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## 9 Courting disaster?

Regional agreements for 'protection elsewhere' and the courts

*Penelope Mathew*

### Introduction

Unauthorised migration (migration that does not comply with national immigration laws) occurs for a variety of reasons, some of which are recognised and protected by international law, while others are not. Some migrants may arrive with a lawful status (a visa or entry permit, for example) but lose it subsequently. This commonly occurs in Australia, as visitors overstay their visas. Others will be unable to secure entry under domestic law for their desired purposes. Impoverished Mexicans desperate for employment in the United States may decide to enter the United States clandestinely, for example.

The focus of this chapter is refugees and people seeking protection as refugees ('asylum seekers'). Refugees are people who must be granted protection from human rights violations at home; they too, however, will find it difficult to migrate in conformity with national immigration laws, because a person is only a refugee once they have crossed an international border and because many countries deliberately shield themselves from refugee flows. Consequently, people seeking legal status as refugees frequently have to resort to people smugglers in order to get the protection they need. They are then unfairly labelled as illegal or criminal in public discourse, along with the people smugglers.

This chapter examines some regional and bilateral agreements that attempt to ensure that refugees and asylum seekers stay in the country to which they first flee or are returned to that country. One of the problems with these regional agreements is that refugee rights are neither universally accepted nor universally implemented and, as a consequence, these agreements pose risks for refugee rights that invite litigation. The important role of the courts in protecting refugee rights from the potentially corrosive effects of these agreements will be explored.

The chapter develops as follows. First, the phenomenon of regionalism in refugee protection is briefly examined. Then the agreements subjected to judicial scrutiny in a number of specific court cases are discussed. The

chapter turns next to look at two court decisions that examine the extent to which participation in relevant treaties has been accepted as a sufficient guarantee of refugee rights, particularly the cardinal prohibition on torture and related ill treatment. The chapter then examines two further decisions that considered whether rights beyond the prohibition on torture and return to a place of persecution must be guaranteed for refugees. Some observations about the role of the courts and their impact on the politics of regionalism conclude the chapter.

### Regionalism in refugee protection

The first 'universal' refugee treaty – the 1951 Convention Relating to the Status of Refugees (Refugee Convention)<sup>2</sup> – began life as a response to a regional refugee problem. Its definition of a refugee was designed to protect those displaced as a result of World War II and its aftermath. A person was only a refugee because of events occurring before 1 January 1951, and states that were party to the convention had the option of further limiting their obligations to refugees displaced as a result of events in Europe. The definition – which encompassed people who were outside their countries of origin owing to a well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion – was backward-looking. As a result, regional agreements with broader definitions of a refugee have been adopted in Africa and the Americas in order to respond to the experiences of refugees in those regions.<sup>3</sup>

The Refugee Convention did not, however, seek to limit the parties responsible for sheltering refugees to European countries – quite the contrary. The movement of refugees is one aspect of migration that requires a global response. Individuals flee for their lives from many regions of the world, effectively asserting their right to seek asylum under Article 14 of the Universal Declaration of Human Rights.<sup>4</sup> In 1967, the Protocol relating to the

2 Convention relating to the Status of Refugees, opened for signature 28 July 1951, 189 UNTS 150 (entered into force 22 April 1954).

3 *Organization of African Unity Convention Governing the Specific Aspects of Refugee Problems in Africa*, opened for signature 10 September 1969, 1001 UNTS 45 (entered into force 20 June 1974) (African Union Refugee Convention); *Cartagena Declaration on Refugees* (adopted by the Colloquium on the International Protection of Refugees in Central America, Mexico and Panama, 22 November 1984) in 'Annual Report of the Inter-American Commission on Human Rights' (1984-85) OAS Doc OEA. /Ser.L/V/II.66/doc.10, rev 1, 190-3.

4 GA Res 217A (III), UN GAOR, 3rd sess, 183rd plen mtg, UN Doc A/810 (10 December 1948).

Status of Refugees (Refugee Protocol)<sup>5</sup> lifted the temporal and geographic restrictions on the definition, ensuring that the definition in the Convention applied to refugees from anywhere and into the future. If refugees are to be fairly treated the world over, it is important to have a universal definition of refugee-hood that is implemented uniformly and for refugees' rights to be observed everywhere. However, while the Refugee Convention now protects refugees from every country, the Convention and Protocol have not yet attracted universal support from countries. Many Asian countries and Middle Eastern countries are not party to the Convention.

The coverage of the Refugee Convention might be described as incomplete in other ways, too. Nowhere does it say that any particular country is bound to guarantee entry to its territory, nor does the Convention contain any legally binding obligation to share responsibility for refugees. Many countries have adopted mechanisms, such as carrier sanctions (penalties on airlines, for example) and visa requirements for persons from refugee-generating countries, to prevent the arrival of asylum seekers in their territories in the hope of avoiding all responsibility for them. Some countries have also adopted regional or bilateral agreements where the government in one country will return refugees to another country.

These agreements might be justified as long as refugees are protected somewhere; then there would be no problem with returning or sending refugees to another country. This is sometimes described as 'protection elsewhere' (Foster 2007: 230-237). 'Protection elsewhere' does not have a firm textual footing in the Refugee Convention, which says very little about sending refugees and asylum seekers elsewhere. The cardinal obligation imposed by the treaty is the obligation of *non-refoulement* – namely the obligation not to return a refugee to a place of persecution (Article 33). The only references to a requirement that refugees or asylum seekers go to safe third countries are in Articles 31 and 32. Article 32 prohibits the expulsion of a 'lawfully present' refugee except on grounds of national security or public order, while Article 31 is a safeguard against unnecessary restrictions on the movement of unauthorised asylum seekers, allowing restrictions to be imposed only until his/her status is regularised *or* the person gains admission to another country. In each case, the individual concerned is to be given 'a reasonable period' to obtain admission to another country.

More importantly, it is evident that refugees are not always protected in the places to which they are sent under these agreements. In addition,

5 Protocol relating to the Status of Refugees, opened for signature 31 January 1967, 606 UNTS 267 (entered into force 4 October 1967).

these agreements often reflect power imbalances in which richer states return refugees to poorer states, which may be less capable of providing for refugees, thereby operating as a containment device. Matthew Gibney describes this phenomenon as ‘engineered regionalism’ (2007: 58) because the states of the Global North intervene to prevent the globalisation of asylum.

