SINK OR SWIM: THE DEADLY CONSEQUENCES OF PEOPLE SMUGGLING

I. INTRODUCTION

> *Deep in the maze of teeming bazaars to the north of Peshawar, where they sell stolen televisions, large blocks of hashish and cheap Kalashnikov assault rifles, is a new breed of travel agents. Their business is discreet, effective and illegal, and the profits are enormous.*[1]

The kachakbar[2] greet Afghan refugees who stream across the border at Khyber Pass[3] into the refugee camps[4] promising a new life in the West.[5] In an interview with a British journalist, smugglers describe how they inform those they smuggle to say that they come from a part of Afghanistan ruled by the Taliban,[6] and while most of these people are genuine refugees some of them are not even Afghans.[7]

"For as long as there have been people there has been migration;"[8]

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1. Rory McCarthy, et al., *Asylum Crisis: The Voyage: Hazardous, Long and Costly: the Refugees' Lonely Odyssey: Only the Smugglers are Certain Winners in the Escape Business,* THE GUARDIAN, Sept. 1, 2001, at A4. In the past two decades six million Afghan people have fled their country to escape war. *See id.* Hundreds of thousands of Afghans continue to flee after a vicious drought in the past few years, and the rise of the Taliban regime. *See id.*

2. Kachakbar translates to refugee smuggler. *See id.*

3. "Khyber Pass" ENCYCLOPEDIA BRITANNICA ONLINE, *at* http://search.eb.com/bol/topic?eu=46429&sctn=1&pm=1 (last visited Nov. 17, 2001). The Khyber Pass is the most important pass connecting Afghanistan and Pakistan. *See id.* Khyber Pass extends northwest through the Safid Kuh mountain range near Peshawar, Pakistan for about fifty-three kilometers to Kabul, Afghanistan. *See id.* For centuries the Khyber Pass was used to invade India. *See id.*

4. *See* BBC NEWS, Tom Housden, *Tampa Case Highlights Afghan Crisis*, Sept. 4, 2001, *at* http://news.bbc.co.uk/hi/english/world/south_asia/newsid_1525000/1525264.stm. The people in refugee camps are reduced to an underclass, thus some turn to begging and prostitution for survival. *See id.*

5. *See* McCarthy, et al., *supra* note 1, at A4.

6. *See The Taliban and Afghanistan: Implications for Regional Security and Options for International Action*, UNITED STATES INSTITUTE OF PEACE, *available at* http://www.usip.org/oc/sr/sr_afghan.html (1998). "The Taliban, whose name means 'students,' have their roots in the Pakistan-based seminaries established for Afghan refugees during the Soviet occupation." *Id.* The Taliban practice a very strict version of Islam inflicting it upon all citizens of Afghanistan. *See id.*

7. *See* McCarthy et al., *supra* note 1, at A4. Smugglers earn a forty percent profit for each smuggled person. *See id.*

8. Adam Graycar & Rebecca Tailby, *People Smuggling: National Security Implications*, Australian Defence College Canberra, Aug. 14, 2000, *available at* http://www.aic.gov.au/conferences/other/smuggling.pdf, at 1.

however, illicit illegal migration continues to rise at an alarming rate.[9] The International Organization for Migration[10] estimates that the current level of illegal migrants is four million per year.[11] As these refugees so fear for their lives that they are forced to leave the only home they have ever known, they turn to the people smuggler for transportation.[12] The economic and physical cost of travel is overwhelming,[13] while the length of the journey is far from

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9. *See* ICC Commercial Crime Services, *Warning to Ship Agents Against Conspiracies to Ship Illegal Immigrants,* Sept. 26, 2001, *at* http://www.iccwbo.org/ccs/news_archives/2000/illegal_immigrants.asp. The ICC Commercial Crime Series is a division of the International Chamber of Commerce. *See id.* The ICC is the world business organization that promotes an open and international trade, the investment system, and the market economy. *See id.*

10. *See* International Organization for Migration (IOM) home webpage, *at* http://www.iom.int/ (last visited Feb. 15, 2002). The IOM is the leading international organization working with migrants and governments providing human responses to migration challenges. *See id.* Established in 1951, the IOM aids in resettling European migrants and refugees. *See id.* IOM Member States as of Nov. 30, 2001 are: Albania, Algeria, Angola, Argentina, Armenia, Australia, Austria, Azerbaijan, Bangladesh, Belgium, Belize, Benin, Bolivia, Bulgaria, Burkina, Faso, Canada, Cape Verde, Chile, Colombia, Congo, Costa Rica, Côte d'Ivoire, Croatia, Cyprus, Czech Republic, Democratic Republic of the Congo, Denmark, Dominican Republic, Ecuador, Egypt, El Salvador, Finland, France, Gambia, Georgia, Germany, Greece, Guatemala, Guinea, Guinea-Bissau, Haiti, Honduras, Hungary, Iran (Islamic Republic of), Israel, Italy, Japan, Jordan, Kenya, Kyrgyzstan, Latvia, Liberia, Lithuania, Luxembourg, Madagascar, Mali, Morocco, Netherlands, Nicaragua, Norway, Pakistan, Panama, Paraguay, Peru, Philippines, Poland, Portugal, Republic of Korea, Romania, Senegal, Sierra Leone, Slovakia, Slovenia, South Africa, Sri Lanka, Sudan, Sweden, Switzerland, Tajikistan, Thailand, Tunisia, Uganda, Ukraine, United Kingdom of Great Britain and Northern Ireland, United Republic of Tanzania, United States of America, Uruguay, Venezuela, Yemen, Yugoslavia (Fed. Rep. of), and Zambia. *See* Members and Observers, Feb. 16, 2002, *at* http://www.iom.int/en/who/main_members.shtml. The following are Observer States: Afghanistan, Belarus, Bhutan, Bosnia and Herzegovina, Brazil, Cambodia, China, Cuba, Estonia, Ethiopia, Ghana, Holy See, India, Indonesia, Ireland, Jamaica, Kazakhstan, Malta, Mexico, Mozambique, Namibia, Nepal (the Kingdom of), New Zealand, Papua New Guinea, Republic of Moldova, Russian Federation, Rwanda, San Marino, Sao Tome and Principe, Somalia, Spain, The former Yugoslav Republic of Macedonia, Turkey, Turkmenistan, Ukraine, Viet Nam, Zimbabwe. *See id.* International Governmental Organizations Holding Observer Status include: United Nations; International Labour Organisation; Food and Agriculture Organization of the United Nations; United Nations Educational, Scientific and Cultural Organization; World Health Organization; International Bank for Reconstruction and Development; International Maritime Organization; United Nations Industrial Development Organization; Council of Europe; Organisation for Economic Co-operation and Development; European Union; Organization of American States; Inter-American Development Bank; Italian-Latin American Institute; International Centre for Migration Policy Development; Community of Portuguese Speaking Countries; Organization of African Unity; A organisation Internationale de la Francophonie; Asian-African Legal Consultative Committee; International Committee of the Red Cross; Union du Maghreb Arabe. *See id.*

11. *See id.*

12. *See* BBC NEWS, William Horsley, *Analysis: Solving the Refugee Problem,* Sept. 3, 2001, *at* http://news.bbc.co.uk/hi/english/world/newsid_1523000/1523897.stm.

13. *See* Glenn Mitchell & Jim Dickins, *Trading in Tragedy,* HERALD SUN, Oct. 27, 2001, at 21. Often the people being smuggled are highly educated middle class professionals who sell every asset they own in order to pay between $16,000 and $20,000 for travel. *See id.*

swift.[14] But, for $12,000 and two passport-sized photographs, a smuggler will sign a contract guaranteeing travel from Pakistan to Australia.[15] Similarly, the 433 people aboard the MV Tampa,[16] who for ten days after being rescued at sea became the center of an international controversy between Norway, Indonesia, and Australia, faced this dark beginning to their own voyage.[17]

This Note examines the Australian government's management of the MV Tampa incident to determine the effect its decision will have on Australia's battle against people smuggling. In addition, this Note analyzes the people smuggling epidemic in Europe and global initiatives to stop people smuggling. Part II focuses on the effects of people smuggling on refugees who are seeking asylum in Australia. In Part III, the Note addresses Australia's response to increased people smuggling. Part IV analyzes the MV Tampa incident. The Note addresses, in Part V, effects of the Australian court's decision, including the continuing arrival of boat people[18] to Australia, and Australia's policy of transporting the boat people to other Pacific nations. Finally in parts VI through VII, this Note examines Europe's difficulties with people smuggling and global initiatives to stop people smuggling.

II. PEOPLE SMUGGLING: A ROADBLOCK TO REFUGEES

A. *People Smuggling in General*

The organized illegal movement of groups or individuals across international borders, usually for payment, is commonly known as people smuggling.[19] The smuggling[20] and trafficking[21] of human beings is increasing throughout the world, and is "exacerbated" in size and seriousness by the

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14. *See* McCarthy, et al., *supra* note 1, at A4.

15. *See id.* The smuggler's goal is to be picked up by authorities at a remote territorial outpost, Christmas Island or Ashmore Reef, instead of mainland Australia. *See id.*

16. *See* discussion *infra* Part IV.

17. *See* ABC NEWS, Leela Jacinto, *Forced Entry Troops Board Illegals Ships, International Concern Mounts*, Sept. 2, 2001, *at* http://abcnews.go.com/sections/world/DailyNews/boatpeople_2_010829.html.

18. *See* Josh Briggs, *Sur Place Refugee Status in the Context of Vietnamese Asylum Seekers in Hong Kong*, 42 AM. U.L. REV. 433, 437 (1993). The term boat people was derived in the 1970's when asylum seekers secretly and illegally departed Vietnam on crowded, tiny, unseaworthy boats in search of asylum. *See id.*

19. *See* Department of Immigration Multicultural and Indigenous Affairs Fact Sheet: 73 People Smuggling, *at* http://www.immi.gov.au/facts/73smuggling.htm (last updated Dec. 2, 2001)[hereinafter DIMIA Fact Sheet].

20. *See* United Nations General Assembly: Convention Against Transnational Organized Crime; Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children; and Protocol Against the Smuggling of Migrants by Land, Sea and Air, 40 I.L.M. 335 (2001). Smuggling is the procurement of illegal entry of a person into a State of which the latter person is not a national with the objective of making a profit. *See id.* at 384.

21. Trafficking is the recruitment, transportation, or receipt of persons through deception or coercion for the purposes of sexual exploitation or forced labour. *See id.* at 378.

involvement of organized crime.[22] People smuggling is the third largest moneymaker for organized crime after drug and gun trafficking,[23] thus making people smuggling a very lucrative enterprise.[24]

In addition, the smugglers frequently change routes and methods of arrival in order to remain hidden from authorities;[25] however, "[e]stablished smuggling routes are known to exist in Amman and Bangkok."[26] Because people smugglers continually change ports of departure and use alias identification, it is difficult for countries to intercept them.[27]

However, while the smuggler earns a profit,[28] smuggled persons seek survival,[29] and should not be blamed for pursuing protection from persecution.[30] Many smuggled persons are refugees.[31]

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22. *See* Graycar & Tailby, *supra* note 8, at 1.

23. *See* Media Release, Senator The Honorable Christopher Ellison, Mar. 13, 2001, *at* http://www.law.gov.au/aghome/agnews/2001newsjus/e41_01.htm.

