concerted promotion from human rights advocates to convince President Clinton to institute refugee status determination interviews on board ships.<sup>99</sup> In *Sale v. Haitian Centers Council, Inc.*, the U.S. Supreme Court ruled that these harsh presidential practices were valid. Justice Stevens delivered the opinion of the Court majority:

The President has directed the Coast Guard to intercept vessels illegally transporting passengers from Haiti to the United States and to return those passengers to Haiti without first determining whether they may qualify as refugees. The question presented in this case is

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<sup>97</sup> *See id.*

<sup>98</sup> *Sale v. Haitian Ctrs. Council*, 509 U.S. 155, 163–65 (1993) (internal citation omitted).

<sup>99</sup> Frank Brennan, *The Public, the Church, and Asylum Seekers*, EUREKA STREET (Aug. 12, 2013), <http://www.eurekastreet.com.au/article.aspx?aeid=37066#.Vi7PTRCrQdV> [<https://perma.cc/5UR5-UGQK>]; John Kifiner, *Haitian Refugee Interviews Begin Aboard U.S. Navy Ship*, N.Y. TIMES (June 17, 1994), <http://www.nytimes.com/1994/06/17/world/haitian-refugee-interviews-begin-aboard-us-navy-ship.html> [<https://perma.cc/6ZQW-ZATY>].

whether such forced repatriation, “authorized to be undertaken only beyond the territorial sea of the United States,” violates . . . the Immigration and Nationality Act of 1952. We hold that neither [the Act] nor Article 33 of the United Nations Protocol Relating to the Status of Refugees applies to action taken by the Coast Guard on the high seas.<sup>100</sup>

In relation to Article 33 of the Refugee Convention, the Supreme Court said:

The drafters of the Convention and the parties to the Protocol . . . may not have contemplated that any nation would gather fleeing refugees and return them to the one country they had desperately sought to escape; such actions may even violate the spirit of Article 33; but a treaty cannot impose unanticipated extraterritorial obligations on those who ratify it through no more than its general humanitarian intent. Because the text of Article 33 cannot reasonably be read to say anything at all about a nation’s actions toward aliens outside its own territory, it does not prohibit such actions.<sup>101</sup>

In an uncharacteristic mode for the usually isolationist U.S. justices, the Supreme Court quoted many international law scholars in the footnotes in support of this proposition, including Goodwin-Gill.<sup>102</sup> Goodwin-Gill wrote, “A categorical refusal of disembarkation cannot be equated with breach of the principle of non-refoulement, even though it may result in serious consequences for asylum-seekers.”<sup>103</sup> They also quoted the respected A. Grahl-Madsen, who previously worked as an in-house lawyer for UNHCR for many years.<sup>104</sup> The Court quotes him:

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<sup>100</sup> *Sale*, 509 U.S. at 158–59.

<sup>101</sup> *Id.* at 183.

<sup>102</sup> *See, e.g., id.* at n.41.

<sup>103</sup> *Id.* at 184, (quoting GUY GOODWIN-GILL, *THE REFUGEE IN INTERNATIONAL LAW* 87 (1st ed. 1983)). Earlier in the quoted work, Goodwin-Gill concedes, “At the 1951 Conference, no formal objection appears to have been raised to the Swiss interpretation of non-refoulement, limiting its application to those who have already entered state territory.” GOODWIN-GILL & MCADAM, *supra* note 45, at 74. He goes on to say, “Little is to be gained today by any further analysis of the motives of states or the meaning of words in 1951.” GOODWIN-GILL, *THE REFUGEE IN INTERNATIONAL LAW*, *supra*, at 207. He develops his argument, saying, “Let it be assumed that, in 1951, the principle of non-refoulement was binding solely on the conventional level, and that it did not encompass non-rejection at the frontier.” *Id.* at 208. He then argues that state practice has changed and that “[b]y and large, States in their practice and in their recorded views, have recognised that *non-refoulement* applies to the moment at which asylum-seekers present themselves for entry.” *Id.* Presumably, if state practice can become more accommodating taking on obligations not stipulated in the text, state practice can also become less accommodating confining itself only to those obligations stipulated in the text.

<sup>104</sup> *See Sale*, 509 U.S. at 182 n.40.



[Non-refoulement] may only be invoked in respect of persons who are already present--lawfully or unlawfully--[sic] in the territory of a Contracting State. Article 33 only prohibits the expulsion or return (refoulement) of refugees to territories where they are likely to suffer persecution; it does not obligate the Contracting State to admit any person who has not already set foot on their respective territories.<sup>105</sup>

Goodwin-Gill has often pointed out that the Refugee Convention has a number of distinct features: “[A]s an international text, it must be interpreted in accordance with the general principles of international law . . . . [I]t is ‘a living instrument’, to be interpreted in the light of present-day conditions . . . . [and it is] ‘marked by the absence of an in-built monitoring system.’”<sup>106</sup> This helps explain why refugee advocates often speak of government policies being contrary to the spirit, if not the letter, of the Refugee Convention.<sup>107</sup> That spirit is often enlivened by creative dialogue between UNHCR and the academy. In recent writings, Goodwin-Gill has been more critical of those who bluntly espouse that an asylum seeker has no right of entry to a state of his or her choice when in flight from persecution.<sup>108</sup> In his remarks to the 2012 American Society of International Law Conference entitled *International Norm-Making on Forced Displacement: Challenges and Complexity*, he said:

Although some 148 states are now party to the 1951 Convention and/or the 1967 Protocol, there is no single body with the competence to pronounce with authority on the meaning of words, let alone their application in widely and wildly differentiated and evolving fact situations. In the first instance, it is therefore for each state party to implement its international obligations in good faith and, in its practice and through its courts and tribunals, to determine the meaning and scope of those obligations.<sup>109</sup>

He added:

Interpreting the 1951 Convention presents the challenge of reconciling a “living instrument” with consistency with international law. A good-faith interpretation of the treaty is called for, which reflects, if

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<sup>105</sup> *Id.* (quoting A. GRAHL MADSEN, THE STATUS OF REFUGEES IN INTERNATIONAL LAW 94 (1972)).

<sup>106</sup> Guy Goodwin-Gill, *The Search for the One, True Meaning . . .*, in THE LIMITS OF TRANSNATIONAL LAW 204, 206–07 (Guy Goodwin-Gill & Helene Lambert eds., 2010).

<sup>107</sup> *See id.*

<sup>108</sup> *See, e.g.*, Guy Goodwin-Gill, *Confronting Complexity: Interpretation or Over-Interpretation*, 106 PROC. ANN. MEETING (AM. SOC’Y INT’L L.) 439, 440 (2012).

<sup>109</sup> *Id.*

not the unknown intent of the drafters, then its object and purpose and the practice of states and their consent to be bound.<sup>110</sup>

Three decades since the Haitian crisis began, Australia is confronted with the same situation and its political parties are firmly committed to stopping the boats. Following up on some Australian controversy about whether boat people had a right to enter Australia seeking protection, Goodwin-Gill published a spirited editorial in the *International Journal of Refugee Law*, stating:

The persistent illusion of an absolute, exclusionary competence is still a matter of concern, however, because it tends to frame and direct national legislation and policies in ways that are inimical to international cooperation and, not infrequently, contemptuous of human rights. This persistence is all the more surprising, given what international law has achieved and what international organization has done to resolve or mitigate humanitarian problems. . . .

The history is important, and no international lawyer can avoid being an historian. This gives us the long view essential to understanding law in the relations of states, and enables us to counter misunderstandings dressed up as advocacy—to point out, for example, that no one in the Commission on Human Rights in 1947–48 ever suggested that a right ‘to be granted asylum’ (even if it were adopted, which it was not) meant that you could just turn up anywhere by boat and demand and get it. What history tells us, though, is that the French were not without reason to argue that a right to seek asylum would mean little if not linked to a right to be granted asylum. Equally, it shows that other states spoke for their time when responding that this was out of sync with contemporary international law, at least on the narrow, immigration issue of entry and residence. History, then and now, reminds us of the range of legal and practical matters which were left open, and which have since had to be resolved consistently with the general principles of the Declaration at large.

It does not follow, either logically or as a matter of fact, that because states declined to declare a right to be granted asylum in 1948, the individual in flight and at risk of persecution or other relevant harm necessarily has ‘no right’ to enter state territory at any time. The issue is often one of ‘framing’, [sic] for everything depends on context, and the question for international lawyers (and for governments, legislators, critics and commentators) is when and in the light of what obligations might circumstances requiring entry prevail.

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<sup>110</sup> *Id.* at 442–43.

... Factual scenarios are hugely diverse (which accounts for the difficulty of harmonising refugee decision making across jurisdictions), but it can never be excluded that the state may well be required, as a matter of obligation, to allow an individual to enter its territory *for the purpose of protection*. To imagine that this is equivalent to granting asylum, as that is understood in the practice of states, is to miss the whole picture – one which is rich in its complexity, demanding more than the simple intonation of words like ‘admission’, ‘entry’, ‘right’, ‘no right’, without reference to protection and to context and meaning in international law.<sup>111</sup>

In March 2014, Goodwin-Gill followed up with an even more spirited attack on the U.S. Supreme Court’s *Sale* decision:

Nor do I think that the judgment of the Supreme Court in *Sale* counts for anything juridically [sic] significant, other than within the regrettably non-interactive legal system of the United States. Here, the Court ruled for domestic purposes on the construction of the Immigration and Nationality Act. What it said on the meaning of the treaty was merely dictum and the Court was not competent –in at least two senses – to rule on international law.

