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AUSTRALIAN RESPONSES TO REFUGEE JOURNEYS

Matters of perspective and context

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Since 1945, more than 9 million people have migrated to Australia.² Of these, some 1 million were refugees and displaced people,³ although in the 1950s and 1960s institutional distinctions were not drawn between refugees and migrants.⁴ In 1954, Australia provided the signature that brought the *1951 Convention Relating to the Status of Refugees* ('*Refugee Convention*') into force.⁵ To some, whether supporters or opponents of refugee policy, these figures and the decision to accede to the *Refugee Convention* tell the story of refugee resettlement to Australia as a proud and generous history of leadership and humanitarianism dating back to

1 The author would like to thank Gabriel Smith for very helpful research assistance for this chapter.

2 Department of Home Affairs ('DHA'), *Fact Sheet: Key Facts About Immigration* (undated), archived webpage available at: webarchive.nla.gov.au/awa/20181010074801/www.homeaffairs.gov.au/about/corporate/information/fact-sheets/02key; DHA, Visa Statistics, relating to the migration, asylum and humanitarian programs available at: homeaffairs.gov.au/research-and-statistics/statistics/visa-statistics.

3 DHA, *Fact Sheet*; DHA, Visa Statistics. Figures vary, even on the DHA website. By one account, the resettlement figure now stands at 880,000 people; see: immi.homeaffairs.gov.au/what-we-do/refugee-and-humanitarian-program/about-the-program/about-the-program; Klaus Neumann, *Across the Seas: Australia's Response to Refugees: A History* (Melbourne: Black Inc., 2015), 141.

4 Neumann, *Across the Seas*, 141; see also Senate Standing Committee on Foreign Affairs and Defence, Parliament of Australia, *Australia and the Refugee Problem* (1976), 47.

5 *Convention Relating to the Status of Refugees*, opened for signature 28 July 1951, 189 UNTS 150 (entered into force 22 April 1954), art 31 ('*Refugee Convention*').

the postwar period.⁶ To others, the utilitarian undertones of the story complicate the narrative of generosity and humanitarianism, not least in the context of post-arrival treatment.⁷

There is no doubt that there is good in this story. After all, thousands upon thousands of refugees have been resettled to Australia and have seized the chance to rebuild their lives. Yet, when seen in context, the reality is more nuanced and it becomes clear that the narrative of generosity that accompanies this story is a fulsome one with some significant blind spots.⁸ And, as we will see, it is one in which the refugee appears to be a secondary consideration, regarded as merely incidental or instrumental in fulfilling geopolitical interests and priorities.⁹ It is as a result of this that there is a need to ensure that Australian histories of the refugee journey are both told and understood in global perspective and context, legally, politically and statistically.

With this in mind, this chapter gives an overview of this very context, showing how politico-legal interests and traditions of much longer standing have informed the development of the modern refugee protection framework. There are several important points to note here. First, while the *Refugee Convention* is commonly presented as a global instrument giving protection to refugees, when it was drafted, geographical and temporal restrictions were included in order to exclude major groups of refugees from outside Europe. Second, there was an underlying assumption driven by geopolitical dynamics of the Cold War period that Convention refugees¹⁰ would be provided with permanent settlement outside their country of origin. This assumption gave rise to the 'exilic bias' that characterised

6 Barry York, 'Australia and Refugees, 1901–2002: An Annotated Chronology Based on Official Sources' (Information and Research Services, Parliamentary Library, Parliament of Australia, Chronology No 2, 2002–2003), 1.

7 Alexandra Dellios, *Histories of Controversy: The Bonegilla Migrant Centre* (Melbourne: Melbourne University Press, 2017).

8 For two insightful studies of postwar refugee resettlement that describe a more complicated history than the popular narrative of humanitarianism, see Dellios, *Histories of Controversy*; Jayne Persian, *Beautiful Balts: From Displaced Persons to New Australians* (Sydney: NewSouth Publishing, 2017).

9 Guy S Goodwin-Gill, 'The Politics of Refugee Protection', *Refugee Survey Quarterly* 27, no. 1 (2008): 8–23, 9, doi.org/10.1093/rsq/hdn003.

10 A refugee is defined as a 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 his country of nationality [or former habitual residence] and is unable, or owing to such fear, is unwilling to avail himself of the protection of that country': *Refugee Convention* art 1A(2).

postwar approaches to refugee protection.¹¹ Third, the decolonisation movement of the 1960s and the emergent *1967 Protocol Relating to the Status of Refugees* ('1967 Protocol'), which removed the geographical and temporal limitations, opened up the possibility for significantly increased refugee numbers, many of whom were non-European. Their permanent presence in countries of the liberal West was, however, not necessarily perceived to be of economic benefit or strategic interest. This dynamic and, later, the end of the Cold War would therefore produce several major policy effects. In the first instance, it would produce a shift in policy (and discursive) focus from *permanent* solutions with the aforementioned 'exilic bias'¹² to a *durable* solutions discourse and an accompanying state-centric preference for voluntary return.¹³ In the second, it led to a lifting of barriers to exit by refugee-producing countries that had hitherto served as the main point of resistance to refugee-hood. This in turn led to new and increasingly elaborate and strident regulatory barriers to *entry* into countries of asylum (or *non-entrée* policies). Finally, it led to a new politicisation of the policy (and discourse) of refugee resettlement. This background frames Australia's evolving response to the refugee and her journey, and at once explains the genesis of Australia's current claims that its refugee resettlement policy positions it as a global leader in refugee protection at the same time as it undermines the credibility of those claims.

Part I of this chapter, 'A prehistory', looks at responses to refugee movements in early international law and selected responses through to the interwar period that are illustrative of a situation-specific approach to refugee protection. Part II, 'The *Refugee Convention*', analyses key geopolitical drivers behind the drafting of the *Refugee Convention* following World War II and the context for Australia's accession to it in 1954. Part III, 'The *1967 Protocol*', examines the shifts in international law and policy in the context of decolonisation and other developments during the Cold War. Part IV, 'The Cold War et seq.', considers approaches to refugee protection and effects on the international legal and policy framework of

11 Gervase J L Coles, 'The Human Rights Approach to the Solution of the Refugee Problem: A Theoretical and Practical Enquiry', in *Human Rights and the Protection of Refugees Under International Law*, ed. by Alan E Nash (Conference Proceedings, Montreal, 29 November – 2 December 1987), 195, 209.

12 That is, local integration in the country of asylum and resettlement to a third country.

13 Dennis Gallagher, 'Durable Solutions in a New Political Era', *Journal of International Affairs* 47, no. 2 (1994): 429–50.

the Cold War and the events that marked its end. Part V, ‘Charting a way forward in the twenty-first century’, looks briefly at present-day responses to the so-called global migration crisis.

Part I: A prehistory

At its heart, the refugee’s journey is integral to the story of humanity, whether as a product of conflict or internecine struggles, poverty or natural disaster, persecution or expulsion. Flight and requests for hospitality and asylum are concepts as old as life itself. This flight–hospitality dynamic long predates the emergence of the nation-state as the dominant governing structure. In turn, the manifestation of this dynamic in international society in the person of the ‘refugee’ is as old as the state system, and it will remain for as long as the state system remains.¹⁴ So, while the focus of this volume is on a particular place (Australia) and a particular period (1970 to the present), we need to situate the refugee and her journey within a much longer historical trajectory and in global context.

The refugee journey in early international law

From its earliest conceptions, European international legal theory contemplated and legitimised the refugee journey as a right of mobility consequential to an *individual* right of self-preservation.¹⁵ By the same token, the nation-state has also recognised that there is potential for the encounter between the foreigner and the sovereign to be hostile and therefore a threat, triggering exclusion measures. So, a tension arises in this border encounter, represented by competing acts and interests of self-preservation.

Early international legal writers such as Vattel resolved this tension by recognising that there would always be situations where the duties of humanity should prevail over the sovereign power of exclusion; situations in which peaceful entry, passage and stay (including the possibility of a permanent asylum) should be permitted to ‘those whom

14 Emma Haddad, *The Refugee in International Society: Between Sovereigns* (Cambridge: Cambridge University Press, 2008), 209.