### Engineered regionalism in Europe and the Asia-Pacific

One example of a regional agreement is the Dublin Regulation.<sup>6</sup> Pursuant to this agreement, the member states of the European Union (EU) agreed that responsibility generally rests with the first European state to which an unauthorised migrant from a non-EU country – that is, one who arrives without a visa or other document as required by national immigration law – gains physical access.<sup>7</sup> The Dublin Regulation reflects an internal division between heartland and periphery, haves and have-nots, providers and the deprived. After the collapse of the Berlin Wall, Germany, along with other similarly situated countries, pushed for arrangements to minimise the potential pull factor of strong economies, which were perceived to result in abuse of the asylum process by economic migrants (Gibney 2004: 101-102). The intra-European arrangements do not share responsibility on the basis of capacity, but rather leave the ‘burden’<sup>8</sup> where it lies.<sup>9</sup>

It is assumed that it is safe for EU member states to rely on each other in this manner, because the EU has supposedly effectively harmonised the treatment of refugees and asylum seekers throughout the region and is thought to be a safe place for third-country nationals. In addition to the Dublin Regulation, there are three key EU instruments governing the

6 The version of the regulation relevant to the discussion of the case law in this chapter is the ‘Dublin II Regulation’: *Council Regulation (EC) No. 343/2003 of 18 February 2003 establishing the criteria and mechanisms for determining the member state responsible for examining an asylum application lodged in one of the member states by a third-country national* [2003] OJ L 50/1 (Dublin II Regulation).

7 Dublin II Regulation, article 10.

8 It has long been recognised that it is derogatory to speak of refugees as a burden, and that the term responsibility is preferable and also more descriptive of the ways in which all states can contribute to solutions for refugees, as responsibility-sharing can occur through financial support as well as the physical accommodation of people.

9 On the question of why capacity should be the criterion, see Kritzman-Amir (2009).

treatment of refugees and asylum seekers – the ‘Qualification Directive’,<sup>10</sup> the ‘Reception Directive’<sup>11</sup> and the ‘Procedures Directive’<sup>12</sup> – that seek to harmonise the application of the Refugee Convention in EU states. However, Greece, which forms part of the southern gateway to Europe, has not protected refugees, resulting in an important decision from the European Court of Human Rights – *M.S.S. v Belgium and Greece*<sup>13</sup> – as well as one from the Court of Justice of the European Union: *N.S. v Secretary of State for the Home Department* and *M.E. and others v Refugee Applications Commissioner, Minister for Justice, Equality and Law Reform*.<sup>14</sup>

The Dublin Regulation also permits EU states to send asylum seekers to countries outside the EU. Not surprisingly, states at the gateway to Europe have sought to deflect refugees by sending them to countries outside the region. Italy negotiated an agreement with Libya whereby migrants and asylum seekers embarking on sea journeys to Italy were intercepted and returned to Libya.<sup>15</sup> Libya does not have a domestic asylum procedure. Irregular migrants in Libya faced appalling conditions of detention as well as precarious living conditions within the Libyan community. There was also the ever-present possibility of being returned to their countries of origin (such as Eritrea, Somalia and Nigeria). The European Court of Human Rights delivered another strong decision concerning this agreement in *Hirsi*

10 *Directive 2011/95/EU of the European Parliament and of the Council of 13 December 2011 on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection, and for the content of the protection granted* [2011] OJ L 337/9 (Recast Qualification Directive).

11 *Directive 2013/33/EU of the European Parliament and of the Council of 26 June 2013 laying down standards for the reception of applicants for international protection* [2013] OJ L 180/96 (Recast Reception Directive).

12 *Directive 2013/32/EU of the European Parliament and of the Council of 26 June 2013 on common procedures for granting and withdrawing international protection* [2013] OJ L 180/60 (Recast Procedures Directive).

13 European Court of Human Rights, Grand Chamber, Application No 30696/09, 21 January 2011.

14 Court of Justice of the European Union, C-411/10 and C-493/10, 21 December 2011 (*N.S.* and *M.E.*).

15 See the description of the bilateral cooperation agreement signed in Tripoli on 29 December 2007 in *Hirsi Jamaa and Others v Italy* (ECtHR, Grand Chamber, Application No 27765/09, 23 February 2012)[5] (*Hirsi v Italy*).

*v Italy*.<sup>16</sup> A new version of the Dublin Regulation (the Dublin III Regulation) reflects some of the lessons learned from this case law.<sup>17</sup>

Drawing in part on the European practice, Australia has adopted its own version of 'protection elsewhere'. Operating in the Asia-Pacific region in which most states are not party to the Refugee Convention and/or Protocol, unlike the EU, Australia has had to offer incentives to other countries in the region in order to send or return asylum seekers to them. For example, during the years of the Liberal-National Howard government, Australia contracted Nauru and Papua New Guinea to house, or rather detain, asylum seekers while their claims to refugee status were heard. In addition to paying for the detention centres, development aid was offered as an incentive (see Fry 2002). These arrangements, known as the 'Pacific Solution', concluded in 2008 when the Labor prime minister closed the overseas detention centres. Following an increase in boat arrivals, however, the opposition insisted that Labor government policies were to blame and suggested reviving the Pacific Solution. Eventually, the government (led by Julia Gillard) capitulated, and asylum seekers are again being detained in Nauru and Papua New Guinea. However, it is questionable whether the new version of the Pacific Solution will have the impact it was perceived to have in the first iteration, when there was a marked drop in boat arrivals (see chapter 8 this volume).<sup>18</sup> Many of the refugees sent to Nauru and Papua New Guinea had to be resettled in Australia, and the arrangements were very costly, both financially and in terms of the mental health of the refugees and asylum seekers concerned (Bem et al. 2007).

Prior to its decision to return to the Pacific Solution, the Labor government proposed as an alternative that 800 asylum seekers be sent to Malaysia in exchange for resettling in Australia 4,000 refugees recognised by the United Nations High Commissioner for Refugees in Malaysia.<sup>19</sup> This resulted in a challenge before the Australian High Court in the cases of *Plaintiff M70/2011 v Minister for Immigration and Citizenship*; *Plaintiff M106 of 2011*

16 *Hirsi v Italy* (ECtHR, Grand Chamber, Application No 27765/09, 23 February 2012).

17 *Regulation (EU) No 604/2103 of the European Parliament and of the Council of 26 June 2013 establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person* [2013] OJ L 180/31 (Dublin III Regulation).

18 For the statistics on boat arrivals, see Phillips & Spinks (2012).

19 Australian minister for immigration and citizenship, 'Arrangement between the Government of Australia and the Government of Malaysia on Transfer and Resettlement', signed 25 July 2011, [www.minister.immi.gov.au/media/media-releases/\\_pdf/20110725-arrangement-malaysia-aust.pdf](http://www.minister.immi.gov.au/media/media-releases/_pdf/20110725-arrangement-malaysia-aust.pdf), 3-4 (Australia-Malaysia Agreement).

*v Minister for Immigration and Citizenship* (*M70*).<sup>20</sup> The decision in these cases, which required that any country in which offshore processing was undertaken have *legal* protections in place for refugees and asylum seekers as a matter of international or domestic law,<sup>21</sup> was circumvented with the passage of the *Migration Legislation Amendment (Regional Processing and Other Measures) Act 2012* (Commonwealth of Australia). This legislation implements one recommendation by an expert panel convened by the government following protracted, acrimonious debate over unauthorized boat arrivals, to

provide advice and recommendations to the Government on policy options available, and in its considered opinion, the efficacy of such options, to prevent asylum-seekers risking their lives on dangerous boat journeys to Australia. (Expert Panel on Asylum Seekers 2012: 9)

Although *M70* was overturned, the decision has some important things to say about the way in which international refugee law is to be applied. Its overturn through legislation also raises serious questions about the role of law in refugee protection.

