IN THE HIGH COURT OF AUSTRALIA
SYDNEY REGISTRY **NO S169 OF 2014**

BETWEEN:

CPCF
Plaintiff

MINISTER FOR IMMIGRATION AND BORDER PROTECTION
First Respondent

THE COMMONWEALTH OF AUSTRALIA
Second Respondent

SUBMISSIONS OF THE OFFICE OF THE UNITED NATIONS HIGH COMMISSIONER FOR REFUGEES

SEEKING LEAVE TO INTERVENE AS AMICUS CURIAE

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Date of document: 15 September 2014
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PART I CERTIFICATION

1. The Office of the United Nations High Commissioner for Refugees (**UNHCR**) certifies that these submissions are in a form suitable for publication on the Internet.

PART II BASIS OF INTERVENTION

2. UNHCR seeks leave to appear as *amicus curiae* to make written and oral submissions regarding the following matters:

   (a) the content and application of Australia's *non-refoulement* obligations including, in particular, under the 1951 *Convention relating to the Status of Refugees* and the 1967 *Protocol relating to the Status of Refugees* (together, the **Refugee Convention**);

   (b) the proper construction and scope of s 72(4) of the *Maritime Powers Act 2013* (Cth) (the **Maritime Powers Act**), as informed by the content of Australia's *non-refoulement* obligations; and

   (c) the scope of non-statutory executive powers of the Commonwealth, as informed by the content of Australia's *non-refoulement* obligations.

PART III WHY LEAVE TO APPEAR SHOULD BE GRANTED

3. UNHCR relies on the affidavit of Ellen Bondebjerg Hansen made on 9 September 2014 in support of its application for leave to appear as *amicus curiae* in this matter.

4. UNHCR proposes to address in detail matters addressed only briefly in the plaintiff's submissions, namely international and comparative cases and materials in relation to the content and application of Australia's *non-refoulement* obligations.

5. UNHCR is in a unique position to assist the court on issues concerning Australia's international obligations in relation to asylum seekers and refugees, which are significant in the proceeding. UNHCR has special knowledge and expertise in relation to these issues, stemming in particular from its over 60 years of history supervising the implementation by States parties of the *1951 Convention relating to the Status of Refugees* (see Art 35) and the *1967 Protocol relating to the Status of Refugees* (see Art II) (together, the **Refugee**

Convention). UNHCR contends that it has a legitimate interest in making submissions in relation to the rights of asylum seekers and refugees under the Refugee Convention. This is the first occasion upon which an Australian court has been called upon to consider the application of *non-refoulement* obligations in the context of a vessel intercepted outside of Australian territorial waters. The matter involves issues of legal principle that may have a significant effect on the rights of persons other than the parties.

6. UNHCR is unaware of any practical considerations that militate against the granting of leave to be heard. All parties have received adequate notice of UNHCR's intention to seek leave; and the plaintiff's legal advisers have indicated their support.

PART IV APPLICABLE LAW

7. UNHCR accepts the accuracy of the plaintiff's statement of applicable constitutional provisions, statutes and regulations.

PART V ARGUMENT

8. In summary, UNHCR will contend that:

   (a) the obligations in Art 33(1) of the Refugee Convention apply to a State party wherever it exercises jurisdiction in relation to a refugee or asylum seeker, including where the State acts outside of its territory: (a) on board a vessel flying the flag of the State; or (b) in circumstances where the State exercises effective control over the refugee or asylum seeker;

   (b) properly construed, the power in section 72(4) of the Maritime Powers Act is constrained by Australia's *non-refoulement* obligations, including under the Refugee Convention and customary international law, and is not available in circumstances where Australia has not assessed whether taking a person to a place would infringe those obligations; and

   (c) any non-statutory power to detain a person is also constrained by Australia's *non-refoulement* obligations, and likewise is not available in circumstances where Australia has not assessed whether taking a person to a place would infringe those obligations.

***Non-refoulement* under the Refugee Convention**

9. The principle of *non-refoulement* is the cornerstone of international refugee protection. It is enshrined in Art 33(1) of the Refugee Convention, which prohibits a state from 'expelling' or 'returning' a refugee 'in any manner whatsoever' to the frontiers of territories where his or her life or freedom would be threatened on account of his or her race, religion, nationality, membership of a particular social group or political opinion.

10. A 'refugee' is defined in Art 1A(2) of the Refugee Convention as including any person who 'owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion is outside of the country of his [or her] nationality and is unable or, owing to such fear, is unwilling to avail himself [or herself] of the protection of that country'.

11. The protection against *refoulement* in Art 33(1) applies to any person who is a refugee under the terms of the Refugee Convention. A person does not become a refugee because of recognition, but is recognised because he or she is a refugee.[1] It follows that the principle of *non-refoulement* applies not only to persons whose refugee status has been formally recognised, but to asylum seekers whose status has not yet been assessed.[2]

12. There are three issues as to the scope and application of the *non-refoulement* obligation under Art 33(1) that are of potential relevance to the present proceeding: first, the application of the obligation in circumstances where Australian officials act outside Australian territory; second, the scope of the obligation in relation to indirect, rather than direct, *refoulement;* and third*,* the duty on a State to make inquiries before sending a person to a third country.

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1 UNHCR, *Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol Relating to the Status of Refugees* (1979, reissued 2011) [28], UN Doc. HCR/1P/4/ENG/REV.3.