15 Eve Lester, *Making Migration Law: The Foreigner, Sovereignty and the Case of Australia* (Cambridge: Cambridge University Press, 2018), 68, 70–73, discussing the work of Samuel Pufendorf.

tempest or necessity obliged to approach their frontiers'.¹⁶ In other words, while exclusion measures may also reflect the claim *of the state* to a right to self-preservation, early international law understood such measures as permissible only to the extent necessary for the purposes of self-defence.¹⁷ As I have argued elsewhere, we know that early (European) international law's refugee was conceptualised as a European *insider*, rather than a non-European *outsider*.¹⁸ In other words, notwithstanding the racial and imperialist power interests and dynamics that shaped the making of international law and ideas about who should benefit from its protections,¹⁹ we can still educe from early treatises recognition that refugees flee out of necessity and that the duties of humanity give rise to concomitant obligations of hospitality.²⁰

Situation-specific responses to refugee movements

As we have seen, the concepts of asylum and exile and the corresponding obligation to respect the duties of humanity are longstanding.²¹ Nevertheless, historically, responses to refugee movements have tended to be ad hoc and situation specific. So, for example, there were situation-specific responses to the plight of the Huguenots (seventeenth century)²² – the displaced population to whom the term 'refugee' was first ascribed²³ – as well as a range of ad hoc responses to the Jewish pogroms in Russia

16 Emmerich de Vattel, *The Law of Nations; or, Principles of the Law of Nature, Applied to the Conduct of Affairs of Nations and of Sovereigns*, trans. and ed. Joseph Chitty (Lawbook Exchange, first published 1854, 2005 ed.) [trans of: *Le Droit des gens; ou Principes de la loi naturelle, appliqués à la conduit et aux affaires des Nations et des Souverains* (first published 1758)], bk II ch VII § 94, bk II ch VIII § 100, bk I ch XIX § 231.

17 See Lester, *Making Migration Law*, 99–101, discussing the interpretation of 'self-preservation' in the treatises of Vattel and Sir Robert Phillimore.

18 *Ibid.*, ch 2.

19 On the inextricable relation between imperialism and the making of international law, including in the 'post-colonial' era, see, generally, Antony Anghie, *Imperialism, Sovereignty and the Making of International Law* (New York: Cambridge University Press, 2005); and Sundhya Pahuja, *Decolonising International Law: Development, Economic Growth and the Politics of Universality* (New York: Cambridge University Press, 2011), doi.org/10.1017/cbo9781139048200.

20 Lester, *Making Migration Law*, 76–77.

21 Vattel, *The Law of Nations*, bk II ch VIII § 100; *Ibid.*, 76.

22 The Edict of Potsdam (1685), for example, provided for the safe passage of French Protestants (Huguenots) to Brandenburg-Prussia and accorded them religious freedom denied through the revocation of the Edict of Nantes (Edict of Fontainebleau, 1684) by Louis XIV: John Stoye, *Europe Unfolding: 1648–1688*, 2nd ed. (Oxford: Blackwell, 2000), 272; Lester, *Making Migration Law*, 69–70.

23 Haddad, *The Refugee in International Society*, 51–52.

(nineteenth century).²⁴ In the early twentieth century and in the wake of World War I, pressure to protect large numbers of Russian²⁵ and Armenian refugees²⁶ also produced situation-specific responses, whether through national governments or coordinated international responses in the interwar period under the auspices of the League of Nations.²⁷

After World War II, the emergence of an international protection regime might suggest that situation-specific responses would become a thing of the past. However, as we will see in the next section, even with the emergence of an international protection framework, situation-specific responses continued to characterise the way in which the ‘international community’ responded to many refugee crises. Indeed, even as it was framed as an international instrument, we will see that the *Refugee Convention* itself was a situation-specific response to the absence of protection for the vast numbers of displaced people in Europe.²⁸ In contrast, the issue of mass displacement of *non*-Europeans in the early postwar years was sidelined by the ‘international’ protection framework as it was considered to be both strategically marginal and overwhelming in its enormity.

Part II: The *Refugee Convention*

In the wake of World War II, the *Refugee Convention* secured the commitment and cooperation of states parties to accord protection to refugees, not least on account of the international scope and nature of refugee movements. Other international instruments were also crucial, notably the *Charter of the United Nations*²⁹ and the *Universal Declaration of Human*

24 John Doyle Klier, *Russians, Jews, and the Pogroms of 1881–1882* (Cambridge: Cambridge University Press, 2011), 269.

25 Peter Gatrell, *A Whole Empire Walking: Refugees in Russia During World War I* (Bloomington: Indiana University Press, 1999).

26 Peter Balakian, *The Burning Tigris: The Armenian Genocide and America's Response* (New York: HarperCollins, 2003); Stefanie Kappler et al. (eds), *Mass Media and the Genocide of the Armenians: One Hundred Years of Uncertain Representation* (Basingstoke: Palgrave Macmillan, 2016), doi.org/10.1007/978-1-137-56402-3.

27 Gilbert Jaeger, ‘On the History of the International Protection of Refugees’, *International Review of the Red Cross* 83, no. 843 (2001): 727; Haddad, *The Refugee in International Society*, 31.

28 Pia Oberoi, *Exile and Belonging: Refugees and State Policy in South Asia* (Oxford: Oxford University Press, 2006), 22 n. 26.

29 United Nations, *Charter of the United Nations*, adopted 26 June 1945 1 UNTS XVI, entered into force 24 October 1945 (*UN Charter*); Annemarie Devereux, *Australia and the Birth of the International Bill of Human Rights 1946–1966* (Sydney: Federation Press 2005); Eve Lester, ‘Internationalising Constitutional Law: An Inward-Looking Outlook’, *Australian Feminist Law Journal* 42, no. 2 (2016): 321–49, 335–40, doi.org/10.1080/13200968.2016.1273066.

Rights,³⁰ which recognised, respectively, the imperative of cooperation between states to maintain international peace and security³¹ and the universality of the right to seek and enjoy asylum.³² The underpinning of international cooperation, intended to embrace a number of postwar issues including finding permanent solutions for refugees, was a critical dimension to these commitments.³³ The characterisation of asylum as an inherently peaceful and humanitarian (and therefore supposedly non-political) act was politically important at the time and endures in theory if not in practice. Nevertheless, it is now more widely recognised that it is unrealistic to imagine that either the ‘refugee problem’ or humanitarian responses to it can ever be entirely apolitical.³⁴ So, while international legal discourse on refugee protection between 1950 and 1989 (marking the end of the Cold War) might have been relatively depoliticised, the Western agenda that this depoliticised discourse encouraged and legitimised positioned refugee law as neutral and apolitical – indeed innocent.³⁵ However, this depoliticised discourse was itself political, because of, rather than in spite of, the discernible geopolitical interests and Cold War dynamics at work. These interests and dynamics deployed law’s innocence to determine who would be protected under the *Refugee Convention* and, equally as importantly, who would be neglected.³⁶

An ‘international’ protection framework emerges

It is well recognised that it was large-scale displacement in Europe that prompted the negotiation and adoption of the *Refugee Convention* and the grant by the General Assembly of a (temporary) mandate to the Office

30 *Universal Declaration of Human Rights*, GA Res 217A (III), UN GAOR, 3rd sess, 183rd plen mtg, UN Doc A/810 (10 December 1948) (*UDHR*). Devereux, *Australia and the Birth of the International Bill of Human Rights 1946–1966*; and specifically on the right to asylum and the issue of free movement, see Lester, ‘Internationalising Constitutional Law’, 340–44.

31 *UN Charter*, arts 1(3), 55, 56; Volker Türk and Madeline Garlick, ‘From Burdens and Responsibilities to Opportunities: The Comprehensive Refugee Response Framework and a Global Compact on Refugees’, *International Journal of Refugee Law* 28, no. 4 (2016): 656–78, 658, doi.org/10.1093/ijrl/eww043.

32 See *UDHR*, art 14. For discussions, Devereux, *Australia and the Birth of the International Bill of Human Rights 1946–1966*, and Lester, ‘Internationalising Constitutional Law’, 328–35.

33 Türk and Garlick, ‘From Burdens and Responsibilities to Opportunities’, 658–65.

34 Goodwin-Gill, ‘The Politics of Refugee Protection’, 21; Haddad, *The Refugee in International Society*, 214.

35 For a critical analysis of law’s claim to equality, universality and indeed innocence, see Peter Fitzpatrick, ‘Racism and the Innocence of Law’, *Journal of Law and Society* 14, no. 1 (1987): 119–32.

