

## A SOMETIMES DANGEROUS CONVERGENCE: REFUGEE LAW, HUMAN RIGHTS LAW AND THE MEANING OF ‘EFFECTIVE PROTECTION’

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*In late 2011 the High Court of Australia and the European Court of Justice made rulings on the conditions under which asylum seekers can be transferred to a third country. The High Court of Australia held that asylum seekers cannot be transferred unless they will be protected from persecution and be entitled to all of the rights outlined in the Refugee Convention. However, four months later the European Court of Justice set the threshold much lower. It ruled that a transfer could occur unless the asylum seeker would be subject to persecution or inhuman or degrading treatment. These sharply contrasting decisions raise wider issues for refugee protection especially in light of the desire for a harmonious interpretation of the Refugee Convention. Such a result is also surprising given the proliferation of human rights instruments and jurisprudence in the European Union, compared to Australia’s lack of a national human rights framework. This article will use these cases to demonstrate that, while some courts have drawn on principles of human rights law to progressively interpret the Refugee Convention, the nature of protection in the Refugee Convention is both distinct from and beyond the preservation of fundamental human rights. Accordingly, reference to principles of human rights law in transfer decisions can have the counter-productive effect of lowering the threshold for ‘effective protection’. This raises the need for critical examination of the boundaries of human rights and refugee law and consideration of the extent to which they should remain distinct bodies of law.*

### I INTRODUCTION

Increasingly, states in the Global North have entered into inter-governmental agreements by which asylum seekers can be transferred to third countries to have their asylum claim processed. For example, on 19 July 2013, then Prime Minister of Australia Kevin Rudd announced and brought into effect the *Regional Resettlement Arrangement between Australia and Papua New Guinea* (PNG Resettlement Arrangement).<sup>1</sup> Pursuant to the *PNG Resettlement Arrangement*, asylum seekers who arrive in Australia by boat and without a visa will be sent to Papua New Guinea’s Manus Island for processing and, if found to be refugees, resettled elsewhere. The current Prime Minister, Tony Abbott, has indicated that his government will continue to conduct offshore processing on Manus Island. The 1951 UN

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<sup>1</sup> Article 3 of the *PNG Resettlement Arrangement* provides that it will commence on the day of announcement.

*Convention on the Status of Refugees* and its *1967 Protocol* (Refugee Convention)<sup>2</sup> is silent as to whether asylum seekers can be transferred to third countries. Nevertheless, the accepted position is that such a transfer can take place as long as the asylum seekers receive ‘effective protection’ in the third country.<sup>3</sup> However, what amounts to ‘effective protection’ remains unsettled. With a High Court challenge to the PNG Resettlement Arrangement on foot, it is timely to consider recent jurisprudence related to the concept of ‘effective protection’.

This article will first outline the nature of protection provided by the Refugee Convention. It will then discuss the practice of transferring asylum seekers to third countries pursuant to intergovernmental agreements and the debates this has triggered about the meaning of ‘effective protection’. This will lead to a discussion of how the concept of ‘effective protection’ was approached by the High Court of Australia in *Plaintiff M70/2011*<sup>4</sup> and the European Court of Justice in *NS (C 411/10)*.<sup>5</sup> This article will demonstrate that the High Court of Australia’s decision was a high water mark for refugee protection: it provided that asylum seekers cannot be transferred to a third country unless they will be protected from persecution and be entitled to all the rights outlined in the Refugee Convention. However, the the European Court of Justice set the threshold for ‘effective protection’ much lower four months later. It drew on article 4 of the *Charter of Fundamental Rights of the European Union* (Charter) to rule that a transfer could occur unless the asylum seeker would be subject to persecution or inhuman or degrading treatment.

The sharp contrast between the above rulings raises wider issues for refugee protection. This is especially so in light of the desire for a harmonious approach to the interpretation of the Refugee Convention.<sup>6</sup> Such a result is also surprising when taking into account the proliferation of human rights instruments and jurisprudence in the European Union compared to Australia’s lack of a national human rights framework. Principles of human rights law have been used to progressively interpret the Refugee Convention and this convergence of refugee and human rights law has been welcomed by refugee law scholars.<sup>7</sup> However, there has been little critical examination of the boundaries of refugee law and human rights law, and the extent to which they need to remain distinct bodies of law. This article will draw on the above cases to demonstrate that, while principles of human rights law have in some instances been used to advance refugee law, the nature of protection in the Refugee

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<sup>2</sup> *Convention Relating to the Status of Refugees*, opened for signature 28 July 1951, 189 UNTS 150 (entered into force 22 April 1954) as amended by the *1967 Protocol Relating to the Status of Refugees*.

<sup>3</sup> UNHCR, *Summary Conclusions on the Concept of ‘Effective Protection’ in the Context of Secondary Movements of Refugees and Asylum Seekers* (February 2003), [15] <<http://www.refworld.org/docid/3fe9981e4.html>> ; University of Michigan Law School, *Michigan Guidelines on Protection Elsewhere* (3 January 2007), [4] <<http://www.refworld.org/docid/4ae9acd0d.html>> (‘Michigan Guidelines’).

<sup>4</sup> *Plaintiff M70/2011 v Minister for Immigration and Citizenship and Plaintiff M106/2011 v Minister for Immigration and Citizenship* [2011] HCA 32 (‘*Plaintiff M70/2011*’).

<sup>5</sup> *NS (C 411/10) v Secretary of State for the Home Department and ME (C 493/10) and others v Refugee Applications Commissioner, Minister for Justice, Equality and Law Reform* European Union: European Court of Justice, 21 December 2011 (‘*NS (C 411/10)*’).

<sup>6</sup> Guy Goodwin-Gill, ‘The Search for One, True Meaning’ in Guy Goodwin-Gill and Hélène Lambert (eds), *The Limits of Transnational Law: Refugee Law, Policy Harmonization and Judicial Dialogue in the European Union* (Cambridge University Press, 2010); James Simeon, ‘Introduction: The Research Workshop on Critical Issues in International Refugee Law and Strategies Towards Interpretive Harmony’ in James Simeon (ed), *Critical Issues in International Refugee Law: Strategies Towards Interpretive Harmony* (Cambridge University Press, 2010).

<sup>7</sup> Michelle Foster, *International Refugee Law and Socio-economic Rights: Refuge From Deprivation* (Cambridge University Press, 2007).

Convention is both distinct from and beyond the preservation of fundamental human rights. Accordingly, reference to principles of human rights law in transfer decisions can have the counter-productive effect of lowering the threshold for refugee protection.

## II THE REFUGEE CONVENTION AND REFUGEE PROTECTION

Pursuant to the Refugee Convention, a refugee is a person who has a 'well-founded fear of persecution for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable, or owing to such fear, is unwilling to avail himself [or herself] of the protection of that country.'<sup>8</sup> There is considerable judicial authority and academic discussion on the meaning and parameters of this definition.<sup>9</sup> Much of this debate and discussion is outside the scope of this article, which is concerned with the protection owed to asylum seekers and refugees.

Nevertheless, there are two aspects of this definition that are relevant to the concept of refugee protection. Those are that the refugee is outside his or her country of nationality and, due to a well-founded fear of persecution, is unable or unwilling to avail himself or herself of the protection of that country. These two aspects of refugeehood indicate that the relationship between the refugee and their country of nationality has been severed.<sup>10</sup> This has very significant implications in the nation-state system. In the nation-state system, it is the state that protects and provides fundamental human rights. Most international human rights instruments provide that such rights apply to those within a state's territory and subject to its jurisdiction.<sup>11</sup> However, in reality, the full benefit of human rights is often only realised by citizens or those with some form of permanent residence status.<sup>12</sup> This goes to the heart of the tension between refugee and human rights law. While human rights law is premised on the assumption that rights flow from the mere fact of being human, in refugee law rights accrue from a legally recognised status.<sup>13</sup> In other words, 'what international refugee law seems to say is: yes, the rights of the person matter, but recognition of a delimited status counts for much more.'<sup>14</sup>

Accordingly, when the relationship between state and citizen has been severed, as is the case with refugees, 'surrogate' state protection needs to be provided by other states.<sup>15</sup> This

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<sup>8</sup> *Refugee Convention* art 1A(2).

<sup>9</sup> See *Islam v Secretary of State for the Home Department; R v Immigration Appeal Tribunal ex parte Shah* [1999] 2 AC 629; *Khawar v Minister for Immigration and Multicultural Affairs* (2002) 210 CLR 1; Thomas Aleinikoff, 'Protected Characteristics and Social Perceptions: An Analysis of the Meaning of 'Membership in a Particular Social Group' in Erica Feller, Volker Turk and Frances Nicholson (eds), *UNHCR'S Global Consultations on International Protection* (Cambridge University Press, 2003); Guy Goodwin-Gill and Jane McAdam, *The Refugee in International Law* (Oxford University Press, 2007) 20-50.