At best, the judgment might constitute an element of State practice, but even here its international relevance can be heavily discounted. The Court failed, among others, to have regard to the binding unilateral statements made by the US [sic] when interdiction was first introduced, and the ten years of consistent practice which followed. And as any student of international law will tell you, practice and statements of this nature are highly relevant, particularly when against interest.

UNHCR, moreover, which is responsible for supervising the application of the 1951 Convention/1967 Protocol, protested the judgment at the time and has consistently maintained the position set out in its *amicus* brief to the Supreme Court (and in earlier interventions with the US authorities). Significantly, no other State party to the treaties has objected to UNHCR’s position, though the forum and the opportunity are readily available, such as the UNHCR Ex-

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<sup>111</sup> Guy Goodwin-Gill, *The Dynamic of International Refugee Law*, 25 INT’L J. REFUGEE L. 651, 653–55 (2013).

ecutive Committee, ECOSOC, or the Third Committee of the UN General Assembly.<sup>112</sup>

Be all this as it may, Goodwin-Gill nonetheless concedes in his most recent writing that “[t]he 1951 Convention does not deal with the question of admission, and neither does it oblige a state of refuge to accord asylum as such . . . .”<sup>113</sup> Goodwin-Gill’s co-author Professor Jane McAdam, when explaining the extra-territorial effect of international obligations and the need for Australian personnel on the high seas to be attentive to the protection needs of asylum seekers before refusing them access to Australian territory, claimed:

Only the United States has said that the Refugee Convention doesn’t have that extra-territorial application and that’s the basis on which the U.S. justifies its interdiction and expulsion of Haitians and Cubans for instance. The U.S. Supreme Court upheld that view but . . . , to borrow Guy Goodwin-Gill’s language, the U.S. Supreme Court was not competent, in two senses of the word, to rule on the international law obligations of the United States, and in any sense, they were really interpreting a domestic statute. UNHCR . . . at the time and subsequently has spoken out very strongly that the U.S. interpretation is wrong as a matter of international law, and not one country has ever contradicted UNHCR. In international law terms, that is a very strong tacit acceptance that UNHCR’s position is correct and that the U.S. is out there on a limb.<sup>114</sup>

I am *ad idem* with Goodwin-Gill when he makes the following two observations:

A State which intercepts a boat carrying refugees on the high seas [sic] and which returns them directly to their country of origin violates the principle. Equally, an intercepting State which disembarks refugees and asylum seekers in a country which it knows or reasonably expects will refole them, or otherwise violate their fundamental human rights, becomes party to that act.<sup>115</sup>

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<sup>112</sup> Guy Goodwin-Gill, *The Globalization of High Seas Interdiction—Sale’s Legacy and Beyond*, (Mar. 2014), <http://opiniojuris.org/2014/03/16/yale-sale-symposium-globalization-high-seas-interdiction-sales-legacy-beyond/> [<https://perma.cc/ZV59-TJTV>].

<sup>113</sup> Guy Goodwin-Gill, *The International Law of Refugee Protection*, in *THE OXFORD HANDBOOK OF REFUGEE AND FORCED MIGRATION STUDIES* 36, 45 (Elena Fiddian-Qasmiyeh ed., 2014).

<sup>114</sup> Andrew & Renata Kaldor Ctr. for Int’l Refugee L., *Q&A Panel: The High Court and the Asylum Case*, (July 22, 2014), <https://youtu.be/yCuf9DhMW-A> [<https://perma.cc/7VBM-5VEH>] (quoted statement begins at 17:06).

<sup>115</sup> Guy Goodwin-Gill, *The International Protection of Refugees and Asylum Seekers: Between Principle and Pragmatism?* (Nov. 3, 2014), <http://www.kaldorcentre.unsw.edu.au/publication/2014-annual-conference-keynote-address> [<https://perma.cc/A3N4-WYTN>].

I respectfully part company with his bold generalized assertion that “non-refoulement is precisely the sort of obligation which is engaged by extraterritorial action . . . .”<sup>116</sup> That is not my understanding of the jurisprudence of the U.S. Supreme Court.<sup>117</sup> Nor is it my understanding of the jurisprudence of the House of Lords nor the High Court of Australia. In fact, the House of Lords specifically rejected these arguments in relation to *non-refoulement* and extra-territoriality in 2005.<sup>118</sup>

I am a strong critic, and always have been, of Australian measures—including long-term detention, offshore processing (like those practiced in Nauru and Papua New Guinea), and chequebook solutions to resettlement (like the proposed Cambodia solution). Since 2013, knowing there is strong bipartisan support for a return to Pacific-Solution type options in the Australian Parliament, I have wanted to investigate if ever it might be possible to turn back boats to Indonesia decently, fairly, and legally.

The highly respected international lawyers Goodwin-Gill and Jane McAdam seem to be answering, “No, it could NEVER be legal.”<sup>119</sup> If that be so, it is not an option, and we will be left with non-transparent returns (which suit both Australia *and* Indonesia) and punitive, deterrent measures post-entry to Australia and in places like Nauru and Papua New Guinea.

### III. A REASON TO RECONSIDER SOLIDIFIED JURISPRUDENCE: AUSTRALIA’S SITUATION

Indonesia is a signatory to the ICCPR and U.N. Convention Against Torture (CAT), and it makes regular reports to the requisite UN bodies.<sup>120</sup> In 2008, the Committee Against Torture wanted assurances in Indonesian domestic law that *refoulement* would never be able to occur, but there was no evidence in the report about any particular case or alleged violation.<sup>121</sup> In August 2013, UN-HCR published its concluding observations on Indonesia.<sup>122</sup> This detailed report made no mention of any concerns relating to *refoulement*—either under

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<sup>116</sup> *Id.*

<sup>117</sup> *See Sale*, 508 U.S. at 183.

<sup>118</sup> *See generally* R (European Roma Rights Ctr.) v. Immigration Officer at Prague Airport [2005] 2 AC 1 (HL) (appeal taken from Eng.) (stating no law requires an individual to be allowed into a country before applying for asylum).

<sup>119</sup> *See supra* notes 111–114 and accompanying text.

<sup>120</sup> *See* Convention Against Torture and Other Cruel, Inhuman Treatment or Punishment, Dec. 10, 1984, S. TREATY DOC. 100-20, 1465 U.N.T.S. 85; International Covenant on Civil and Political Rights, Dec. 16, 1966, S. EXEC. DOC. E, 95-2, 999 U.N.T.S. 171.

<sup>121</sup> Comm. Against Torture, *Consideration of Reports Submitted by States Parties Under Article 19 of the Convention: Concluding Observations of the Committee Against Torture: Indonesia*, ¶ 28, U.N. Doc. CAT/C/IDN/CO/2 (July 1, 2008).

<sup>122</sup> Office of the U.N. High Comm’r for Human Rights, Human Rights Comm., *Concluding Observations on the Initial Report of Indonesia*, U.N. Doc. CCPR/C/IDN/CO/1 (Aug. 21, 2013).

ICCPR or CAT.<sup>123</sup> Thus, the following question arises: Given that Indonesia signed the CAT and ICCPR, complies with the reporting provisions of CAT and ICCPR, and is not likely to sign the Refugee Convention; and given that there are no confirmed reports of Indonesia's wrongly refouling persons returned from Australia, could the conditions ever be fulfilled which would warrant Australia's returning asylum seekers to Indonesia provided only that Australia is satisfied that the asylum seekers are not in direct flight from persecution *in* Indonesia, and further provided that Australia is satisfied that the returnees will not face the real risk of torture or cruel or degrading treatment in Indonesia?

It is the height of legal formalism to posit that one could never entertain the notion of setting preconditions for such returns (such as UNHCR supervised processing, accommodation and services administered by the International Organization for Migration, etc.) only because Indonesia is not a signatory to the Refugee Convention.<sup>124</sup> It is one thing to have credible evidence of wrongful *refoulement* from Indonesia prior to determination of claims, but it is another to rule out *ab initio* the possibility of safe returns to Indonesia. If you do the latter, how could you ever even be satisfied that Indonesia's accession to the Refugee Convention would ever justify returns? The *reductio ad absurdum* of Goodwin-Gill's position is that Australia could *never* return anyone to Indonesia regardless of what instruments it had signed and regardless of what international reporting it had undertaken.<sup>125</sup>

Many Australian debates now come down to advocates alleging that Australian policy is contrary to the spirit of the Refugee Convention, while the government responds that its policy is consistent with the letter of the Convention.<sup>126</sup> Compliance with the letter does not make a policy right or decent. There is often a need for more robust moral argument and also more finely honed constitutional and statutory construction arguments to counter what is being proposed.

Whatever is made of U.S. exceptionalism in international law, the approach of the United States, in fact, has given license and a paradigm during the last two decades to other rich nations worried about an influx of boat people.<sup>127</sup> Australian governments of both political persuasions have adopted the jurisprudence of the U.S. Supreme Court, and to date, the Australian High

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<sup>123</sup> *See id.*

<sup>124</sup> *See* UNHCR, STATES PARTIES TO THE 1951 CONVENTION RELATING TO THE STATUS OF REFUGEES AND THE 1967 PROTOCOL (Apr. 2015), <http://www.unhcr.org/3b73b0d63.html> [<https://perma.cc/827A-XUQH>].

<sup>125</sup> *Cf.* Guy Goodwin-Gill, *supra* note 115.

<sup>126</sup> *See generally* AUSTRL. HUMAN RIGHTS COMM., ASYLUM SEEKERS, REFUGEES AND HUMAN RIGHTS (2013) (providing an overview of the human rights issues surrounding Australia's approach to asylum seekers and refugees).

<sup>127</sup> *See* Goodwin-Gill, *supra* note 84, at 443.