24. *See* CNN.com, *People Smuggling Tops Euro Agendas*, Feb. 9, 2001, *at* http://europe.cnn.com/2001/WORLD/europe/france/02/09/britain.illegals. The trade in illegal immigrants is worth more than $30 billion a year. *See id. See also* Graycar & Tailby, *supra* note 8, at 3. Smuggling by organized crime represents the greatest risk to Australia since organizations are well financed, use local criminals, and have the flexibility to escape law enforcement. *See id.* at 3. People smuggling by organized crime is normally characterized by:

> well-equipped forgery workshops to create the essential travel documents; the ability to modify their operations to adapt to changing risks by using different routes, entry schemes, and conveyances; operation centres, accommodations, and hideouts in transit countries and potential transit countries; the economic wealth for substantial bribes and the best in technology. . . an ability to use violence to obtain payment or services from the undocumented migrants.

Id. at 3. *See also* Mitchell & Dickens, *supra* note 13, at 21. While people smuggling is just as profitable as drug trafficking, the penalties are much less. *See id.*

25. *See* DIMIA Fact Sheet, *supra* note *19*.

26. *Id.* Boat arrivals depart from several points in Indonesia including Kupang, Lombock, Sumbawa, and Flores. The usual route to Australia is through Indonesia. *See id. See* Housden, *supra* note 4. People fly to Jakarta, transfer to another island, and then take a boat to Australia. *See id.*

27. *See* Mitchell & Dickens, *supra* note 13, at 22.

28. *See* Amnesty International Australia, Aug.-Sept. 2000 Newsletters, *at* http://www.amnesty.org.au/airesources/index-73.html (Sept. 29, 2001). The lives of refugees and unauthorized immigrants being smuggled are at very high risk since smugglers use unseaworthy boats, cramming them with hundreds of people, in order to extract a considerable profit. *See id.*

29. *See* Graycar & Tailby, *supra* note 8, at 2. People who are smuggled have many motivating factors including, "escape from extreme poverty and unemployment; improve earnings and standard of living; escape from persecution, conflict or war; escape from ecological crisis or degradation." *Id.*

30. *See id.*

31. *See Refugees by Numbers*, *available at* http://www.unhcr.ch (2001). In 2001, the United Nation High Commission of Refugees (UNHCR), the organization mandated by the United Nations to lead and coordinate international action for the worldwide protection and resolution of refugee problems, approximated that there were 22.3 million persons of concern. *See id.* The ten largest groups included, Afghanistan with estimated 2.5 million; Iraq with 572,500; Burundi with 525,700; Sierra Leone with 487,200; Sudan with 467,700; Somalia with 451,600; Bosnia-Herzegovina with 448,700; Angola with 350,600; Eritrea with 345,600; and

Under the Refugee Convention[32] and the Refugee Protocol,[33] a refugee is defined as any person who:

> owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable to or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence as a result of such events, is unable or, owing to such fear is unwilling to return to it.[34]

Croatia with 340,400. *See id.* at 8.

32. *See* Convention Relating to the Status of Refugees, July 28, 1951, 138 U.N.T.S. 150 [hereinafter 1951 Convention].
The Preamble States:

> CONSIDERING that the Charter of the United Nations and the Universal Declaration of Human Rights approved on 10 December 1948 by the General Assembly have affirmed the principle that human beings shall enjoy fundamental rights and freedoms without discrimination,
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> CONSIDERING that the United Nations has, on various occasions, manifested its profound concern for refugees and endeavored to assure refugees the widest possible exercise of these fundamental rights and freedoms,
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> CONSIDERING that it is desirable to revise and consolidate previous international agreements relating to the status of refugees and to extend the scope of and the protection accorded by such instruments by means of a new agreement,
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> CONSIDERING that the grant of asylum may place unduly heavy burdens on certain countries, and that a satisfactory solution of a problem of which the United Nations has recognized the international scope and nature cannot therefore be achieved without international co-operation,

Id. Signatory nations include: Australia, Austria, Belgium, Brazil, Canada, Colombia, Denmark, Egypt, France, Federal Republic of Germany, Greece, Holy See, Iraq, Israel, Italy, Luxembourg, Monaco, Netherlands, Norway, Sweden, Switzerland (also representing Liechtenstein), Turkey, United Kingdom of Great Britain and Northern Ireland, United States of America, Venezuela, and Yugoslavia. *See id.*

33. *See* Protocol Relating to the Status of Refugees, Jan. 31, 1967, 606 U.N.T.S. 267[hereinafter 1967 Protocol]. The purpose of the Protocol is stated in the preamble:

> Considering that the Convention relating to the Status of Refugees done at Geneva on 28 July 1951 (hereinafter referred to as the Convention) covers only those persons who have become refugees as a result of events occurring before 1 January 1951, Considering that new refugee situations have arisen since the Convention was adopted and that the refugees concerned may therefore not fall within the scope of the Convention, Considering that it is desirable that equal status should be enjoyed by all refugees covered by the definition in the Convention irrespective of the dateline 1 January 1951. . . .

Id.

34. 1951 Convention, *supra* note 32, at 152. The Refugee Convention was the first major international agreement to offer refugees legal protection. *See* DIMIA Fact Sheet 61: Seeking Asylum within Australia, *at* http://www.immi.gov.au/facts/61asylum.htm, last visited (Feb. 1, 2002).

Refugees face dire circumstances when approached by smugglers, and thus are easy prey for smugglers who promise the fortunes of the West.[35]

B. Smuggling Refugees in Australia

A person illegally arrives in Australia if they arrive without travel documents, or if the documents are found to be fraudulent upon presentation.[36] According to the Department of Immigration Multicultural and Indigenous Affairs (DIMIA),[37] "Australia has experienced an influx of boat people, mainly from the Middle East, a region where people smuggling networks are operating."[38] In 1998-99, forty-two unauthorized boats arrived carrying 921 people into Australia;[39] however, in the first four months of 2000, seventy unauthorized boats carrying 3,941 people arrived in Australia, an increase of more than 328 percent.[40]

Australia has resettled[41] over 600,000 refugees and displaced persons in

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35. *See* BBC NEWS, Barnaby Phillips, *Refugee Numbers 'Expected to Grow'*, Sept. 4, 2001, *at* http://news.bbc.co.uk/hi/english/world/africa/newsid_1525000/1525549.stm. Even "if you are sitting in a slum every day, you can still see through the media how richer people are leading their lives in other countries." *Id.*

36. *See* DIMIA Fact Sheet, *supra* note 19. If a person arrives in Australia without identification, they are required by law to be placed in immigration detention until their situation is resolved. *See id.*

37. *See generally* Department of Immigration Multicultural & Indigenous Affairs web page *at* http://www.immi.gov.au (Sept. 26, 2001)[hereinafter DIMIA webpage]. The DIMIA manages the migration of people into and out of Australia, including refugees. *See id.* The DIMIA is in charge of Australia's Humanitarian Program, which provides protection through resettlement to refugees and others in need from all over the world. *See id.* The Humanitarian Program is comprised of two components: an offshore resettlement program for persons overseas and an onshore protection for those already in Australia. *See id.* The offshore resettlement program consists of two categories: 1) Refugee- people who have been recognized as refugees and in conjunction with the UNHCR are identified in need of resettlement; 2) Special Humanitarian Program- People outside their home country who have suffered discrimination "amounting to gross violation of human rights" having an application supported from an Australian citizen or resident. *See id.* The main focus of the Offshore Resettlement Program in 2001-2002 will be the Middle East, South-West Asia, and the former Yugoslavia with approximately 4000 places set aside for the Refugee competent and 3000 for the Special Humanitarian Program. *See* Australian Immigration Statistics, *at* http://www.immi.govau/statistics/refugee.htm,(last visited Oct.3, 2001). The onshore resettlement program consists of 1) Special Assistance Category- People who do not meet the requirements of the Special Humanitarian Program, but are facing situations of discrimination, displacement, or hardship; 2) Onshore Protection Visa Grants- People who have a need to protection under the UN Refugee Convention and are granted protection visas in Australia. *See id.*

38. DIMIA Fact Sheet, *supra* note 19.

39. *Id.*

40. *See id.* The people comprising the arrivals were mostly from the Middle East. *See id.*

41. *See* UNHCR & Refugees, *at* http://www.unhcr.ch/un&ref/who/whois.htm (last visited Sept. 5, 2001)[hereinafter UNHCR website]. "Resettlement in a third country is sometimes the only possible way to guarantee international protection of a refugee who is being denied adequate protection in the country of asylum." *Id.* There are only ten resettlement countries out

the past fifty years.[42] Today, nearly half of all migration to Australia comes from Asia.[43] This phenomenon did not occur until the late 1970's after a flood of Vietnamese citizens, seeking asylum, began arriving on boats coining the term boat people.[44] The increase of Asian citizens seeking asylum was in contrast to the Australian Immigration policy at that time.[45] Historically, Australia's immigration policy has been described as follows:

> while not racially exclusive, [it] was to increase the population without changing its dominantly European composition, or at least to change it slowly. The boat people were not part of the policy. They had not been processed thousands of kilometres away by skilful immigration officials. Reflecting population pressures and political turmoil near at hand, they simply turned up, uninvited, asking for refuge. For Australia, history and geography had merged, causing a shiver of apprehension.[46]

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of the 185 member states of the United Nations including: United States of America, Canada, Australia, New Zealand, Norway, Finland, Sweden, Denmark, Switzerland, and the Netherlands. *See id.*

42. *See* DIMIA Fact Sheet 60: Australia's Refugee and Humanitarian Program, *at* http://www.immi.gov.au/facts/60refugee.htm (last updated Dec. 2, 2001).

43. *See* W. COURTLAND ROBINSON, TERMS OF REFUGE: THE INDOCHINESE EXODUS AND THE INTERNATIONAL RESPONSE 151 (Zed Books 1998). Migration to Australia in the nineteenth and early twentieth century mainly came from the United Kingdom. *See id.* This was in part due to the 'White Australia' policy passed by the Federal parliament in 1901 under the Immigration Restriction Act. *See id.* Non-whites were only allowed to enter Australia on a temporary basis under a permit. *See id.* The *Bulletin*, a supporter of Australian nationalism, wrote in 1901:

> [i]t is impossible to have a large coloured alien population in the midst of a white population without a half-caste population growing up between the two. India proves that; would prove it much more conclusively only the white population isn't large enough to be a very extensive parent to the Eurasian mongrel. Spanish and Portuguese America show it. The United States show it., Queensland [by importing Pacific Island labour] shows it already to an alarming extent. And Australia thinks highly enough of its British and Irish descent to keep the race pure.

GEOFFREY SHERINGTON, THE AUSTRALIAN EXPERIENCE AUSTRALIA'S IMMIGRANTS 91 (1980). *See also* Bulletin, 22 June 1901, *quoted in*, ATTITUDES TO NON-EUROPEAN IMMIGRATION 98, (A.T. Yarwood ed.,1968).