<sup>10</sup> Andrew Shacknove, 'Who is a Refugee' (1985) 95(2) *Ethics* 274, 275.

<sup>11</sup> See, eg. *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, UNTS 999 (entered into force 23 March 1976) art 2(1).

<sup>12</sup> Emma Haddad, 'The Refugee: The Individual Between Sovereigns' (2003) 17(3) *Global Society* 297; Hannah Arendt, 'The Decline of the National-State and the End of the Rights of Man' in Hannah Arendt, *The Origins of Totalitarianism* (Allen & Unwin, first published 1948, 1967 ed).

<sup>13</sup> Colin Harvey 'Is Humanity Enough? Refugees, Asylum Seekers and the Rights Regime' in Colin Harvey and Satvinder Juss (eds) *Contemporary Issues in Refugee Law* (Edward Elgar, 2013).

<sup>14</sup> *Ibid* 75.

<sup>15</sup> James Hathaway, *The Rights of Refugees Under International Law* (Cambridge University Press, 2005) 135.

surrogate protection allows the refugee ‘a taste of the substance of citizenship.’<sup>16</sup> The Refugee Convention seeks to achieve this by obligating the host country to provide certain rights and freedoms to refugees. Indeed, it is the protection of these rights that is at the heart of the Refugee Convention. The preamble to the Refugee Convention affirms the ‘principle that human beings shall enjoy fundamental rights and freedoms without discrimination’ and that refugees should be assured ‘the widest possible exercise of these fundamental freedoms.’ The Refugee Convention contains 37 substantive provisions and 32 of these outline obligations that signatory states owe to asylum seekers and refugees.<sup>17</sup> They include, for example, the freedom to practice religion and the religious education of children,<sup>18</sup> property rights,<sup>19</sup> the right of association,<sup>20</sup> housing,<sup>21</sup> and freedom of movement.<sup>22</sup>

These rights accrue to asylum seekers and refugees at different times depending on their level of connection with the host country. The first tranche of rights applies to those who are merely in the territory of the host country. This means that they apply to both asylum seekers whose claims for asylum have not yet been determined and those who have been recognised as refugees by the host state.<sup>23</sup> These rights include the right to public education<sup>24</sup> and access to the courts.<sup>25</sup> The second tranche of rights accrues when refugees are lawfully present in the host state.<sup>26</sup> This includes the right to self-employment.<sup>27</sup> The last tranche of rights accrues when refugees are lawfully staying in the host state’s territory.<sup>28</sup> This includes the right to wage earning employment.<sup>29</sup>

Included in these three tranches of rights is the principal of *non-refoulement* which is outlined in article 33 of the Refugee Convention. Article 33 provides that refugees cannot be returned to a place where their ‘life or freedom would be threatened on account of race, religion, nationality, membership of a particular social group or political opinion’. Importantly, the principle of non-refoulement applies to both recognised refugees and also to asylum seekers whose status is yet to be determined.<sup>30</sup> Non-refoulement has been described by the United Nations High Commissioner for Refugees (UNHCR) as ‘the cornerstone of asylum and international refugee law’.<sup>31</sup> Indeed, without the principle of non-refoulement the refugee regime would be ineffectual because states would not be restrained from returning asylum seekers and refugees to a place of persecution. Accordingly, states signatory to the Refugee Convention cannot make any reservations in relation to article 33.<sup>32</sup>

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<sup>16</sup> Harvey, above n 13, 72.

<sup>17</sup> *Refugee Convention* arts 3–8 and 10–34.

<sup>18</sup> *Ibid* art 4.

<sup>19</sup> *Ibid* arts 13 and 14.

<sup>20</sup> *Ibid* art 15.

<sup>21</sup> *Ibid* art 21.

<sup>22</sup> *Ibid* art 26.

<sup>23</sup> Hathaway, above n 15.

<sup>24</sup> *Refugee Convention* art 22.

<sup>25</sup> *Ibid* art 16.

<sup>26</sup> Hathaway, above n 15.

<sup>27</sup> *Refugee Convention* art 18.

<sup>28</sup> Hathaway, above n 15.

<sup>29</sup> *Refugee Convention* art 17.

<sup>30</sup> Hathaway, above n 15.

<sup>31</sup> UNHCR, *UNHCR Note on the Principle of Non-refoulement* (November 1997)

<<http://www.refworld.org/docid/438c6d972.html>>.

<sup>32</sup> *Refugee Convention* art 42(1).

### III TRANSFERRING ASYLUM SEEKERS TO THIRD COUNTRIES AND THE CONCEPT OF 'EFFECTIVE PROTECTION'

Refugee-receiving states in the Global North have increasingly become concerned with what is considered to be an overwhelming number of asylum seekers reaching their shores.<sup>33</sup> A related concern is 'forum shopping': states are of the view that on the journey to their final destination asylum seekers may have passed through countries in which they could have enjoyed protection.<sup>34</sup> One way that states have sought to address these concerns has been through intergovernmental agreements by which asylum seekers can be transferred to third countries to have their asylum claims processed.<sup>35</sup> Gregor Noll has argued that through such inter-governmental agreements, 'liberal democracies have afforded themselves the lethal luxury of a maritime Berlin wall.'<sup>36</sup>

An example of such an agreement is the Dublin Regulation, adopted by European Union member states in 2003 and recast in 2013. The Dublin Regulation determines the state that has responsibility for hearing an asylum seeker's application and includes provisions for the transfer of an asylum seeker to that state.

More recently, in 2011 the Australian Government entered into an agreement (Malaysia Agreement) with Malaysia by which up to 800 asylum seekers in Australian territory would be sent to Malaysia. Once in Malaysia, the UNHCR would carry out an assessment of the asylum seekers' protection claims. That agreement was rendered inoperable as a result of the High Court of Australia's decision in *Plaintiff M70/2011*. However, after legal subsequent reforms, the Australian Government set up asylum centres in Nauru and Papua New Guinea and, very recently, entered into the *PNG Resettlement Arrangement*.

The Refugee Convention does not specifically address the transfer of asylum seekers to third countries. In fact, the Refugee Convention does not address any procedural aspect of refugee status determination. Accordingly, the Refugee Convention neither explicitly prohibits nor condones this practice.<sup>37</sup> States have tried to justify such transfers on the concepts of burden sharing and international co-operation in the Refugee Convention's preamble.<sup>38</sup> This article is, however, not concerned with the legitimacy of transfers to third countries (this issue has been debated elsewhere)<sup>39</sup> but rather the conditions that must be present in the third country before such a transfer can occur.

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<sup>33</sup> Karin Landgren, 'Deflecting International Protection by Treaty: Bilateral and Multilateral Accords on Extradition, Readmission and the Inadmissibility of Asylum Requests' (Working Paper No. 10, UNHCR, 15 June 1999) 1.

<sup>34</sup> Agnes Hurwitz, *The Collective Responsibility of States to Protect Refugees* (Oxford University Press, 2009) 46.

<sup>35</sup> Michelle Foster, 'Protection Elsewhere: The Legal Implications of Requiring Refugees to Seek Protection in Another State' (2007) 28 *Michigan Journal of International Law* 223.

<sup>36</sup> Gregor Noll, 'Why Refugees Still Matter: A Response to James Hathaway' (2007) 8 *Melbourne Journal of International Law* 536, 537.

<sup>37</sup> Foster, above n 35; Michigan Guidelines, above n 3, [1].

<sup>38</sup> James Hathaway, 'Why Refugee Law Still Matters' (2007) 8 *Melbourne Journal of International Law* 89.

<sup>38</sup> Hathaway, above n 15, 663–4.

<sup>39</sup> Foster, above n 35, 230–237.

In relation to the conditions that must be present in the third country, states have accepted that asylum seekers cannot be transferred to a third country where they will be at risk of refoulement.<sup>40</sup> This includes situations where the asylum seekers would be at risk of persecution in the third country as well as *chain-refoulement* (where the third country is likely to return the asylum seeker to a place of persecution).<sup>41</sup> However, the unsettled and contested question is what other conditions must be present in the third country.<sup>42</sup> The UNHCR has suggested that transfers to a third country can only be permitted if the asylum seeker and/or refugee can enjoy ‘effective protection’ in that country.<sup>43</sup> ‘Effective protection’ is not a legal term but rather a concept used by the UNHCR and refugee law scholars to describe the nature of protection that states owe to asylum seekers and refugees.