Court has not begged to differ.<sup>128</sup> In 2005, the House of Lords indicated its agreement with the U.S. Supreme Court decision and reasoning about Article 33.<sup>129</sup> In *Regina (European Roma Rights Centre) v. Immigration Officer at Prague Airport*, the House of Lords had been asked to rule that the U.S. decision was wrong.<sup>130</sup> The House of Lords declined.<sup>131</sup> Their Lordships, having surveyed the history of the 1951 Convention and later attempts to amend or re-interpret it, stated categorically that the *non-refoulement* provision related only to persons within the territory of a state.<sup>132</sup> They considered all the arguments for expansion of the *non-refoulement* principle to go beyond the frontier of the nation state.<sup>133</sup> Goodwin-Gill appeared as counsel for UNHCR, arguing that the principle of *non-refoulement* is a rule of customary international law that co-exists with a state's treaty obligations, such as Article 33 of the Refugees Convention, which prohibits states from returning refugees to territories where they risk persecution, torture, or death and requires states not to reject refugees at the border of their country of nationality where they fear persecution.<sup>134</sup>

UNHCR's argument was rejected by the House of Lords. In the lead judgment in the House of Lords, Lord Bingham stated:

In 1967 the United Nations adopted a Declaration on Territorial Asylum which provided, in article 3, that no person entitled to invoke article 14 of the Universal Declaration of Human Rights should be subjected to measures such as rejection at the frontier, but a conference held in 1977 to embody this and other provisions in a revised convention ended in failure. As Justice Gummow J [of the Australian High Court] put it in *Ibrahim . . .*, in his judgment given in October 2000, "there have been attempts which it is unnecessary to recount here to broaden the scope of the Convention itself by a Draft United Nations Convention on Territorial Asylum but these collapsed more than twenty years ago."<sup>135</sup>

Lord Bingham concluded the discussion about the submission urging the court to expand the principle of *non-refoulement* to persons at the frontier and outside the territory of the nation state signatory to the Convention:

<sup>128</sup> See *CPCF v. Minister for Immigration and Border Protection* [2015] HCA 1, ¶ 10.

<sup>129</sup> See *R (European Roma Rights Ctr.) v. Immigration Officer at Prague Airport* [2005] 2 AC 1 (HL) (appeal taken from Eng.) [hereinafter *R v. Immigration Officer*].

<sup>130</sup> See *id.* ¶¶ 17–18.

<sup>131</sup> See *id.* ¶ 68.

<sup>132</sup> See *id.* ¶¶ 24–26.

<sup>133</sup> See *id.*

<sup>134</sup> See *id.* ¶¶ 9, 10, 22, 57.

<sup>135</sup> *Id.* ¶ 17 (quoting *Minister for Immigration and Multicultural Affairs v. Hussein Mohamed Haji Ibrahim*, [2000] HCA, ¶ 142).

In considering whether the rule contended for has received the assent of the nations, it is pertinent to recall that the states parties to the 1951 Convention have not, despite much international discussion, agreed to revise its terms or extend its scope at any time since 1967. None of the citations [put in support of the proposition] is from a legislative instrument. The House was referred to no judicial decision supporting the rule contended for and a number of recent decisions (*Sale* in the United States, *Ibrahim* and *Khawar* in Australia) are inimical to it. Have the states in practice observed such a rule? It seems to me clear that they have not.<sup>136</sup>

Whereas other law lords said they simply agreed with Lord Bingham on the asylum issues raised, Lord Hope of Craighead dealt with the questions himself and was even more forthright. He said:

I do not, with respect, think that the *Sale* case was wrongly decided. The issue in that case was not as to what was or was not fair. The majority recognised the moral weight of the argument that a nation should be prevented from repatriating refugees to their potential oppressors whether or not the refugees were within that nation's borders. But in their opinion both the text and the negotiating history of article 33 affirmatively indicated that it was not intended to have extraterritorial effect. Judicial support for this view is found in the opinion of Gummow J [of the Australian High Court] in *Applicant A v Minister for Immigration and Ethnic Affairs* (1997) and in the other authorities which Lord Bingham has referred to.<sup>137</sup>

One wonders what is the point of the UNHCR putting submissions to the High Court of Australia as they did in October 2014, proposing that “the weight of opinion at international law is that the principle of *non-refoulement*, including under Art 33(1) of the Refugee Convention applies, wherever a State exercises jurisdiction, and whether it is exercised *de jure* or *de facto*.”<sup>138</sup> In addition, the UNHCR claimed that it was “only aware of one superior court decision that is inconsistent with this understanding, being the decision of the U.S. Supreme Court in *Sale*.”<sup>139</sup> The UNHCR submission was misleading and unhelpful, especially given that the UNHCR was an intervener in the House of

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<sup>136</sup> *Id.* ¶ 27.

<sup>137</sup> *Id.* ¶ 68 (citations omitted).

<sup>138</sup> Submission of UNHCR Seeking Leave to Intervene as *Amicus Curiae* ¶ 26, *CPCF v. Minister for Immigration and Border Protection* [2015] HCA 1 (No. S169 of 2014) (Austl.).

<sup>139</sup> *Id.* ¶ 27.



Lords case.<sup>140</sup> Both the Australian High Court and the House of Lords historically have followed the U.S. Supreme Court in *Sale* or at least assumed it is correct.<sup>141</sup> For its part, the Australian Human Rights Commission submitted to the High Court “that the construction given to Article 33(1) by the majority of the U.S. Supreme Court in *Sale v. Haitian Centers Council, Inc.*, [sic] is incorrect.”<sup>142</sup> In the recent decision of *CPCF v. Minister for Immigration and Border Protection*, the High Court of Australia did not cast any adverse imputa-

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<sup>140</sup> See Written Case on Behalf of the Intervener, *R v. Immigration Officer*, [2005] 2 AC 1 (UK). Counsel for the Commonwealth was able to deal with the matter simply and forthrightly in oral argument:

Your Honours, I will not take you to *Sale* or the *Roma Rights Case*, but it was argued in the *Roma Rights Case* in the House of Lords that *Sale* was wrong and that invitation was rejected expressly in the judgment of Lord Hope. The leading judgment was given by Lord Bingham but at the end of his judgment, Lord Bingham agreed with Lord Hope’s remarks. It was, we submit, the whole House of Lords rejected the submission that *Sale* was wrong and we submit your Honours should not lightly conclude that the highest courts in both the United States and the United Kingdom were wrong in the conclusion that they reached.

Transcript of Oral Argument, *CPCF v. Minister for Immigration and Border Protection* [2015] HCA 1 (No. S169 of 2014) (Austl.), <http://www.austlii.edu.au/au/other/HCATrans/2014/228.html> [<https://perma.cc/UH58-R9ME>].

<sup>141</sup> See *R v. Immigration Officer*, ¶ 68 (UK); *CPCF v. Minister for Immigration and Border Protection* [2015] HCA 1, ¶ 10 (Austl.).

<sup>142</sup> Proposed Submissions of the Australian Human Rights Commission Seeking Leave to Intervene ¶ 25, *CPCF v. Minister for Immigration and Border Protection* [2015] HCA 1 (No. S169 of 2014), (Austl.). The AHRC submission provides a novel, expansive approach to the historic interpretation of Article 33 when it states:

According to Goodwin-Gill and McAdam, the first reference in an international agreement to the principle that refugees should not be returned to their country of origin occurred in the 1933 Convention relating to the International Status of Refugees. Article 3 of that Convention contained an undertaking by States not to remove resident refugees or keep them from their territory ‘by application of police measures, such as expulsions or non-admittance at the frontier (*refoulement*)’ unless dictated by national security or public order.

The language that ultimately formed the basis for Article 33(1) of the Refugees Convention was the product of an *Ad hoc* Committee on Statelessness and Related Problems appointed by the United Nations Economic and Social Council. A representative of the United States delegation on that Committee provided the following description of the key principle:

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

*Id.* ¶¶ 11–12 (quoting UN Ad Hoc Committee on Refugees and Stateless Persons, *Ad Hoc Committee on Statelessness and Related Problems, First Session: Summary Record of the Twentieth Meeting Held at Lake Success, New York, on Wednesday, 1 February 1950*, at 2.30 p.m., ¶ 54, UN Doc. E/AC.32/SR.20 (Feb. 10, 1950)).

tions on the relevant U.S. and UK decisions.<sup>143</sup> In this case, the High Court found no grounds for invalidating the Australian government's holding of 157 Tamil asylum seekers on an Australian vessel on the high seas in the Indian Ocean for a month while Australia attempted to negotiate their return to India from whence they had set sail.<sup>144</sup> The Chief Justice, referring to the U.S. and UK decisions, said, "The defendants argued that the non-refoulement obligation under the Refugees Convention only applied to receiving States in respect of refugees within their territories. There is support for that view in some decisions of this Court, the House of Lords and the Supreme Court of the United States."<sup>145</sup> Justice Keane, referring to those decisions, said, "Judicial authority in Australia, the United Kingdom and the United States of America suggests that a state's obligations under the Convention arise only with respect to persons who are within that state's territory."<sup>146</sup> He went on to say:

Under the Migration Act, the protection obligations imposed on the Executive government are afforded to non-citizens who are within Australian territory. The authorities suggest that this limitation is consistent with the circumstance that the protection obligations imposed by the Convention concern rights to be afforded to persons within the territory of Contracting States.<sup>147</sup>

The European Court of Human Rights has developed a more human-rights-friendly approach to the reception of asylum seekers.<sup>148</sup> Perhaps in the future, the Australian High Court might be convinced to follow more jurisprudence of the European Court of Human Rights rather than the U.S. Supreme Court and the UK House of Lords, at least when interpreting Australian statutes which are arguably consistent with the fulfillment of Australia's international treaty obligations. But this would require the High Court to abandon some of its own earlier jurisprudence as well as the House of Lords' unequivocal endorsement of the U.S. Supreme Court's approach.<sup>149</sup> What makes this most unlikely is that the Australian parliament is legislating exhaustive provisions that are dismissive of international law.<sup>150</sup> In the absence of any Australian bill of rights or Human Rights Act, the High Court of Australia is then con-

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<sup>143</sup> See *CPCF v. Minister for Immigration and Border Protection* [2015] HCA 1, ¶ 10 (Austl.).