36 B S Chimni, ‘The Geopolitics of Refugee Studies: A View from the South’, *Journal of Refugee Studies* 11, no. 4 (1998): 350–74.

of the United Nations High Commissioner for Refugees (UNHCR).³⁷ At the time of its drafting, the scope of the *Refugee Convention* was temporally limited to ‘events occurring before 1 January 1951’.³⁸ It also included a geographical limitation that enabled states to apply its terms only to pre-1951 events that took place *in Europe*.³⁹ In addition to this, the Convention’s application was confined to the type of refugee who was of political and ideological interest to the West; a person whose fear of persecution had to be for reasons of civil or political status.⁴⁰

The refugee as defined under the *Refugee Convention* was a person whose grant of asylum would, in Cold War terms, serve to weaken the hand of the Eastern Bloc as it strengthened that of the West. Narrowly defined, a person fleeing generalised violence or conflict- or state-induced poverty did not come within its purview unless he⁴¹ could sustain an individualised claim to persecution for one of the five Convention grounds.⁴² This constructed what Chimni has described as ‘an image of a “normal” refugee’ as ‘white, male and anti-communist’.⁴³ The distinction thereby created produced what he has since described as a ‘myth of difference’; that is, the idea that refugees fleeing Europe did so for radically different reasons – and indeed had radically different needs – to those fleeing the Third World.⁴⁴ Yet, there was large-scale displacement in the Third World at the time of

37 Oberoi, *Exile and Belonging*, 20.

38 *Refugee Convention*, art 1A(2).

39 *Refugee Convention*, art 1B. Although textually the most obvious example is the inclusion of art 1D concerning the Palestinians, see also, e.g., Oberoi, *Exile and Belonging*, 17–25, and Laura Madokoro, *Elusive Refuge: Chinese Migrants in the Cold War* (Cambridge, MA: Harvard University Press, 2016), 32.

40 It is a fairly recent development that the possibility of social and economic rights violations grounding a claim to refugee status has been recognised: see, most notably, Michelle Foster, *International Refugee Law and Socio-Economic Rights: Refuge from Deprivation* (Cambridge: Cambridge University Press, 2007), doi.org/10.1017/cbo9780511493980.009.

41 Although from time to time, as here, I intentionally use the male pronoun, I use the female pronoun generically in my writing. Although I acknowledge that dispensing with gendered pronouns in favour of using ‘they/them’ is a valid and inclusive approach that properly resists the gender binary, my purpose in differentially using the male and female pronouns is part of a broader objective of engaging critically with law and history and highlighting shifting power dynamics over time. In other words, ‘she/her’ is a form of resistance that is conscious and critical, with transformative possibilities. In making this choice, I am persuaded by Haddad’s thinking, recognising that the habitual use of the male pronoun can allow the identity of the subject to go unnoticed by the reader: Haddad, *The Refugee in International Society*, 39–41; see also Wendy Martyna, ‘What Does “He” Mean? Use of the Generic Masculine’, *Journal of Communication* 28, no. 1 (1978): 131–38, doi.org/10.1111/j.1460-2466.1978.tb01576.x; Lester, *Making Migration Law*, 15–16 n. 49.

42 *Refugee Convention*, art 1A(2).

43 Chimni, ‘The Geopolitics of Refugee Studies’, 351; cf. Chinese fleeing the victorious Chinese Communist Party during the Chinese Civil War: see Madokoro, *Elusive Refuge*, 2–3, 37.

44 Chimni, ‘The Geopolitics of Refugee Studies’, 355–63.

drafting and, despite the superficial universality of the *Refugee Convention*, protection of refugees and displaced persons in strategically marginal contexts were not included in its terms.

Sites of non-European displacement on a massive scale included the 1948 Arab–Israeli conflict,⁴⁵ the Indian subcontinent in the context of Partition,⁴⁶ the Chinese Civil War and the second Sino–Japanese War.⁴⁷ Despite their size and significance, none of these situations was contemplated in the Convention’s terms. That said, they were central – not marginal – to the thinking of the framers of the *Refugee Convention*. Displacement figures for these situations were in the order of tens of millions. As Oberoi has noted, in the context of decolonisation of India and Pakistan alone, upwards of 30 million people were displaced,⁴⁸ representing one of the greatest forced movements of people in contemporary history.⁴⁹ Of these, some 14.5 million were ‘refugees’ in the Convention’s sense of being outside their country of origin, in some cases as a result of newly demarcated international borders.⁵⁰ Likewise, the Sino–Japanese War (1937–1945), which displaced as many as 95 million people by one account,⁵¹ did not feature in the refugee protection calculus. As Madokoro has noted, the drafting of the Convention similarly disregarded the movement of people out of the Chinese mainland following the victory of the Chinese Communist Party in the Chinese Civil War.⁵²

In the text of the Convention, these exclusions would be reflected most tellingly through the incorporation of the geographical and temporal limitations on its reach as well as art 1D, which explicitly excluded from the Convention’s embrace refugees receiving assistance from another UN agency. This provision was specifically intended to cover Palestine

45 For a detailed discussion of the legal complexities of the situation, see Lex Takkenberg, *The Status of Palestinian Refugees in International Law* (Oxford: Clarendon Press, 1998).

46 Oberoi, *Exile and Belonging*, 11–43.

47 Madokoro, *Elusive Refuge*, 103.

48 Oberoi, *Exile and Belonging*, 1.

49 Ibid.

50 Madokoro, *Elusive Refuge*, 23.

51 Keith A Crawford and Stuart J Foster, *War, Nation, Memory: International Perspectives on World War II in School History Textbooks* (IAP Publishing, 2008), 90. Schoppa describes numbers as being in the tens of millions: R Keith Schoppa, *In a Sea of Bitterness: Refugees During the Sino-Japanese War* (Cambridge MA: Harvard University Press, 2011), 6, doi.org/10.4159/harvard.9780674062986.

52 Madokoro, *Elusive Refuge*, 23.

refugees assisted by the UN Relief and Works Agency ('UNRWA').⁵³ Notwithstanding their exclusion, the aforementioned non-European situations were the subject of debate during the drafting process. In each instance, arguments were constructed as to why these groups of non-European refugees should be excluded from protection under the *Refugee Convention*. In this connection, the focus of the drafters was on the definition of a refugee set out in art 1A(2) and the issue of legal rights and protection rather than framing an agreement for the provision of material assistance and relief. So, while India and Pakistan positioned themselves in the course of debate as providing international protection and assistance to refugees, this impelled them to concede that their refugees had the protection of a state.⁵⁴ In response, therefore, other delegations could assert that Partition refugees did not require international legal protection because they did not lack the protection of a government, and therefore would not need to be covered by the Convention's terms.⁵⁵ Similarly, the central argument for excluding Chinese refugees from the People's Republic of China ('PRC') was that they had, at least in theory, a place of refuge in the Republic of China (Taiwan), which still had a seat in the United Nations. Robinson, the Israeli delegate, argued that this meant that Chinese refugees 'had a government of their own ... able to provide refuge ... to those who sought asylum there'.⁵⁶ In Robinson's words, therefore, for 'the purposes of the Convention, there were practically no refugees in the world other than those coming from Europe'.⁵⁷ Of course, if that were the case, the geographical and temporal limitations that were incorporated into the Convention would have been moot. Robinson knew also that there were some 750,000 Palestine refugees, but, as noted above,

53 Exclusion of Palestinian refugees receiving assistance from UNRWA under art 1D contrasts with arts 2–34 of the *Refugee Convention*, which outline a rights framework for (European) refugees: see, generally, Takkenberg, *The Status of Palestinian Refugees in International Law*.

54 UN General Assembly, Provisional Summary Record of the Two Hundred and Sixty-Third Meeting Held at Lake Success New York on Tuesday, 15 November 1949, at 10.45 am, 15 November 1949, A/C.3/SR.263, [59], available at: www.refworld.org/docid/3ae68bec18.html.

55 UN General Assembly, Fourth Session, Joint Third and Fifth Committees, 264th Plenary Meeting, 2 December 1949, para 73 (Eleanor Roosevelt), cited in Oberoi, *Exile and Belonging*, 21.

56 Although attempts to argue that refugees of Jewish background should avail themselves of Israel's Law of Return, enacted in 1950, have been described as imbued with 'an exquisite irony' given the very *raison d'être* of the *Refugee Convention*, it is nevertheless striking that this argument should have been raised by the Israeli delegate: see *NAEN v Minister for Immigration and Multicultural and Indigenous Affairs* (2003) 130 FCR 46, 60 (per Sackville J).