The UNHCR’s position is that ‘effective protection’ includes non-refoulement but, importantly, also requires ‘accession to and compliance with the 1951 Convention and/or 1967 Protocol...unless the destination country can demonstrate that the third State has developed a practice akin to the 1951 Convention and/or its 1967 Protocol.’<sup>44</sup> The UNHCR does not specifically state that all of the rights outlined in the Refugee Convention must be guaranteed by the receiving state. It does however require that ‘the person has access to means of subsistence sufficient to maintain an adequate standard of living’ and that ‘steps are undertaken by the third State to enable the progressive achievement of self-reliance, pending the realisation of durable solutions.’<sup>45</sup>

The meaning of ‘effective protection’ was further considered in the Michigan Guidelines on Protection Elsewhere 2007 (Michigan Guidelines). The Michigan Guidelines were created and adopted by the Fourth Colloquium on Challenges in International Refugee Law led by Professor Hathaway. The Michigan Guidelines echo the UNHCR’s position that ‘while it is preferable that the state to which protection is assigned (“receiving state”) be a party to the Convention, such status is not a requirement for implementation of a protection elsewhere policy which respects international law.’<sup>46</sup>

Nevertheless, the Michigan Guidelines adopt the position that ‘effective protection’ means not only non-refoulement but also compliance with *all* of the obligations outlined in the Refugee Convention.<sup>47</sup> This position is premised on the principle that ‘a state cannot “contract out” of its international legal obligations’.<sup>48</sup> This is supported by *TI v United Kingdom*<sup>49</sup> in which the European Court of Human Rights held that a state cannot relinquish its human rights obligations by transferring an individual to another state.<sup>50</sup> This case concerned the removal of a Sri Lankan man from the United Kingdom to Germany. The court

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<sup>40</sup> See, eg, *NAGV and NAGW of 2002 v Minister for Immigration and Multicultural Affairs* [2005] HCA 6; see also Foster, above n 35, 226.

<sup>41</sup> *TI v United Kingdom* (European Court of Human Rights, Third Section, Application Number 43844/98, 7 March 2000).

<sup>42</sup> Michelle Foster, ‘The Implications of the Failed ‘Malaysian Solution’: The Australian High Court and Refugee Responsibility Sharing at International Law’ (2012) 13 *Melbourne Journal of International Law* 1.

<sup>43</sup> UNHCR, above n 3.

<sup>44</sup> *Ibid* [15(e)].

<sup>45</sup> *Ibid* [15(g)].

<sup>46</sup> Michigan Guidelines, above n 3, [2].

<sup>47</sup> *Ibid* [8].

<sup>48</sup> Foster, above n 35, 268.

<sup>49</sup> *TI v United Kingdom* (European Court of Human Rights, Third Section, Application Number 43844/98, 7 March 2000).

<sup>50</sup> Foster, above n 35.

concluded that, despite the transfer, the United Kingdom was still under a legal obligation to ensure that the transferee was not treated in a manner that would violate the United Kingdom's obligations under article 3 of the *European Convention for the Protection of Human Rights and Fundamental Freedoms* (European Convention on Human Rights)<sup>51</sup> (that no-one shall be subject to torture or to inhuman or degrading treatment or punishment). The drafters of the Michigan Guidelines argue that the reasoning in this case is equally applicable to the Refugee Convention. Therefore, pursuant to this principle, a host state must ensure that all of the rights in the Refugee Convention will be accorded to asylum seekers by the third country before any transfer can take place.<sup>52</sup>

The Michigan Guidelines note that there has been minimal judicial consideration of the conditions under which asylum seekers can be transferred to third countries. Nevertheless, the Michigan Guidelines' position regarding the meaning of 'effective protection' is supported by some case law. For example, the dissenting judgment of Lee J in the Australian case of *Al-Rahal v MIMA*<sup>53</sup> provides that 'as far as the operation of the [Refugee Convention] is concerned under international law, equivalent protection to that required of a Contracting State under the [Refugee Convention] must be secured to an applicant in a third country before it can be said that person is not a refugee requiring consideration under the [Refugee Convention].'<sup>54</sup> However, the Michigan Guidelines' drafters assert that such cases fail to articulate a legal basis for the position that 'effective protection' encompasses both non-refoulement and the other rights outlined in the Convention.<sup>55</sup>

The Michigan Guidelines were published in 2007 but the issues raised in the Guidelines were not considered by superior courts until late 2011 when matters concerning asylum seeker transfers came before the High Court of Australia and the European Court of Justice. The next section of this article will undertake a comparative and critical analysis of the way in which these courts approached the question of the conditions under which an asylum seeker can be transferred to a third country.

#### IV THE HIGH COURT OF AUSTRALIA'S DECISION IN *PLAINTIFF M70/2011*

This matter was brought by two asylum seekers from Afghanistan who arrived in Australian territory in August 2011. Both feared persecution in Afghanistan on the basis of being Shi'a Muslims. The first plaintiff, Plaintiff M70, was an adult. The second plaintiff, Plaintiff M106, was a 16 year old unaccompanied minor. The two plaintiffs were subject to be transferred to Malaysia pursuant to the Malaysia Agreement. The Department of Immigration determined that Plaintiff M70 could be transferred immediately. However, Plaintiff M106 would only be transferred once Malaysia had established the relevant support services for unaccompanied minors. The Malaysia Agreement provided that special procedures would be developed to address vulnerable asylum seekers including unaccompanied minors.

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<sup>51</sup> *European Convention for the Protection of Human Rights and Fundamental Freedoms*, as amended by *Protocols Nos. 11 and 14*, opened for signature 4 November 1950, ETS 5 (entered into force 3 September 1953).

<sup>52</sup> Foster, above n 35.

<sup>53</sup> (2001) 100 FCR 73.

<sup>54</sup> *Ibid* 78.

<sup>55</sup> Foster, above n 35, 264–5.

Pursuant to the Malaysia Agreement, both plaintiffs would undergo a refugee status determination procedure in Malaysia conducted by the UNHCR. If they were found to be refugees, they would be referred to a country of resettlement in accordance with the UNHCR's procedures and criteria. If the asylum seekers were found not to be refugees, they were required to return to their country of origin. In return, Australia agreed to resettle 4,000 recognised refugees currently residing in Malaysia. The International Organisation for Migration was responsible for facilitating this transfer and also had other roles in assisting both countries to implement the agreement.

The government of Malaysia agreed to co-operate with the UNHCR, respect the principle of non-refoulement and treat the asylum seekers with 'dignity and respect and in accordance with human rights standards.'<sup>56</sup> The Malaysia Agreement was a bilateral agreement (not a treaty) that merely recorded the countries' 'intentions and political commitments'.<sup>57</sup> Accordingly, it was not legally binding.

The Malaysia Agreement was made under section 198A(1) of the *Migration Act 1958* (Cth) (*Migration Act*). Section 198A(1) has subsequently been removed from the *Migration Act* but, pursuant to the wording at the time, section 198A(1) provided that an asylum seeker on an offshore territory<sup>58</sup> may be taken to another country if the Minister for Immigration has made a declaration under section 198A(3)(a) that the third country:

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

The Minister made a declaration that Malaysia satisfied the above criteria despite the fact that Malaysia is not a signatory to the Refugee Convention, does not grant asylum and does not have any domestic legislation providing protection for asylum seekers or refugees. The Minister based his decision on an assessment of Malaysia's treatment of refugees provided by the Department of Foreign Affairs (DFAT).<sup>59</sup> In its assessment, DFAT noted that 'fundamental liberties' were guaranteed under the Malaysian Federal Constitution.<sup>60</sup> However, it did not assess whether the rights prescribed in the Refugee Convention would be guaranteed in Malaysia.

The plaintiffs argued that the Minister's declaration was made *ultra vires*. This argument was based on the plaintiffs' submission that the criteria in s198A(3)(a) of the *Migration Act* were jurisdictional facts. This means that these criteria have to be objectively satisfied before the Minister can make a valid declaration. The plaintiffs argued that these criteria could not have been satisfied because Malaysia is not a signatory to the Refugee Convention nor does it have

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<sup>56</sup> *Plaintiff M70/2011* [39] (French CJ).

<sup>57</sup> *Malaysia Agreement* cl 16.

<sup>58</sup> The *Migration Amendment (Excision from Migration Zone) Act 2001* (Cth) amended the *Migration Act 1958* (Cth) to designate certain places (such as Christmas Island) as 'excised offshore places'.

<sup>59</sup> *Plaintiff M70/2011* (French CJ).

<sup>60</sup> *Ibid* [28].

any domestic law that establishes a refugee protection regime. Contrastingly, the Commonwealth argued that a declaration under section 198A is valid if it is exercised in good faith and within the scope and purpose of the *Migration Act* — its validity does not rest on the objective truth of the criteria outlined in s198A(3)(a). Accordingly, this case essentially turned on statutory interpretation of domestic law.