### **See no evil: Does participation in international treaties justify an assumption of compliance?**

One difference between the EU arrangements and the Australian bilateral agreements is that EU countries seek to rely on the international legal commitments of other states in order to comply with their own obligations, while Australia has often sought to rely on countries that have not accepted similar international legal obligations. Indeed, the *Migration Act 1958* (Commonwealth of Australia) has almost been stripped of any references to human rights protection in response to the High Court's decision that law is a *sina qua non* of refugee protection. There are problems with each strategy. Treaty participation is a necessary but not sufficient requirement for refugee protection.

<sup>20</sup> *Plaintiff M70/2011 v Minister for Immigration and Citizenship; Plaintiff M106 of 2011 v Minister for Immigration and Citizenship* (2011) 244 CLR 144 (*M70*).

<sup>21</sup> *M70* (2011) 244 CLR 144 [61]-[65] (French CJ); [117]-[120] (Gummow, Hayne, Crennan and Bell JJ); [240]-[244] (Kiefel J).



The question of whether the participation of supposedly safe third countries in relevant international and regional treaties is sufficient for EU states to acquit their own obligations was tested in *M.S.S. v Belgium and Greece*.<sup>22</sup> In this case, the Grand Chamber of the European Court of Human Rights examined the situation of asylum seekers returned from Belgium to Greece under the Dublin Regulation. The Court undertook a detailed examination of material from non-governmental organisations concerning the situation in Greece and held that Belgium knew or ought to have known that Greece was not meeting its international commitments.<sup>23</sup> The Court held, *inter alia*, that both Greece and Belgium were liable for violations of Article 3 of the European Convention on Human Rights (ECHR),<sup>24</sup> which prohibits torture or inhuman or degrading treatment or punishment, as a result of the substandard refugee status determination procedure and conditions of detention in which many asylum seekers were held in Greece and the destitution they were subjected to when living in the Greek community. The case is significant because it confirms that in certain circumstances, economic deprivation may amount to a violation of Article 3 and that EU states cannot blindly rely on the presumption of safety that underpins the EU instruments governing asylum. This offers a significant safety net for the protection of refugees and asylum seekers' rights.

In *Hirsi v Italy*,<sup>25</sup> the Court was forced to venture further afield and consider whether Italy could return asylum seekers to Libya under a bilateral agreement that permitted the interception of asylum seekers at sea. Italy's justification of its action included two major points.<sup>26</sup> First, Libya could be assumed to live up to its obligations<sup>27</sup> – in this case, not the Refugee Convention as Libya is not a party, but the African Union Refugee Convention,<sup>28</sup> the International Covenant on Civil and Political Rights<sup>29</sup> and the Convention

22 *M.S.S. v Belgium and Greece* (ECtHR, Grand Chamber, App No 30696/09, 21 January 2011).

23 *M.S.S. v Belgium and Greece* (ECtHR, Grand Chamber, App No 30696/09, 21 January 2011) [348].

24 *European Convention on Human Rights*, ETS 5.

25 *Hirsi v Italy* (ECtHR, Grand Chamber, Application No 27765/09, 23 February 2012).

26 There were also a number of smaller arguments, such as whether the applicants had asked for protection and whether the lawyers had proper power of attorney to act for the applicants.

27 *Hirsi v Italy* (ECtHR, Grand Chamber, Application No 27765/09, 23 February 2012) [97]–[98].

28 *Organization of African Unity Convention Governing the Specific Aspects of Refugee Problems in Africa*, opened for signature 10 September 1969, 1001 UNTS 45 (entered into force 20 June 1974).

29 *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976).

against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment<sup>30</sup> – despite all the evidence to the contrary.

Second, Italy argued it was not exercising ‘jurisdiction’ over the asylum seekers during the interception operations but merely a ‘rescue’.<sup>31</sup> Consequently, Italy took the view that its own human rights obligations, including those under the ECHR, did not accompany its border personnel onto the High Seas. Ironically, therefore, Italy sought to use its law enforcement personnel to avoid the law.

As in *M.S.S. v Belgium and Greece*, the Grand Chamber found that Italy must have known or should have known that the interception programme would result in the violation of its obligations.<sup>32</sup> The Court also emphatically rejected the characterisation of the High Seas as

an area outside the law where individuals are covered by no legal system capable of affording them enjoyment of the rights and guarantees protected by the Convention which the States have undertaken to secure to everyone within their jurisdiction.<sup>33</sup>

The Court found, unanimously, that Italy was enforcing its law by exercising its jurisdiction over the migrants and asylum seekers and controlling its border. Consequently, Italy had violated the prohibition on collective expulsion contained in the fourth protocol to the ECHR, along with Article 3 of the ECHR.<sup>34</sup>

This is a new development. It was quite possible that the Court might have distinguished between *non-refoulement* and expulsion. With the exception of the ruling to the contrary by the US Supreme Court in *Sale v Haitian Centers Council*,<sup>35</sup> it has long been accepted that *non-refoulement* is a broad term encompassing repulsion from territory and extra-territorial in scope (Goodwin-Gill & McAdam 2007: 246-250; Hathaway 2005: 163, 336-337). By contrast, expulsion connotes pushing out of territory and therefore implies entry to it. The Court’s case law had previously only considered expulsions from within state territory.

30 *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, opened for signature 10 December 1984, 1465 UNTS 85 (entered into force 26 June 1987).

31 *Hirsi v Italy* (ECtHR, Grand Chamber, Application No 27765/09, 23 February 2012) [65].

32 *Hirsi v Italy* [131] & [156].

33 *Hirsi v Italy* [178].

34 *Hirsi v Italy* [182] and *dispositif*; points 6, 7, 8 & 9.

35 *Sale v Haitian Centers Council* 509 US 155 (1993).

In both *M.S.S. v Belgium and Greece* and *Hirsi v Italy*, the Court did not permit countries to operate on the basis of mutual confidence by a cursory look at whether the supposedly safe third country concerned participates in relevant international or regional treaties. Nor did it permit European countries to avoid their obligations by acting extraterritorially. Instead, the Court looked at the practice on the ground in the purported safe third countries. Consequently, neither Greece nor Libya's treatment of migrants and asylum seekers was seen to conform to relevant obligations, while Italy's obligations followed it out onto the High Seas.

### **Beyond the prohibitions on torture and *refoulement* to persecution**

The Court's focus in *M.S.S. v Belgium and Greece* and *Hirsi v Italy* was on the prohibition of *refoulement* to a place of torture or related ill treatment. It is well established that the prohibition on torture and related ill treatment includes a *non-refoulement* norm. Importantly, though, notwithstanding the Court's evident willingness to include certain forms of economic deprivation within that prohibition, there is a threshold of severity that must be satisfied which may not encompass all human rights violations. It may be questionable whether denial of any and every right, even on the discriminatory basis that the persons concerned are refugees or asylum seekers, meets the threshold of severity. Denial of the empowerment right to an education, particularly primary and secondary education, may well be regarded as degrading treatment even if it is not as immediately severe as the destitution suffered in *M.S.S. v Belgium and Greece*, but how would courts respond if governments denied refugees the right to join trade unions? Frequently, the denial of refugee rights is cumulative, but it is possible to think of hypotheticals in which only particular rights are targeted, which, on their own, might not cross the threshold of inhuman or degrading treatment or punishment.