44. *See* Robinson, *supra* note 43, at 152. More than 2,000 Vietnamese boat people beached themselves on the Australian shores using more than fifty-one vessels during late 1977 to the middle of 1978. *See id.* Most of these vessels stopped in Singapore, Malaysia, or Indonesia for food and water along the way. *See id.* Thus, the people aboard avoided seeking asylum at the country of first arrival and instead sought asylum in Australia. *See id.*

45. *See id.*

46. BRUCE GRANT, THE BOAT PEOPLE: AN 'AGE' INVESTIGATION 179 (Penguin Books 1979).

The arrival of so many asylum seekers[47] by boat suggested that Australia had become not only a resettlement country, but also a country of first asylum.[48] Continued concern over the number of illegal migrants arriving in Australia by boat is questionable, considering that currently 50,000 illegal migrants are estimated to be living in Australia simply by overstaying[49] their visas.[50]

People smuggling not only threatens the amount of migrants Australia can accept each year, it also raises concerns of domestic security, increases economic consequences, and places strains on international relations.[51] In addition, if the international community perceives Australia as "soft" on illegal immigration, people smugglers will more relentlessly target Australia, thus increasing the problem of illegal migration.[52] When migrants illegally enter Australia, the Australian government is limited in its power to decide who is

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47. *See* Unauthorized Arrivals and Detention Information Paper, *at* http://www.immi.gov.au/illegals/uad/01.htm (last updated Nov.7, 2001). [hereinafter Unauthorized Arrivals]. "People who apply for recognition as refugees are called asylum seekers. They are not refugees until their claims for protection are assessed against the 1951 UN Convention and the 1967 Protocol relating to the Status of Refugees, and they are accorded such status." *Id.*

48. *See* UNHCR website, *supra* note 41. Under the Refugee Convention, after refugees leave their country of origin, asylum should be sought in the first country available. *See id.*

49. *See* DIMIA FACT Sheet 86, Overstayers and People in Breach of Visa Conditions in Australia, *at* http://www.immi.gov/au/facts/86overstayers.htm (last updated Dec. 10, 2001)[hereinafter Overstayers in Breach]. Upon requesting a visa to Australia, a person signs a contract stipulating that they will leave by a certain date, and anyone who stays past this date is an overstayer. *See id.*

50. *See* Andrew N. Langham, *The Erosion of Refugee Rights in Australia: Two Proposed Amendments to The Migration Act*, 8 PAC. RIM L. & POL'Y J.651, 657 (1999). According to Professor Mary Crock, "concern about the phenomenon of uninvited refugees and asylum seekers is quite out of proportion to the actual number of persons who seek refuge here. The level of misunderstanding in the community is high, prompted in many cases by poor reporting or blatant scare mongering tactics in the media." *Id. See also* Overstayers in Breach, *supra* note 49. As of June 30, 2001, Australia estimated that 60,103 people overstayed their visas. *See id.*

51. *See* Graycar & Tailby, *supra* note 8, at 7.

National security is threatened by people smuggling in the following ways:

> ***First***, illegal entrants are not scrutinised against immigration's character requirements. Thus, 'undesirables' or persons posing threats to national security are not screened out offshore, but may enter the country undetected, or if they arrive by boat with no identification papers their identity is very difficult to ascertain and thus their threat to security is unknown.
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> ***Second***, illegals may come from countries whose political and cultural climate are very different to our own, eg. ethnic tension, violence, religious or political fundamentalism. . . . [I]llegals may find it difficult to adapt to our culturopolitical climate and may continue with their own cultural/political practices. . .
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> ***Third***, there are some rumors of terrorists or persons of concern posing as refugees to enter Australia illegally and unidentified. . .
>
> ***Fourth***, one of the most serious threats to Australia's security stems from the increasing involvement of **criminal syndicates** in smuggling people to Australia. . . .

Id.

52. *See id.* at 7.

allowed entrance into the country.[53]

III. AUSTRALIA'S RESPONSE TO PEOPLE SMUGGLING

Determined to strengthen its response to the number of illegal migrants in 1999, Australia allotted funding of over 124 million dollars[54] to improve the Coastal Surveillance Task Force, increase prosecution of smugglers, and launch an overseas information campaign aimed at stopping illegal arrivals.[55] In addition, Australia announced the exclusion of unauthorized arrivals from accessing permanent residence,[56] elimination of migrants who have refugee protection overseas from gaining protection in Australia, and utilization of fingerprinting and other biometric tests to ascertain the identity of asylum seekers.[57]

In 2000-01, Australia spent over 211 million dollars[58] on detention, legal assistance, protection determination, and review and litigation costs for people who arrived unlawfully.[59] In response to the continuing problem of illegal migration and people smuggling, Australia announced a new approach to

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53. *See id.*

54. *See Australian Dollar, at* http://www.x-rates.com/d/AUD/table.html (last visited Nov. 14, 2001)[hereinafter Australian Dollar]. The Australian dollar exchange rate with the American dollar on Nov. 14, 2001 equals 0.5186 AU$ for one US$. *See id.*

55. *See* DIMIA Fact Sheet, *supra* note 19. The funding allotted was used to improve, "Coastwatch, Customs, and Navy capabilities to detect pursue, intercept, and search boats carrying unauthorized arrivals." *Id.* The changes to the Migration Act included detaining and prosecuting all crewmembers for smuggling people illegally into Australia. *See id.* The penalties for smuggling were increased to up to twenty years in prison and up to a $220,000 fine. *See id. See also* BBC NEWS, Red Harrison, *Australia Cracks Down on People Smuggling*, Dec. 23, 1999, *at* http://newsvote.bbc.co.uk/hi/english/world/asiapacific/newsid_575000/57597. The campaign entitled "Pay a people smuggler and you'll pay the price", included posters warning people of the penalties, "You will NOT be welcome, you WILL be kept in detention centers, thousands of kilometers from Sydney and you could LOSE all your money and be sent back." *Id.* Australia spends approximately $50,000 for every unauthorized arrival from their time of arrival to departure. *See id.*

56. *See* Philip Ruddock, *2002-2003 Migration and Humanitarian Programs-A Discussion Paper The Humanitarian Program, at* http://minister.immi.gov.au/consultations/discpaper4a.htm (last visited Jan. 31, 2002). Temporary Protection Visas (TPV) are issued to applicants whom Australia owes protection obligations but either arrived unauthorized or were found to have fraudulent documents. *See id.* Unlike permanent visas, a TPV does not confer rights to family reunion, to return if they leave Australia, or to the full range of settlement services, including welfare assistance. *See id.* TPV's provide the basic services required under the Refugee Convention, allowing recipients to stay in Australia for up to three years, seek employment, and seek basic services. *See id.* All unauthorized arrivals are held in detention facilities until they leave or are granted a stay in Australia. *See id.*

57. *See* DIMIA Fact Sheet *supra* note 19. The use of biometric tests, including DNA testing, face, palm, or retinal recognition testing, and voice testing will ensure that the boat people do not have protection somewhere else, or have previously been denied refugee status overseas. *See id. See also* DIMA Fact Sheet 88 Processing Unlawful Boat Arrivals, *at* http://www.immi.gov.au/facts/88process.htm (Nov. 14, 2001).

58. *See* Australian Dollar, *supra* note 54.

59. *See* Ruddock, *supra* note 56.

handling the situation, including minimizing outflows from countries of origin, working internationally to disrupt people smugglers, and setting up a new reception point for unauthorized arrivals.[60] The increase in unauthorized arrivals to Australia has threatened Australia's ability to adequately take part in resettlement of refugees who apply through the United Nations High Commission for Refugees (UNHCR).[61]

In order to protect Australia from the influx of illegal migrants, especially refugees, the Australian Parliament has passed several new laws.[62] In 1999, Parliament amended the Migration Act of 1958[63] to allow prosecution of groups bringing non-citizens unlawfully into Australia.[64] This amendment

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60. *See* Press Release MPS 131/2001 Philip Ruddock, *Background Paper on Unauthorised Arrivals Strategy,* Sept. 6, 2001, *at* http://www.minister.immi.gov.au/media_releases/media01/r01131.htm
[hereinafter Background Paper]. Mr. Ruddock stated:

> Government's approach comprises three major elements: 1. prevention of the problem by minimising the outflows from countries of origin and secondary outflows from countries of first asylum; 2. working with other countries to disrupt people smugglers and intercept their clients en route to their destination, while ensuring that those people in need of refugee protection are identified and assisted as early as is possible; and 3. developing appropriate reception arrangements for unauthorised arrivals who reach Australia, focusing on the early assessment of the refugee status of the individual, the prompt removal of those who are not refugees, or who are refugees but can access effective protection elsewhere, and the removal of additional benefits not required by the Refugees Convention to minimise the incentive for people to attempt illegal travel to Australia.

61. *See Ruddock, supra* note 56.

62. *See* DIMA Unauthorized Arrivals and Detention, *at* http://www.immi.gov.au/illegals/uad/02.htm (*last updated* Nov. 7, 2001).

63. *See* Migration Act, 1958, (Austl.)[hereinafter Migration Act]. The long title of the Act reads: "An Act relating to the entry into, and presence in, Australia of aliens, and the departure or deportation from Australia of aliens and certain other persons." *Id.* The purpose of the Migration Act is described in section 4:

> (1) The object of this Act is to regulate, in the national interest, the coming into, and presence in, Australia of non-citizens.
> (2) To advance its object, this Act provides for visas permitting non-citizens to enter or remain in Australia and the Parliament intends that this Act be the only source of the right of non-citizens to so enter or remain.
> (3) To advance its object, this Act requires persons, whether citizens or non-citizens, entering Australia to identify themselves so that the Commonwealth government can know who are the non-citizens so entering.
> (4) To advance its object, this Act providesfor the removal or deportation from Australia of non-citizens whose presence in Australia is not permitted by this Act.

Id. at c. 4.

64. *See id.* at c. 232A. The Migration Act states:

> A person who:
> (a) organises or facilitates the bringing or coming to Australia, or the entry or proposed entry into Australia, of a group of 5 or more people to whom subsection 42(1) applies; and
> (b) does so reckless as to whether the people had, or have, a lawful right to come to Australia; is guilty of an offence punishable, on conviction, by imprisonment for

was enacted to deter individuals who are paid by criminal organizations to cease bringing illegal persons into Australia.[65] While under this new amendment[66] a handful of people have been convicted,[67] people smuggling

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20 years or 2,000 penalty units, or both.

Id. *See also* Migration Act c. 233, which states:

Persons concerned in bringing non-citizens into Australia in contravention of this act or harbouring illegal entrants:

(1) A person shall not take any part in:
   (a) the bringing or coming to Australia of a non-citizen under circumstances from which it might reasonably have been inferred that the non-citizen intended to enter Australia in contravention of this Act;
   (b) the concealing of a non-citizen with intent to enter Australia in contravention of this Act; or
   (c) the concealing of an unlawful non-citizen or a deportee with intent to prevent discovery by an officer.

(2) A person is guilty of an offence if:
   (a) the person harbours another person; and
   (b) the other person is an unlawful non-citizen, a removee or a deportee.

Penalty: Imprisonment for 10 years or 1,000 penalty units, or both.

Id.

65. *Id.* at c. 233A. The statute for prosecuting those who bring illegal persons into Australia states:

(1) A person must not, in connection with:
   (a) the entry or proposed entry into Australia, or the immigration clearance, of a group of 5 or more non-citizens (which may include that person), or of any member of such a group; or
   (b) an application for a visa or a further visa permitting a group of 5 or more non-citizens (which may include that person), or any member of such a group, to remain in Australia;

   do any of the following:
   (c) present, or cause to be presented, to an officer or a person exercising powers or performing functions under this Act a document that the person knows is forged or false;
   (d) make, or cause to be made, to an officer or a person exercising powers or performing functions under the Act a statement that the person knows is false or misleading in a material particular;
   (e) deliver, or cause to be delivered, to an officer or a person exercising powers or performing functions under this Act, or otherwise furnish, or cause to be furnished, for official purposes of the Commonwealth, a document containing a statement or information that the person knows is false or misleading in a material particular.