In a six to one verdict, the High Court of Australia ruled that the Minister's declaration was made outside of the powers granted to him under the *Migration Act*. Gummow, Hayne, Crennan and Bell JJ provided the lead majority judgment. French CJ and Keifel J delivered separate judgments concurring with the majority, while Heydon J dissented.

French CJ did not agree that the criteria in s198A of the *Migration Act* were jurisdictional facts. His Honour defined a jurisdictional fact as 'a factual criterion, satisfaction of which is necessary to enliven the power of a decision-maker to exercise a discretion.'<sup>61</sup> This can be contrasted to a criterion that 'involves assessment and value judgments on the part of the decision-maker.'<sup>62</sup> French CJ reasoned that the language used in s198A 'indicates the need for ministerial evaluative judgment'<sup>63</sup> and therefore the criteria could not constitute jurisdictional facts. His Honour did, however, also state that if the Minister misconstrued any of the criteria his declaration would be affected by a jurisdictional error and, hence, be invalid.<sup>64</sup> French CJ held that the Minister had misconstrued the criteria. Specifically, the Minister made his declaration in 'a hope or belief or expectation that the specified country will meet the criteria at some time in the future',<sup>65</sup> whereas the language in s198A required the Minister to make a 'judgment that the circumstance described by each of those criteria is a present and continuing circumstance.'<sup>66</sup>

The lead majority (with Keifel J concurring) accepted the plaintiffs' argument that the above criteria constitute jurisdictional facts. This conclusion was based on their examination of the 'text, context and purpose' of s198A of the *Migration Act*. Their Honours held that the text, context and purpose of s198A 'point to the need to identify the relevant criteria with particularity.'<sup>67</sup> Therefore, the power could not be engaged 'whenever the Minister bona fide thought or believed that the relevant criteria were met.'<sup>68</sup>

The significance of the lead majorities' conclusion that the criteria in section 198A(3)(a) were jurisdictional facts (in particular from an administrative law perspective) has been discussed elsewhere.<sup>69</sup> The focus of this article is the High Court of Australia's analysis of whether the criteria in section 198A(3)(a) were satisfied by the Malaysia Agreement. Of particular relevance is the High Court of Australia's assessment of the plaintiffs' submission that the word 'protection' in section 198A(3)(a) was 'a legal term of art to describe the rights to be accorded to a person who is, or claims to be, a refugee under the Refugee Convention.'<sup>70</sup>

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<sup>61</sup> Ibid [57].

<sup>62</sup> Ibid.

<sup>63</sup> Ibid [58].

<sup>64</sup> Ibid [59].

<sup>65</sup> Ibid [62].

<sup>66</sup> Ibid [61].

<sup>67</sup> Ibid [109] (Gummow, Hayne, Crennan and Bell JJ)..

<sup>68</sup> Ibid.

<sup>69</sup> Mark Smyth and Matt Sherman, 'Case Note – Plaintiff M70/2011 v Minister for Immigration and Citizenship' (2012) 19 *Australian Journal of Administrative Law* 64.

<sup>70</sup> *Plaintiff M70/2011* [63] (French CJ).

Pursuant to this submission, the Minister would have to be satisfied that a third country not only provided protection from refoulement but also guaranteed all of the rights outlined in the Refugee Convention before an asylum seeker could be transferred to that country. While there has been some examination of this argument,<sup>71</sup> its relevance to the larger debate on the meaning of ‘effective protection’ has not been widely explored.

Each of the majority judges was satisfied that the word ‘protection’ encompassed Australia’s obligation of non-refoulement.<sup>72</sup> The question of whether the concept of ‘protection’ also encompassed the other obligations owed to refugees under the Refugee Convention attracted different responses. Gummow, Hayne, Crennan and Bell JJ accepted the plaintiffs’ submission that the word ‘protection’ is a ‘legal term of art’. In their joint judgment they held that the concept of ‘protection’ and the criteria in section 198A(3) of the *Migration Act* is a ‘reflex of obligations Australia undertook when it became signatory to the [Refugee] Convention.’<sup>73</sup> The lead majority held that:

When s198A(3)(a) speaks of a country that provides access and protections it uses language that directs attention to the kinds of obligation that Australia and other signatories have undertaken under the Refugees Convention and the Refugees Protocol. Reference has already been made to the non-refoulement obligation imposed by Art 33(1) of the Refugees Convention. But signatories undertake other obligations.<sup>74</sup>

Their honours listed some of these other obligations such as freedom of religion, access to the courts and work rights.<sup>75</sup>

Accordingly, the lead majority concluded that the criteria in section 198A(3)(a) and the concept of protection embedded in that criteria requires the ‘provision of protections of all of the kinds which parties to the Refugees Convention and the Refugees Protocol are bound to provide to such persons. Those protections include, but are not limited to, protection against refoulement.’<sup>76</sup> This joint judgment provides a strong precedent for the principle that ‘effective protection’ encompasses both non-refoulement along with the array of positive refugee rights outlined in the Refugee Convention.

This position is essentially the same as that taken in the Michigan Guidelines. While the lead majority did not say that the receiving state had to be a signatory to the Refugee Convention, it did provide that these protections had to be enshrined in law and carried out in practice. Specifically, the lead majority held that ‘a country does not provide protections of the kind described in s 198A(3)(a)(ii) or (iii) unless its domestic law deals expressly with the classes of persons mentioned in those sub-paragraphs or it is internationally obliged to provide the particular protections.’<sup>77</sup> Therefore, similar to the Michigan Guidelines and the UNHCR it does not go as far as to suggest that the receiving state must be a signatory to the Refugee Convention as long as its domestic law reflects the obligations under the Refugee Convention. One problem with this position is that domestic laws can be repealed and,

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<sup>71</sup> See Foster, above n 42; Wood and J McAdam, ‘Australian Asylum Policy all at Sea: An Analysis of *Plaintiff M70/2011 v Minister for Immigration and Citizenship* and the Australia–Malaysia Arrangement’ (2012) 61 *International and Comparative Law Quarterly* 274.

<sup>72</sup> *Plaintiff M70/2011* [63] (French CJ), [117] (Gummow, Hayne, Crennan and Bell JJ), [240] (Keifel J).

<sup>73</sup> *Ibid* [118] (Gummow, Hayne, Crennan and Bell JJ).

<sup>74</sup> *Ibid* [117] (Gummow, Hayne, Crennan and Bell JJ).

<sup>75</sup> *Ibid*.

<sup>76</sup> *Ibid* [119].

<sup>77</sup> *Ibid* [126].

without any international obligations, the international community and the UNHCR would have fewer grounds on which to press for reform.

It must be acknowledged that the concurring judgments did not embrace the plaintiffs' submission to the same extent. French CJ did not directly address the argument that the word 'protection' was a legal term of art. He acknowledged that 'the criteria in s198A(3)(a) are dominated by the word "protection".'<sup>78</sup> However, he reasoned that protection 'at its heart... means protection from refoulement.'<sup>79</sup> He acknowledged the plaintiffs' submission that the Refugee Convention requires states to provide other forms of protection such as access to the courts and religious freedom.<sup>80</sup> However, he ultimately concluded that 'it is not necessary to delineate all of the matters comprehended by the term "protection" in s198A(3) or the particulars of "relevant human rights standards" mentioned in s198A(3)(a)(iv).'<sup>81</sup> It was not necessary for French CJ to answer this question because he held that the Minister was required to determine whether Malaysia's laws provide the necessary protection for refugees as opposed to the 'practical reality' in Malaysia.<sup>82</sup> The fact that the Minister conceded that he had not made such a consideration was the basis upon which French CJ declared that the Minister's declaration was invalid.<sup>83</sup>

In her concurring judgment, Keifel J held that protection must 'at the least, be protection against persecution and refoulement.'<sup>84</sup> While her Honour did not specifically provide that all of the obligations in the Refugee Convention beyond non-refoulement need to be observed, she did state that the third country must have a refugee status determination procedure and recognise 'the status of refugee and [give] effect to it.'<sup>85</sup>

It can be argued that both French CJ and Keifel J drew an arbitrary hierarchy between non-refoulement and the remainder of rights in the Refugee Convention. While non-refoulement has been described, as noted above, by the UNHCR as 'the cornerstone of asylum and international refugee law,'<sup>86</sup> there is nothing in the text of the Refugee Convention that indicates that respecting the principle of non-refoulement alone is a sufficient standard for refugee protection. This is reflected in the structure of the Refugee Convention: non-refoulement is contained in article 33 – one of the last substantive provisions in the Refugee Convention. Also, there is nothing in the wording of article 33 that suggests that it should be prioritised over the other rights contained in the Refugee Convention. In addition, while states cannot make reservations in respect of article 33, reservations are not permitted on other core protection obligations,<sup>87</sup> being the requirement to apply the provisions of the Refugee Convention 'without discrimination as to race, religion or country of origin',<sup>88</sup> the requirement to accord refugees 'treatment at least as favourable as that accorded to their nationals with respect to freedom to practice their religion and freedom as regards the

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<sup>78</sup> Ibid [63] (French CJ).