<sup>144</sup> See *id.* ¶¶ 1–3.

<sup>145</sup> *Id.* ¶ 10.

<sup>146</sup> *Id.* ¶ 461 (citation omitted). He did go on to observe, "The plaintiff does not accept that this body of authority is correct, but it is unnecessary to come to a conclusion on that point." *Id.*

<sup>147</sup> *Id.* ¶ 492 (citation omitted).

<sup>148</sup> See *infra* note 167 and accompanying text.

<sup>149</sup> See *CPCF*, [2015] HCA 1, ¶ 461 (Austl.); *R v. Immigration Officer*, [2005] 2 AC 1, ¶ 68 (UK).

<sup>150</sup> See, e.g., *Maritime Powers Act 2013* (Cth) s 22A (as amended by *Migration and Maritime Powers Legislation Amendment* (Resolving the Asylum Legacy Caseload) Act 2014 (Cth) s 6).

strained to interpret the unambiguous Australian statutory provisions regardless of the letter or spirit of international instruments and law.<sup>151</sup> As Justice Keane said in the recent case:

Australian courts are bound to apply Australian statute law “even if that law should violate a rule of international law.” International law does not form part of Australian law until it has been enacted in legislation. In construing an Australian statute, our courts will read “general words . . . subject to the established rules of international law” unless a contrary intention appears from the statute. In this case, there is no occasion to invoke this principle of statutory construction. The terms of the Act are specific. They leave no doubt as to its operation.<sup>152</sup>

All seven judges of the High Court basically took this approach.<sup>153</sup> The Australian parliament has been so specific in codifying the law of asylum at the frontier that there is nothing for the judges to do except to apply the letter of the law—regardless of the general principles of international law.<sup>154</sup> You may just as well be quoting the Catechism of the Catholic Church to them as submit the learned opinions of international lawyers.

#### IV. THE EUROPEAN UNION’S INTERPRETATION

In Europe, the focus has been on boats coming across the Mediterranean Sea and through the Balkans.<sup>155</sup> The European Court of Human Rights became apprised of EU practices in the Mediterranean in the 2012 case *Hirsi v. Italy*.<sup>156</sup> The applicants in that case were eleven Somali nationals and thirteen Eritrean nationals who “were part of a group of about two hundred individuals who left Libya aboard three vessels with the aim of reaching the Italian coast.”<sup>157</sup> Three vessels from the Italian Revenue Police and Coast Guard intercepted the boats on May 6, 2009, when the vessels were thirty-five nautical miles south of Lampedusa.<sup>158</sup> Italian authorities transferred occupants of the boats onto Italian military ships and returned them to Tripoli.<sup>159</sup> After arriving in Tripoli, the migrants were handed over to the Libyan authorities.<sup>160</sup> The applicants claim that

<sup>151</sup> *See id.*

<sup>152</sup> *CPCF*, [2015] HCA 1, ¶ 462 (citations omitted).

<sup>153</sup> *See id.* ¶¶ 8 (French, C.J.), 80 (Hayne & Bell, JJ.), 219–220 (Crennan), 304 (Kiefel, J. stating issue does not need to be reached), 385 (Gageler, J.), 462 (Keane, J.).

<sup>154</sup> *See id.* ¶¶ 279–280.

<sup>155</sup> *See* Patrick Boehler & Sergio Peçanha, *supra* note 37.

<sup>156</sup> *See* *Hirsi Jamaa v. Italy*, 2012-II Eur. Ct. H.R. 97, ¶¶ 9–14.

<sup>157</sup> *Id.* ¶ 9.

<sup>158</sup> *Id.* ¶ 10.

<sup>159</sup> *Id.* ¶ 11.

<sup>160</sup> *Id.* ¶ 12.

“they objected to being handed over to the Libyan authorities but were forced to leave the Italian ships.”<sup>161</sup> The Italian Minister of the Interior, at a press conference on May 7, 2009, stated that the operation to intercept the vessels and return the migrants to Libya was the consequence of bilateral agreements with Libya that entered into force on February 4, 2009.<sup>162</sup> He also stated that the agreements represented a critical turning point in the fight against clandestine immigration.<sup>163</sup>

The applicants complained that their return to Libya had forced them to be subject to the risk of torture or inhuman or degrading treatment in Libya and in their respective countries of origin.<sup>164</sup> The migrants based their complaint on Article 3 of the European Convention on Human Rights, which provides: “No one shall be subjected to torture or to inhuman or degrading treatment or punishment.”<sup>165</sup>

The Court found:

The Court has already had occasion to note that the States which form the external borders of the European Union are currently experiencing considerable difficulties in coping with the increasing influx of migrants and asylum-seekers. It does not underestimate the burden and pressure this situation places on the States concerned, which are all the greater in the present context of economic crisis. It is particularly aware of the difficulties related to the phenomenon of migration by sea, involving for States additional complications in controlling the borders in southern Europe.

However, having regard to the absolute character of the rights secured by Article 3, that cannot absolve a State of its obligations under that provision.

The Court reiterates that protection against the treatment prohibited by Article 3 imposes on States the obligation not to remove any person who, in the receiving country, would run the real risk of being subjected to such treatment.<sup>166</sup>

The Court ruled unanimously that the applicants were within the jurisdiction of Italy for the purposes of Article 1 of the Convention; that there had been a violation of Article 3 of the Convention based on the applicants’ exposure to the risk of ill treatment in Libya; and that the risk of the applicants’ be-

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<sup>161</sup> *Id.*

<sup>162</sup> *Id.* ¶ 13.

<sup>163</sup> *Id.*

<sup>164</sup> *Id.* ¶ 83.

<sup>165</sup> *Id.* (quoting Convention for the Protection of Human Rights and Fundamental Freedoms art. 3, Nov. 4, 1950, 213 U.N.T.S. 222, E.T.S. 5.).

<sup>166</sup> *Id.* ¶¶ 122–123 (citation omitted).

ing returned to Somalia and Eritrea constituted a violation of Article 3 of the Convention.<sup>167</sup>

When Lord Neuberger, the Chief Justice of the United Kingdom, visited Australia in 2014, he took the opportunity to express some forthright views about the European Court of Human Rights.<sup>168</sup> He told the justices of the Victorian Supreme Court:

I think we may sometimes have been too ready to treat Strasbourg court decisions as if they were determinations by a UK court whose decisions were binding on us. It is a civilian court under enormous pressure, which sits in chambers far more often than in banc [sic], and whose judgments are often initially prepared by staffers, and who have produced a number of inconsistent decisions over the years. I think that we are beginning to see that the traditional common law approach may not be appropriate, at least to the extent that we should be more ready not to follow Strasbourg chamber decisions.<sup>169</sup>

But in the end, he came down in favor of the general approach of the European Court, conceding that the United Kingdom's ratification of the Convention and the passage of its own Human Rights Act resulted in the courts being "pitchforked into ruling on the most contentious issues of the day," including asylum seekers' rights.<sup>170</sup> He observed:

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<sup>167</sup> *Id.* ¶¶ 3, 6–7. In a separate judgment, Judge Pinto de Albuquerque joined issue with the U.S. Supreme Court. He said:

It is true that the statement of the Swiss delegate to the conference of plenipotentiaries that the prohibition of *refoulement* did not apply to refugees arriving at the border was supported by other delegates, including the Dutch delegate, who noted that the conference was in agreement with this interpretation. It is also true that Article 33 § 2 of the United Nations Convention relating to the Status of Refugees exempts from the prohibition of *refoulement* a refugee who constitutes a danger to the security of a country "in which he is", and refugees on the high seas are in no country. One might be tempted to construe Article 33 § 1 as containing a similar territorial restriction. If the prohibition of *refoulement* were to apply on the high seas, it would create a special regime for dangerous aliens on the high seas, who would benefit from the prohibition, while dangerous aliens residing in the country would not.

With all due respect, the United States Supreme Court's interpretation contradicts the literal and ordinary meaning of the language of Article 33 of the United Nations Convention relating to the Status of Refugees and departs from the common rules of treaty interpretation.

*Hirsi Jamaa*, 2012-II Eur. Ct. H.R. 97, 174–75 (Pinto de Albuquerque, J., concurring).

<sup>168</sup> See Lord Neuberger, *The Role of Judges in Human Rights Jurisprudence: A Comparison of the Australian and UK Experience* ¶ 35 (Aug. 8, 2014), <https://www.supremecourt.uk/docs/speech-140808.pdf> [<https://perma.cc/EGC4-J2PL>].

<sup>169</sup> *Id.*

<sup>170</sup> *Id.* ¶ 5.