57 UN Conference of Plenipotentiaries on the Status of Refugees and Stateless Persons, *Conference of Plenipotentiaries on the Status of Refugees and Stateless Persons: Summary Record of the Twenty-second Meeting*, 26 November 1951, A/CONF.2/SR.22 (Mr Robinson, Israel), available at: www.refworld.org/docid/3ae68cde10.html; Madokoro, *Elusive Refuge*, 30.

they were expressly excluded. Implicitly, therefore, material assistance and relief for non-European refugee populations (even absent legal protection) was considered to suffice.

During the drafting process, there was even resistance to representations that Palestine refugees should be covered by the Convention's terms should UNRWA cease to exist. One delegate suggested that such an approach would not be necessary because a protocol or separate convention that was 'perfectly suited' to the requirements of Palestine refugees could 'easily' be arranged.⁵⁸ History of course tells us otherwise, and with Palestine refugees registered by UNRWA numbering 5.6 million in 2019,⁵⁹ we are also reminded that refugee populations expand exponentially if their situations are allowed to become protracted and the conditions that produce them remain unresolved.

In the course of debate, the Indian delegate described the *Refugee Convention* as a 'partial remedy involving discrimination', stating that 'the UN should try to help not only special sections of the world's population, but all afflicted people everywhere'. As she said, '[s]uffering knew no racial or political boundaries; it was the same for all'.⁶⁰ So, although the geographical and temporal limitations in the Convention had been opposed by a majority of representatives from the emerging Third World states,⁶¹ as well as the UK and (for a time) France, this universalist position was ultimately unsuccessful.⁶² Oberoi describes India and Pakistan as being left with a sense of exclusion on the grounds of political expediency.⁶³

58 UN Conference of Plenipotentiaries on the Status of Refugees and Stateless Persons, *Conference of Plenipotentiaries on the Status of Refugees and Stateless Persons: Summary Record of the Twenty-ninth Meeting*, 28 November 1951, A/CONF.2/SR.29 (Mr Rochefort, France), available at: www.refworld.org/docid/3ae68cdf4.html.

59 'Figures at a Glance', UNHCR.org, as at 18 June 2020, available at: www.unhcr.org/en-au/figures-at-a-glance.html.

60 UN, Fifth Session, Third Committee, 332nd Meeting, 1 December 1950, paras 26–27, cited in Oberoi, *Exile and Belonging*, 24.

61 Oberoi, *Exile and Belonging*, 19–20, and, at 24, referring to the position of the Chilean delegation as well as the position of India and Pakistan. As she notes, the Chilean delegate argued that 'it was the duty of the UN to extend international protection to every person who, for reasons beyond his control, could no longer live in the country of his birth': UN, Fifth Session, Third Committee, 324th Meeting, 22 November 1950, para 36.

62 Oberoi, *Exile and Belonging*, 20; Madokoro, *Elusive Refuge*, 31. This is so, even though the majority of states (including Australia) ultimately opted for a broader geographical reach as provided in *Refugee Convention* art 1B(1)(b).

63 Oberoi, *Exile and Belonging*, 22 n. 26.

The participation of China in the drafting process – as the Republic of China (Taiwan) *not* the PRC – is notable for two reasons. First, Taiwan was invited into negotiations on account of China's history of providing shelter to some 200,000 white Russian and 18,000 Jewish refugees in the 1920s and 1930s rather than out of concern for Chinese refugees.⁶⁴ Second, because the General Assembly gave its China seat to Taiwan not the PRC, the Soviet and Polish delegations withdrew from the meetings. This, as Madokoro has noted, gave 'ample room for Western nations to advance their Cold War interests in discussions'.⁶⁵

The geopolitical dynamics at play in the drafting of the *Refugee Convention* make it hard to resist the conclusion that writing the Palestinian, Partition and Chinese refugee crises out of the *Refugee Convention* as unworthy of international protection and permanent rights-based solutions not only reflected Cold War politics and ideology, but was also racialised.⁶⁶ Certainly, there is evidence to suggest that an international instrument underwriting both legal protection and material assistance to many millions of non-European refugees was seen by powerful states to be a problem too enormous to manage in the first instance and as strategically unnecessary in the second.⁶⁷ It also suggests that the global estimate that 151 million people were forcibly displaced as a result of persecution, conflict, decolonisation and wars of independence between 1940 and 2015 is, at best, conservative.⁶⁸

So, notwithstanding that the *Refugee Convention* presented as an *international* instrument in seemingly benign or neutral terms, it is clear that the debate around its geographical and temporal limitations reveals an informed neglect and deliberate exclusion of large populations of non-European refugees. Although the emergent international framework recognised the importance of legal protection and envisaged permanent solutions, its situation-specific focus was on European refugees and

64 Madokoro, *Elusive Refugee*, 26.

65 *Ibid.*

66 Fitzpatrick, 'Racism and the Innocence of Law'; Madokoro, *Elusive Refugee*, 20, who underscores that refugees fleeing the Chinese Communist Party's victory in the Civil War were a political and ideological fit for the *Refugee Convention* but not a racial one.

67 Oberoi, *Exile and Belonging*, 22.

68 Lydia DePillis, Kulwant Saluja and Denise Lu, 'A Visual Guide to 75 years of Major Refugee Crises Around the World', *Washington Post*, 21 December 2015, available at: www.washingtonpost.com/graphics/world/historical-migrant-crisis/?noredirect=on. However, note that the graphics provide limited information about displacement figures in the context of, for example, the Chinese Civil War and the second Sino-Japanese War.

displaced persons. In contrast, the ‘international community’ did not see fit to respond to non-European displacement and to deliver to affected refugees the permanent solutions envisaged for European refugees and displaced persons.⁶⁹ Instead, assistance (not rights or solutions) was deemed sufficient for the rest. Thus, both the text of the *Refugee Convention* and its *travaux préparatoires* remind us of the way in which non-European refugee situations shaped, and indeed narrowed, its scope. And, as the next section demonstrates, this suited Australia well.

White Australia and the *Refugee Convention*

During World War II, Australia hosted more than 6,000 non-European wartime refugees fleeing the Japanese conquest of South-East Asia.⁷⁰ Like many of the ad hoc responses to refugee movements discussed above, this too was a situation-specific response. Importantly, it was only ever intended to be a temporary one and special exemptions to members of this population under Australia’s restrictive and racialised immigration legislation were only granted on condition that they return to their own countries once hostilities ceased. Most returned after the war, and Australia took tough legislative measures to ensure that the remaining 1,000 or so who resisted return – because they had settled, married, had children and/or found jobs – could nevertheless be deported.⁷¹

As we have seen, this differentiated approach to refugee protection was reflected in Australia’s position on negotiation of the aforementioned instruments, and in relation to which it played a pivotal role. An examination of Australia’s role affirms the view that its diplomatic engagement was always characterised by an ‘anxious parochialism’ that viewed immigration – including by refugees – as a matter entirely within the domestic purview of the state.⁷² There is no doubt that this differentiated approach was driven in particular by the perceived political-economic imperatives of the White Australia immigration policy. So, although

69 Johan Cells, ‘Responses of European States to de facto Refugees’, in *Refugees and International Relations*, ed. Gil Loescher and Laila Monahan (Oxford: Clarendon Press, 1989), 187, 189.

70 Kevin Blackburn, ‘Disguised Anti-Colonialism: Protest Against the White Australia Policy in Malaya and Singapore, 1947–1962’, *Australian Journal of International Affairs* 55, no. 1 (2001): 101–17, 103, doi.org/10.1080/10357710120055102.

71 *Ibid.*, 103. For a discussion of the *War-Time Refugees Removal Act 1949* (Cth), see Lester, *Making Migration Law*, 142–51.

72 Lester, ‘Internationalising Constitutional Law’, 328; see, generally, Devereux, *Australia and the Birth of the International Bill of Human Rights 1946–1966*.

Australia had already received non-European wartime refugees from the region, it had no enduring interest in providing them with the permanent protection contemplated in the *Refugee Convention*. As the secretary of the immigration department, Tasman Heyes, observed in 1950:

There are thousands of non-European refugees, and acceptance by Australia of a convention which provides that such a class of persons should not be discriminated against and should not be subjected to any penalty for illegal entry, would be a direct negation of the immigration policy followed by all Australian Governments since Federation.⁷³

As Neumann has said, this was an understatement.⁷⁴ What we can see here is that Australia's participation in the drafting of the *Refugee Convention* and its subsequent accession, as well as the negotiation of other relevant international instruments, were viewed through the lens of a discriminatory immigration policy that sought to exercise absolute and unqualified control. This is consistent with Australia's determination to ensure that non-European wartime refugees could be excluded while young, white, able-bodied refugee labour was welcomed.⁷⁵ What we can see, therefore, is that although the White Australia immigration policy would have its day, there is no doubt that it was a policy that not only helped shape the differentiated terms of the *Refugee Convention* but was also enabled by them.