<sup>79</sup> Ibid.

<sup>80</sup> Ibid.

<sup>81</sup> Ibid [65].

<sup>82</sup> Ibid.

<sup>83</sup> Ibid [65]–[66].

<sup>84</sup> Ibid [240] (Keifel J).

<sup>85</sup> Ibid [243].

<sup>86</sup> UNHCR, *UNHCR Note on the Principle of Non-refoulement* (November 1997) <<http://www.refworld.org/docid/438c6d972.html>>.

<sup>87</sup> *Refugee Convention* art 42(1).

<sup>88</sup> Ibid art 3.

religious education of their children,<sup>89</sup> and the requirement to provide refugees with free access to the courts.<sup>90</sup>

The position that non-refoulement is not a sufficient standard for refugee protection is also supported by the preamble to the Refugee Convention, which provides that ‘it is desirable to revise and consolidate previous international agreements relating to the status of refugees and to extend the scope of and protection accorded by such instruments by new means of agreement.’ The Refugee Convention was not the first international agreement regarding refugees but it was the first to provide extensive provisions for refugee protection. For example, the earlier *1933 Convention Relating to the International Status of Refugees*<sup>91</sup> (which was not widely ratified) contained very few provisions regarding refugee protection. It only addressed free access to the courts,<sup>92</sup> welfare,<sup>93</sup> and education<sup>94</sup> and provided very limited work rights.<sup>95</sup>

Further, if the rights outlined in the Convention are not guaranteed by the third country, it is possible that asylum seekers will be refouled within the meaning of article 33 of the Refugee Convention. For example, restrictions on access to the courts or freedom of religion could mean that there is a threat to life or freedom on account of race, religion, nationality, political opinion or membership of a particular social group. Neither judgment considered this relationship between non-refoulement and the remainder of rights outlined in the Refugee Convention.

In his dissenting judgment, Heydon J referred to the plaintiffs’ argument that the term ‘protection’ is a ‘legal term of art’ as ‘so ambitious a submission as to cast doubt not only on its validity but also on the validity of other arguments advanced.’<sup>96</sup> He concluded that section 198A(3) of the *Migration Act* does not require the third country to guarantee the rights outlined in the Refugee Convention because these rights are only owed to refugees whose status has been approved. Therefore these rights cannot be enforced by asylum seekers whose refugee status has yet to be determined.<sup>97</sup> Heydon J’s conclusion is difficult to support in light of the fact that refugee status is deemed to be declaratory as opposed to constitutive.<sup>98</sup> Also, the first tranche of rights accrue as soon as the refugee is physically present in the host country’s territory notwithstanding whether a refugee status determination procedure has been carried out. Similarly, the second tranche of rights can accrue before an asylum seeker’s claim has been determined.<sup>99</sup>

The above judgments do not provide consistent authority on the meaning of ‘effective protection’. Nevertheless, the lead majority judgment was the first judgment of a superior court to declare that asylum seekers cannot be transferred to a third country unless they will

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<sup>89</sup> Ibid art 4.

<sup>90</sup> Ibid art 16(1).

<sup>91</sup> *Convention Relating to the International Status of Refugees*, adopted 28 October 1933, 159 LNTS 3663 (entered into force 13 June 1935) (*1933 Refugee Convention*).

<sup>92</sup> *1933 Refugee Convention* art 6.

<sup>93</sup> Ibid arts 9,10 and 11.

<sup>94</sup> Ibid art 12.

<sup>95</sup> Ibid art 7.

<sup>96</sup> *Plaintiff M70/2011* [167] (Heydon J).

<sup>97</sup> Ibid.

<sup>98</sup> *Refugee Appeal No. 75574*, No. 75574, New Zealand: Refugee Status Appeals Authority, 29 April 2009, [58]; Hathaway, above n 15, 11.

<sup>99</sup> *Minister of Home Affairs v Watchenuka* (2004) 1 All SA 21.

be protected from persecution and be guaranteed access to the remainder of rights in the Refugee Convention.

However, the precedential value of the decision has, in the Australian context, been diminished with the passing of the *Migration Legislation Amendment (Regional Processing and Other Measures) Act 2012* (Cth) (*Regional Processing Act*). The Explanatory Memorandum to the *Regional Processing Act* states that it was introduced in direct response to the High Court of Australia's decision in *Plaintiff M70/2011*:

The purpose of the amendments in this Bill is to address the issues arising from the High Court of Australia's decision on 31 August 2011 in order to allow for offshore processing of the protection claims of offshore entry persons. The amendments will ensure that the Government has sufficient power to implement offshore processing arrangements. The amendments will ensure that the government of the day can determine the border protection policy that it believes is in the national interest.<sup>100</sup>

The Explanatory Memorandum further explains that the 'national interest' includes:

[m]atters which relate to Australia's standing, security and interests. For example, these matters may include governmental concerns related to such matters as public safety, border protection, national security, defence, Australia's economic interests, Australia's international obligations and its relations with other countries. Measures for effective border management and migration controls are in the national interest.<sup>101</sup>

The *Regional Processing Act* removes section 198A from the *Migration Act* and inserts new sections 198AA to 198AH. These provisions give the Minister the power to designate a third country as a 'regional processing centre'.<sup>102</sup> The only condition for the exercise of this power is that the Minister thinks that it is in the national interest.<sup>103</sup> The reforms specifically provide that 'the designation of a country to be a regional processing country need not be determined by reference to the international obligations or domestic law of that country.'<sup>104</sup> Pursuant to these reforms, Nauru and Papua New Guinea have been designated as 'regional processing centres'. Asylum seekers have been sent to Nauru and Papua New Guinea's Manus Island since August 2012.<sup>105</sup>

At the time the *Regional Processing Act* was passed, it only applied to asylum seekers who were designated as 'offshore entry persons'. This means that they did not reach the Australian mainland but rather an excised offshore place such as Christmas Island. However, on 16 May 2013 the Australian Federal Parliament passed a Bill that provided that asylum seekers who reached the Australian mainland could be transferred to a regional processing centre.<sup>106</sup> Essentially, these reforms provide that asylum seekers may be sent to third countries without

<sup>100</sup> Explanatory Memorandum, *Migration Legislation Amendment (Regional Processing and Other Measures) Bill 2012* (Cth) 1.

<sup>101</sup> Ibid.

<sup>102</sup> *Migration Act 1958* (Cth) s198AB(1).

<sup>103</sup> Ibid s198AB(2).

<sup>104</sup> Ibid s198AA(d).

<sup>105</sup> The Australian Human Rights Commissioner has been denied access but the UNHCR sent a three person team to the facility on Manus Island in January 2013. The UNHCR reported that the asylum seekers on Manus Island were being kept in mandatory and indefinite detention, were not able to process their claim for asylum and the living conditions were 'harsh, and for some, inadequate': UNHCR, *Mission to Manus Island, Papua New Guinea* (4 February 2013) UNHCR, 2 <<http://unhcr.org.au/unhcr/images/2013-02-04%20Manus%20Island%20Report%20Final.pdf>>.

<sup>106</sup> *Migration Amendment (Unauthorised Maritime Arrivals and Other Measures) Bill 2012* (Cth).

any consideration of whether that transfer would breach Australia's non-refoulement obligations or whether any of the rights outlined in the Refugee Convention would be guaranteed.

Nevertheless, the High Court of Australia's decision in *Plaintiff M70/2011* still provides an important international precedent on the meaning of 'effective protection'. Associate Professor Foster, who led the drafting of the Michigan Guidelines, has stated that the ruling 'provides a valuable addition to our understanding of the constraints on refugee responsibility sharing schemes at international law, and is certain to have significance beyond the Australian context alone.'<sup>107</sup> Indeed, courts in states signatory to the Refugee Convention often consider jurisprudence from other states. This article will, however, now consider a ruling from the European Court of Justice only four months later that set a much lower threshold for 'effective protection'.

#### V THE EUROPEAN COURT OF JUSTICE'S DECISION IN *NS (C 411/10)*

On 21 December 2011, the European Court of Justice handed down its decision in *NS (C 411/10)*. This case provided preliminary rulings requested from the United Kingdom Court of Appeal (England and Wales) and the High Court of Ireland. Together, the joined cases from the United Kingdom Court of Appeal and the High Court of Ireland concerned six asylum seekers from Afghanistan, Iran and Algeria. One asylum seeker from Afghanistan made his refugee application in the United Kingdom and the other five had made their asylum claims in Ireland. However, all had first entered the European Union in Greece.