There is also controversy as to the list of rights to which a *non-refoulement* obligation attaches. *Non-refoulement* is essentially a device to avoid complicity in harm<sup>36</sup> by preventing return while a person remains within state

36 As the framers of the Refugee Convention put it, '[t]he turning back of a refugee to the frontiers of a country where his life or freedom would be threatened on account of his race, religion, nationality or political opinion would be tantamount to delivering him into the hands of his persecutors.' *Report of the Ad Hoc Committee on Statelessness and Related Problems*, Lake

jurisdiction. However, only certain rights – those apparently causing irreparable harm or, in the case of many ECHR rights, ‘flagrant denials’ of the right – are accepted as carrying *non-refoulement* obligations.<sup>37</sup>

With respect to other rights, the situation is generally different. Although it has been argued that the obligation of *non-refoulement* may extend to many human rights on the basis of a ‘complicity principle’ whereby any state that sends a person back to a place where their rights would be violated is also held responsible for the violations (Legomsky 2003), the extension of clear obligations of *non-refoulement* has in fact happened incrementally. Explicit treaty norms have been adopted one by one (the Refugee Convention was followed by Article 3 of the Convention against Torture, for example) and judicial precedents implying *non-refoulement* norms into human rights provisions (such as the European Court of Human Rights’ decision in *Soering v United Kingdom*)<sup>38</sup> have accumulated slowly.

The argument that every human right carries a *non-refoulement* obligation would have a significant impact on state sovereignty over immigration and cannot, unfortunately, be readily accepted (Battjes 2009). Generally, the sending state does not incur responsibility through the mere act of sending someone away. Absent some more active participation – for example, a continued exercise of jurisdiction in the sense of effective control over the person,<sup>39</sup> or an act of aiding and abetting a human rights violation<sup>40</sup> – it is the responsibility of the receiving state to comply with human rights. Therefore, a different explanation as to why international law requires respect for refugee rights beyond the fundamental protection from return to a place of persecution, as a prerequisite for the treatment of a country as a safe third country, needs to be supplied. Without such justification, governments may take an extreme and troubling approach to the protection of refugees, which could leave refugees without any rights protection other

Success, New York, UN ESCOR, UN Doc E/1618; UN Doc E/AC.35/5 (16 January–16 February 1950) annex II (*Comments on the draft convention*) 61.

37 For criticism of the thresholds, see Battjes (2009).

38 *Soering v United Kingdom* (1989) 161 Eur Court HR (ser A).

39 Human Rights Committee, *General Comment No 31: The Nature of the General Legal Obligation Imposed on States Parties to the Covenant*, 80th sess, UN Doc CCPR/C/21/Rev.1/Add.13 (29 March 2004) [10].

40 See Article 16 of the International Law Commission’s Draft Articles on Responsibility of States for Internationally Wrongful Acts, in *Report of the International Law Commission on the Work of Its Fifty-third Session*, UN GAOR, 56th sess, Supp. No 10, UN Doc A/56/10 (2001).

than the most basic protection from active *refoulement*, which is exactly the position adopted by the Australian Government Solicitor in *M70*.<sup>41</sup>

Over the years, the UNHCR and experts have adopted a reading of the Refugee Convention that seeks to shore up rather than diminish refugee protection. The executive committee of the UNHCR programme has recognised in several conclusions ('executive committee conclusions' or 'ExCom conclusions') that any country to which a refugee is sent must 'treat the asylum-seeker (asylum-seekers) in accordance with accepted international standards, ... ensure effective protection against *refoulement*, and ... provide the asylum-seeker (asylum-seekers) with the possibility to seek and enjoy asylum'.<sup>42</sup> An expert roundtable convened in Lisbon by the UNHCR came to a similar position.<sup>43</sup> More recently, the Michigan Guidelines on Protection Elsewhere (adopted by a group of experts and senior Michigan Law School students) stated that refugees should be entitled to all the rights guaranteed in Articles 2-34 of the Refugee Convention in any place to which they are sent (Hathaway 2007: 215). In this section of the chapter, two cases in which courts have grappled with this issue are examined: the Australian High Court's decision in *M70*<sup>44</sup> and the decision by the Court of Justice of the European Union (CJEU) in *N.S. and M.E.*<sup>45</sup>

### Swapping unauthorised asylum seekers for recognised refugees and the High Court's decision on 'protection elsewhere'

The Australian government's agreement with Malaysia reflected Australia's consternation over unauthorised asylum seekers arriving by boat as opposed to refugees screened in and resettled from countries of first asylum. Under this arrangement, Australia agreed that it would resettle 4,000 persons from Malaysia recognised by UNHCR as refugees in exchange for Malaysia accepting 800 asylum seekers who had arrived in Australia by

41 See the exchange between the Solicitor-General and Justice Gummow concerning Professor Hathaway's position: Transcript of Proceedings, *Plaintiff M70/2011 v Minister for Immigration and Citizenship; Plaintiff M106 of 2011 v Minister for Immigration and Citizenship* [2011] HCATrans 224 (23 August 2011).

42 This formulation in particular is found in UNHCR Executive Committee, Conclusion No 85 (XLIX), 'International Protection' (1998)[aa].

43 UNHCR, 'Summary Conclusions on the Concept of "Effective Protection" in the Context of Secondary Movements of Refugees and Asylum-Seekers' (Lisbon Expert Roundtable, 9-10 December 2002) (2003) [15.b].

44 *M70* (2011) 244 CLR 144.

45 *N.S. and M.E.* (CJEU, C-411/10 and C-493/10, 21 December 2011).

boat without visas. *M70*<sup>46</sup> involved two conjoined cases concerning asylum seekers due to be returned under the so-called Malaysia swap – one adult and one unaccompanied minor.

Malaysia is not a party to the Refugee Convention, the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, or the International Covenant on Civil and Political Rights, although it is a party to the Convention on the Rights of the Child.<sup>47</sup> Malaysia may be bound by a *non-refoulement* norm preventing return to a place of persecution as a matter of customary international law, and it is certainly bound by the customary and peremptory or *non-derogable* prohibition on *refoulement* to a place of torture.<sup>48</sup> In practice, however, Malaysia treats asylum seekers as illegal immigrants and does not have a domestic procedure for recognition of refugee status.