The fact that “unelected” judges, especially foreign judges, are perceived to have been given powers which they previously had not enjoyed, coupled with the distaste in some political quarters for all things European, and the media’s concentration on prisoners’ votes and asylum seekers, has rendered the Convention something of a whipping boy for some politicians and newspapers. This appears to many people to be unfortunate. There are decisions of the Strasbourg court with which one can reasonably disagree, indeed with which I disagree. This is scarcely surprising; indeed, it would be astonishing if it were otherwise. However, to my mind, there are very few of its decisions which can fairly be said to be misconceived.<sup>171</sup>

Compared to the EU, Australia does not have a Human Rights Act, and it is not accountable to any outside judicial body like Strasbourg.<sup>172</sup> This may help to account for Australia’s less-nuanced approach to stopping the boats.<sup>173</sup> In Australia, the Executive finds itself freer from judicial constraint. Mind you, the Australian High Court flexes its muscles from time to time. In September 2014, the court unanimously struck down the government’s attempt to avoid giving permanent protection visas to asylum seekers proven to be refugees who also pass the requisite health and security checks.<sup>174</sup> But since then, the Parliament has legislated to provide only temporary protection visas.<sup>175</sup>

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<sup>171</sup> *Id.* ¶ 41.

<sup>172</sup> *See id.* ¶ 32 (“The international character of the Convention, with its treaty status and the Strasbourg court role, is of course wholly lacking for Victorian Judges when it comes to the [Victorian] Charter [of Human Rights and Responsibilities.]”); *How Are Human Rights Protected in Australian Law*, AUSTL HUMAN RIGHTS COMM’N, <https://www.humanrights.gov.au/how-are-human-rights-protected-australian-law> [<https://perma.cc/ZP9R-RDUS>] (last visited Oct. 27, 2015) (“Unlike most similar liberal democracies, Australia has no Bill of Rights to protect human rights in a single document.”).

<sup>173</sup> *See, e.g.*, Lord Neuberger, *supra* note 168, ¶ 32; *How Are Human Rights Protected in Australian Law*, *supra* note 172.

<sup>174</sup> *Plaintiff S4/2014 v. Minister for Immigration and Border Protection* [2014] HCA 34, ¶ 7 (Austl.). In that case, “The plaintiff had no visa permitting him to enter or remain in Australia.” *Id.* ¶ 1. “On arrival in Australia, at Christmas Island, the plaintiff was lawfully taken into immigration detention,” where he was held for two years while being assessed for a protection visa. *Id.* ¶¶ 1–2. Next, “[t]he department determined that the plaintiff was ‘grant ready’.” *Id.* ¶ 3. This means that “the department determined that the plaintiff was a refugee and satisfied relevant health and character requirements for the grant of a protection visa.” *Id.* The Minister then decided not to grant a protection visa but rather another short-term visa which would then preclude the grant of a permanent protection visa. *See id.* ¶¶ 4–5. The Court ruled that the grant of this visa was invalid as its grant would have undermined the whole legislative purpose of the two year detention, namely assessment for a permanent protection visa. *See id.* ¶¶ 47–48, 53, 61(1).

<sup>175</sup> *See* Louise Yaxley, Jane Norman & Jonathan Gul, *Temporary Protection Visas: Senate Votes to Bring Back Temporary Visas After Deal to Get Children Off Christmas Island*, ABC NEWS, (Dec. 5, 2014, 4:27 AM), <http://www.abc.net.au/news/2014-12-05/senate-agrees-to-reintroduce-temporary-protection-visas/5945576> [<https://perma.cc/KG9W-4EU9>].

Presently, Australia is quite sterile ground for international lawyers agitating the rights of asylum seekers. Not only has the High Court made clear that there is little room for the application of international law when interpreting tight statutory provisions aimed at enhancing border protection, but also the Australian Parliament has now legislated a string of new statutory provisions specifying that:

- The exercise of various border protection powers is not invalid:
- (a) because of a failure to consider Australia's international obligations, or the international obligations or domestic law of any other country; or
  - (b) because of a defective consideration of Australia's international obligations, or the international obligations or domestic law of any other country; or
  - (c) because the exercise of the power is inconsistent with Australia's international obligations.<sup>176</sup>

The Australian Executive has displayed its frustration with an international law approach as enunciated by UN agencies: when Prime Minister Tony Abbott responded to criticisms by the UN Special Rapporteur on Torture Juan Méndez, who had expressed criticisms of Australia's offshore asylum arrangements, he admitted that he had not visited the facilities.<sup>177</sup> The Rapporteur tabled a series of broad, sweeping findings against Australia in relation to torture *et al.* at the UN Human Rights Council. For example in relation to one complaint, Méndez wrote:

In the absence of information to the contrary, the Rapporteur concludes that there is substance in the allegations presented in the initial communication, reiterated above, and thus, that the Government of Australia, by failing to provide adequate detention conditions; end the practice of detention of children; and put a stop to the escalating violence and tension at the Regional Processing Centre, has violated the right of the asylum seekers, including children, to be free from torture or cruel, inhuman or degrading treatment, as provided by articles 1 and 16 of the CAT.<sup>178</sup>

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<sup>176</sup> *Maritime Powers Act 2013* (Cth) s 22A(1) (as amended by *Migration and Maritime Powers Legislation Amendment (Resolving the Asylum Legacy Caseload) Act 2014* (Cth) s 6.).

<sup>177</sup> See Juan E. Méndez, Report of the Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment at ¶ 19, U.N. Doc. A/HRC/28/68/Add.1 (Mar. 6, 2015); Lisa Cox, *Tony Abbott: Australians 'Sick of Being Lectured to' by United Nations, After Report Finds Anti-Torture Breach*, SYDNEY MORNING HERALD (Mar. 10, 2015), <http://www.smh.com.au/federal-politics/political-news/tony-abbott-australians-sick-of-being-lectured-to-by-united-nations-after-report-finds-antitorture-breach-20150309-13z3j0.html> [<https://perma.cc/7RER-CQXQ>].

<sup>178</sup> Méndez, *supra* note 177, ¶ 19.

Suggestions to the UN Human Rights Council that a government is torturing children do need more than the repetition of hearsay allegations. According to *The Sydney Morning Herald*, Prime Minister Abbott replied:

I really think Australians are sick of being lectured to by the United Nations, particularly, particularly given that we have stopped the boats, and by stopping the boats, we have ended the deaths at sea. . . .

The most humanitarian, the most decent, the most compassionate thing you can do is stop these boats because hundreds, we think about 1200 in fact, drowned at sea during the flourishing of the people smuggling trade under the former government.

. . . .  
I think the UN's representatives would have a lot more credibility if they were to give some credit to the Australian government for what we've been able to achieve in this area.<sup>179</sup>

On the issue of border protection and asylum, it has reached the stage in Australia that government and the Parliament are attempting to lock out all influence by international law.<sup>180</sup>

## V. RELIGIOUS DISCOURSE TOWARDS REFUGEES

Having offered some observations about the present *cul-de-sac* confronting international lawyers concerned about Australia's behavior at the border, I now turn to the effects of religious discourse and other moral urgings in the public square, convinced that such discourse often can augment, consolidate, and extend the protection of the human rights of those whose interests do not coincide with those of the majority in a nation state.

As a Jesuit and a lawyer, permit me to be so bold as to suggest that the public moral argument posited on religious conviction and domestic judicial review are two necessary, additional devices for reining in the executive government responding to populist sentiment to secure the borders and stop the boats. It is the judicial method which permits fine consideration of the claims of those who present at our borders, helping to counter the more broad stroke governmental decisions to punish those who present at our borders in order to send a message to other intending asylum seekers and to give a preference to those asylum seekers chosen by government rather than those who self-select by presenting themselves at the border. It is the moral argument (whether religious or not), which augments the secular liberal approach within the nation state. The secular liberal finds it hard to formulate an argument for universal

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<sup>179</sup> Cox, *supra* note 177 (internal quotation marks omitted).

<sup>180</sup> *See id.*



care extending beyond the injunction for government to care for their own citizens by maintaining the security of their borders. At the very least, the secular liberal should concede the assistance, which might be obtained from the religious practitioners who profess the dignity of all human persons, and not just those holding passports for nation states living in peace and with economic security.

Marking the 60th anniversary of the UN Declaration of Human Rights, the late and revered Seamus Heaney wrote:

Since it was framed, the Declaration has succeeded in creating an international moral consensus. It is always there as a means of highlighting abuse if not always as a remedy: it exists instead in the moral imagination as an equivalent of the gold standard in the monetary system. The articulation of its tenets has made them into world currency of a negotiable sort. Even if its Articles are ignored or flouted—in many cases by governments who have signed up to them—it provides a worldwide amplification system for “the still, small voice”.<sup>181</sup>

Religious leaders have a capacity to contribute to the amplification of the still, small voice, just as international lawyers do—so too do poets, folk singers, and novelists. The concept of human rights has real work to do whenever those with power justify their solutions to social ills or political conflicts only on the basis of majority support or by claiming the solutions will lead to an improved situation for the mainstream majority. Even if a particular solution is popular or maximizes gains for the greatest number of people, it might still be wrong and objectionable. There is a need to regard the wellbeing of all members of the human community, and not just those within the preferred purview of government consideration.

Lampedusa, Italy continues to be a beacon for asylum seekers fleeing desperate situations in Africa seeking admission into the EU.<sup>182</sup> Lampedusa is a lightning rod for European concerns about the security of borders in an increasingly globalized world where people as well as capital flow across porous

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<sup>181</sup> *Human Rights, Poetic Redress*, IRISH TIMES (Sept. 10, 2009), <http://www.irishtimes.com/news/human-rights-poetic-redress-1.903757> [https://perma.cc/EHG2-VYJX].