(2) A person must not transfer or part with possession of a document or documents:
   (a) with the intention that the document or documents be used to help a group of 5 or more people, none of whom are entitled to use the document or documents, or any member of such a group, to gain entry into or remain in Australia, or to be immigration cleared; or
   (b) if the person has reason to suspect that the document of documents may be so used.

Penalty: Imprisonment for 20 years or 2,000 penalty units, or both.

Id.

66. *Id.* at c. 233C. The new amendment provides for harsher penalties and longer incarceration periods, such as:

Mandatory Penalties for certain offences

networks continue to thrive.

Furthermore, the Migration Amendment (Excision from Migration Zone) Act 2001[68] aims to remove Cocos Island,[69] Christmas Island,[70] Ashmore

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(1) This section applies if a person is convicted of an offence under section 232A or 233A, unless it is established on the balance of probabilities that the person was aged under 18 years when the offence was committed.
(2) The court must impose a sentence of imprisonment of at least:
  (a) 8 years, if the conviction is for a repeat offence; or
  (b) 5 years, in any other case.
(3) The court must also set a non-parole period of at least:
  (a) 5 years, if the conviction is for a repeat offence; or
  (b) 3 years, in any other case.
(4) In this section:
  (a) *non-parole period* has the same meaning as it has in Part 1B of the *Crimes Act 1914*; and
  (b) a person's conviction for an offence is for a *repeat offence* if, on a previous occasion after the commencement of the section, a court:
    (i) has convicted the person of another offence, being an offence against section 232A or 233A; or
    (ii) has found, without recording a conviction, that the person had committed another such offence.

Id.

67. *See generally R v. Feng Lin* (2001)60071/00 BC 200100204(Austl).

68. *See* Migration Amendment (Excision from Migration Zone) (Consequential Provisions) Bill, No., 2001, (Austl.) "A Bill for an Act to make consequential provision for dealing with unauthorised arrivals in places excised from the migration zone under the *Migration Act 1958* for purposes related to unauthorised arrivals, and for related purposes." *Id.* One of the major amendments includes instructions for officers who suspect that a person may be attempting to enter Australia illegally. *See id.* The amendment of Migration Act 1958 section 189, (4) states: "If an officer reasonably suspects that a person in Australia but outside the migration zone: (a) is seeking to enter an excised offshore place; and (b) would, if in the migration zone, be an unlawful non-citizen; the officer may detain the person." *Id.* In addition, under an amendment to section 198A,

> An officer may take an offshore entry person from Australia to a country in respect of which a declaration is in force under subsection (3). (2) The power under subsection (1) includes the power to do any of the following within or outside Australia: (a) place the person on a vehicle or vessel; (b) restrain the person on a vehicle or vessel; (c) remove the person from a vehicle or vessel; (d) use such force as is necessary and reasonable. (3) The Minister may: (a) declare in writing that a specified 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; and (b) in writing, revoke a declaration made under paragraph (a).

Migration Act, *supra* note 64, at c. 198A.

69. *See* Commonwealth Dept. of Transport and Regional Services, *at* http://www.dotrs.gov.au/terr/cocos/index.htm (last visited Oct. 25, 2001). Cocos Islands, also referred to as the Keeling Islands, are located approximately 900 kilometers south west of Christmas Island. *See id.* Cocos Islands consists of twenty-seven coral islands in the eastern Indian Ocean. *See id.* In April of 1984 Cocos Islands voted to integrate with Australia. *See id.*

Reef,[71] and Cartier Reef[72] from the Australian Migration Zone under the Migration Act of 1958.[73] By removing the outermost territories from the Migration Zone,[74] Australia prevents smugglers from attempting to bring asylum seekers to these points for processing in Australia, therefore asylum seekers who did embark on these places would not "jump the queue."[75]

Likewise, the Border Protection Act[76] provides authority to prevent arrival in, and remove a vessel from, Australia's territorial waters.[77] To effectively stop people on boats from entering Australia illegally, coastal officials will prevent arrival and remove vessels from Australian waters without a legal proceeding.[78] Thus, Australia will avoid processing people

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The total population according to the 1996 Census was 655 people. *See id.*

70. *See* Commonwealth Dept. of Transport and Regional Services, *at* http://www.dotrs.gov.au/terr/xmas/index.htm (last visited Oct. 25, 2001). Christmas Island is located 1,565 kilometers to the northwest of Australia. *See id.* The island was named on Christmas Day 1643. *See Id.* The United Kingdom transferred sovereignty to Australia on October 1, 1958, under the Christmas Island Act of 1958. *See id.*

71. *See* Ashmore Reef National Nature Reserve, *at* http://www.ea.gov.au/coasts/mpa/ashmore (last visited Oct. 25, 2001). Ashmore Reef consists of three small islands, the largest about one kilometer long. *See id.* The reef is located 600 kilometers northwest of the mainland and about 100 kilometers south of Indonesia. *See id.* Ashmore Reef became a National Nature Reserve in August of 1983. *See id.* The reef has a variety of marine habitats, thus it is able to support the greatest number of species on the Western Australia coast. *See id.* The Reef itself is not inhabited, but an Australian Customs vessel patrols the reef to watch for illegal activity and illegal entry. *See* Karen McCormick, *Customs Protecting an Environment 'magnifique', Manifest,* Vol. 4 (May 2001), *available at* http://www.customs.gov.au/media/manifest/May2001/html/p10.htm (last visited Feb. 1, 2002).

72. *See* Commonwealth Dept. of Transport and Regional Services, *at* http://www.dotrs.gov.au/terr/ashcart/ (last visited Oct. 25, 2001). Cartier Island is a small uninhabited island covered with grass located 320 kilometers northwest of Australia and 144 kilometers south of the Indonesian Island of Roti. *See id.*

73. *See* Migration Act, *supra* note 63.

74. *See id.* at c. 5. Migration zone consists of the States, the Territories, Australian resource installations, Australian sea installations, and to avoid doubt includes:

> (a) land that is part of a State or Territory at mean low water; and
> (b) sea within the limits of both a State or a Territory and a port; and
> (c) piers, or similar structures, any part of which is connected to such land or to ground under such sea; but does not include sea within the limits of a State or a Territory but not in port

Id.

75. John Zubrzycki, *UN Attacks Refugee Bungling,* THE AUSTRALIAN, Oct. 22, 2001, at 8. UN officials "have also repudiated claims that Afghan asylum-seekers were queue-jumpers and economic refugees. . . ." *Id.* A senior official for the UNHCR stated, "[t]his whole thing about queue-jumping is nonsense. The only refugees who get in the queue are extreme cases, those who might be killed, and Australia's bureaucracy is too slow and cumbersome to process them in time." *Id.* Australia processed only 109 refugee visas for Afghans in 2000, even though more than tens of thousand were awaiting resettlement. *See id.*

76. *See* Border Protection (Validation and Enforcement Powers) Act 2001 No. 126, 2001 (Austl.)[hereinafter Border Protection Act]. The Act's title reads: "[a]n Act to validate the actions of the Commonwealth and others in relation to the *MV Tampa* and other vessels, and to provide increased powers to protect Australia's borders, and for related purposes." *Id.*

77. *See id.*

78. *See id.*

aboard vessels, which have been turned away.[79]

IV. ANALYSIS OF THE MV TAMPA INCIDENT

A. *Introduction*

On August 26, 2001, after receiving a call from Australian authorities to assist a vessel[80] in distress, the Norwegian Ship, MV Tampa,[81] rescued 433 people[82] located approximately 140 kilometers north of Christmas Island.[83] The Australian Coast Guard did not provide the Captain of the MV Tampa, Arne Rinnan, with a point of disembarkation for the "rescuees;"[84] thus, the MV Tampa continued to Indonesia.[85] Captain Rinnan changed course for Christmas Island after several of the "rescuees" threatened to jump over board.[86] Before entering Australian waters, but close to Christmas Island, Australian authorities requested that the MV Tampa change course for Indonesia.[87] As a precautionary measure, Australian authorities closed Christmas Island's only port, Flying Fish Cove, to prevent private boats from accessing the MV Tampa.[88]

The DIMA[89] contacted Captain Rinnan by radio on August 27, 2001,

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> If an officer detains a ship or aircraft under this section, any restraint on the liberty of any person found on the ship or aircraft that results from the detention of the ship or aircraft is not unlawful, and proceedings, whether civil or criminal, in respect of that restraint may not be instituted or continued in any court against the Commonwealth, the officer or any person assisting the officer in detaining the ship or aircraft.

Id. See also Migration Act 1958 c. 245f(9).

79. *See id.*

80. *See Victorian Council for Civil Liberties Inc. v. Hon. Ruddock, Minister for Immigration & Multicultural Affairs; Vadarlis v. Hon. Ruddock, Minister for Immigration & Multicultural*(2001) F.C.A. 1297, ¶ 14. The vessel was a twenty-meter wooden fishing boat. *See id.*

81. *See id.* ¶ 15. The MV Tampa is a 49,000-ton container ship registered in Norway and licensed to carry no more than fifty people. *See id.* The Tampa was sailing from Fremantle to Singapore, carrying a crew of twenty-seven with more than twenty million dollars of cargo aboard. *See id.*

82. *See id.* ¶ 17. Captain Rinnan had been informed that only eighty people were on the sinking ship. *See id.*

83. *See id.* ¶ 16.

84. *See id.* ¶ 17. Those rescued could not be acknowledged as refugees until they were processed, thus the court adopted the term rescuees. *See id. See also* Unauthorized Arrivals, *supra* note 47.

85. *See Victorian Council v. Ruddock & Vadarlis v. Ruddock* (2001)F.C.A. 1297, ¶ 18.

86. *See Ruddock v. Vadarlis* (2001) F.C.R. 1329, ¶ 18.

87. *See id.*

88. *See Victorian Council v. Ruddock & Vadarlis v. Ruddock* (2001) F.C.A. 1297, ¶ 20. The Harbor Master posted a signed order that "all boat movements in an out of the cove is prohibited." *Id.* In addition public and local authorities were notified that the port was closed. *See id.*

89. *See* DIMIA webpage, *supra* note 37. The DIMIA was called the DIMA at the time

requesting the MV Tampa to remain at its current position until further advised by the Australian government.[90] Captain Rinnan informed Australia that the medical situation on board the MV Tampa was becoming critical.[91] On August 29, 2001, Captain Rinnan sailed the MV Tampa into Australian territorial waters, stopping four nautical miles from Christmas Island.[92] Within two hours of entering Australian waters, forty-five Special Armed Services troops from the Australian Defense Force left Christmas Island and boarded the MV Tampa.[93] The purpose of the troops was to provide security for the crew, render medical assistance, and facilitate the MV Tampa's departure from Australian waters.[94] On August 30, 2001, the Norwegian Ambassador boarded the MV Tampa and received a letter stating in part, "[w]e do not know why we have not been regarded as refugees and deprived from rights of refugees according to International Convention (1951). We request from Australian authorities and people, at first not to deprive us from the rights that all refugees enjoy in your country."[95] The letter was signed "Afghan Refugees Now off the

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of the MV Tampa incident. *See id.*

90. *See Victorian Council v. Ruddock & Vadarlis v. Ruddock* (2001) F.C.A. 1297, ¶21. "[T]he Australian Government at the highest level formally requests that you not approach Christmas Island and that you stand off at a distance at least equal to your current position - 13.5 nautical miles from the island." *Id.*

91. *See id.* ¶22. A conversation between the solicitor, (attorney of the owners of the MV Tampa and Captain Rinnan), and Australia was confirmed via fax. *See id.*

> [T]he medical situation on board is critical. **If it is not addressed immediately people will die shortly.** . . . The ship has now run out of the relevant medical supplies and has no way of feeding these people. . . . It is a simple matter to send a boat from shore to collect the sickest people, supply food and medical assistance. . . . At the request of the Australian Government the vessel is currently just off shore of Christmas Island. If the situation is not resolved soon more drastic action, may have to be taken to prevent loss of life.