If it is impermissible to rely on another country's mere membership of a treaty in order to acquit a country's own obligation of *non-refoulement*, it seems foolhardy to rely on a customary legal rule in circumstances where there is no domestic legal framework implementing the customary rule and/or the practice of the state does not comply with it (Wood & McAdam 2012: 295). Unfortunately, many countries do not implement their international obligations in the domestic legal arena. The Lisbon Roundtable took the view that a non-party state could only be viewed as safe if it had adopted procedures 'akin' to those which are party to the convention.<sup>49</sup>

The High Court was required to consider whether the Australian minister had validly declared Malaysia to be a safe third country to which the asylum seekers could be sent, under s198A of the *Migration Act*. At the time of the Court's decision, section 198A(1) of the *Migration Act* permitted the

46 *M70* (2011) 244 CLR 144.

47 *Convention on the Rights of the Child*, opened for signature 20 November 1989, 1577 UNTS 3 (entered into force 2 September 1990).

48 The states parties to the Refugee Convention and Protocol have declared that *non-refoulement* is customary international law: UNHCR, 'Declaration of States Parties to the 1951 Convention and or Its 1967 Protocol relating to the Status of Refugees (as adopted at the Ministerial Meeting of States Parties in Geneva Switzerland on 13 December 2001), UN Doc HCR/MMSP/2001/09' (2002)[4]. Malaysia and some other countries in the Southeast Asian region pushed back boats during the Vietnamese refugee outflow, and they might conceivably argue they are 'persistent objectors' to any norm of customary international law and not bound by it. (This argument is not available in the case of the norm preventing return to a place of torture given its status as *jus cogens*).

49 UNHCR, 'Summary Conclusions ...' (2003), [15.e.].

transfer of asylum seekers to another country where the minister had made a declaration under s198A(3) that the country

- i. provides access, for persons seeking asylum, to effective procedures for assessing their need for protection; and
- ii. provides protection for persons seeking asylum, pending determination of their refugee status; and
- iii. provides protection to persons who are given refugee status, pending their voluntary repatriation to their country of origin or resettlement in another country; and
- iv. meets relevant human rights standards in providing that protection ...

Although this provision was used to transfer asylum seekers to Nauru and Papua New Guinea as part of the Howard government's version of the Pacific Solution, and Nauru was not then a party to the Refugee Convention, *M70*<sup>50</sup> was the first time the High Court considered a ministerial declaration of a country as safe under s198A. Consequently, one of the unknowns was the extent to which the declaration was judicially reviewable. The government argued that to comply with the section, the minister must have made an evaluative judgment, in good faith, concerning the criteria in s198A. Further, the government argued that the criteria required the minister to focus on the 'practical reality' or factual situation, which was supposedly evidenced by a Memorandum of Understanding (MOU) between Australia and Malaysia, an MOU that was specifically said to be non-binding.<sup>51</sup>

None of the six majority judges accepted that the minister could rely on what he hoped might occur on the basis of the MOU, which the minister's affidavit revealed as the true basis of his decision.<sup>52</sup> The minister had made his declaration on the inadequate assessment that Malaysia had made a 'significant conceptual shift in its thinking about how it wanted to treat refugees and asylum-seekers' and had 'begun the process of improving protection offered to such persons'.<sup>53</sup> The majority judges agreed that the criteria in s198A subparagraphs (i) to (iii) referred to 'protection', a legal

50 *M70* (2011) 244 CLR 144.

51 Australian minister for immigration and citizenship, 'Arrangement ...' signed 25 July 2011, Clause 16.

52 *M70* (2011) 244 CLR 144 [58]-[59] (French CJ).

53 Minister for immigration and citizenship and commonwealth of Australia, 'Submissions of the Defendants', Submission in *Plaintiff M70/2011 v Minister for Immigration and Citizenship; Plaintiff M106 of 2011 v Minister for Immigration and Citizenship*, Case No M70/2011; M106/2011, 18 August 2011 [84.3].



term of art (i.e. encompassing the scheme of recognised refugee rights in the Convention and the means to protect them), and therefore required the minister to have regard to the legal situation.<sup>54</sup> The question to be answered was whether Malaysia was bound by international law or its own domestic law to do all the things set out in the section.

This is a relatively easy question for a court to answer. While the content of customary international law presents some difficulties and Australian courts have been wary of it, it is easy for an Australian court to establish whether another country is party to a treaty, and foreign law may be proved as a fact before Australian courts. The majority found that the minister's declaration of Malaysia as a safe country for the purposes of s198A was invalid because Malaysia was not party to the Refugee Convention and had no domestic asylum procedure.<sup>55</sup> Four majority judges wrote a joint judgment in which they said that the criteria in s198A were meant to be a 'reflex' of Australia's international legal obligations and that any country to which asylum seekers were transferred would offer the same legal protection as Australia.<sup>56</sup>

The Court did not clearly indicate whether it would go beyond the criteria of treaty ratification or proof of domestic legal obligations and review whether or not a declared country implemented these laws in practice. To go beyond the legal situation and examine the facts on the ground is a slightly more difficult task for a domestic court to undertake, but certainly not impossible. It would have required the High Court to undertake the kind of scrutiny exercised by the European Court of Human Rights in *M.S.S. v Belgium and Greece*, where reports by non-governmental organisations and submissions from the UNHCR were accepted as showing that the human rights situation was substandard in Greece (the UNHCR was not party to the Malaysia agreement, but the regional office in Canberra had accepted the agreement as 'workable',<sup>57</sup> so it might have been interesting to see what evidence the organisation would have presented). Two judges, Chief Justice French and Justice Kiefel, indicated that s198A(3) required the minister to look at the facts on the ground as well as whether the legal protections were

54 *M70* (2011) 244 CLR 144 [61]-[65] (French CJ); [117]-[120] (Gummow, Hayne, Crennan and Bell JJ); [240]-[244] (Kiefel J).

55 *M70* (2011) 244 CLR 144 [66] (French CJ); [135]-[136] (Gummow, Hayne, Crennan and Bell JJ); [249]-[254] (Kiefel J).

56 *M70* (2011) 244 CLR 144 [118] (Gummow, Hayne, Crennan and Bell JJ).

57 *M70* (2011) 244 CLR 144 [25] (French CJ).



in place.<sup>58</sup> The majority simply noted that it was not necessary to decide this issue for the purposes of this case.<sup>59</sup>

Another unknown in *M70* was exactly what ‘human rights’ would need to be observed in a third country before the minister could declare it to be safe. The joint majority judgment dealt with this question by saying that,

when s 198A(3)(a)(iii) speaks of a country that “provides protection to persons who are given refugee status, pending their voluntary repatriation to their country of origin or resettlement in another country”, it refers to provision of protections of all of the kinds which parties to the Refugees Convention ... are bound to provide to such persons.<sup>60</sup>

Protection, in the view of the High Court, means the full scheme of rights protection contained in the Refugee Convention, not just the obligation of *non-refoulement*.

This scheme of protection is qualified, however. The Refugee Convention makes some rights conditional on refugees securing ‘lawful presence’ or ‘lawful stay’, for example (see Hathaway 2005; Mathew 2012). Very important rights, like the right to work, are conditioned in this way. The joint judgment avoided the controversy as to what rights must be met if the asylum seeker is transferred before they have had their status determined and been granted ‘lawful presence’ under Australian law, noting that it was unnecessary to decide the issue.<sup>61</sup> What mattered was that the Refugee Convention contained a scheme of rights beyond *non-refoulement* and that Australia’s legislation required any declared country to act as a reflex of those obligations.