<sup>182</sup> See *Italy to Begin Relocating Eritrean Refugees This Week*, REUTERS (Oct. 6, 2015), <http://www.reuters.com/article/2015/10/06/us-europe-migrants-italy-idUSKCN0S020H20151006> [https://perma.cc/PJ8H-ZV9P] (indicating that Lampedusa will be one of the first locations in European Union plan to sift through migrants and refugees); Elisabetta Povoledo, *Pope Offers Mass on Island Beacon for Refugees*, N.Y. TIMES (July 8, 2013), <http://www.nytimes.com/2013/07/09/world/europe/pope-offers-mass-on-island-beacon-for-refugees.html> [https://perma.cc/85X7-QGXV].

borders.<sup>183</sup> That is why Pope Francis went there on his first official papal visit outside Rome.<sup>184</sup> At Lampedusa on July 8, 2013, he said:

“Where is your brother?” Who is responsible for this blood? In Spanish literature we have a comedy of Lope de Vega which tells how the people of the town of Fuente Ovejuna kill their governor because he is a tyrant. They do it in such a way that no one knows who the actual killer is. So when the royal judge asks: “Who killed the governor?”, they all reply: “Fuente Ovejuna, sir”. Everybody and nobody! Today too, the question has to be asked: Who is responsible for the blood of these brothers and sisters of ours? Nobody! That is our answer: It isn’t me; I don’t have anything to do with it; it must be someone else, but certainly not me. Yet God is asking each of us: “Where is the blood of your brother which cries out to me?” Today no one in our world feels responsible; we have lost a sense of responsibility for our brothers and sisters. We have fallen into the hypocrisy of the priest and the levite whom Jesus described in the parable of the Good Samaritan: we see our brother half dead on the side of the road, and perhaps we say to ourselves: “poor soul . . . !”, and then go on our way. It’s not our responsibility, and with that we feel reassured, assuaged. The culture of comfort, which makes us think only of ourselves, makes us insensitive to the cries of other people, makes us live in soap bubbles which, however lovely, are insubstantial; they offer a fleeting and empty illusion which results in indifference to others; indeed, it even leads to the globalization of indifference. In this globalized world, we have fallen into globalized indifference. We have become used to the suffering of others: it doesn’t affect me; it doesn’t concern me; it’s none of my business! Here we can think of Manzoni’s character – “the Unnamed.” The globalization of indifference makes us all “unnamed,” responsible, yet nameless and faceless.<sup>185</sup>

## VI. APPLYING RELIGIOUS DISCOURSE TO POLICY

It is all very well for the Pope to say these things. But who is listening? And even if they are listening, who is taking notice? Should it extend beyond

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<sup>183</sup> See Ruben Andersson, *The European Union’s Migrant ‘Emergency’ Is Entirely of its Own Making*, GUARDIAN (Aug. 22, 2015), <http://www.theguardian.com/commentisfree/2015/aug/23/politics-migrants-europe-asylum> [https://perma.cc/N4AV-BDVW]; Povoledo, *supra* note 182.

<sup>184</sup> See Povoledo, *supra* note 182.

<sup>185</sup> Francis 2, Pope, Catholic Church, Visit to Lampedusa: Homily of Holy Father Francis 2 (July 8, 2013) (transcript available at [http://w2.vatican.va/content/francesco/en/homilies/2013/documents/papa-francesco\\_20130708\\_omelia-lampedusa.html](http://w2.vatican.va/content/francesco/en/homilies/2013/documents/papa-francesco_20130708_omelia-lampedusa.html) [https://perma.cc/8NF2-EGZU]).

Catholicism? The Pope's intervention, as well as the innate moral sense of the Italian community that there had to be a more decent way of dealing with prospective migrants drowning in the Mediterranean, contributed to the Italian Government's decision to establish the Mare Nostrum operation.<sup>186</sup>

Recently in Australia, two of our greatly admired ex-prime ministers from opposite sides of the political fence have died.<sup>187</sup> They were Gough Whitlam and Malcolm Fraser.<sup>188</sup> Whitlam was prime minister at the end of the Vietnam War, and Fraser succeeded him in 1975.<sup>189</sup> Each was concerned by the prospect of large numbers of Vietnamese refugees arriving in Australia by boat without visas.<sup>190</sup> Their political parties were committed equally to stopping the boats. Initially with the fall of South Vietnam, Australian politicians and civil servants were very wary about receiving large numbers of refugees from Vietnam.<sup>191</sup> In 1976, a joint parliamentary committee unanimously concluded that, prior to the evacuation of the Australian embassy in Saigon in 1975, there was "deliberate delay in order to minimise the number of refugees with which Australia would have to concern itself."<sup>192</sup> Politicians from both sides of the aisle stated, "As unpalatable as it may be, we are forced to conclude that the [Whitlam] Government acted reluctantly and, as expressed by one witness, in order to placate an increasingly suspicious Australian public."<sup>193</sup>

As prime minister, Fraser gave great leadership in the Australian community, cultivating public acceptance of the idea that Australia would play its part

<sup>186</sup> See Povoledo, *supra* note 182; Steve Scherer, *Italy's Renzi Says EU Must Take Responsibility for Boat Migrants*, REUTERS (June 24, 2014), <http://www.reuters.com/article/2014/06/24/italy-eu-migrants-idUSL6N0P54JD20140624> [<https://perma.cc/EPC4-2BGM>]; Pope Francis Receives in Audience the Survivors of the Lampedusa Shipwreck That Claimed 368 Lives, VATICAN INFO. SERV. (2014), <http://www.news.va/en/news/pope-francis-receives-in-audience-the-survivors-of> [<https://perma.cc/3RNH-QSMC>].

<sup>187</sup> See Latika Bourke, *Former Prime Minister Gough Whitlam Dead at 98*, SYDNEY MORNING HERALD, (Oct. 21, 2014), <http://www.smh.com.au/federal-politics/political-news/former-prime-minister-gough-whitlam-dead-at-98-20141020-1192t2.html> [<https://perma.cc/HN6F-KZ8X>] [hereinafter *Gough Whitlam*]; Latika Bourke, *Former Prime Minister Malcolm Fraser Dead at 84*, SYDNEY MORNING HERALD (Mar. 20, 2015), <http://www.smh.com.au/federal-politics/political-news/former-prime-minister-malcolm-fraser-dead-at-84-20150319-1m3jm6.html> [<https://perma.cc/4CHC-9QM9>] [hereinafter *Malcolm Fraser*].

<sup>188</sup> *Gough Whitlam*, *supra* note 187; *Malcolm Fraser*, *supra* note 187.

<sup>189</sup> See *Fifty Australians: The Hon. Edward Gough Whitlam, AC, QC (1916–2014)*, AUSTRALIAN WAR MEMORIAL, <https://www.awm.gov.au/exhibitions/fiftyaustralians/49.asp> [<https://perma.cc/J7UL-L8P6>] (last visited Jan. 23, 2016); *Malcolm Fraser*, *supra* note 187.

<sup>190</sup> See *Malcolm Fraser*, *supra* note 187; Mike Steketee, *Malcolm Fraser the Unsung Hero of Humane Refugee Policy*, AUSTRALIAN (Jan. 2, 2010), <http://www.theaustralian.com.au/opinion/columnists/fraser-the-unsung-hero-of-humane-refugee-policy/story-e6f7gax-1225815259755> [<https://perma.cc/2XL6-U4XK>].

<sup>191</sup> See PARLIAMENT OF THE COMMONWEALTH OF AUSTRALIA, S. STANDING COMM. ON FOREIGN AFFAIRS AND DEF., AUSTRALIA AND THE REFUGEE PROBLEM, S. 30th Parliament-329/1976, ¶ 2.35 (1976).

<sup>192</sup> *Id.*

<sup>193</sup> *Id.* ¶ 2.38.

in receiving a significant number of Vietnamese refugees chosen by Australian government officials from camps in other Southeast Asian countries like Thailand.<sup>194</sup> Eventually, an orderly departure program was negotiated with the Vietnamese government.<sup>195</sup> On both sides of the political aisle in Australia, there were concerns expressed about “queue jumpers” and those falsely claiming to be refugees while seeking a better life.<sup>196</sup> Both Whitlam and Fraser, like all their political successors, expressed concerns about boat people arriving without visas and without prior selection by Australian officials.<sup>197</sup> In May 1977, Fraser’s Minister for Immigration, Michael MacKellar, set out Australia’s first comprehensive refugee policy, insisting: “The decision to accept refugees—must always remain with the Government of Australia.”<sup>198</sup> He announced,

There will be a regular intake of Indo-Chinese refugees from Thailand and nearby areas at a level consistent with our capacity as a community to resettle them. In this operation, we shall be relying greatly on the co-operation of the UNHCR, other Governments, especially the Thai Government, and voluntary agencies in Australia.<sup>199</sup>

A year later, there was an increasing flow of refugees out of Vietnam and into camps around Southeast Asia.<sup>200</sup> The Fraser government insisted on the need for a co-operative international approach.<sup>201</sup> When non-governmental agencies started to provide assistance to boat people on the high seas, MacKellar told Parliament: “I put the proposition that the people concerned with the project could not see a situation emerging where Australia would automatically

<sup>194</sup> See Steketee, *supra* note 190.

<sup>195</sup> *Timeline: Vietnamese Immigration to Australia*, ABC NEWS (June 22, 2012), <http://www.abc.net.au/news/2012-06-20/timeline-of-vietnamese-immigration-to-australia/4080074> [<https://perma.cc/LU4L-AXP2>].

<sup>196</sup> See Moss Cass, *Stop This Unjust Queue Jumping*, AUSTRALIAN, June 29, 1978, (transcript available at [http://www.safecom.org.au/pdfs/moss-cass\\_queue-jumpers.pdf](http://www.safecom.org.au/pdfs/moss-cass_queue-jumpers.pdf) [<https://perma.cc/A7KT-4QGM>]).