Id.

92. *See id.* ¶25.

93. *See id.* ¶26.

94. *See id.*

95. *Id.* ¶28. The letter presented to the Norwegian Ambassador read as follows:

> You know well about the long time war and its tragic human consequences and you know about the genocide and massacres going on in our country and thousands of us innocent men, women and children were put in public graveyards, and we hope that you understand that keeping view of above mentioned reasons we have no way but to run out of our dear homeland and to seek a peaceful asylum. And until now so many miserable refugees have been seeking asylum in so many countries. In this regard before this Australia has taken some real appreciable initiatives and has given asylum to a high number of refugees from our miserable people. This is why we are wholeheartedly and sincerely thankful to you. We hope you do not forget that we are also from the same miserable and oppressed refugees and now sailing around Christmas Island inside Australian boundaries waiting permit to enter your country. But your delay while we are in worst conditions has hurt our feelings. We do not know why we have not been regarded as refugees and deprived from rights of refugees according to International Convention (1951). We request from Australian authorities and people, at first not to deprive us from the rights that all refugees

coast of Christmas Island."[96]

The Victoria Civil Liberties Union[97] and Mr. Eric Vadarlis[98] commenced legal proceedings in Australia's federal court on August 31, 2001, arguing that the Migration Act[99] applied to the "rescuees."[100] However, on September 1, 2001, the Solicitor-General for the Commonwealth announced[101] that the "rescuees" on the MV Tampa would be moved to the HMAS Manoora[102] for

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> enjoy in your country. In the case of rejection due to not having anywhere to live on the earth and every moment death is threatening us. We request you to take mercy on the life of 438 men, women and children.

Id.

96. *Victorian Council v. Ruddock & Vadarlis v. Ruddock* (2001) F.C.A. 1297. ¶ 28.

97. *See id.* ¶ 9. The Victorian Council for Civil Liberties is incorporated under the Associations Incorporations Act of 1981. *See id.* It is a non-governmental organization committed to advocating and protecting fundamental rights and freedoms. *See id.*

98. *See id.* Vadarlis is a solicitor practicing in Melbourne who seeks to offer legal assistance to asylum seekers on a pro-bono basis. *See id.*

99. *See* Migration Act, *supra* note 63. "The Migration Act gives the government very wide powers to detain and remove unlawful non-citizens who are about to enter or who are in Australia." *Id.*

100. *See Victorian Council v. Ruddock & Vadarlis v. Ruddock* (2001) F.C.A. 1297, ¶ 29. The respondents included: The Minister for Immigration and Multicultural Affairs, the Commonwealth, and William Farmer, Secretary and Chief Executive Officer of the Department of Immigration and Multicultural Affairs. *See id.*

101. *See id.* ¶ 32. The announcement made by Prime Minister John Howard in regard to the MV Tampa situation was as follows:

> I am announcing today that we have reached agreement with the Governments of New Zealand and Nauru for processing of the people rescued by the MV Tampa. Under the terms of the agreement, the rescuees will be conveyed to Nauru and New Zealand for initial processing. New Zealand has agreed to process 150 of those aboard the Tampa. It is envisaged that this will include family groups involving women and children. Those found to be genuine refugees in New Zealand would remain there. The remainder of the rescuees will be assessed in Nauru and those assessed as having valid claims from Nauru would have access to Australia and other countries willing to share in the settlement of those with valid claims. Australia will bear the full cost of Nauru's involvement in this exercise. Arrangements will be made to safely transship the rescuees through a third country. We are currently in discussions with appropriate countries to effect this. We are also working closely with the International Organisation for Migration and the UNHCR to ensure that these arrangements are managed carefully and that the rescuees receive appropriate counseling and assistance. Australia will continue to ensure that the rescuees receive all necessary humanitarian assistance while these arrangements are put in place. I would like to take this opportunity to express my Government's gratitude to the Governments of Nauru and New Zealand for their ready and constructive humanitarian assistance.

Id.

102. *See id.* ¶ 40. Prime Minister Howard's comments at a press conference were as follows:

> The proposal is that the people should be transferred from the Tampa to the amphibious troop ship Manoora which is a very large vessel capable of travelling [sic] six thousand kilometres. It's a large troop ship that has extensive medical facilities on board including I understand two operating theatres. Troops remain on this ship for weeks on end. It is within the inevitable constraints of any vessel

transport to the islands of Nauru[103] and New Zealand.[104]

B. *Federal Court Decisions*

1. *Justice North*

The Victorian Civil Liberties Union and Mr. Valdaris argued that the "rescuees" were detained unlawfully and should have been granted a writ of habeas corpus.[105] Because the asylum seekers aboard the MV Tampa did not hold visas entitling them to enter Australia, they were deemed unlawful non-citizens under the Migration Act[106]. According to testimony by Mr. Farmer,

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> quite comfortable and it can adequately accommodate all of the people who will be taken from the Tampa. . . . The Manoora is now ready to take people on board. The idea is they should be transferred to the Manoora then the Manoora will sail to Port Moresby and then they will be transferred to aircraft that will take them to Nauru and to New Zealand. . . . We have achieved an [sic] humanitarian outcome. All of the people can be properly cared for. . . . This is a truly Pacific solution to a problem which involved the governments of Australia, New Zealand, Nauru and Papua New Guinea and they have all worked together and I again express on behalf of the Government and the Australian people our thanks to the governments and the people of those three countries for their willingness to cooperate.

Id.

103. *See* BBC NEWS, *Pacific States Step into the Breach*, Sept. 3, 2001, *at* http://news.bbc.co.uk/hi/english/world/asia-pacific/newsid_1520000/1520388. Nauru is a small island (twenty-one square kilometers) that lies almost on the equator, north of Fiji, and east of the Solomon Islands. *See id.* The population of Nauru is approximately 11,000. *See id.* Nauru depends on imports for all of its food and water. *See id.*

104. *See Victorian Council v. Ruddock & Vadarlis v. Ruddock* (2001)F.C.A. 1297, ¶ 40.

105. BLACK'S LAW DICTIONARY 715 (7th ed. 1999). Writ of Habeas Corpus is defined as: "A writ employed to bring a person before a court, most frequently to ensure that the party's imprisonment or detention is not illegal." *Id.*

> The writ of habeas corpus, by which the legal authority under which a person may be detained can be challenged, is of immemorial antiquity. After a checkered career in which it was involved in the struggles between the common-law courts and the Courts of Chancery and the Star Chamber, as well as in the conflicts between Parliament and the crown, the protection of the writ was firmly written into English law by the Habeas Corpus Act of 1679. Today it is said to be 'perhaps the most important writ known to the constitutional law of England....' Charles Alan Wright, *The Law of Federal Courts* § 53, at 350 (5th ed. 1994) (quoting *Secretary of State for Home Affairs v. O'Brien*, [1923] A.C. 603, 609).

Id.

106. *See* Migration Act, *supra* note 63. Under the Migration Act 1958 section 14, unlawful non-citizens:

> (1) A non-citizen in the migration zone who is not a lawful non-citizen is an unlawful non-citizen.
>
> (2) To avoid doubt, a non-citizen in the migration zone who, immediately before 1 September 1994, was an illegal entrant within the meaning of the Migration Act as in force then became, on that date, an unlawful non-citizen.

Secretary and Chief Executive Officer of DIMA, Australia's position during negotiations was that the "rescuees" aboard the MV Tampa were the responsibility of Norway and Indonesia.[107] Yet, this situation was completely different from typical illegal entry cases. Usually, those rescued at sea were brought to Christmas Island by locals or by the Australian federal police and processed under section 189 of the Migration Act,[108] without the involvement of the highest level of government.[109] In fact, the government maintained control of the "rescuees" in all respects by directing the MV Tampa where it was allowed to go, closing the harbor ensuring isolation, stopping communication, and failing to consult with the refugees about the plans for departure made by Australia.[110]

Australia argued that the "rescuees" were not detained because at least three avenues of escape were available to them.[111] However, the suggestion that the "rescuees" simply could have left is preposterous. After Australia had closed the only port on Christmas Island, no one was allowed access to the MV Tampa to take the "rescuees" anywhere.[112] Likewise, the notion that the "rescuees" could have left on the MV Tampa is erroneous. Not only did the MV Tampa have a limited number of supplies, but it was a commercial ship

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Id.

107. *See id.* ¶ 74.

108. *See* Migration Act, *supra* note 63, c.189.

Detention of unlawful non-citizens

(1) If an officer knows or reasonably suspects that a person in the migration zone (other than an excised offshore place) is an unlawful non-citizen, the officer must detain the person.

(2) If an officer reasonably suspects that a person in Australia but outside the migration zone:

(a) is seeking to enter the migration zone (other than an excised offshore place); and

(b) would, if in the migration zone, be an unlawful non-citizen;

the officer must detain the person.

(3) If an officer knows or reasonably suspects that a person in an excised offshore place is an unlawful non-citizen, the officer may detain the person.

(4) If an officer reasonably suspects that a person in Australia but outside the migration zone:

(a) is seeking to enter an excised offshore place; and

(b) would, if in the migration zone, be an unlawful non-citizen;

the officer may detain the person.

(5) In subsections (3) and (4) and any other provisions of this Act that relate to those subsections, *officer* means an officer within the meaning of section 5, and includes a member of the Australian Defense Force.

Id.

109. *See Victorian Council v. Ruddock & Vadarlis v. Ruddock* (2001) F.C.A. 1297 ¶ 75.

110. *See id.* ¶ 81.

111. *See id.* ¶ 69. "One of the means of escape was to leave with anybody who was prepared to take them from the MV Tampa." *Id.* ¶ 70. Another means of escape was to simply leave on the MV Tampa. *See id.* ¶ 71. Finally, "rescuees could leave pursuant to the Nauru/NZ arrangements. . . ." *Id.* ¶ 73.

112. *See id.* ¶ 81.

not licensed to carry all of the "rescuees."[113] In fact, Australia had initiated the MV Tampa's aiding the "rescuees."[114] It was a miscarriage of justice to expect the MV Tampa alone to provide care and safe haven for the "rescuees."[115] Finally, the "rescuees" had no choice in the decision about whether they were going to be processed in New Zealand or in Nauru.[116] It is notorious that a significant number of asylum seekers are from Afghanistan,[117] thus Australia was aware that some of the people aboard the MV Tampa qualified as refugees.[118] Nauru is not a signatory to the Refugee Convention;[119] hence refugees processed there would not be protected by "refoulment."[120]

Rather than rely on statutory authority to expel the "rescuees" from Australian waters, Australian officials argued that the expulsion of the "rescuees" was an exercise of prerogative power.[121] History has shown that "[w]hether the exclusion and expulsion of friendly aliens was permissible under the prerogative is doubtful."[122] International law does recognize the power to exclude or expel aliens as a sign of sovereignty over territory.[123]

> One of the rights possessed by the supreme power in every State is the right to refuse to permit an alien to enter that State, to annex, what conditions it pleases to the permission to enter it, and to expel or deport from the State, at pleasure, even a friendly alien, especially if it considers his presence in

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113. *See Victorian Council v. Ruddock & Vadarlis v. Ruddock* (2001)F.C.A. 1297, ¶ 70.