So, how did Australia respond? In November 1954, five years after passing the *Wartime Refugees Removal Act* to enable removal from Australia of non-European refugees and long before it abolished the White Australia immigration policy, Australia became one of the first states to accede to the *Refugee Convention*. As we have seen, there was no pushback in the Convention against Australia's immigration policy and the commitment Australia made to receive postwar refugees as migrants. Indeed, it was entirely consistent with Australia's political-economic (and highly racialised) desire to 'populate or perish' – that 'catchy alliterative'

73 Heyes to Secretary, Department of External Affairs, 22 May 1950, NAA: A445, 194/2/3, cited in Neumann, *Across the Seas*, 137.

74 Neumann, *Across the Seas*, 137.

75 See, generally, Persian, *Beautiful Balis*.

nation-building slogan⁷⁶ that etched European immigration in the popular imagination as a strategic imperative in the face of unexpectedly low numbers of postwar British settlement.⁷⁷ Minister for Immigration Arthur Calwell's 'Beautiful Balts' – blond, attractive, middle-class refugees – were a saleable European substitute.⁷⁸ They were, as Persian has noted, 'the elite of the refugee problem'.⁷⁹

Part III: The 1967 Protocol

Of course, displacement since the early postwar years continued to occur in many places outside Europe. For example, it arose as a consequence of the decolonisation process and associated wars of independence, and in the context of ongoing and new proxy wars of the Cold War superpowers. Decolonisation and wars of independence not only generated large numbers of refugees who needed protection, but they also provided a catalyst for the adoption of further instruments, some international, others regional.⁸⁰ Of great significance was the *1967 Protocol*, which removed the geographic and temporal limitations in the *Refugee Convention*.

Decolonisation and the Cold War

The negotiation and adoption of the *1967 Protocol* reflected the realisation that the geographical and temporal limitations to the *Refugee Convention* could no longer be sustained. Whether the reasons for this were primarily legal, political or operational is a matter of debate. As Einarsen has noted, however, it was the non-universality of the refugee definition in the 1951 *Convention* that meant there was little incentive for states that were affected by the process of decolonisation rather than pre-1951 events in

76 The term 'populate or perish' was first coined by Billy Hughes as a call for motherhood to serve defence imperatives: see 'Hughes, William Morris (Billy) (1862–1952)', *Australian Dictionary of Biography*, available at: adb.anu.edu.au/biography/hughes-william-morris-billy-6761. It was later co-opted by Australia's first immigration minister as a rallying cry for immigration: James Jupp, *From White Australia to Woomera: The Story of Australian Immigration*, 2nd ed. (Melbourne: Cambridge University Press, 2007), 159, doi.org/10.1017/cbo9780511720222; Catriona Elder, *Being Australian: Narratives of National Identity* (Sydney: Allen & Unwin, 2007), 83–84, 93–114.

77 Judith Brett, 'Fair Share: Country and City in Australia', *Quarterly Essay* 42, (2011), 1–67, 29; Persian, *Beautiful Balts*, 6.

78 Persian, *Beautiful Balts*, 6–7.

79 *Ibid.*, 45.

80 The earliest regional example of a refugee-specific instrument was in Africa: Organization of African Unity (OAU), *Convention Governing the Specific Aspects of Refugee Problems in Africa* ('OAU Convention'), 10 September 1969, 1001 UNTS 45.

Europe to ratify the *Refugee Convention*. In the absence of a duty on the part of those states to cooperate with UNHCR⁸¹ – which was becoming increasingly operational in its delivery of humanitarian assistance and protection – it was difficult for UNHCR to engage them in its work for refugee protection in Africa.⁸² This appears to have been a key driver behind the adoption of the *1967 Protocol*.

The transition to a protection regime that was no longer temporally and geographically limited certainly appeared to signal a step towards universalisation. However, while there may be some truth to this, it also coincided with a perceptible shift from the ‘exilic bias’ of refugee protection to the emergence and consolidation of a range of policies of containment.⁸³ These policies took different forms. Broadly, however, they can be described as state-centric tools and policies intended to keep the refugees of the Third World at arm’s length. As we will see, this led to institutional declarations that voluntary repatriation of refugees was now the ‘preferred’ solution as well as, with time, the proliferation of laws and policies of exclusion by the liberal West. Although the process of decolonisation presented as a political opportunity for Cold War rivals and the emergent newly independent states as sites for proxy wars, refugees were still regarded as politically and ideologically interesting and continued to serve as pawns in Cold War geopolitical brinkmanship. This suggests that any claim that the *1967 Protocol* tells a progress story needs to be treated with caution. The reality is clearly more complex and nuanced.

Australia and the Indochinese refugee crisis

In the postwar period up to 1975, Australia received some 297,000 refugees, most of whom arrived not as refugees, but as assisted or unassisted migrants.⁸⁴ As we have seen, these figures notwithstanding, any

81 *Refugee Convention*, art 35.

82 Terje Einarsen, ‘Drafting History of the 1951 Convention and the 1967 Protocol’, *The 1951 Convention Relating to the Status of Refugees and Its 1967 Protocol: A Commentary*, ed. Andreas Zimmermann (Oxford: Oxford University Press, 2011) 37–73, 69, doi.org/10.1093/actrade/9780199542512.003.0002.

83 Chimni, ‘The Geopolitics of Refugee Studies’, 355, 367, 369; see also T Alexander Aleinikoff, ‘State-centered Refugee Law: From Resettlement to Containment’, *Michigan Journal of International Law* 14, no. 1 (1992): 120–38.

84 Janet Phillips, ‘Australia’s Humanitarian Program: A Quick Guide to the Statistics Since 1947’ (Research Paper Series 2016–17, Parliamentary Library, Parliament of Australia, updated 17 January 2017), 2 (Table 1).

claim to humanitarianism was unquestionably secondary to the enduring political-economic desire to ‘populate or perish’. And of course, as we have also seen, the figures pale in comparison to the scale of European displacement, much less global displacement.

Australia did not accede to the *1967 Protocol* until December 1973 and it was not until 1977, more than 20 years after its accession to the *Refugee Convention*, that Australia developed its first clear refugee policy.⁸⁵ Even then, in a post-Protocol environment, with the inking of its first refugee policy and the institutional demise of the White Australia immigration policy, Cold War dynamics continued to govern the order of things. The refugee crisis of greatest significance to Australia at this time was the Indochinese refugee crisis of the late 1970s and 1980s.

The departure of some 3 million Indochinese followed the fall of Saigon and other proxy wars in Indochina. As Madokoro has noted, virulent racism accounted at least in part for the international community having frozen out the possibility of refugee protection for Chinese refugees fleeing communism in mainland China in the 1950s.⁸⁶ But in the case of the Indochinese, Cold War politics and ideology became the enabler in negotiating multilateral agreements for protection and resettlement of refugees on a large scale.⁸⁷ For the most part, refugees were resettled to Australia, Canada, France and the US. For Australia, it was the first real test of Australia’s mettle following both its decision to abolish the White Australia policy and its accession to the *1967 Protocol*, which together signalled a willingness to protect post-1951 non-European refugees.

To quell the exodus from Vietnam in a way that would still deliver protection, a memorandum of understanding between the Vietnamese government and UNHCR was negotiated and signed in 1979. Under this Orderly Departure Program (ODP), the Vietnamese government agreed to authorise exit for the purposes of ‘family reunion and other humanitarian cases’ where other countries were willing to receive them.⁸⁸ This meant that at least some people could leave Vietnam without having

85 The formulation of a refugee resettlement policy was a major recommendation of a Senate inquiry in 1976: Senate Standing Committee on Foreign Affairs and Defence, *Australia and the Refugee Problem*, 89; Claire Higgins, *Asylum by Boat: Origins of Australia’s Refugee Policy* (Sydney: NewSouth Publishing, 2017), 17.

86 Madokoro, *Elusive Refuge*, 27–30.

87 Judith Kumin, ‘Orderly Departure from Vietnam: Cold War Anomaly or Humanitarian Innovation?’, *Refugee Survey Quarterly* 27, no. 1 (2008): 104–17, 105, doi.org/10.1093/rsq/hdn009.