Pursuant to the Dublin Regulation, the member state responsible for assessing their application was Greece and therefore these asylum seekers were due to be transferred there.<sup>108</sup> Greece does not, however, have a functioning asylum system and there are reports of asylum seekers in Greece being arbitrarily detained and being subject to ill treatment.<sup>109</sup>

The proceedings in the United Kingdom Court of Appeal (England and Wales) and the High Court of Ireland were stayed and both courts referred a number of questions to the European Court of Justice. The European Court of Justice considered these questions together. The relevant question for the issue addressed in this paper is whether Ireland and the United Kingdom were obligated to process the asylum seekers' claims due to the fact that transferring the asylum seekers to Greece would expose them to a risk of violation of their fundamental rights.<sup>110</sup> The fundamental rights that were identified in particular were articles 1 (human dignity is inviolable), 4 (prohibition of torture and inhuman and degrading treatment or punishment), 18 (right to asylum), 19(2) (prohibition of removal where there is a serious risk of being subjected to the death penalty, torture or other inhuman or degrading treatment or punishment) and 47 (right to an effective remedy and a fair trial) of the Charter and Directives 2003/9 (minimum standards for the reception of asylum seekers), 2004/83 (minimum standards for the qualification and status of third country nationals as refugees)

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<sup>107</sup> Foster, above n 42, 24.

<sup>108</sup> At the time the case was heard, the Dublin II Regulation was in force. The Dublin Regulation has since been recast and is now known as the Dublin III Regulation.

<sup>109</sup> See, eg, Amnesty International, *Greece: The End of the Road for Refugees, Asylum Seekers and Migrants* (December 2012) Amnesty <<http://files.amnesty.org/archives/eur250112012eng.pdf>>.

<sup>110</sup> *NS (C 411/10)* [50].

and 2005/85 (minimum standards on the procedures for granting and withdrawing refugee status).<sup>111</sup>

The reason why the Refugee Convention was not referred to is because the European Court of Justice does not have jurisdiction to consider the Refugee Convention. Nevertheless many of the above provisions make direct reference to the Refugee Convention. For example, article 18 of the Charter provides that 'the right to asylum shall be guaranteed with due respect for the rules of the Geneva Convention of 28 July 1951 and the Protocol of 31 January 1967 relating to the status of refugees....' In this case the European Court of Justice acknowledged that article 18 of the Charter requires that 'the rules of the [Refugee] Convention and the 1967 Protocol are to be respected.'<sup>112</sup> In addition, the preambles to the Directives outlined above confirm that the Common European Asylum System is designed to achieve the 'full and inclusive application of the Geneva Convention Relating to the Status of Refugees 28 July 1951, as supplemented by the New York Protocol of 31 January 1967.' Indeed, the European Court of Justice described the purpose of the Common European Asylum System as 'full and inclusive application of the [Refugee] Convention.'<sup>113</sup>

Nevertheless, the European Court of Justice held that the only grounds upon which a member state is prevented from transferring an asylum seeker to the responsible member state is:

[w]here they cannot be unaware that systemic deficiencies in the asylum procedure and in the reception conditions of asylum seekers in that Member State amount to substantial grounds for believing that the asylum seeker would face a real risk of being subjected to inhuman or degrading treatment within the meaning of Article 4 of the Charter.<sup>114</sup>

Therefore, an asylum seeker can be transferred to a member state even if that state does not grant to asylum seekers the rights outlined in the Refugee Convention (as referred to in article 18 of the Charter and the preambles to the above noted Directives). The only principles restraining the transfer of an asylum seeker are non-refoulement and treatment that would amount to inhuman or degrading treatment. In this respect, the European Court of Justice adopted a narrower position than the opinion given by Advocate General Trstenjak who suggested that 'the transfer of asylum seekers to a Member State in which there is a serious risk of violation of the asylum seekers' fundamental rights is incompatible with the Charter of Fundamental Rights.'<sup>115</sup>

In coming to its decision, the European Court of Justice stressed that there is an assumption that the treatment of asylum seekers in all Member States complies with the requirements of the Charter and the Refugee Convention.<sup>116</sup> While it is conceivable that some member states may violate fundamental rights, the European Court of Justice held that these violations will

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<sup>111</sup> Directives are objectives set by the Council of the European Union that each member state must achieve. Each member state must introduce or adapt laws to ensure that these objectives are achieved. These Directives are part of the European Union's goal to establish a Common European Asylum System: European Union: European Parliament, *Towards a Common European Asylum System – Assessments and Proposals – Elements to be Implemented for the Establishment of an Efficient and Coherent System*, September 2008, PE 408.291. This means that the European Union is aiming to harmonise procedures and standards for the treatment and recognition of refugees by European Union member states.

<sup>112</sup> *NS (C 411/10)* [75].

<sup>113</sup> *Ibid.*

<sup>114</sup> *Ibid* [94].

<sup>115</sup> Opinion of Advocate General Trstenjak, *NC v Secretary of State for the Home Department*, Case C-411/10, Opinion delivered on 22 September 2011 [116].

<sup>116</sup> *NS (C 411/10)* [80].

not prevent a transfer. This is because, if minor breaches of the Charter or Directives prevented an asylum seeker from being transferred, the objective of the Common European Asylum System (to provide a speedy determination of the responsible member state) would be undermined.<sup>117</sup> As the European Court of Justice put it:

At issue here is the *raison d'être* of the European Union and the creation of an area of freedom, security and justice and, in particular, the Common European Asylum System, based on mutual confidence and a presumption of compliance, by other Member States, with European Union law and, in particular, fundamental rights.<sup>118</sup>

The European Court of Justice's decision in *NS (C 411/10)* indicates that the European Court of Justice is inclined to give effect to the purpose of the Common European Asylum System at the expense of a thorough examination of the objectives of the Charter and Refugee Convention. This is despite the European Court of Justice being specifically asked to consider article 18 of the Charter (which confirms due respect for the rules in the Refugee Convention). It is difficult to support the European Court of Justice's position that a state not honouring its obligations under the Refugee Convention would only amount to a 'minor breach' of article 18 of the Charter. As outlined above, the bulk of the Refugee Convention is devoted to outlining the obligations states owe to asylum seekers and refugees.

Due to the fact that this was a preliminary ruling, the European Court of Justice did not rule that the asylum seekers could not be transferred to Greece. Rather, this was a matter for the United Kingdom Court of Appeal (England and Wales) and the High Court of Ireland to decide. What is significant about this case is that the threshold for 'effective protection' (that a transfer can take place unless substantial grounds for believing that the asylum seeker would face a real risk of being subjected to inhuman or degrading treatment) is much lower than the threshold set by the High Court of Australia in *Plaintiff M70/2011*. These sharply contrasting decisions on when asylum seekers can be transferred to a third country have wider implications for international refugee protection. Refugee law scholars have identified that one of the critical contemporary issues in refugee protection is achieving harmony in the interpretation of the Refugee Convention.<sup>119</sup> The remainder of this article will assess the positions taken by the High Court of Australia and European Court of Justice in light of this objective.

#### VI ONE TRUE MEANING OF 'EFFECTIVE PROTECTION'? THE SOMETIMES DANGEROUS CONVERGENCE BETWEEN REFUGEE LAW AND HUMAN RIGHTS LAW

States are 'in principle committed to a harmonized approach to refugee protection.'<sup>120</sup> Guy Goodwin-Gill has drawn attention to a wealth of jurisprudence that supports the position that states signatory to the Refugee Convention should interpret the Refugee Convention in a similar manner. For example, Lord Bingham has commented that 'it is plain that the [Refugee] Convention has a single autonomous meaning, to which effect should be given in and by all member states, regardless of where a decision falls to be made.'<sup>121</sup> In addition, Lord Steyn, when discussing the Refugee Convention, has provided that:

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<sup>117</sup> Ibid [84]–[85].

<sup>118</sup> Ibid [83].

<sup>119</sup> Simeon, above n 6.

<sup>120</sup> Goodwin-Gill, above n 6, 240.

<sup>121</sup> *Sepe (FC) and Another (FC) v Secretary of State for the Home Department* [2003] UKHL 15, [6] quoted in Goodwin-Gill, above n 6.