114. *See id.* ¶ 16.

115. *See id.* ¶ 72.

116. *See id.* ¶ 79.

117. *See id.* ¶ 67.

118. *See id.* ¶ 66. The Prime Minster of New Zealand stated to the media on September 1, 2001 concerning the "Pacific Solution" :

> [A]sylum seekers from Afghanistan flee from one of the world's most repressive regimes. Human rights abuses are common, one quarter of children die by the age of five and 3.6 million Afghans have become refugees. The next planned refugee arrivals in New Zealand under its quota arrangements with the UNHCR are also Afghans.

Id.

119. *See* 1951 Convention, *supra* note 32.

120. *See Victorian Council v. Ruddock & Vadarlis v. Ruddock* (2001) F.C.A. 1297, ¶ 79. *See generally* 1951 Convention, *supra* note 32. Refoulement is the process of returning refugees to a country where their life or freedom would be threatened. *See id.*

121. *See Victorian Council v. Ruddock & Vadarlis v. Ruddock* (2001) F.C.A. 1297, ¶ 110.

122. *Id.* ¶ 112. (*quoting* Harry Street & Rodney Brazier, *de Smith Constitutional and Administrative Law* 149-50(5th Ed) Penguin Books, 1985); *See also id.* (quoting Robtelmes v. Brenan (1906) 4 C.L.R. 395, 414-5.)

> Whether expulsion in Great Britain or in one of her self-governing Colonies or States, requires statutory authority has, no doubt, been the subject of some hesitation on the part of eminent lawyers, but it is not necessary for us to decide that question. It does not arise. The question here is, first, whether the statutory authority exists, and next, whether it has been properly exercised?

Id. ¶ 113.

123. *See Victorian Council v. Ruddock & Vadarlis v. Ruddock* (2001) F.C.A. 1297 ¶ 119.

> the State opposed to its peace, order, and good government, or to its social or material interests.[124]

Nevertheless, Australian case law stipulates that the common law prerogative power does not govern entry of persons into Australia.[125] Justice North examined the ruling in *Chu Kheng Lim v. Minister for Immigration, Local Government and Ethnic Affairs* which stated that "[u]nder the common law of Australia and subject to qualifications in the case of an enemy alien in time of war, an alien who is within this country, whether lawfully or unlawfully, is not an outlaw."[126]

In addition, the title of the statutory provision concerning the removal of aliens does not include the use of prerogative power.[127] Because the Migration Act is the authoritative law on entrance of persons into Australia, the Australian government could not claim a prerogative power to expel the "rescuees".[128] Consequently, by way of habeas corpus, Justice North ordered the Commonwealth to release the 433 "rescuees" on September 11, 2001.[129]

2. *Full Bench*

On appeal, a majority of the full bench[130] ruled that the Commonwealth acted within its executive power under section sixty-one of the Australian Constitution.[131] Power to determine who may enter Australia is so central to Australia's sovereignty it seems unreasonable that the Government lacked the power to prevent aliens from entering Australia.[132] According to the Full Bench, the issue presented in the MV Tampa incident was not whether the

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124. Vattel, Law of Nations, book 1, section 231; book 2, section 125. *See also Robtelmes v. Brennan* (1906) 4 C.L.R. 395. "It cannot be doubted that a nation state has sovereign power to exclude illegally entering aliens from its borders, and to legislate for this purpose." *Id.*

125. *See Victorian Council v. Ruddock & Vadarlis v. Ruddock* (2001) F.C.A. 1297, ¶ 121(quoting *Minister for Immigration and Ethnic Affairs v. Mayer* (1984) 4 F.C.R. 312 at 316. "At the present time the law with respect to the entry of persons to Australia and with respect to their expulsion is regulated by statute." *See id. See also Minister for Immigration and Ethnic Affairs v. Mayer* (1985) 7 FCR 254.

126. *Chu Kheng Lim v. Minister for Immigration, Local Government and Ethnic Affairs* (1992) 176 C.L.R. 1, ¶ 19.

127. *See Victorian Council v. Ruddock & Vadarlis v. Ruddock* (2001) F.C.A. 1297 ¶ 122. "The long title of the act is '[a]n Act relating to the entry into, and presence in, Australia of aliens, and the departure or deportation from Australia of aliens and certain other persons.'" *See also* Migration Act, *supra* note 63.

128. *See Victorian Council v. Ruddock & Vadarlis v. Ruddock* (2001) F.C.A. 1297.

129. *See id.* ¶ 95.

130. *See Ruddock v. Vadarlis* (2001) F.C.A. 1329. Chief Justice Black, Justice Beaumont and Justice French presided. *See id.*

131. *See* Austl. Const. ch. II, pt. V. § 61. "The executive power of the Commonwealth is vested in the Queen and is exercisable by the Governor-General as the Queen's representative, and extends to the execution and maintenance of this Constitution, and of the laws of the Commonwealth." *Id.*

132. *See Ruddock v. Vadarlis,* (2001) F.C.A. 1329, ¶ 193.

government had the executive power to expel, but whether at common law the "rescuees" had a legal right to enter Australia.[133] At the time the incident involving the MV Tampa arose, and since then, Australian courts have never granted aliens a common law right to enter Australian territory.[134]

The common law does not address whether in the absence of statutory authorization the Constitution confers upon the Executive a power to exclude or prevent the entry of a non-citizen to Australia.[135] Therefore, to determine whether the Australian government overstepped its boundaries, the court looked to the Migration Act.[136] The court found that the Australian government acted within its scope of executive power by preventing the "rescuees" from entering the migration zone.[137] In addition, the Full Bench ruled that the "rescuees" were not detained in such a way as to qualify for a writ of habeas corpus.[138]

3. *High Court*[139]

On October 29, 2001, Justice Kenneth Hayne[140] heard arguments on why the appeal of the Federal Court's ruling on the "rescuees" should be expedited.[141] There was concern that because the "rescuees" had been

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133. *See id.* ¶ 111.

134. *Id.* ¶ 112. "[A] grave question [arises] as to the plaintiff's right to maintain the action. He can only so if he can establish that an alien has a legal right, enforceable by action, to enter British territory. No authority exists for the proposition that an alien has any such right." *Musgrove v. Chun Teeong Toy* (1891) A.C. 272, 282. *See also Johnstone v. Pedlar* (1921) 2 A.C. 262, 276, "No doubt a friendly alien is not for all purposes in the position of a British subject. For instance, he may be prevented from landing on British soil without reason given." *Id. See also Koon Wing Lau v. Calwell* (1949) 80 C.L.R. 533 at 555-56, "As far as aliens are concerned, they can be excluded and prevented from remaining in the country at common law or by the authority of a statute: see Musgrove v. Chun Teeong Toy; Attorney-General for Canada v. Cain and Gilhula; R. v. Bottrill." *Id.*

135. *See Ruddock v. Vadarlis, supra* note 130, ¶ 179.

136. See *id.* ¶ 109. "[T]he Act, by its creation of facultative provisions, which may yield a like result to the exercise of executive power, in this particular application of it cannot be taken as intending to deprive the Executive of the power necessary to do what it has done in this case." *Id.*

137. *See id.* ¶ 204.

138. See *id.* ¶ 206. "Partial restraint was to be distinguished from detention. To obstruct a person from going in a particular direction, it was argued, does not constitute detention. The rescuees were only prevented from going to their preferred destination." *Id.*

139. *See generally* High Court of Australia homepage *at http://www.hcourt.gov.au,* (last visited Nov. 1, 2001). The High Court is the highest court in the Australian judicial system. *See id.* Section 71 of the Australian Constitution established the Court in 1901. *See id.* Current Members of the Court include Chief Justice Gleeson, Justice Gaudron, Justice McHugh, Justice Gummow, Justice Kirby, Justice Callinan, and Justice Hayne. *See id.*

140. Justice Kenneth Madison Hayne was appointed to the High Court in September of 1997. *See id.* Formerly he was a judge of the Court of Appeal of Victoria having been appointed one of the foundation judges of the Court in 1995. *See id.*

141. *See* Vadarlis v. MIMA & Ors M93/2001, High Court of Australia Transcripts, *at* http://www.austlii.edu.au/au/other/hca/transcripts/2001/M93/1.html (last visited Feb. 7, 2002).

transported from Australia to other nations and that they may be further dispersed they would be outside the jurisdiction of the Australian government.[142] This concern was reasonably justified because the solicitor's request for relief was a reinstatement of Justice North's decision, which allowed the "rescuees" to be released and processed in Australia.[143] Justice Hayne granted the expedition since the issue was the illegal detention of the "rescuees" by the Commonwealth.[144]

On November 27, 2001, the High Court[145] heard arguments concerning whether the relief requested on behalf of the "rescuees" should be granted.[146] The Court focused on the issue of whether the "rescuees" could indeed be brought back to Australia if relief was granted.[147] The Australian government argued that the entire issue of habeas corpus was moot, as the "rescuees" were no longer located in Australian territory.[148] The Court held that essential claim of detention made at trial and in the Full Court of the Federal Court, could no longer be made because the "rescuees" were no longer under Australian jurisdiction.[149] The Court further explained that if the "rescuees" were currently detained they would be detained in a foreign country subject to that country's law.[150]

C. *Australian Courts Decision in Comparison with the Convention on the Law of the Sea and the Convention on the Status of Refugees*

1. *United Nations Convention on the Law of the Sea*[151]

This hearing provided Justice Hayne with information on why the *Vadarlis* appeal should be expedited to December 14th, 2001, thus pushing aside other legal claims to be heard by the High Court. *See id.*

142. *See id.* Most of the boat people from the MV Tampa are in Nauru where they are undergoing processing through the UNHCR to determine their refugee status. *See* Norrie Ross, *Judge Allows Tampa Hearing,* HERALD SUN,(Oct. 30, 2001), at 13. If the boat people are resettled in a third country, then the current litigation would become moot. *See id.*

143. *See* Vadarlis v. MIMA & Ors M93/2001, High Court of Australia Transcripts, *at* http://www.austlii.edu.au/au/other/hca/transcripts/2001/M93/1.html (last visited Feb. 7, 2002).

144. *See id.*

145. Justice Gaudron, Justice Gummow, and Justice Hayne presided. *See id.*

146. *See* Vadarlis v. MIMA & Ors M93/2001, High Court of Australia Transcripts, *at* http://www.austlii.edu.au/au/other/hca/transcripts/2001/M93/3.html (last visited Feb. 7, 2002).