Although the High Court was construing Australian legislation, not the Refugee Convention directly, the legislation was consistent with executive committee conclusions, and the judgment sheds light on what the international legal approach to refugee protection should be. If another country agrees to take the asylum seekers, then it should be required to take full responsibility and to allow the person to acquire the rights due to refugees lawfully present or lawfully staying in that country. Of course, this should

58 *M70* (2011) 244 CLR 144 [67] (French CJ); [245] (Kiefel J) suggesting that the minister might consider that the criteria were not met where, despite the law on the books, the human rights of asylum seekers were not protected in practice.

59 *M70* (2011) 244 CLR 144 [113]-[114], [124] (Gummow, Hayne, Crennan and Bell JJ).

60 *M70* (2011) 244 CLR 144 [119] (Gummow, Hayne, Crennan and Bell JJ).

61 *M70* (2011) 244 CLR 144 [117] (Gummow, Hayne, Crennan and Bell JJ).

mean recognition in domestic law that the persons concerned are lawfully present or staying.

This approach is logical if we are not to empty the Convention of nearly all content, whittling down the bill of rights for refugees to one obligation: the prohibition on physical return to a place of persecution. The absence of a right to enter any state party should not result in the divorce between the obligation of *non-refoulement* and the rest of the bill of rights. Although the framers were concerned to protect state sovereignty, it is highly unlikely that they could have foretold the Pacific Solution, where one country paid others to house refugees and asylum seekers, resulting in the violation of refugee rights through indefinite detention. Indeed, it is most unlikely that the framers could have envisaged that refugees could be sent to non-party states given the relative newness of the norm of *non-refoulement* and the fact that non-party states could not be expected to observe it. Hathaway cites a statement by the French representative at the Conference of Plenipotentiaries, which adopted the Refugee Convention, showing that in fact the framers expected that refugees would only be sent to other states parties and that refugee rights would be observed (Hathaway 2005: 328).

Unlike other foreigners, refugees are a partial exception to the sovereign prerogative over entry, in that they cannot be returned. It is therefore important, as Hathaway (2005: 331-333) has argued, to take a good faith approach to *non-refoulement* whereby at least those rights acquired at the time of arrival in a potential country of asylum are respected in any place to which the refugee is later sent. The Michigan Guidelines on Protection Elsewhere have gone a step further, stating that

any refugee transferred must benefit in the receiving state from all Convention rights to which he or she is entitled at the time of transfer. He or she must also acquire in the receiving state such additional rights as are mandated by the requirements of the Convention. (Hathaway 2007: 215)

As the High Court has helpfully framed the issue, any safe third country should operate as a 'legal reflex' of the sending country.

It is not a 'good faith' reading of the Convention to actively *prevent* refugees from acquiring lawful presence or stay, upon which so many rights in the Refugee Convention are predicated. Nor should a country be able to wash its hands of refugees and asylum seekers by placing them under the control of another country if it will not respect those rights (Foster 2007: 269-270). Many of the rights in the Refugee Convention, which are conditioned on factors such as lawful presence or stay, are just as vital to

refugee survival as physical *non-refoulement*. One example is the right to work. As the United States delegate on the ad hoc committee responsible for drafting much of the Convention said, ‘without the right to work, all other rights were meaningless.’<sup>62</sup> Survival cannot be guaranteed solely by the refusal to return refugees. Indeed, failure to accord refugee rights such as the right to work may amount to a *constructive* violation of the obligation of *non-refoulement*,<sup>63</sup> because it may cause a person to return home (Mathew 2012: 97-99).

It is therefore troubling that the Australian parliament’s response to the High Court’s decision has been to amend the *Migration Act* so as to delete most references to human rights. Under the *Migration Act* as amended, the minister simply designates a country as safe through a legislative instrument, because the minister thinks it is in the national interest to do so. Under s198AB(3)(a), the minister must have regard to whether or not the country has given Australia any assurances to the effect that:

- (i) the country will not expel or return a person taken to the country under section 198AD to another country where his or her life or freedom would be threatened on account of his or her race, religion, nationality, membership of a particular social group or political opinion; and
- (ii) the country will make an assessment, or permit an assessment to be made, of whether or not a person taken to the country under that section is covered by the definition of *refugee* in Article 1A of the Refugees Convention as amended by the Refugees Protocol.

The assurances do not have to be binding (s198AB(4)).

Either House of Parliament may choose not to approve the instrument on the basis that it disagrees with the decision to send refugees to the particular country concerned. However, it is clear that the legislators have tried to keep the courts’ role in scrutinising the legislative instrument to a minimum by reducing references to objective standards against which the minister’s decision may be assessed. It is also notable that the possibilities

62 Statement of Mr Henkin of the United States: UN Ad Hoc Committee on Refugees and Stateless Persons, *Ad Hoc Committee on Refugees and Stateless Persons, Second Session: Summary Record of the Thirty-Seventh Meeting Held at the Palais des Nations, Geneva, on Wednesday, 16 August 1950, at 3.00 p.m.*, UN Doc E/AC.32/SR.37 (26 September 1950).

63 For a recent decision in which the terminology ‘constructive *refoulement*’ is used, see *MA and others v. Director of Immigration*, HCAL 10/2010 and HCAL 73/2010 and HCAL 75/2010 and HCAL 81/2010 and HCAL 83/2010, Hong Kong: High Court, 6 January 2011, [82], [www.unhcr.org/refworld/docid/4f144c282.html](http://www.unhcr.org/refworld/docid/4f144c282.html).

for considering human rights during the legislative process were limited because of the haste in which the government wished to pass the new legislation.<sup>64</sup> It is concerning that people claiming refugee status – a surrogate for citizenship that enables protection by another country because their own country has failed to protect them – are treated in such an overtly politicised manner.

### The Court of Justice of the European Union and refugee rights under EU law

The Court of Justice of the European Union (CJEU) has also considered the question of what rights are owed to refugees beyond *non-refoulement* in a case involving the construction of the Dublin Regulation, *N.S. and M.E.*<sup>65</sup> In this case, the Court's point of departure was the norm of *non-refoulement* attached to the prohibition on torture and related ill-treatment contained in Article 4 of the Charter of Fundamental Human Rights of the European Union.<sup>66</sup>

The case concerned one Afghan applicant for asylum in the United Kingdom (N.S.) and five applicants in Ireland who were from Afghanistan, Iran and Algeria. As in *M.S.S. v Belgium and Greece*, the purported safe country was Greece. The CJEU came to the same conclusion as the European Court of Human Rights and decided that the applicants could not be returned to Greece, owing to the established risk of inhuman or degrading treatment. However, the CJEU stated that not *every* violation of a refugee or asylum seeker's human rights would render a country 'unsafe'. The Court stated that in general, it 'must be assumed that the treatment of asylum seekers in all Member States complies with the requirements of the [Charter of Fundamental Human Rights of the European Union], the [Refugee] Convention and the ECHR'.<sup>67</sup>

64 At the federal level, there is a relatively new process of legislative scrutiny for compatibility with human rights: *Human Rights (Parliamentary Scrutiny) Act 2011* (Commonwealth). The Refugee Convention is not one of the instruments against which scrutiny occurs, but other human rights instruments are clearly implicated by the move to offshore processing. However, scrutiny of the *Migration Legislation Amendment (Regional Processing and Other Measures) Act 2012* (Commonwealth) did not occur initially because the originating bill was introduced in parliament before the human rights scrutiny arrangements came into force. An inquiry was eventually held after the passage of the legislation.