There can only be one true interpretation of a treaty ... it is left to national courts, faced with material disagreement on an issue of interpretation, to resolve it. But in doing so it must search, untrammelled by notions of its own legal culture, for the true, autonomous and international meaning of the treaty. And there can only be one true meaning.<sup>122</sup>

Despite the above objective, states diverge greatly on their interpretation of the Refugee Convention. This is partly due to the lack of an international treaty monitoring body. Cohesion is sought through UNHCR advisory opinions and materials, judicial reference to major academic works by refugee law scholars and courts looking to relevant jurisprudence from other jurisdictions.<sup>123</sup> However, while there are 'global conversations' about aspects of refugee law 'the reality is of a devolved system whose outcomes are frequently context dependent.'<sup>124</sup>

Concerns have been raised that this has impinged on the legitimacy of international refugee law.<sup>125</sup> One tool for achieving uniformity is the requirement to interpret the Refugee Convention pursuant to the principles outlined in the *Vienna Convention on the Law of Treaties* (Vienna Convention).<sup>126</sup> Article 31 of the Vienna Convention provides that 'a treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.' However this tool for achieving harmonisation is often rendered nugatory because national courts rarely interpret the Refugee Convention directly. Rather, courts interpret domestic legislation (for example, in Australia, the *Migration Act*) that may not reflect international obligations.<sup>127</sup> In doing so, they are also drawing on domestic principles of statutory construction.

It is not within the parameters of this article to propose a comprehensive solution to this dilemma. Rather, this article will draw on the above two cases to discuss the inconsistencies that can occur when human rights law is used to interpret the obligations in the Refugee Convention. Refugee law is considered to be part of the broader category of human rights law.<sup>128</sup> Nevertheless, as outlined above, one fundamental tension between these two bodies of law is that refugees accrue rights through an acquired legal status while human rights law assumes that rights are possessed by all regardless of their legal position.<sup>129</sup>

Despite the above noted tension, there are obvious connections between refugee and human rights law. While some courts have maintained a distinction between refugee and human rights law by interpreting the Refugee Convention without consideration of human rights principles,<sup>130</sup> other courts have explicitly drawn on human rights to interpret the Refugee Convention. This convergence has perhaps been most strongly evident in the use of international human rights law to interpret the concept of 'persecution'.<sup>131</sup> The word 'persecution' is not defined in the Refugee Convention. It was Professor Hathaway who first

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<sup>122</sup> *Adan (Lul Omar) v Secretary of State for the Home Department* [2001] 2 AC 477, 516–517 quoted in Goodwin-Gill, above n 6.

<sup>123</sup> Harvey, above n 13.

<sup>124</sup> *Ibid* 70.

<sup>125</sup> Simeon, above n 6.

<sup>126</sup> *Vienna Convention on the Law of Treaties*, opened for signature 23 May 1969, UNTS 1155 (entered into force 27 January 1980).

<sup>127</sup> Goodwin-Gill, above n 6.

<sup>128</sup> Harvey, above n 13.

<sup>129</sup> *Ibid*.

<sup>130</sup> Foster, above n 7.

<sup>131</sup> *Ibid*.

suggested that ‘persecution’ can be understood as violations of fundamental human rights.<sup>132</sup> Many jurisdictions have adopted this approach and drawn on international human rights law to define persecution to include serious violations of fundamental human rights.<sup>133</sup>

The convergence of human rights and refugee law has been very evident in Europe. The European Court of Justice and the European Court of Human Rights have jurisdiction to hear matters regarding the Charter and the European Convention on Human Rights respectively. While neither of these courts has jurisdiction to interpret the Refugee Convention directly, many of their decisions have been hailed as triumphant victories for asylum seekers and refugees. For example, decisions from the European Court of Justice and the European Court of Human Rights have addressed non-refoulement,<sup>134</sup> deprivation of liberty and unlawful detention,<sup>135</sup> and interception on the high seas.<sup>136</sup>

Similar to the use of human rights law to interpret the concept of persecution, the convergence of refugee and human rights law on the above matters has been welcomed by refugee advocates.<sup>137</sup> Indeed, refugee scholars are currently investigating the influence of decisions from these courts on other jurisdictions.<sup>138</sup> It has also been argued that reference to human rights principles to interpret the Refugee Convention is consistent with article 31(3)(c) of the Vienna Convention, which provides that when interpreting treaties courts shall take into account ‘any relevant rules of international law applicable in the relations between the parties.’<sup>139</sup> Due to the fact that the Refugee Convention concerns the right to seek and enjoy asylum, principles of human rights law have been considered ‘relevant rules of international law.’<sup>140</sup> However, there has been little critical examination of the boundaries of refugee law and human rights law and to what extent they need to remain distinct bodies of law.

In contrast to the proliferation of human rights jurisprudence in the European Union, Australia does not have a national Human Rights Act or Bill of Rights. Also, the High Court of Australia has been criticised for its reticence to engage with principles of international human rights law.<sup>141</sup> This lack of reference to principles of human rights law has created

<sup>132</sup> James Hathaway, *The Law of Refugee Status* (Butterworths, 1991) 104.

<sup>133</sup> *Chan v Minister for Immigration and Ethnic Affairs* (1989)169 CLR 379; *Directive 2011/95/EU of the European Parliament and of the Council 13 December 2011 on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection, and for the content of the protection granted (recast)* [20 December 2011] L337/9 art 9; UNHCR, *Agents of Persecution UNHCR Position* (14 March 1995) <<http://www.refworld.org/docid/3ae6b31da3.html>>.

<sup>134</sup> *Saadi v Italy* (European Court of Human Rights, Grand Chamber, Application Number 37201/06, 28 February 2008).

<sup>135</sup> *Amuur v France* (European Court of Human Rights, Application Number 19776/92, 25 June 1996).

<sup>136</sup> *Hirsi Jamaa and Others v Italy* (European Court of Human Rights, Application Number 27765/09, 23 February 2012).

<sup>137</sup> See, for example, Gina Clayton, ‘Asylum Seekers in Europe: M.S.S. v Belgium and Greece’ (2011) 11(4) *Human Rights Law Review* 758; Sophie Lieven, ‘Case Report on C-411/10, NS and C-493/10, M.E. and Others 21 December 2011’ (2012) 14(2) *European Journal of Migration Law* 223; Patricia Mallia, ‘Case of M.S.S. v Belgium and Greece: A Catalyst in the Re-thinking of Dublin II Regulation’ (2011) 30(3) *Refugee Survey Quarterly* 107; Violetta Moreno-Lax, ‘Dismantling the Dublin System: M.S.S. v Belgium and Greece’ (2012) 14(1) *European Journal of Migration and Law* 1.

<sup>138</sup> H el ene Lambert, Jane McAdam and Maryellen Fullerton, *The Global Reach of European Refugee Law* (Cambridge University Press 2013, forthcoming).

<sup>139</sup> Foster, above n 7.

<sup>140</sup> Ibid.

<sup>141</sup> Juliet Curtin, ‘Never Say Never: *Al-Kateb v Godwin*’ (2005) 27(2) *Sydney Law Review* 355.

troubling decisions in respect of refugee rights. For example, in *Al-Kateb v Godwin*<sup>142</sup> the majority of the High Court of Australia provided that an asylum seeker whose claim for asylum has failed can be detained indefinitely pursuant to s196 of the *Migration Act*. In coming to its decision the majority did not have reference to foreign jurisprudence regarding the prohibition of arbitrary detention. Yet, as noted above, the lead majority judgment in *Plaintiff M70/2011* was a high water mark in the meaning of 'effective protection' and set a much higher threshold for refugee protection than the European Court of Justice in *NS (C 411/10)*.

Before this anomaly can be examined, the nature of protection outlined in the Refugee Convention must be considered. The nature of this protection is not merely the preservation of fundamental human rights. To explain further, while some of the rights in the Refugee Convention reflect general human rights principles (for example freedom of religion), the nature of protection outlined in the Refugee Convention is both distinct from and beyond preservation of basic human rights. Indeed, some of the obligations on states in the Refugee Convention are not paralleled in international human rights law.

A good example is articles 27 and 28 of the Refugee Convention. Article 27 provides that a state shall issue identity papers to any refugee in its territory who does not possess a valid travel document. Article 28 provides that a state shall issue to refugees lawfully staying in its territory travel documents for the purpose of travel outside the territory. There is no corresponding human right to identity and travel documents.<sup>143</sup> This is an obligation imposed on states under the Refugee Convention due to the special situation of many refugees who do not have identity or travel documents and are not in a position to obtain them from their country of origin. In addition, rights to moveable and immoveable property (article 13 of the Refugee Convention) and artistic rights and industrial property (article 14 of the Refugee Convention) have no direct human right equivalent.<sup>144</sup>

The subject matter of some state obligations under the Refugee Convention reflects human rights obligations. For example, the right to wage earning employment (article 17)<sup>145</sup> under the Refugee Convention is similar to article 6 of the International Covenant on Economic Social and Cultural Rights requiring that states recognise the right to work. Similarly, the obligation to accord refugees the same treatment as nationals with respect to social security (article 24) has some parallels with article 9 of the International Covenant on Economic Social and Cultural Rights which requires states to recognise the right to social security.