147. *See id.*

148. *See id.*

149. *See id.*

150. *See id.* All "rescuees" from the MV Tampa had been moved to Nauru or New Zealand at the time of the High Court. *See id.*

151. United Nations Convention on the Law of the Sea, Nov. 23, 1982, 21 I.L.M. 1261 (entered into force Dec. 10, 1982)[hereinafter Law of the Sea]. The purpose of the Convention is outlined in the preamble:

> Prompted by the desire to settle, in a spirit of mutual understanding and co-operation, all issues relating to the law of the sea and aware of the historic significance of this Convention as an important contribution to the maintenance of peace, justice and progress for all peoples of the world,

It is the duty of every ship "to render assistance to any person found at sea in danger of being lost. . . ."[152] Therefore, when the Australian authorities

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Noting that developments since the United Nations Conferences on the Law of the Sea held at Geneva in 1958 and 1960 have accentuated the need for a new and generally acceptable convention on the law of the sea,

Conscious that the problems of ocean space are closely interrelated and need to be considered as a whole,

Recognizing the desirability of establishing through this Convention, with due regard for the sovereignty of all States, a legal order for the seas and oceans which will facilitate international communication, and will promote the peaceful uses of the seas and oceans, the equitable and efficient utilization of their resources, the conservation of their living resources, and the study, protection and preservation of the marine environment,

Bearing in mind that the achievement of these goals will contribute to the realization of a just and equitable international economic order which takes into account the interests and needs of mankind as a whole and, in particular, the special interests and needs of developing countries, whether coastal or land-locked,

Desiring by this Convention to develop the principles embodied in resolution 2749 (XXV) of 17 December 1970 in which the General Assembly of the United Nations solemnly declared *inter alia* that the area of the sea-bed and ocean floor and the subsoil thereof, beyond the limits of national jurisdiction, as well as its resources, are the common heritage of mankind, the exploration and exploitation of which shall be carried out for the benefit of mankind as a whole, irrespective of the geographical location of States,

Believing that the codification and progressive development of the law of the sea achieved in this convention will contribute to the strengthening of peace, security, co-operation and friendly relations among all nations in conformity with the principles of justice and equal rights and will promote the economic and social advancement of all peoples of the world, in accordance with the Purposes and Principles of the United Nations as set forth in the Charter,

Affirming that matters not regulated by this Convention continue to be governed by the rules and principles of general international law,

Id. at 1271.

152. *Id.* at 1288. The duty to render assistance is outlined in Article ninety-eight of the Law of the Sea:

(1) Every State shall require the master of a ship flying its flag, in so far as he can do so without serious danger to the ship, the crew or the passengers:
   (a) to render assistance to any person found at sea in danger of being lost;
   (b) to proceed with all possible speed to the rescue of persons in distress, if informed of their need of assistance, in so far as such action may reasonably be expected of him;
   (c) after a collision, to render assistance to the other ship, its crew and its passengers and, where possible, to inform the other ship of the name of his own ship, its port of registry and the nearest port at which it will call.

(2) Every coastal State shall promote the establishment, operation and maintenance of an adequate and effective search and rescue service regarding safety on and over the sea and, where circumstances so require, by way of mutual regional arrangements co-operate with neighbouring States for this purpose.

Id.

called the MV Tampa to render assistance, under international law the ship progressed to aid the "rescuees."[153] The International Law of the Sea Convention, however does not address where passengers are to be taken after rescue at sea.[154] Additionally, no binding international convention relating to stowaway asylum-seekers exists, thus the practice varies widely throughout the world.[155] These problems were highlighted in the MV Tampa incident when Norway, Indonesia, and Australia[156] refused to take responsibility for the "rescuees."[157] The actions taken by Australia during the MV Tampa standoff deters ships' masters from assisting people at sea in distress.[158]

Likewise, Australia's new legislation,[159] which allows ships to be chased down if Australian authorities request admittance, is in direct contrast to the Law of the Sea Convention, which allocates a right of innocent passage.[160]

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153. *See* Inter-Governmental Maritime Consultative Organization: International Convention for the Safety of Life at Sea, 14 I.L.M. 959, Nov. 1, 1974. Maritime tradition is that vessels go to the nearest port in an emergency. *See id.* Signatories to the Convention include: Argentina, Belgium, Bulgaria, Byelorussian Soviet Socialist Republic, Chile, China, Congo, Czechoslovakia, Democratic Yemen, Denmark, Egypt, France, Federal Republic of Germany, Ghana, Greece, Hungary, Iceland, Indonesia, Iran, Israel, Liberia, Mexico, Monaco, Norway, Poland, Portugal, Republic of Korea, Republic of Viet-Nam, Spain, Sweden, Switzerland, Ukrainian Soviet Socialist Republic, Union of Soviet Socialist Republics, United Kingdom of Great Britain and Northern Ireland, United States of America, Venezuela, and Yugoslavia. *See id.*

154. *See* UNHCR & Refugees, *Who is a Refugee*, *at* http://www.unhcr.ch/un&ref/who/whois.htm (last visited Sept. 5, 2001).

155. *See id. See also* BBC NEWS, Tom Housden, *Maritime Conventions Tested*, Aug. 30, 2001, *at* http://news.bbc.co.uk/hi/english/world/asia-pacific/newid_1514000/1514912. According to Professor Guy Goodwin Gill, a specialist in international refugee law, "[t]here are gaps in the international regime of refugee protection. Although on the one hand the ship's master has a duty to rescue anyone in distress-including a refugee-there is no international rule governing how [they] should be treated thereafter." *Id.*

156. *See* Law of the Sea, *supra* note 151, at 1286. Article 87 acknowledges the principle of freedom of the high seas:

> 1. The high seas are open to all States, whether coastal or land-locked. Freedom of the high seas is exercised under the conditions laid down by this Convention and by other rules of international law. It comprises, *inter alia*, both for coastal and land-locked States:(a)freedom of navigation;(b)freedom of overflight;(c)freedom to lay submarine cables and pipelines, subject to Part VI;(d)freedom to construct artificial islands and other installations permitted under international law, subject to Part VI;(e)freedom of fishing, subject to the conditions laid down in section 2;(f)freedom of scientific research, subject to Parts VI and XIII.
> 2. These freedoms shall be exercised by all States with due regard for the interests of other States in their exercise of the freedom of the high seas, and also with due regard for the rights under this Convention with respect to activities in the Area.

Id.

157. *See* Jacinto, *supra* note 17.

158. *See* Housden, *supra* note 155.

159. *See* Border Protection Act, *supra* note 76.

160. *See* Law of the Sea, *supra* note 151, at 1287. "No State may validly purport to subject any part of the high seas to its sovereignty." *Id.*

Australia's new policy to deter people smuggling is in direct contrast to the Law of the Sea.[161]

2. *Convention on the Status of Refugees*

The MV Tampa incident is an "example of growing global tensions over the fate of millions of refugees and migrants criss-crossing the globe to escape persecution, war, poverty, or hunger."[162] While international law imposes an obligation upon a coastal state to provide humanitarian assistance to vessels in distress, there is no concurrent obligation requiring the coastal state to resettle those individuals.[163]

Nevertheless, under the 1951 Convention, it makes no difference if a refugee arrives in a country legally or illegally.[164] Once the "rescuees" on the MV Tampa conceded that they were possible refugees, Australia should have immediately processed their claims.[165] Another viable solution included Australia processing the "rescuees" claims with a guarantee of resettlement in Norway for those who qualified as refugees.[166]

Australia was in the best position to take a global lead in aiding refugees during the MV Tampa incident.[167] Yet, Australia's hesitation suggests that people smugglers may actually be doing a better job than the Australian government in assisting refugees.[168] Similar to the "rescuees" on the MV Tampa, the vast majority of recent boat people are from Afghanistan and Iraq.[169] Most asylum seekers from these two countries have qualified as "Convention refugees."[170] However, the asylum seekers who resort to smuggling themselves to sanctuary, seriously compromise their refugee claims in many countries, including Australia.[171]

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161. *See id.*

162. Elizabeth Neuffer, *Australia Urged to End Refugee Plight Standoff 438 Aboard Ship*, THE BOSTON GLOBE, Aug. 30, 2001, at A1.

163. *See id.*

164. *See id. See also* 1967 Protocol, *supra* note 33.

165. *See* Jean-Pierre Fonteyne, *Australia's Obligations Quite Clear; Jean-Pierres Fonteyne Explains why Refugee Claims by those on the Tampa must be processed*, THE CANBERRA TIMES, Aug. 31, 2001, at A11.

166. *See* ABC NEWS, *Annan: Australian Boat People Plan Acceptable*, Sept. 2, 2001, *at* http://abcnews.go.com/wire/World/reuters200110902_193.html.

167. *See id.* United Nation officials stressed that the MV Tampa should have been allowed to dock immediately, as they believed those on board were more likely to be refugees than illegal migrants. *See id.*

168. *See* William Maley, *Working Paper No. 63 Security, People-Smuggling and Australia's New Afghan Refugees*, Mar. 2001, Australian Defence Studies Centre, at 10.

169. *See id.*

170. *Id.* Convention refugees are defined in the 1951 Refugee Convention. *See* 1951 Convention, *supra* note 32.

171. *See* Erika Feller, *The Institute for Global Legal Studies Inaugural Colloquium: The UN and the Protection of Human Rights: The Evolution of the International Refugee Protection Regime*, 5 WASH. U.J.L. & POL'Y 129, 137 (2001).

V. PEOPLE SMUGGLING IN THE SOUTH PACIFIC AFTER THE MV TAMPA

After the MV Tampa incident, boat people continue to flock to Australia.[172] In October 2001, the HMAS Adelaide attempted to block the entrance of a new group of migrants off the coast of Christmas Island, but the vessel would not stop.[173] Gunshots were fired across the bow of the asylum seekers boat to prevent the vessel from entering Australian waters.[174] Approximately two hours after the gunfire, the Australian Coast Guard witnessed children being thrown overboard.[175] According to the Australian government, the warning shots were "totally unrelated to people jumping overboard."[176] The act of throwing children into the ocean, in order to be picked up by the HMAS Adelaide, is just one demonstration of the desperate measures people smugglers will use to transport their human cargo to Australia.[177] In addition, less than two weeks later, over 353 asylum seekers bound for Australia died off the coast of Java after their boat sank in rough seas.[178] This was the "worst loss of life in the history of boat people traffick from Indonesia. . ."[179]

Australia's response to people smuggling continues to send a message to the smugglers that Australia will remove people who have no right to stay.[180] To achieve this goal, Australia has entered into multi-million dollar[181] deals with Nauru[182] and Papua New Guinea[183] to keep asylum seekers off-

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172. *See Stranded Boat People allowed to Land,* THE CANBERRA TIMES, (Oct. 31, 2001). Australia was forced to allow 220 asylum-seekers to land on Christmas Island after their boat sank on October 29, 2001. *See id.*

173. *See* Andrea Mayes & Kevin Ricketts, *Wrap-PNG agrees to take boat people on Adelaide,* AAP NEWSFEED, Oct. 10, 2001, at Financial News. The Australian navy rescued over 187 people after their vessel sank off the coast of Christmas Island. *See id.* Those rescued were transported to Papua New Guinea. *See id.*

174. *See id.*

175. *See id.*

176. *Id.*

177. *See id.*

178. *See* Reuters, *Migrants' Boat Sinks Off Java; 350 Drown; Asylum Seekers Were Headed to Australia,* THE WASHINGTON POST, Oct. 23, 2001, at A18. Those that were killed included Iraqis, Iranians, Afghans, Palestinians, and Algerians. *See id. See also* Don Greenlees, *Overload kills on voyage of doom,* THE AUSTRALIAN, Oct. 24, 2001, at 5. The vessel "was overloaded with fuel and had more than four times the number of passengers it could safely carry. . . ." *Id.*

179. *Id.*

180. *See* Phillip Ruddock, *Rebuttal of Four Corners Program,* Aug. 16, 2001, *at* http://www.minister.immi.gov.au/media_releases/media01/r01118.htm.

181. *See* Australian Dollar, *supra* note 54.