88 *Ibid.*, 111–12.

to take up the dangerous alternative of a boat journey. As Kumin has noted, the ODP is the only time UNHCR has provided large-scale assistance to people seeking to leave their country of origin, attributing it as much to a fortuitous confluence of events, interests and personalities as from a rational decision to provide would-be refugees with a viable alternative.⁸⁹ She has also wondered whether such a model could only work in a Cold War context.⁹⁰

Over the next 10 years, in refugee camps across South-East Asia, the protection tables would start to turn. States were less ready presumptively to accord prima facie recognition to refugees. Over time, and alongside the commitment to resettle, the Comprehensive Plan of Action on Indochinese Refugees (CPA) was negotiated. Adopted in June 1989, it conditioned temporary protection of certain Indochinese refugees by South-East Asian nations on an international commitment to screen asylum claims, to resettle those screened in to third countries, to return those screened out to their countries of origin and to continue processing departures under the ODP. The CPA coincided with the unravelling of the Cold War stand-off that had shaped both international relations and refugee protection in the postwar era and represents a critical moment that would shape state practice in at least two unexpected ways. First, this period marked the diminishing importance of the exit permit by refugee-producing countries that had hitherto served as the main point of resistance to refugee-hood. Second was the decisive emergence of temporary protection as part of a recalibration and reprioritisation of durable solutions. The impact that these developments had on international protection dynamics and the changing political landscape of durable solutions are considered in the following part.

Part IV: The Cold War et seq.

Even before the Berlin wall came down, flight from communism had already begun to lose its ideological cachet. Nevertheless, there were high hopes for a new and enlightened era in refugee protection. They would be short-lived. Instead, and despite a burgeoning refugee law jurisprudence and literature, the *Refugee Convention* and its *Protocol* and their limitations

89 Ibid., 105.

90 Ibid., 117.

as instruments of international protection would be brought into sharp relief.⁹¹ As this part explores, geopolitical interests (re)calibrated and (re)prioritised the commitment to protect refugees through measures that restricted access to protection procedures and reshaped the way in which durable solutions were used and understood.

From barriers to exit to barriers to entry

When the Cold War dynamics of the post–World War II period took hold, the single greatest obstacle to protection from persecution that a would-be refugee faced was finding a way out – to exit his⁹² country of persecution and the clutches of communism. Exit permits or exit visas – markers of a state-centred politico-legal resistance to the refugee journey – were prized and rare, and of course often fraudulently obtained. People smugglers were celebrated as heroes of the liberal West because they risked their lives to facilitate the escape of others who were refused or could not secure exit permits. Importantly, they were assisting the sort of people the liberal West wanted to protect. So here we see that the refugee fleeing communism was privileged in the sense of being wanted and welcomed, and his clandestine departure celebrated instead of criminalised.

These days, since the wall of communism has crumbled both figuratively and literally, the visa to exit a state of persecution has been replaced by something equally prized and rare, the visa to enter a safe haven. In other words, in the post–Cold War era a pattern of politico-legal resistance to the refugee journey now manifests as resistance to reception. As a result of this shift from barriers to exit to the construction of barriers to entry, refugees are cast adrift into a protection-less space where they lead a ‘provisional’ or ‘bare life’ existence in a state of perpetual exception – ‘in orbit’ or ‘in limbo’.⁹³ These protection-less spaces are created through physical tools of exclusion (such as interdiction on the high seas, biometrics and other border control measures in the international zones of airports,

91 Chimni, ‘The Geopolitics of Refugee Studies’, 360, 362–65; Goodwin-Gill, ‘The Politics of Refugee Protection’, 18.

92 On the image of the ‘normal’ refugee as ‘white, male and anti-communist’, see Chimni, ‘The Geopolitics of Refugee Studies’, 351.

93 Chan Kwok Bun, ‘Getting Through Suffering: Indochinese Refugees in Limbo 15 Years Later’, *Southeast Asian Journal of Social Science* 18, no. 1 (1990): 1–18, 6, doi.org/10.1163/080382490x00015; Fiona Jenkins, ‘Bare Life: Asylum-Seekers, Australian Politics and Agamben’s Critique of Violence’, *Australian Journal of Human Rights* 10, no. 1 (2004): 79–95, doi.org/10.1080/1323238x.2004.11910771; Giorgio Agamben, *Homo Sacer: Sovereign Power and Bare Life*, trans. Daniel Heller-Roazen (Stanford: Stanford University Press, 1998).

or territorial or extraterritorial detention) or tools that exclude refugees from social and economic participation and engagement, leaving them to eke out an existence on society's margins – maybe on the streets, in train stations or in underground passageways. The shift has been perfected in its brutality.

This pattern highlights a central and enduring problem in the global mobility dynamic, namely that the right of a person to leave any country including her own, enshrined in post–World War II international law, has no right of entry counterpart for non-citizens.⁹⁴ The lack of a right of entry reflects a Cold War dynamic that problematised barriers to exit as barriers to freedom and therefore positioned the right to leave as imperative, but at the same time retained entry as a choice (of the state) permissibly limited by the immigration laws of the receiving country.⁹⁵ The practical effect of this at the end of the Cold War was that once exit permits were no longer needed and a person could leave the putative refugee-producing country with comparative ease, she now risked being stuck in a precarious limbo. In the result, the arbitrariness of exit permit schemes was superseded by a new arbitrariness in which the most pervasive obstacles to protection were now at points of entry. This development has generated a vast and complex state machinery that obstructs access to both territory and procedures, and positions refugee protection as 'by invitation only'.⁹⁶ In parallel, as the next section explores, a recalibration of durable solutions has changed the political landscape of protection.

The changing political landscape of durable solutions

As we know from the foregoing, Cold War refugee protection, most notably in the liberal West, was dominated by an 'exilic bias' that privileged European refugees from the Eastern Bloc and prioritised resettlement and local integration over voluntary repatriation to the country of origin. Over time, the relationship between the three durable solutions has been recalibrated and reprioritised. This has happened in ways that have curtailed access to the 'asylum space' and now, alongside voluntary repatriation, includes a growing institutional preference for

94 For more detailed discussion, see Lester, *Making Migration Law*, 51 n. 4, 59, 65.

95 Lester, 'Internationalising Constitutional Law', 342 n. 145.

96 Human Rights Watch, "By Invitation Only"—Australian Asylum Policy', *Human Rights Watch* 14, no. 10 (2002), available at: www.hrw.org/reports/2002/australia/.

temporary protection. Although, of course, not itself a durable solution, temporary protection has come to serve instead as a technique for staving off access to local integration and resettlement, and for channelling the institutional preference for voluntary repatriation. This has had two key effects. First, some states have deployed temporary protection policies as a substitute for local integration. Second, there has been an accompanying politicisation of resettlement. I turn first to temporary protection.

Although not the first time temporary protection policies were activated,⁹⁷ it was in the context of the Indochinese refugee crisis that temporary protection secured its place in international protection discourse. Part of the problem since has been the absence of clear content, boundaries and legal foundation for the concept.⁹⁸ There has also been an increasing and state-centric tendency for host countries to couple temporary protection with their preference for voluntary repatriation; that is, to qualify the grant of temporary protection with an expectation (or requirement) of voluntary return. So, not only has temporary protection served as an (effective) emergency response technique in situations of mass influx,⁹⁹ but it has also become a tool whose use has undermined international protection obligations. For example, legislation granting temporary protection to 4,000 Kosovar and 1,800 East Timorese refugees following their humanitarian evacuation to Australia in 1999 assumed voluntary return would ensue and specifically prohibited both cohorts from applying for asylum. The legislation also provided that decisions to extend, shorten or cancel temporary safe haven visas were a matter of ministerial discretion.¹⁰⁰ In the last few months of 1999, when some Kosovars signalled their resistance to return, the immigration minister threatened them with withdrawal of basic necessities, detention and removal, and told them that it was not a matter of ‘if’ but ‘when’ they would return to Kosovo.¹⁰¹ Policies such as these come and go. Current policy is to

97 UNHCR, ‘Discussion Paper’ (UNHCR Roundtable on Temporary Protection, San Remo, 19–20 July 2012), 3 n. 12.

98 UNHCR, ‘Summary Conclusions on Temporary Protection’ (UNHCR Roundtable on Temporary Protection, San Remo, 19–20 July 2012), 1 (‘Summary Conclusions’).