<sup>197</sup> See Commonwealth, *Parliamentary Debates*, House of Representatives, 24 May 1977, 1714 (Michael MacKellar, Minister for Immigration & Ethnic Affairs) (Austl.); Gerard Henderson, *How Whitlam Closed the Door on Refugees*, SYDNEY MORNING HERALD (Apr. 18, 2006), <http://www.smh.com.au/news/opinion/how-whitlam-closed-the-door-on-refugees/2006/04/17/1145126051892.html> [<https://perma.cc/N64J-K9QL>] (“An examination of the departmental files for 1975 reveals that Whitlam practised the message that Australia will determine who comes to this country some decades before Howard preached it.”).

<sup>198</sup> Commonwealth, *Parliamentary Debates*, House of Representatives, 24 May 1977, 1714 (Michael MacKellar, Minister for Immigration & Ethnic Affairs) (Austl.).

<sup>199</sup> *Id.* at 1716.

<sup>200</sup> 1 ENCYC. OF DIASPORAS: IMMIGRANT AND REFUGEE CULTURES AROUND THE WORLD 1142 (Melvin Ember et al. eds., 2005).

<sup>201</sup> Commonwealth, *Parliamentary Debates*, House of Representatives, 24 May 1977, 1716 (Michael MacKellar, Minister for Immigration & Ethnic Affairs) (Austl.).

allow the entry of any people that such a vessel happened to pick up.”<sup>202</sup> On June 29, 1978, the Labor Party’s spokesman on immigration, Dr. Moss Cass, wrote a very inflammatory opinion piece in *The Australian* lamenting the arrival of over 1000 boat people in Darwin Harbour, none of whom had been sent back to Vietnam.<sup>203</sup> He said, “The implications of a government policy which accepts queue-jumping on this scale are obvious.”<sup>204</sup> He was adamant that “those refugees seeking residence in Australia who jump the queue by arriving on our shores without proper authorisation should not be given resident status, even temporarily.”<sup>205</sup> On August 15, 1978, the Labor frontbencher, Clyde Cameron, who had been Whitlam’s Immigration Minister, asked Prime Minister Fraser a rather hostile and insinuating question: “Will he tell the Parliament what approaches were made by the United States of America which were in any way responsible for the decision to permit Vietnamese nationals to enter Australia without permits?”<sup>206</sup> Fraser answered:

The United States of America has not attempted to influence procedures for entry to Australia.

The Australian Government will at all times decide the requirements for entry to Australia.

No Vietnamese nationals are permitted to enter Australia without entry permits. The 1634 boat refugees who have arrived in Darwin without prior authority were issued with temporary entry permits on arrival pending consideration of their applications to remain here.<sup>207</sup>

The major political parties agreed on the need to arrest the flow of boats, while being generous with the resettlement of Vietnamese refugees, who then came through the camps in Southeast Asia under what later became the comprehensive plan of action in 1989.<sup>208</sup> On March 16, 1982, Ian MacPhee, Fraser’s next Immigration Minister after MacKellar, provided Parliament with an update on the government’s refugee policy, stating, “The decision to accept refugees must always remain with the Australian Government.”<sup>209</sup> He told Parliament:

<sup>202</sup> Commonwealth, *Parliamentary Debates*, House of Representatives, 7 June 1978, 3149 (Michael MacKellar, Minister for Immigration & Ethnic Affairs) (Austl.).

<sup>203</sup> See *Stop This Unjust Queue Jumping*, *supra* note 196.

<sup>204</sup> *Id.*

<sup>205</sup> *Id.*

<sup>206</sup> See Commonwealth, *Parliamentary Debates*, House of Representatives, 12 Sept. 1978, 902 (Malcolm Fraser, Prime Minister) (Austl.).

<sup>207</sup> *Id.*

<sup>208</sup> See PHILLIPS & SPINKS, *supra* note 16, at 9–10.

<sup>209</sup> Commonwealth, *Parliamentary Debates*, House of Representatives, 16 Mar. 1982, 991 (Ian MacPhee, Minister for Immigration & Ethnic Affairs) (Austl.).

During my visit last year I reached the conclusion, commonly held by many involved in both the Indo-Chinese and Eastern European refugee situations, that a proportion of people now leaving their homelands were doing so to seek a better way of life rather than to escape from some form of persecution. In other words their motivation is the same as over one million others who apply annually to migrate to Australia. To accept them as refugees would in effect condone queue-jumping as migrants.<sup>210</sup>

He called for a “balance between compassion and realism.”<sup>211</sup> He announced progress with an orderly departure program aimed at arresting the flow of boats out of Vietnam.<sup>212</sup> He reached agreement with his counterparts in Thailand and Malaysia on how to arrest the flow and how to handle the numbers coming through.<sup>213</sup> All this humanitarian effort was posited on the premise of stopping the boats from coming uninvited to Australia.<sup>214</sup>

There was a very moving scene at the recent state funeral of Malcolm Fraser when Vietnamese Australians thronged outside the church carrying placards, one of which read: “Farewell to our true champion of humanity[:] Malcolm Fraser.”<sup>215</sup> I honor Fraser, but not because he opened our borders to fleeing boat people coming in numbers in the tens of thousands. He didn’t. He secured the borders, and then, as novelist Tim Winton put it, he led the nation in opening “our arms and hearts to tens of thousands” of refugees.<sup>216</sup> Winton is wrong to claim that Fraser welcomed the boats. Rather, Winton is right to proclaim:

I was proud of my country, then, proud of the man who made it happen, Malcolm Fraser, whose greatness shames those who’ve followed him in the job. Those were the days when a leader drew the people up and asked the best of them and despite their misgivings, Australians rose to the challenge. And I want to honour his memory today.<sup>217</sup>

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<sup>210</sup> *Id.*

<sup>211</sup> *Id.*

<sup>212</sup> *Id.*

<sup>213</sup> *See id.*

<sup>214</sup> *See id.*

<sup>215</sup> John Ferguson & Tessa Akerman, *Malcolm Fraser Funeral: Farewell to a Champion of Humanity*, AUSTRALIAN (Mar. 27, 2015), <http://www.theaustralian.com.au/in-depth/malcolm-fraser/malcolm-fraser-funeral-farewell-to-a-champion-of-humanity/story-fnstaz0z-1227281240705?sv=ad9b9a33de536461f4368d621feea789> [https://perma.cc/JQU8-2CUZ].

<sup>216</sup> Tim Winton, *Tim Winton’s Palm Sunday Plea: Start the Soul-Searching Australia*, SYDNEY MORNING HERALD (Mar. 29, 2015), <http://www.smh.com.au/comment/tim-wintons-palm-sunday-plea-start-the-soulsearching-australia-20150328-1ma5so.html> [https://perma.cc/JP5U-FL93].

<sup>217</sup> *Id.*

By seeking the right balance between compassion and realism, between the human rights of asylum seekers and the national interest of a rich democratic country, we might find as much guidance from the memory of the last generation of refugees in their honoring of the last generation of political leaders who tried to forge a politically acceptable solution that was both compassionate and fair to the many who were seeking asylum. In a country like Australia, I have concluded that stopping the boats is a precondition to finding a politically acceptable, compassionate, and fair solution. The boats will be stopped. But they need to be stopped decently and fairly so that the Australian community might then be more generous in opening the doors to a higher quota of refugees and funding the international agencies and other governments caring for asylum seekers in transit. As one of the richest, most democratic countries in Southeast Asia, Australia will always be an attractive destination for some of the 51,000,000 displaced persons in our world.<sup>218</sup>

Mary Ellen O'Connell concludes her book, *The Power and Purpose of International Law*, with the observation:

International law needs improvement, however, not demolition, because it remains the single, generally accepted means to solve the world's problems. These problems will not be solved by armed conflict or the imposition of a single ideology or religion. Through international law diverse cultures can reach consensus about the moral norms that we should commonly live by. People everywhere believe in law, believe in this alternative to force, as they believe in higher things. They want the power of law to be used to achieve the community's most important common goals. International law reflects that the international community's shared goals today are peace, respect for human rights, prosperity, and the protection of the natural environment.<sup>219</sup>

## VII. THE CONTINUED NEED FOR INTERNATIONAL COOPERATION

International law, statesmanship, moral leadership by civil society, and the churches can all contribute to developing consensus about the moral norms

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<sup>218</sup> See UNHCR, WORLD REFUGEE DAY, *supra* note 38. The CIA World Factbook places Australia's GDP (PPP) at twentieth worldwide, ranking only behind Indonesia among Southeast Asian countries. See *The World Factbook: Country Comparison: GDP (Purchasing Power Parity)*, CIA, <https://www.cia.gov/library/publications/the-world-factbook/rankorder/2001rank.html> [<https://perma.cc/465T-KYV6>] (last visited Oct. 28, 2015). *The Economist's* Intelligence Unit ranks Australia as one of the world's most democratic states, far surpassing all of its neighbors except New Zealand. ECONOMIST INTELLIGENCE UNIT, DEMOCRACY INDEX 2014: DEMOCRACY AND ITS DISCONTENTS 4 (2015), [https://www.eiu.com/public/topical\\_report.aspx?campaignid=Democracy0115](https://www.eiu.com/public/topical_report.aspx?campaignid=Democracy0115) [<https://perma.cc/CR37-Y948>].