65 *N.S. and M.E.* (CJEU, C-411/10 and C-493/10, 21 December 2011).

66 *Charter of Fundamental Rights of the European Union* [2010] OJ C 83/389.

67 *N.S. and M.E.* (CJEU, C-411/10 and C-493/10, 21 December 2011) [80].

The Court draws attention here to the fact that, unlike the Australian High Court, the CJEU has the luxury of operating in a context where all the EU states are (on paper at least) 'reflexes' of each other, to use the Australian High Court's terms. They are legally all on the same plane because they are all party to the relevant treaties, and there are two regional judicial bodies, the European Court of Human Rights and the CJEU, to hold states to account. Moreover, under Dublin, an EU member state takes full responsibility for the refugees, in the sense of determining status and granting a visa.

The assumption that all EU member states comply with those legal obligations could be described as regional parochialism or wishful thinking. The Court admitted that:

[i]t is not inconceivable that the system may, in practice, experience major operational problems in a given member State, meaning that there is a substantial risk that asylum seekers may, when transferred to that Member State, be treated in a manner incompatible with their fundamental rights.<sup>68</sup>

Therefore, the Dublin Regulation did not establish a conclusive presumption of compliance with fundamental rights.<sup>69</sup> The Court noted that 'mere ratification of conventions by a Member State cannot result in the application of a conclusive presumption that that State observes those conventions' and further that '[t]he same principle is applicable to both Member States and third countries.'<sup>70</sup>

The Court was not prepared to rule that 'any infringement of a fundamental right ... will affect the obligations of the other Member States to comply with [the Dublin Regulation].'<sup>71</sup> To do so would add criteria for determining the state responsible for hearing an asylum claim beyond those outlined in the Dublin Regulation.<sup>72</sup> The Court was prepared to rule that transfers must not go ahead where Member States

... cannot be unaware that systemic deficiencies in the asylum procedure and in the reception conditions of asylum seekers in that Member State amount to substantial grounds for believing that the asylum seeker would

68 *N.S. and M.E.* (CJEU, C-411/10 and C-493/10, 21 December 2011) [81].

69 *N.S. and M.E.* (CJEU, C-411/10 and C-493/10, 21 December 2011) [99]-[101].

70 *N.S. and M.E.* (CJEU, C-411/10 and C-493/10, 21 December 2011) [103].

71 *N.S. and M.E.* (CJEU, C-411/10 and C-493/10, 21 December 2011) [84].

72 *N.S. and M.E.* (CJEU, C-411/10 and C-493/10, 21 December 2011) [85].

face a real risk of being subjected to inhuman or degrading treatment within the meaning of Article 4 of the Charter.<sup>73</sup>

There is thus a question as to whether and on what basis the Court might find a refugee not returnable with respect to other rights (Lieven 2012: 236). The opinion of the Advocate General at the Court, which preceded the Court's judgment, suggested a threshold of 'serious risk of violation of an asylum seeker's fundamental rights as enshrined in the Charter of Fundamental Rights.'<sup>74</sup>

Regarding the evidence required to show whether there is a risk of a violation of Article 4 of the Charter, the Court ruled that member states should look at the same sources of evidence examined by the European Court of Human Rights in *M.S.S. v Belgium and Greece*.<sup>75</sup> This evidence included

... the regular and unanimous reports of international non-governmental organisations bearing witness to the practical difficulties in the implementation of the Common European Asylum System in Greece, the correspondence sent by the United Nations High Commissioner for Refugees ... to the Belgian minister responsible, and also the Commission reports on the evaluation of the Dublin system and the proposals for recasting Regulation No 343/2003 in order to improve the efficiency of the system and the effective protection of fundamental human rights. (*M.S.S. v Belgium and Greece*, § 347-350)<sup>76</sup>

The Court noted that member states were aware of the concerns about the Dublin system given the Commission reports on it.<sup>77</sup> The Court found that the returns to Greece should not proceed, and if necessary, the so-called 'sovereignty clause' in the Dublin Regulation should be invoked and the countries concerned (in these cases, the United Kingdom and Ireland) should accept responsibility for determining refugee status themselves.<sup>78</sup>

The persuasive value of the judgment (that is, the influence it may have on courts elsewhere) may be limited because it rests on an interpretation

73 *N.S. and M.E.* (CJEU, C-411/10 and C-493/10, 21 December 2011) [94] and *dispositif*.

74 See Opinion of Advocate General Trstenjak, *Case C-411/10 (N.S. v Secretary of State for the Home Department)* (22 September 2011) [127].

75 *N.S. and M.E.* (CJEU, C-411/10 and C-493/10, 21 December 2011) [91].

76 *N.S. and M.E.* (CJEU, C-411/10 and C-493/10, 21 December 2011) [90].

77 *N.S. and M.E.* (CJEU, C-411/10 and C-493/10, 21 December 2011) [92].

78 *N.S. and M.E.* (CJEU, C-411/10 and C-493/10, 21 December 2011) *dispositif*.

of the relevant EU legislation and the objects of this legislation – namely to assure allocation of responsibility and efficient handling of asylum claims.<sup>79</sup> The Court accepted that the state responsible for determining an asylum claim under Dublin may be the sole state responsible for *some* violations of human rights, limiting itself to ruling on the question of violation of the prohibition on torture and related ill-treatment, which, of course, carries a *non-refoulement* obligation and necessarily implicates both sending and receiving countries.

This contrasts with the legislation being interpreted by the High Court in *M70*, which, reflecting the idea that a safe third country should operate as a ‘reflex’<sup>80</sup> of Australia’s own obligations, required a safe third country to respect all the refugee rights guaranteed by the Refugee Convention as a *prerequisite* for transfers. On the other hand, the High Court’s decision also has some limitations, as the majority of the High Court did not reach the issue of when legal guarantees would be insufficient and the practical situation on the ground should be examined, which is what the CJEU was asked to consider.

As mentioned earlier, the Australian parliament has now amended the legislation so as to make it clearly incompatible with the reading of international law advocated in this chapter, and the Court is not empowered to strike the new legislation down on the basis of incompatibility with international law. This leads to some important questions about the role of the law in securing refugee protection.