99 Council of the European Union, Council Directive 2001/55/EC of 20 July 2001 on Minimum Standards for Giving Temporary Protection in the Event of a Mass Influx of Displaced Persons and on Measures Promoting a Balance of Efforts Between Member States in Receiving such Persons and Bearing the Consequences Thereof, 7 August 2001, OJ L 212–223, 2001/55/EC, available at: www.unhcr.org/refworld/docid/3ddcee2e4.html.

100 For a discussion, see Michael Head, ‘Australia’s 1999 “Safe Haven” Refugee Act: Is it Humanitarian?’, *Australian International Law Journal* (1999): 224–32.

101 *Ibid.*, 225.

grant Temporary Protection Visas to refugees arriving in Australia without a visa – such as those arriving by boat – and to prohibit them from ever applying for a permanent visa. Quite apart from the perpetual cycle of temporariness and uncertainty that this creates it also, crushingly, denies any possibility of family reunion.¹⁰² Such measures, which are blatantly punitive,¹⁰³ form part of a narrative that also politicises resettlement.

In recent years, a contemporary resettlement narrative has emerged that maximises the rhetorical power of resettlement at the same time as it denigrates those who seek protection through other avenues and justifies harsh policies of exclusion. It becomes the basis on which binaries are constructed; binaries that ‘split’¹⁰⁴ refugees into the ‘good’ ones languishing in camps who come ‘by invitation only’,¹⁰⁵ and the ‘bad’ ones whose arrival in Australia, whether by boat or by plane, is unsolicited and therefore unwelcome. It is a narrative that eschews (at worst) and cherry-picks (at best) broader perspective and context, whether historical or global, as well as the living realities of the refugee. A 1996 change in government policy, which linked Australia’s onshore (asylum) and offshore (resettlement) program, was an important step in cementing the binary that is integral to this emergent resettlement narrative. Under the policy, a cap was placed on the number of refugees given protection, such that increases in the number of onshore refugees would result in a corresponding decrease in access to the resettlement program. Although it has been suggested that Cabinet papers reveal that the reasons for the policy change were to obscure planned cuts in the offshore program,¹⁰⁶ the decision meant that onshore refugees could be blamed for those

102 For a summary, see Refugee Advice & Casework Service (RACS), ‘Fact Sheet: Temporary Protection Visas (TPV), Safe Haven Enterprise Visas (SHEV)’ (RACS, December 2020), available at: www.racs.org.au/fact-sheets.

103 *Refugee Convention*, art 31; An expert roundtable convened by UNHCR concluded that temporary protection should not exceed three years, after which refugees should transition (voluntarily) into more permanent solutions: UNHCR, ‘Summary Conclusions’, 4–5 [21].

104 Splitting is a discursive device that fends off the accusation of racism or other prejudice by conceding that some members of an out group are good: see Raymond G Nairn and Timothy N McCreanor, ‘Race Talk and Common Sense: Patterns in Pakeha Discourse on Maori/Pakeha Relations in New Zealand’, *Journal of Language and Social Psychology* 10, no. 4 (1991): 245–62, 251, doi.org/10.1177/0261927x911104002; Martha Agoustinis and Danielle Every, ‘The Language of “Race” and Prejudice: A Discourse of Denial, Reason, and Liberal-Practical Politics’, *Journal of Language and Social Psychology* 26, no. 2 (2007): 123–41, 132, doi.org/10.1177/0261927x07300075.

105 Human Rights Watch, ‘By Invitation Only’.

106 Cameron Stewart, ‘Boats Sinking Our Refugee Program’, *The Australian*, 21 July 2012, available at: www.theaustralian.com.au/national-affairs/opinion/boats-sinking-our-refugee-program/news-story/55755621cfa91cdb881f592249db0a50.

cuts – cast as ‘stealing’ places from offshore refugees.¹⁰⁷ The coupling of the onshore and offshore programs not only fuelled populist migration discourses, but also deflected responsibility for the limited number of resettlement places away from policymakers, projecting responsibility instead onto the onshore refugees it deemed to be unworthy. Because of the demographic differences between offshore (resettled) and onshore (asylum) refugee populations, the decision had the further deleterious effect of pitting different cultural communities against one another.

At the same time as the resettlement narrative denigrates the spontaneously arriving refugee as a thief, it frames an image of Australia as one of the most generous refugee receiving countries in the world, and by some accounts the most generous.¹⁰⁸ The power of this ‘generosity narrative’ lies in its capacity at once to feed and to exploit public perceptions that Australia’s refugee *resettlement* program is not just an adequate response to the global protection crisis, but proof that Australia is pulling its weight internationally. However, while compared to other countries Australia is a leading resettlement country, global resettlement numbers represent less than 1 per cent of the world’s refugee population. So, in staking its generosity claim, Australia is overlooking the plight of the remaining 99 per cent of the world’s refugees.¹⁰⁹ In case these are hard figures to fathom, here is another way of thinking about the numbers. According to figures published by UNHCR, every day in 2019, some 30,137 people were newly displaced globally.¹¹⁰ That works out to be almost twice as many people as the 18,200 Australia resettled across the whole year.¹¹¹ Viewed in this way, Australia’s 2019 resettlement program protected little more than a morning’s worth of the world’s newly uprooted people.

107 Robert Manne and David Corlett, ‘Sending Them Home: Refugees and the New Politics of Indifference’, *Quarterly Essay* 13 (2003).

108 Amanda Vanstone, ‘Think We’re Tough on Refugees? That’s Fake News’, *Sydney Morning Herald*, 22 April 2018, available at: www.smh.com.au/politics/federal/think-we-re-tough-on-refugees-that-s-fake-news-20180420-p4zatw.html.

109 Australia’s resettlement program accounts for 0.09 per cent of the global refugee population. Resettlement figures have long represented less than 1 per cent of the world’s refugee population. However, recent figures suggest a decline to 0.5 per cent, which UNHCR attributes to a decline in resettlement quotas rather than need. The present percentage calculations are based on the following figures published by UNHCR for 2019: 20.4 million refugees under UNHCR’s mandate; 4.2 million asylum seekers; and 107,800 refugees admitted for resettlement. See UNHCR, *Global Trends: Forced Displacement in 2019* (UNHCR, 2020), 2–3, 48. Note, if this figure were to include the 5.6 million Palestinian refugees under UNRWA’s mandate and without a durable solution, the resettlement percentage would drop to 0.41 per cent.

110 UNHCR, *Global Trends 2019*, 2.

111 *Ibid.*, 52.

For states, it is clear that discourses of humanitarianism, accurate or otherwise, are politically important, domestically and internationally. As Dauvergne has observed, the humanitarianism of the contemporary resettlement narrative seeks to ‘mark the nation as good, prosperous, and generous’.¹¹² However, as she notes, this kind of humanitarianism is ‘an impoverished stand-in for justice’.¹¹³ In part, this is because global resettlement figures are so small. Tellingly, the discourse barely conceals the utilitarian nature of this kind of humanitarianism – a functional approach to protection that has a hard core of self-interest coated with a thin veneer of altruism and generosity.

So, how is it possible for states to take this approach? Under international law, there is no binding obligation to resettle refugees.¹¹⁴ In contrast, states *are* legally obliged not to *refouler* a refugee¹¹⁵ and, by extension, to grant her protection if she arrives spontaneously and seeks protection. This is what sets resettlement apart as an attractive policy option. Thus, not only is the protection of a refugee who has not directly engaged the protection obligations of the state optional, but also decisions about the size and composition of the program are policy-based.

Part V: Charting a way forward in the twenty-first century

In the twenty-first century, we find an already fractured protection landscape further damaged by state responses to the so-called global migration crisis; a crisis of political will that has arisen in the context and aftermath of the so-called War on Terror and a resurgence in ‘neo-’ forms of liberalist and colonialist ideologies.

Conflict in the Middle East has had an immeasurable impact on displacement and state responses to the emergent ‘global migration crisis’, most notably in the context of wars in Iraq and Syria. A key feature of

112 Catherine Dauvergne, *Humanitarianism, Identity and Nation: Migration Laws of Australia and Canada* (Vancouver: University of British Columbia Press, 2005), 7.

113 Ibid.

114 Naoko Hashimoto, ‘Refugee Resettlement as an Alternative to Asylum’, *Refugee Survey Quarterly* 37, no. 2 (2018): 162–86, 163, doi.org/10.1093/rsq/hdy004.