182. *See* Ian McPhedran, *Nations in Pacific fear boat people instability,* THE ADVERTISER, Oct. 30, 2001, at 2. The brokered deal between Australia and Nauru is for twenty million dollars. *See id.*

183. *See id.* The Australian government has promised to pay one million dollars to Papua New Guinea. *See id.*

shore.[184] Furthermore, an Australian processing center for asylum seekers will be built at Australia's expense on Papua New Guinea.[185] The International Organization for Migration will operate the center with assistance from Australia.[186]

By transporting illegal migrants to other Pacific Island nations, Australia risks injuring their island neighbors. The substantial increase in population endangers the already limited resources of the islands.[187] For example, Nauru and Papua New Guinea are not equipped to handle the economic, social, and security issues that arise in accepting illegal migrants.[188] By transporting the boat people to other nations, Australia diverts illegal migrants without stopping the people smuggling.[189]

VII. EUROPE'S DIFFICULTIES WITH PEOPLE SMUGGLING

Australia is not alone in dealing with an increase in illegal migrants. Each year, "[c]riminal rings and individuals smuggle hundreds of thousands of illegal immigrants by planes, trucks, and boats into Europe, taking advantage of relaxed visa regulations and unpatrolled coastlines."[190] In addition, it is estimated that since 1997 over 6,000 people have died attempting to illegally enter Europe.[191]

Italy, like Australia, faces an onslaught of boat people.[192] The Italian government attempted to discourage people smuggling by imposing tougher

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184. *See id.* In addition, Australia is negotiating with Fiji, Kiribati, and Palau. *See id.*

185. *See Mayes & Ricketts, supra* note 173.

186. *See id.*

187. *See* McPhedran, *supra* note 182. According to Pacific Islands Forum secretary-general Noel Levi, "[s]uch a substantial population influx places extreme pressure on our already very limited resources, exposing our small and vulnerable economies to further social and economic problems which we can ill afford." *Id.*

188. *See* Statement by Mr. Peter Schatzer, *Global Migration Trends-An Era of International Migration,* (Oct. 10, 2001).

> Discussion on migrants pre-11 September focused on issues such as prevention of illegal border crossings, matching migrants with labour market needs, integration in host societies, multiculturalism etc., much of the focus now is on security. For some time to come, the migration debate will be viewed through a magnifying lens that has "combating terrorism" written on its handle.

Id.

189. *See* Don Greenlees et al., *$14,000 to Hire Boat,* THE AUSTRALIAN, Oct. 30, 2001, *at* http://www.theaustralian.news.com.au/common/story_page/0,5744,3146906%5E2702,00.html.

190. Jennifer Johnson, *International Branch,* 12 GEO. IMMIGR. L.J. 423, 423 (1998).

191. *See* Newsweek, Rod Nordland, *Storming Fortress Europe,* Aug. 13, 2001, *at* http://www.msnbc.com/news/609718.asp. United for Intercultural Action has documented 2,406 deaths throughout Europe since 1996. *See id.* Many deaths go unaccounted for as people have frozen to death attempting to cross Kosovo's mountains of the damned, drowned trying to wade across the Morva River, suffocated in trucks crossing the English Channel, or even fallen from the sky after hiding in aircraft landing gear. *See id.*

192. *See id.*

criminal sentences.[193] According to an Italian police officer who regularly tracks smugglers, "[H]uman life has no value to these traffickers, it's like they're selling oranges or something."[194] Consequently, the people smugglers routinely toss people overboard rather than risk apprehension by authorities.[195] Thus, for many the Adriatic Sea has literally become a final resting place.[196]

Similarly, Great Britain faces an increase of illegal migrants.[197] In the fall of 2001, the Channel Tunnel connecting Britain to mainland Europe faced numerous temporary closings as officials searched for illegal migrants who had boarded freight trains.[198] The Channel Tunnel's entrance in France is within walking distance of the Sangatte Refugee Center.[199] Euro- tunnel[200] estimates it has stopped 18,500 refugees from reaching Great Britain through the tunnel in the first half of 2001.[201] Britain and Italy discussed mutually increasing penalties for people smuggling, but the difficulty is that most smugglers operate outside of the countries' borders.[202]

Since 1989 more than five million people have applied for asylum in European Union states.[203] The European Union, stressing the importance of free movement of persons between member states, created the Schengen Accords, an agreement allowing movement between European countries without presenting a passport or visa.[204] Yet, the Schengen Accords do not take

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193. *See id.*

194. *Id.*

195. *See* CNN.com, Robin Oakley, *Human Trade: The Fastest-Growing Crime*, Sept. 26, 2001, *at* http://asia.com.cnn.com/SPECIALS/2001/immigration/stories/human.trade. "There is evidence that traffickers have thrown women and children, many of whom cannot swim, into the Adriatic to avoid detection by police patrol boats." *Id.*

196. *See* Nordland, *supra* note 191. In late 1996, 283 people mostly Sri Lankan Tamils and Liberians, died in a shipwreck in the Adriatic Sea. *See id.* Authorities never searched for the remains even after fishermen began repeatedly catching corpses in their nets. *See id.* A private diver located the boat in the summer of 2001. *See id.*

197. *See* Horsley, *supra* note 12.

198. *See id.*

199. *See* The Associated Press, *Freight Train Travel Halted in Eurotunnel after Illegal Immigrants try to Slip into Britain*, Oct. 30, 2001, *at* http://abcnews.go.com/wire/World/ap20011030_984.html. The Red Cross administrates the Sangatte center. *See id.* The center was opened in 1999, and was meant to house 650 people. *See id.* The population in September of 2001 was 1,670 persons. *See id.* "The center has become a magnet for refugees, mostly Kurds and Afghans, trying to make it to Britain, which has comparatively lax immigration law." *Id.*

200. Eurotunnel is the regulatory agency that services and patrols the Channel Tunnel. *See id.*

201. *See id.* Freight train traffic was halted as one hundred asylum seekers attempted to enter the tunnel. *See id.*

202. *See* Oakley, *supra* note 195.

203. *See* Horsley, *supra* note 12.

204. *See* Belgium-France-Federal Republic of Germany-Luxembourg-Netherlands: Schengen Agreement on the Gradual Abolition of Checks at Their Common Borders and the Convention Applying the Agreement, 30 I.L.M. 68, 69, 73, 84 (in four parts), Jan. 1991. The Schengen Agreement was concluded on June 14, 1985. *See id.* The Schengen was Convention concluded on June 19, 1990. *See id.* Signatories include, Germany, France, Belgium, the

into account the prevalence of illegal immigration and international crime.[205] In response, western governments have made it harder for asylum seekers to enter their countries.[206] Consequently, refugee agencies criticize European governments for attempting to build "Fortress Europe" to keep out genuine asylum seekers.[207]

VI. GLOBAL INITIATIVE TO STOP PEOPLE SMUGGLING

The United Nations Protocol Against Smuggling of Migrants by Land, Sea and Air,[208] is the beginning of global acknowledgment that smuggling is a grievous problem in need of immediate attention.[209] "The purpose of this Protocol is to prevent and combat the smuggling of migrants, as well as to promote cooperation among States Parties to that end, while protecting the rights of smuggled migrants."[210] The Protocol calls for international involvement, including information sharing and cooperation between countries.[211] In addition, the Protocol allows countries that suspect vessels of smuggling migrants, to notify flag states[212] for authorization to board and search the vessels.[213] The Protocol calls for specialized training to improve the security and quality of travel documents, increase recognition of fraudulent documents, and strengthen efforts to gather criminal intelligence.[214]

Whereas the United Nations Protocol attempts to curb people smuggling, or at least raise awareness, some officials argue that the best way to halt smugglers is to modify the 1951 Convention.[215] The argument for modification

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Netherlands, Luxembourg, and Italy. *See id.*

205. *See* Johnson, *supra* note 190, at 425.

206. *See* Horsley, *supra* note 12.

207. *See* Nordland, *supra* note 191.

208. *See* United Nations General Assembly: Convention Against Transnational Organized Crime; Protocol to Prevent, Suppress and Punish Trafficking in Persons, especially Women and Children; and Protocol Against the Smuggling of Migrants by Land, Sea and Air, 40 I.L.M. 335. [hereinafter Protocol Against Smuggling] The Preamble reads as followed: "[d]eclaring that effective action to prevent and combat the smuggling of migrants by land, sea and air requires a comprehensive international approach, including cooperation, the exchange of information and other appropriate measures, including socio-economic measures, at the national, regional and international levels. . . ."
Id. at 383.

209. *See id.* at 384.

210. *Id.*

211. *See id.*

212. *See id.* at 386. Each vessel that sails on the high sea, flies the flag of the country of origin. *See id.* Authorization from the flag state provides not only permission, but alerts the flag state of any wrongdoing by one of their ships. *See id.*

213. *See id.* at 386-87.

214. *See* Protocol Against Smuggling, *supra* note 208, at 389.

215. *See* Marilyn Achiron, *A 'Timeless Treaty Under Attack,'* REFUGEES, vol. 2, 123 (2001), at 7. "The United Kingdom is taking the lead in arguing for reform, not of the Convention's values, but of how it operates." *Id. See generally* United Nations homepage, *at* http://www.un.org (last visited Nov. 19, 2001).

stems from the fact that the 1951 Convention is outdated, unworkable, and irrelevant in today's ever-changing world.[216] However, "[T]he 1951 convention was never conceived as an instrument of migration control."[217]

The world's system of protection for asylum seekers is threatened unless western countries offer assistance.[218] When western countries create visa restrictions to limit migration, people smuggling increases because refugees are denied the opportunity for legal migration.[219] For now, the world seems content in "[b]uilding walls higher and higher only to find people tunneling under them and dying in the process." [220]

VI. CONCLUSION

People smuggling is on the rise and will continue to grow without an international response to the epidemic. Australia's answer has been to punish the smuggler by not allowing those rescued at sea to be brought to shore. This policy forces the smuggler to turn to more drastic measures, such as throwing people overboard, or sinking the ship to gain access to the country.

Australia has relied on other Pacific Islands to aid in detaining the illegal migrants. The building of the housing center in Papua New Guinea demonstrates that Australia would rather pay off another country than face the illegal migration problem itself. This center will divert boat people away from Australia for the time being, but this is not a responsible or reasonable long-term answer to people smuggling.

Those that are smuggled are not looking for a free pass to the West. Each person who pays a smuggler risks his or her life in order to have some sense of freedom. Whether the freedom is one of peace, prosperity, or release from suffering, increasing fines and moving detention centers will not stop illegal arrivals.

Over 200 years ago people were smuggled into the "new world." History refers to this period as the slave trade. If smuggling continues, we are not only encouraging a practice that ended in the civilized world over a century ago, but supporting it.

People smuggling is the third most lucrative enterprise for organized crime. Many people on this planet are becoming very rich at others' suffering. Some might refer to this as the capitalist system, but it is far from it. Increased interaction between countries in order stop people smuggling must be accomplished. The United Nations Protocol Against Smuggling is only a beginning. International law itself is difficult to enforce; but out of simple

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216. *See* Feller, *supra* note 171, at 136.

217. *Id.*

218. *See* Alan Travis, *Asylum System in Peril: UN warning as 100 Storm Channel Tunnel*, THE GUARDIAN, (Sept. 3, 2001), at 1.

219. *See* Maley, *supra* note 168, at 6.

220. Nordland, *supra* note 191.

respect for human life, governments should be willing to eliminate the people smuggling trade.

There may not be an exact answer to end people smuggling. For as long as each country has borders, the world is still occupied by Europeans, Africans, Asians, Australians, and Americans. Though migration quotas, detention centers, and the right to refuse entry are rights of all sovereign nations, these nations cannot ignore the horrors that harsh regimes inflict on their citizens. We must pursue people smuggling organizations directly, but never forget, that those who are smuggled are looking for a glimmer of light in a dark world.

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