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<sup>142</sup> (2004) 208 ALR 124.

<sup>143</sup> Article 7 of the *Convention on the Rights of the Child*, opened for signature 20 November 1989, UNTS 1577 (entered into force 2 September 1990) provides that a child shall be registered immediately after birth but does not go so far as to say that children shall be provided with identity documents.

<sup>144</sup> Article 11 of the *International Covenant on Social, Economic and Cultural Rights*, opened for signature 20 November 1989, UNTS 993 (entered into force 3 January 1976) addressed the need for adequate housing but does not provide a right to property. Article 15 of the *Convention on the Elimination of All Forms of Discrimination Against Women*, opened for signature 18 December 1979, UNTS 1249 (entered into force 3 September 1981) provides that women shall have rights to administer proper on equal terms as men but does not provide a positive right to property.

<sup>145</sup> The Contracting State shall accord to refugees lawfully staying in their territory the most favourable treatment accorded to nationals of a foreign country in the same circumstances, as regards the right to engage in wage earning employment.

However, the rights under the Refugee Convention are absolute and are immediately binding on states.<sup>146</sup> For example, article 24 (social security) requires that as soon as a refugee is lawfully staying within the territory the state must extend the same social security benefits to them that are extended to nationals. Contrastingly, most of the rights under the International Covenant on Economic Social and Cultural Rights are not absolute and immediately binding but are to be progressively realised. This means that states must take steps, within their means, towards the fulfilment of these rights. Again, the reason why these rights operate differently is due to specific aspects of refugeehood — that refugees often have acute protection needs that must be addressed swiftly. In summary, state obligations under the Refugee Convention ‘are both more extensive than those under general human rights law (e.g. binding rights to private property and to benefit from public relief and assistance) and are defined as absolute and immediately binding (in contrast to general human rights norms).’<sup>147</sup>

The above examples indicate that the purpose of the protection scheme outlined in the Refugee Convention is not to merely provide fundamental human rights but to also provide ‘a taste of the substance of citizenship.’<sup>148</sup> Or, in the words of Professor Hathaway, to ensure that ‘refugees cannot be disenfranchised within their new communities, but rather must be allowed to participate in the economy in a way that genuinely enables them to meet their own needs.’<sup>149</sup>

The reason why the High Court of Australia set a high threshold for ‘effective protection’ is because it interpreted the word ‘protection’ with sole reference to the Refugee Convention and without consideration of human rights law. The lead majority in *Plaintiff M70/2011* did not specifically address the principle of interpretation that they employed to come to their conclusion that ‘protection’ encompassed not only protection from persecution but also an entitlement to the remainder of the rights in the Refugee Convention. Nevertheless when there is ambiguity in domestic legislation that implements an international treaty, Australian courts often interpret the domestic legislation with reference to the context of the treaty, and aim to provide an interpretation that is consistent with these international obligations.<sup>150</sup>

The lead majority’s interpretation of the phrase ‘protection’ in s198A of the *Migration Act* with reference to states’ obligation under the Refugee Convention is consistent with this principle of interpretation. In adopting such a position, the High Court of Australia interpreted the phrase ‘protection’ with specific reference to the Refugee Convention and without reference to principles of human rights law. By ruling that ‘effective protection’ requires both protection from refoulement and the satisfaction of all the rights outlined in the Refugee Convention, the High Court of Australia gave effect to the nature of protection in refugee law which is both distinct from and beyond the mere preservation of basic human rights.

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<sup>146</sup> James Hathaway, ‘Refugees and Asylum’ in Brian Opeskin, Richard Perruchoud and Jillyanne Redpath-Cross (eds), *Foundations of International Migration Law* (Cambridge University Press, 2012), 188–9.

<sup>147</sup> *Ibid*, 190.

<sup>148</sup> Harvey, above n 13, 72.

<sup>149</sup> Hathaway, above n 146.

<sup>150</sup> *Minister for Immigration and Ethnic Affairs v Teoh* (1995) 183 CLR 273, 287 (Mason CJ and Deane J). This rule of statutory construction was discussed in Keifel J’s judgment at [247]. This principle of interpretation is also shared with other jurisdictions – see, eg, the Canadian decision of *National Corn Growers Assn v Canada (Import Tribunal)*, [1990] 2 S.C.R. 1324, 1371.

Contrastingly, the European Court of Justice's decision in *NS (C 411/10)* demonstrates the sometimes problematic convergence of refugee and human rights law. In coming to its decision on the conditions which must be met in a third country before a transfer can occur, the European Court of Justice focused specifically on article 4 of the Charter. As outlined above, article 4 provides that no-one shall be subject to torture or inhuman and degrading treatment and punishment. The European Court of Justice did not give any reason why article 4 of the Charter was prioritised over the other rights it was asked to consider (including article 18 of the Charter which makes specific reference to the Refugee Convention) other than the suggestion that a full examination of minor infringements of other rights would undermine the objective of the Common European Asylum System.<sup>151</sup>

It is possible that the European Court of Justice wanted to come to a position that was consistent with the recent ruling by the European Court of Human Rights in *MSS v Belgium*.<sup>152</sup> In this case the European Court of Human Rights ruled that Belgium's transfer of an asylum seeker to Greece placed Belgium in breach of article 3 of the European Convention on Human Rights (no-one shall be subject to torture or to inhuman or degrading treatment or punishment). The European Court of Human Rights held that Belgium was in breach of article 3 because it could not have been unaware that the deficiencies in the detention centres and living conditions endured by asylum seekers in Greece amounted to degrading treatment.<sup>153</sup> Indeed, the European Court of Justice considered the decision of *MSS v Belgium* in its judgment. While protection from torture and inhuman and degrading treatment is a fundamental human right (and one to which there are no exceptions),<sup>154</sup> its protection alone truncates the quality of protection outlined in the Refugee Convention and envisaged by its drafters.

In discussing the relationship between refugee and human rights law, Harvey has posed the question: 'do human rights underpin, challenge, support or even replace refugee law?'<sup>155</sup> The above analysis indicates that, in the context of 'effective protection', human rights law can undermine and fracture refugee law. In particular, the use of human rights law in transfer decisions truncates and splinters the nature of protection outlined in the Refugee Convention.

## VII CONCLUSION

This article has conducted a comparative and critical analysis of recent Australian and European Union jurisprudence relevant to the meaning of 'effective protection' for asylum seekers and refugees. It argued that the High Court of Australia's decision in *Plaintiff M70/2011* was a high water mark for refugee protection because it was the first superior court to declare that an asylum seeker or refugee cannot be transferred to a third country unless the principle of non-refoulement will be respected *and* all the other rights in the Refugee Convention will be guaranteed. While its precedential authority in Australia has been diminished after the passing of the *Regional Processing Act* and the subsequent PNG Resettlement Arrangement, it still provides the strongest clarification of the protections that must be guaranteed before an asylum seeker can be transferred to a third country. Only four

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<sup>151</sup> *NS (C 411/10)* [84]–[85].

<sup>152</sup> *MSS v Belgium and Greece* (European Court of Human Rights, Application Number 30696/09, 21 January 2011).

<sup>153</sup> *NS (C 411/10)* [88].

<sup>154</sup> *Saadi v Italy*, above n 134.

<sup>155</sup> Harvey, above n 13, 69.

months later, however, the European Court of Justice set the threshold for ‘effective protection’ much lower by ruling that asylum seekers can be transferred unless they would be subject to inhuman or degrading treatment or punishment.

These contrasting decisions raise wider issues for international refugee protection especially in light of the desire to have a harmonious interpretation of the Refugee Convention. While this paper did not attempt to provide a comprehensive solution to this dilemma, it investigated the under-examined issue of the convergence of refugee and human rights law and its implications for achieving an internationally consistent understanding of the obligations in the Refugee Convention. It did this by highlighting that the High Court of Australia reached its decision on the meaning of ‘protection’ with sole reference to the Refugee Convention and no consideration of principles of human rights law. Conversely, the European Court of Justice’s much lower threshold was based on European Union human rights law which truncated and fractured the scope of protection in the Refugee Convention.

Ultimately, it was argued that the reason why the High Court of Australia’s decision was a high water mark for refugee protection is because the nature of protection outlined in the Refugee Convention is both distinct from and beyond the preservation of fundamental human rights. The nature of protection was not just meant to confer fundamental human rights but also a form of surrogate state protection. By exploring this issue this article highlights the need for a critical examination of the boundaries of human rights and refugee law and the extent to which they should remain distinct bodies of law.

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