115 *Refoulement* is the forcible return of a person to a place where her life or freedom would be threatened. It is prohibited under *Refugee Convention* art 33 and is also a principle of customary international law.

this time has been the numbers of refugees who have spontaneously sought protection – often by sea – in Europe and other countries of the global North, as it is now known. In Australia, increased numbers seeking asylum reignited debate and reinvigorated controversial policies such as its scheme of extraterritorial detention and processing, dubbed Pacific Solution Mark II, and triggered a further campaign known as Operation Sovereign Borders, an equally controversial policy designed to prevent boat arrivals through pushbacks.

Another dimension to early twenty-first century developments has been the way in which the so-called War on Terror and radicalisation and extremism have enabled security discourse to permeate and complicate the refugee protection debate and state responses to it. These factors have often clouded the reality that the vast majority of refugees are in flight from, rather than causes of, insecurity. As early as 2001, treatment of the *Tampa* refugees rescued off the coast of Australia just days before the 9/11 attacks in the US and their relocation were justified – but later dismissed – as being security related.¹¹⁶

Resettlement in the context of the Syrian refugee crisis has been important for individuals and communities, but the numbers have been small in real terms. Australia only agreed to resettle 12,000 Syrian refugees in the face of considerable international pressure. In 2015, the suggestion of resettling some of the 8,000 Rohingya refugees stranded at sea in South-East Asia in flight from genocidal policies in Myanmar was dismissed with a resounding ‘Nope, nope, nope’ from an Australian prime minister.¹¹⁷ And in 2018, Australia’s minister for home affairs singled out white South African farmers as a community particularly worthy of Australia’s concern.¹¹⁸ All this suggests that state responses continue to be both selective and situation specific.

116 Irene Khan, ‘Trading in Human Misery: A Human Rights Perspective on the Tampa Incident’, *Washington International Law Journal* 12, no. 1 (2003): 9–22, 11.

117 Lisa Cox, “‘Nope, Nope, Nope’: Tony Abbott Says Australia Will Not Resettle Refugees in Migrant Crisis”, *Sydney Morning Herald*, 21 May 2015, available at: www.smh.com.au/politics/federal/nope-nope-nope-tony-abbott-says-australia-will-not-resettle-refugees-in-migrant-crisis-20150521-gh6eew.html; Penny Green, Thomas MacManus and Alicia de la Cour Venning, *Countdown to Annihilation: Genocide in Myanmar* (London: International State Crime Initiative, 2015), available at: statecrime.org/data/2015/10/ISCI-Rohingya-Report-PUBLISHED-VERSION.pdf.

118 Paul Karp, ‘Australia Considers Fast-Track Visas for White South African Farmers’, *Guardian*, 14 March 2018, available at: www.theguardian.com/australia-news/2018/mar/14/dutton-considers-fast-track-visas-for-white-south-african-farmers.

Institutional responses to the ‘global migration crisis’

In September 2016, the UN General Assembly unanimously adopted the *New York Declaration for Refugees and Migrants* (‘New York Declaration’).¹¹⁹ The New York Declaration came out of a summit that sought to recognise all refugees and migrants as rights holders and to condemn acts and manifestations of racism, xenophobia and other forms of intolerance. The declaration reaffirmed the importance of the international refugee regime and contains a wide range of commitments by member states to strengthen and enhance mechanisms to protect people on the move, both refugees and migrants. It paved the way for the negotiation of two new global compacts in 2018: one on refugees and the other for safe, orderly and regular migration.

States have since negotiated the text of the *Global Compact for Safe, Orderly and Regular Migration* (GCM), adopted in Marrakech in December 2018. In parallel, states also participated in consultations led by UNHCR on the text of the *Global Compact on Refugees* (GCR). Although the names of the compacts suggest a focus in the first instance on migrants and in the second on refugees, there is not a clear line between the two. In particular, the text of the GCM includes a number of issues that are directly relevant to refugees’ experience of ‘border management policies’, particularly when they are impelled to use irregular migration routes in search of protection. Together the compacts represent the latest opportunity to try and achieve international momentum for protection of the rights and interests of refugees and migrants. If history is any measure, Australia’s withdrawal from the GCM on the grounds that it is a ‘threat to sovereignty’ should not have come as a surprise.¹²⁰ Certainly, its decision to do so may undermine prospects for the GCM and GCR to strengthen international frameworks for protection of refugees and migrants. As two leading civil society commentators observed when Australia first signalled its intention

119 *New York Declaration for Refugees and Migrants*, GA Res 71/1, UNGA, 71st sess, UN Doc A/RES/71/1 (3 October 2016).

120 Chris Merritt, ‘UN Migration Pact “a Threat to Sovereignty”’, *The Australian*, 3 August 2018, available at: www.theaustralian.com.au/nation/immigration/un-migration-pact-a-threat-to-sovereignty/news-story/f9c795ec8127863e55aacbd9baebb6eb. Withdrawal from the GCM was confirmed in a joint ministerial statement: The Hon Scott Morrison MP, Prime Minister, The Hon Peter Dutton MP, Minister for Home Affairs, Senator the Hon Marise Payne, Minister for Foreign Affairs, ‘Global Compact for Migration’, joint media release, 21 November 2018, available at: www.foreignminister.gov.au/minister/marise-payne/media-release/global-compact-migration.

to withdraw from the GCM, there were good reasons why Australia should have joined the rest of the world – except most notably Donald Trump’s America and Victor Orban’s Hungary – in rethinking the way it responds to the global movement of people.¹²¹ First and foremost is that no state can respond to these issues alone.

Conclusion

This chapter has demonstrated that, in the case of Australia, both *who* the refugee is and *how* she got to Australia have historically defined how well she has been received, and that this ‘*who*’ and that ‘*how*’ continue to shape the way we think about, validate and accept as justified the ‘*why*’ of her quest for protection and the ‘*where*’ in which she seeks it. The chapter has endeavoured to show that the way we understand Australia’s responses to the refugee journey, and the way those responses fit into a bigger international picture, is highly dependent on historical-political context and perspective. It has sought to show that each part of this framework has a political and ideological dimension that changes, depending on time and place. To that end, it has presented a broader context for understanding and thinking about Australia’s protection of refugees, with the intention of enabling the reader to see Australian accounts of and approaches to the refugee journey through a wider lens.

What we have seen in this background is that Australia’s approach to refugee protection has long been situation specific and highly differentiated. The narrow scope of the *Refugee Convention* in its initial framing certainly helps to explain Australia’s willing accession to it and Australia’s responses to refugee movements in the Convention’s early years. We have seen that Australia’s responses were not just aligned with but also driven by its postwar labour shortages and immigration priorities. It suggests too that the underpinnings of Australia’s oft-celebrated decision to become one of the first states parties to the *Refugee Convention* reflected an early form of the ‘utilitarian humanitarianism’ that has served and suited both Australia’s immigration priorities and changing geopolitical interests.

121 Carolina Gottardo, ‘Migration Compact Will Benefit Australia’, *Eureka Street*, 5 August 2018, available at: www.eurekastreet.com.au/article/migration-compact-will-benefit-australia, and Anne Gallagher, ‘3 Reasons All Countries should Embrace the Global Compact for Migration’, *World Economic Forum*, 22 August 2018, available at: www.weforum.org/.

Finally, we have seen how and with what effects and implications states, including Australia, have (re)calibrated and (re)prioritised durable solutions for refugees over time – those durable solutions being resettlement, local integration and voluntary repatriation. We have seen that Australia's attempts to legitimise exclusionist asylum policies by talking up the resettlement program and implying that it is conceptually and statistically adequate as, in the first instance, a response to the global protection crisis and, in the second, a substitute for spontaneous asylum requests, are unconvincing. At the same time, it is also clear that these attempts are entirely consistent with longstanding approaches to refugee protection.

As the chapter demonstrates, the way in which the state of Australia approaches its obligations to protect refugees and asylum seekers is politically tidal, ebbing and flowing with changing perceptions of the national interest. We see that nation-states such as Australia have positioned themselves legally and politically in a state of perpetual resistance to the refugee journey, unable to accept the need to flee and seek safe haven as a reality that is part of the order of things, or even part of the disorder of things. In the New York Declaration and the two global compacts, we see an acceptance of mobility, including the refugee journey, as part of humanity's reality. Despite Australia's withdrawal from the GCM, that acknowledgement must surely be cause for hope.

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