<sup>219</sup> MARY ELLEN O'CONNELL, *THE POWER AND PURPOSE OF INTERNATIONAL LAW* 370 (2008) (footnote omitted).

that we should commonly live by. At the same time, it is important to secure our national borders while being responsive to our obligations to those less fortunate than us just because they find themselves on the wrong side of our borders plagued by persecution. I return to Australia accepting that my political leaders will always maintain a commitment to stopping the boats, no matter what political party they represent; but I return insisting that there is a need for international cooperation to determine how decently to stop the boats while providing an enhanced commitment to the orderly transfer of an increased number of refugees across our border so that they might live safe and fulfilling lives contributing to the life of the nation.

This cannot be done in Australia until we shut down the processing centers on Nauru and on Manus Island and accept that people should only be held in detention while issues of identity, security, and health are determined. We must negotiate arrangements with Indonesia, India, and any other transit countries to which asylum seekers are being returned, and replicate the new European regulation:

No person shall, in contravention of the principle of *non-refoulement*, be disembarked in, forced to enter, conducted to or otherwise handed over to the authorities of a country where, inter alia, there is a serious risk that he or she would be subjected to the death penalty, torture, persecution or other inhuman or degrading treatment or punishment, or where his or her life or freedom would be threatened on account of his or her race, religion, nationality, sexual orientation, membership of a particular social group or political opinion, or from which there is a serious risk of an expulsion, removal or extradition to another country in contravention of the principle of *non-refoulement*.<sup>220</sup>

It might then be possible for Australian officials to conduct prompt, reliable onboard assessments of asylum seekers on vessels to determine whether it is appropriate to return them to their last port of call, even without the need for an onboard international lawyer to conduct any sort of “framing” exercise.<sup>221</sup> It should then be possible to avoid the recent obscene scenario of 157 persons being detained on the high seas for a month, regardless of whether or not the *non-refoulement* obligation applies extra-territorially.<sup>222</sup>

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<sup>220</sup> Regulation 656/2014 of the European Parliament and of the Council of 15 May 2014, Establishing Rules for the Surveillance of the External Sea Borders in the Context of Operational Cooperation Coordinated by the European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union, art. 4, 2014 O.J. (L 189) 93.

<sup>221</sup> Cf. Goodwin-Gill, *supra* note 111, at 653–55.

<sup>222</sup> See *supra* notes 143–147 and accompanying text.



International law has its place in helping to change the policy settings of governments and to redirect the public debate. No doubt the *Hirsi* decision helped contribute to the development of thinking in Europe culminating in recent regulation for dealing with boat people coming across the Mediterranean.<sup>223</sup> It remains to be seen how effective Frontex Operation Triton is both at dissuading people from setting out on boats in the first place and then rescuing them when they do.<sup>224</sup> With 280,000 people having entered the EU illegally in 2014, it is no surprise that the EU is now experimenting with its own externalized border, seeking to have Niger, Tunisia, Egypt, Morocco, and Turkey pre-screen intending migrants.<sup>225</sup> The United Kingdom continues to be agnostic about the utility of proactive interception and rescue missions on the Mediterranean.<sup>226</sup> When Operation Triton was being established, Baroness Anelay, the Minister of State, Foreign, and Commonwealth Office, told the House of Lords:

We do not support planned search and rescue operations in the Mediterranean. We believe that they create an unintended “pull factor”, encouraging more migrants to attempt the dangerous sea crossing and thereby leading to more tragic and unnecessary deaths. The Government believes the most effective way to prevent refugees and migrants attempting this dangerous crossing is to focus our attention on countries of origin and transit, as well as taking steps to fight the people smugglers who wilfully [sic] put lives at risk by packing migrants into unseaworthy boats.<sup>227</sup>

The Spanish Parliament legislated to allow “hot returns” of irregular migrants at the Spanish enclaves of Ceuta and Melilla in North Africa in order to prevent illegal immigration into Spain, and Spanish border police and Moroccan forces guard the borders of these enclaves.<sup>228</sup> Stefan Kessler, the Europe Senior Policy Officer for the Jesuit Refugee Service, said, “There is the concrete danger that persons will be physically prevented from reaching the border

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<sup>223</sup> See *supra* notes 156–167 and accompanying text; Brennan, *The Politics of Popular Evil and Untrendy Truth*, *supra* note 61.

<sup>224</sup> See Agnieszka Flak & Helen Popper, *Nearly 4,700 Migrants Rescued off Libya Coast: Italian Coastguard*, REUTERS (Sept. 19, 2015), <http://www.reuters.com/article/2015/09/19/us-europe-migrants-italy-idUSKCN0RJ0PG20150919> [<https://perma.cc/9DW8-8CBL>]; Wladimir Pantaleone, *More Than 200 Feared Dead in Sinking of Migrant Boat in Mediterranean*, REUTERS (Aug. 6, 2015), <http://uk.reuters.com/article/2015/08/06/uk-europe-migrants-italy-idUKKCN0QB0SN20150806> [<https://perma.cc/35JV-A7YB>].

<sup>225</sup> See Lorne Cook, *African Envoy Expresses Concerns over EU Migrant Center Plans*, SAN DIEGO UNION-TRIBUNE (Apr. 1, 2015), <http://www.sandiegouniontribune.com/news/2015/apr/01/african-envoy-expresses-concern-over-eu-migrant/> [<https://perma.cc/5AU3-8LTN>].

<sup>226</sup> See 756 Parl Deb HL (5th ser.) (2014) col. WA41 (UK).

<sup>227</sup> *Id.*

<sup>228</sup> See *Spain: Legalising Human Rights Violations*, JESUIT REFUGEE SERV. EUR. (Mar. 31, 2015), [http://www.jrseurope.org/news\\_detail?TN=NEWS-20150327080225](http://www.jrseurope.org/news_detail?TN=NEWS-20150327080225) [<https://perma.cc/3KGD-FEVS>].

crossing points and therefore will be blocked from lodging a protection claim.<sup>229</sup>

When considering the mission of international lawyers trying to humanize these externalized borders, Martii Koskeniemi's prescient remarks come to mind:

International law increasingly appears as that which resists being reduced to a technique of governance. When international lawyers are interviewed on the Iraqi war, or on torture, or on trade and environment, on poverty and disease in Africa—as they increasingly are—they are not expected to engage in hair-splitting technical analyses. Instead, they are called upon to soothe anxious souls, to give voice to frustration and outrage. Moral pathos and religion frequently fail as vocabularies of engagement, providers of 'empty signifiers' for expressing commitment and solidarity. Foreign policy may connote party rule. This is why international law may often appear as the only available surface over which managerial governance may be challenged, the sole vocabulary with a horizon of transcendence—even if, or perhaps precisely because, that horizon is not easily translated into another institutional project. I often think of international law as a kind of secular faith.<sup>230</sup>

None of us would want more realistic and more decent options in these most toxic of times to be forfeited simply because there is a new emerging fundamentalism being preached by the most respected high priests of international law. It is time to concede that none of us has a right to enter another country and that all of us have the obligation not to return anyone presenting at our border to a situation of persecution, torture, or cruel punishment. Though I doubt the possibility that the EU would negotiate appropriate returns of asylum seekers to Libya in the foreseeable future, I continue to entertain the hope that Australia can negotiate appropriate returns to transit several countries—such as Indonesia for Iraqis, Afghans, and Iranians and India for Tamils—so that Australia might then decently extend the hand of welcome to more of the world's 51,000,000 displaced persons.

## CONCLUSION

For the moment, my country is failing to strike the right balance between human rights and the national interest. It is stopping the boats indecently, violating the human dignity of those being held in unsatisfactory conditions in

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<sup>229</sup> *Id.*

<sup>230</sup> Martii Koskeniemi, *The Fate of Public International Law: Between Technique and Politics*, 70 MOD. L. REV. 1, 30 (2007).

Papua New Guinea and on Nauru, and failing to ensure appropriate safeguards are in place for the return of asylum seekers to Indonesia. For as long as international lawyers claim that there is no possibility of a legally negotiated, regional agreement for safe returns (they argue that asylum seekers have a right of entry to Australia to seek asylum), the Australian government, the Australian Parliament, and the Australian courts will maintain, with impunity but with the occasional expression of outrage from international lawyers, a regime of returns insufficiently scrutinized for human rights compliance. I return to Australia accepting that the boats will continue to be stopped (no matter which political party is in power) but that they should be stopped decently and in compliance with the legal regime enunciated by the European Union. After all, such regime has to deal with a far more pressing issue but more searching supervision of the European Court of Human Rights and of the European Parliament, which has greater sensitivity to the human rights of asylum seekers than do their more pragmatic Australian colleagues.

By all means, stop the boats. But also close the facilities on Nauru and in Papua New Guinea. Abandon the Cambodian shipment plan. Negotiate a regional agreement for safe returns ensuring compliance with the *non-refoulement* obligation. Double the refugee and humanitarian component from 13,750 places to 27,000 places in the migration program, as recommended by the 2012 Expert Panel.<sup>231</sup> Encourage further community participation in a refugee resettlement scheme that allows refugee communities and their supporters to increase the number of refugees resettled without taking the places of those refugees who would come anyway without community sponsorship. Why not increase the humanitarian program to at least the 20,000 places, which were guaranteed prior to the election of the Abbott Government? And provide another 7,000 places for community-sponsored refugees.

I agree with novelist Tim Winton that there is a need for countries like Australia to turn back, to “[r]aise us back up to our best selves.”<sup>232</sup> That can best be done by securing our borders and increasing our commitment to orderly resettlement of more refugees, rather than opening the borders and undermining the community’s commitment to further assisting more refugees who are suffering displacement.

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<sup>231</sup> See HOUSTON ET AL., *supra* note 26.

<sup>232</sup> See Winton, *supra* note 216.