## Conclusion

The decisions examined in this chapter highlight the differences, especially in a legal context, between the regions within which the agreements considered by the courts were adopted. The Asia-Pacific region is significantly different from the European region in terms of acceptance of human rights instruments. For example, while there is generally a good rate of ratification of the Convention on the Elimination of all Forms of Discrimination against Women<sup>81</sup> and the Convention on the Rights of the Child, participation by Asian states in other universal human rights treaties is limited. There is also

79 *N.S. and M.E.* (CJEU, C-411/10 and C-493/10, 21 December 2011) [84].

80 *M70* (2011) 244 CLR 144 [118] (Gummow, Hayne, Crennan and Bell JJ).

81 *Convention on the Elimination of All Forms of Discrimination against Women*, opened for signature 18 December 1979, 1249 UNTS 13 (entered into force 3 September 1981).



no generally applicable regional human rights instrument, although the ASEAN Intergovernmental Commission for Human Rights was established in October 2009<sup>82</sup> and it adopted the ASEAN Declaration of Human Rights in 2012. There is also a Commission for the Promotion and Protection of the Rights of Women and Children, which uses the relevant international treaties as a basis for its mandate.<sup>83</sup> Unlike the European or the African and American regions, there are also no regional instruments specifically governing the treatment of refugees, let alone multilateral agreements that deal with the allocation of responsibility for asylum claims or the sharing of responsibilities through resettlement.<sup>84</sup> Despite the different contexts in which the courts are operating, however, the decisions examined in this chapter demonstrate a common reaction by the judiciary to countries' attempts to avoid obligations they owe to refugees and asylum seekers. The European courts have rejected blanket assumptions of safety based on treaty obligations, while the Australian High Court rejected pious hopes of human rights protection based on a non-binding MOU.

In the immediate aftermath of the *M70*<sup>85</sup> decision, some commentators in Australia questioned the significance of a treaty safeguard as opposed to an MOU (Menadue 2012; Kelly 2011). Each represents 'the word' of the relevant governments. In most cases, MOUs are not governed by the maxim '*pacta sunt servanda*' (promises are binding, treaties must be obeyed), but human rights treaties are often dishonoured in practice. However, that treaties are often violated with few consequences should be no reason for us to place our faith in a document that is expressly non-binding, particularly when the rights of vulnerable asylum seekers are at stake. Rather, it is an argument to also consider whether treaties are implemented through domestic law and what the practice is like on the ground. This is particularly true when one of the most controversial aspects of the Malaysia swap, as far as the Australian public was concerned, was the revelation that unauthorised migrants and

82 Association of Southeast Asian Nations (ASEAN), *Terms of Reference of ASEAN Intergovernmental Commission on Human Rights* (July 2009).

83 Association of Southeast Asian Nations (ASEAN), *Terms of Reference of the ASEAN Commission for the Promotion and Protection of the Rights of Women and Children (ACWC)* (February 2010).

84 This may be contrasted with the *Mexico Declaration and Plan of Action to Strengthen International Protection of Refugees in Latin America*, 16 November 2004, under which 'solidarity resettlement' has been initiated. In June 2006, the Organization of American States endorsed the Mexico Declaration and Plan of Action: see *OAS General Assembly Resolution 2232: Protection of Asylum Seekers, Refugees, and Returnees in the Americas* (June 6 2006) 4th sess, OAS Doc AG/RES 2232 (XXXVI-O/06).

85 *M70* (2011) 244 CLR 144.



asylum seekers are sometimes judicially caned for immigration offences.<sup>86</sup> Reliance on governmental or diplomatic assurances like an MOU has been controversial in the context of allegations of torture or inhuman/degrading treatment or punishment, precisely because diplomatic assurances are sought when it is acknowledged that there is a risk of torture. In such cases, it is difficult to see why governmental assurances would make a difference (see Mole & Meredith 2010).<sup>87</sup>

It might be argued that Asian governments may not put the same emphasis on international law and adjudication, for a variety of reasons, which perhaps should be understood and worked with rather than condemned. However, it cannot realistically be argued that law and legal status are simply not important in Asian countries, given the active denial of legal status to irregular migrants, the growing acceptance of international adjudication in areas other than human rights (Saul, Mowbray & Baghoomians 2011: 121) and the moves within ASEAN to create a regional human rights framework. If there is a commitment to human rights that can be relied upon by others, why should we not expect the form of the commitment to adhere to the norm of a treaty commitment that recognises these as rights *inherent to the individual* as opposed to a 'gentleman's agreement'?

The court decisions examined in this chapter have demonstrated that trying to discourage people from undertaking dangerous journeys must not operate as an excuse to violate international law. While the courts can rule on the consistency of regional arrangements with human rights provisions (whether contained in a treaty or reflected in national legislation), they are usually only able to react to events that have already unfolded. As countries in Europe and the Asia-Pacific grapple with the problem of life-threatening journeys made by asylum seekers, particularly those made in the Mediterranean Sea and the Indian Ocean, calls are being made for proactive arrangements (Expert Panel on Asylum Seekers 2012).

86 In a poll published in the tabloid newspaper *The Daily Telegraph*, over 66 per cent of participants said they wanted the Australian government to back away from the Malaysia agreement (Jones 2011).

87 *Report of the UN Special Rapporteur of the Commission of Human Rights on torture and other cruel, inhuman or degrading treatment or punishment to the UN General Assembly*, UN GAOR, 60th sess, Provisional agenda item 73(a), UN Doc A/60/316 (30 August 2005) [31]-[32]. See also the 2011 UN General Assembly Resolution on torture and other cruel, inhuman or degrading treatment or punishment: *General Assembly Resolution on torture and other cruel, inhuman or degrading treatment or punishment*, GA Res 65/205, UN GAOR, 3rd Comm, 65th sess, 71st mtg, Agenda Item 68(a), UN Doc A/RES/65/205 (28 March 2011) [16]. But see, *Othman (Abu Qatada) v United Kingdom* (European Court of Human Rights, Fourth Section, Application No 8139/09, 17 January 2012).

Often, however, the measures are simply meant to act as deterrents and do not deal with the reasons for refugee movement. In most cases, unauthorised boat arrivals have good cause to enter Australia because they are unable to secure protection in the vast majority of countries in the Middle East and the Southeast Asian region.

Respect for the law is a wise policy choice. Attempts at containment of refugees in regions that are not necessarily well equipped to protect them may well encourage dangerous journeys (see Taylor & Rafferty-Brown 2010b; Human Rights Watch 2002). This courts disaster at sea as well as in the courts. Refugees and asylum seekers pose an important question for Asian countries – one that needs to be addressed. The real issue to be discussed between Australia and its neighbours is whether it is possible to develop a responsibility-sharing arrangement in which more countries in the region are encouraged to ratify the Convention and Protocol and implement them in the long term. Australia will have to do rather more than offer 4,000 resettlement places over four years in exchange for some returns if its goal is to secure more participation in international refugee law.

A political reconception of the role of regional agreements by governments is needed if they are to serve the interests of irregular migrants and governments everywhere in a fair manner. This is a matter for political leadership, in which an independent judiciary plays only a supporting role.

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