2 UNHCR Executive Committee, *Conclusion No. 6* (XXVII) (1977) para. (c); UNHCR Executive Committee, *Conclusion No. 15* (XXX) (1979) paras. (b) and (c); UNHCR, *Advisory Opinion on the Extraterritorial Application of Non-Refoulement Obligations under the 1951 Convention relating to the Status of Refugees and its 1967 Protocol* (2007) [6] (***Advisory Opinion***); UNHCR, *Note on International Protection*, UN Doc. A/AC.96/694 (3 August 1987) [23].

Application of *non-refoulement* obligation outside Australian territory

13. Article 33(1) of the Refugee Convention applies wherever a State exercises its jurisdiction.[3] As the United Kingdom Supreme Court explained in *R (ST) v Secretary of State for the Home Department*, a State attracts a set of obligations under the Refugee Convention. The most basic of these apply whenever a refugee is 'subject to the contracting State's jurisdiction', and Art 33(1) is one of those obligations.[4] (Other obligations are attracted, for instance, when a refugee is physically present, or lawfully present, in the territory of the contracting State.)

14. The jurisdiction of a State is primarily territorial, but may in certain circumstances be exercised outside of the State's territory. That proposition was recently accepted by the United Kingdom Supreme Court in *R (European Roma Rights Centre) v Immigration Officer at Prague Airport* in the context of the application of the Refugee Convention.[5] In that case, Lord Bingham of Cornhill referred to an opinion given by Lauterpacht and Bethlehem to the effect that as a 'general proposition', given that a person will come within the jurisdiction of a State when the State exercises 'effective control' over that person, the principle of *non-refoulement* will apply 'wherever this occurs'.[6]

15. Jurisdiction can be based on *de jure* or *de facto* control. *De jure* jurisdiction on the high seas derives from the flag state jurisdiction.[7] *De facto* jurisdiction on the high seas is established when a State exercises effective control over persons. Where people are intercepted on the high seas and put on board a vessel of the intercepting State, the intercepting State is exercising *de jure* as

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3 UNHCR, *Reception of Asylum-Seekers, including Standards of Treatment, in the Context of Individual Asylum Systems, Global Consultations on International Protection*, UN Doc. EC/GC/01/17 (4 September 2001) [3], available at: http://www.unhcr.org/3b95d6244.html.

4 The ***Eritrea Case*** [2012] 2 WLR 735 at 744 [21].

5 The ***Roma Rights Case*** [2005] 2 AC 1 at 33 [21] (Lord Bingham of Cornhill), citing *Bankovic v Belgium* (2001) 11 BHRC 435 at [59], [71], [73]. See also Goodwin-Gill, 'The Extra-Territorial Reach of Human Rights Obligations: A Brief Perspective on the Link to Jurisdiction', in de Chazournes and Koen (eds), *International Law and the Quest for its Implementation* (2010); Lauterpacht & Bethlehem, 'The scope and content of the principle of non-refoulement: Opinion', in Feller et al (eds), *Refugee Protection in International Law, UNHCR's Global Consultations on International Protection* (2003), at 110-11 [62]-[67], 159-160 [242] (***Lauterpacht (2003)***).

6 *Roma Rights Case* [2005] 2 AC 1, 38 [26].

7 Article 92 in conjunction with Article 94 of the United Nations Convention on the Law of the Sea, UNTS 1833, p. 3, entered into force 16 November 1994; *Bankovic v Belgium* (2001) 11 BHRC 435 at [73].

well as *de facto* jurisdiction and is subject to the obligation of *non-refoulement*. Those propositions have been established in the context of the application of comparable treaties by the International Court of Justice,[8] the United Nations Human Rights Committee,[9] the United Nations Committee against Torture,[10] and the European Court of Human Rights.[11]

16. There is nothing in the text of Art 33(1) that suggests the protection it affords depends on whether the refugee is within the territory of the contracting State. UNHCR submits that Blackmun J was correct to state, in his dissenting opinion in *Sale v Haitian Centers Council Inc*, that Art 33(1) 'limits only where a refugee may be sent "***to***", not where he [or she] may be sent ***from'***.[12]

17. In accordance with the relevant rules, as stated in the 1969 *Vienna Convention on the Law of Treaties*,[13] the meaning of a provision in an international treaty must be established by examining the ordinary meaning of the terms employed, in light of their context and object and purpose of the treaty.[14] The Court should also take into account subsequent practice of States in applying the Refugee Convention, as well as any relevant rules of international law.[15] A special meaning should be given to a term only if it is established that the parties intended the term to bear that meaning. If the Commonwealth wishes to persuade the Court that some 'special' meaning ought to be ascribed to the

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8 *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* (2004) ICJ Gen List No 131, at [111]; *Case Concerning Armed Activities of the Territory of the Congo (DRC v Uganda*) (2005) ICJ Gen List No 116, 19 December 2005, at [216].

9 *Lopez Burgos v Uruguay*, Human Rights Committee, UN doc A/36/40, 29 July 1981, at [12.1]-[12.3]; 'The Nature of the General Legal Obligation Imposed on States Parties to the Covenant', UN doc CCPR/C/21/Rev.1/Addd.13, 26 May 2004, at [10]-[11].

10 Conclusions and recommendations of the Committee against Torture concerning the second report of the United States of America, UN Doc CAT/C/USA/CO/2, 25 July 2006, at [14]; Committee against Torture, General Comment No 2, 'Implementation of article 2 by States parties', UN doc CAT/C/GC/2, 24 January 2008.

11 *Loizidou v Turkey (Preliminary Objections)*, (1997) 23 EHRR 513 at [62]-[63]; *Medvedyev v France*, (2010) 51 EHRR 39 at [64]-[67]; *Al-Skeini v United Kingdom*, [2011] 53 EHRR 15 paras 130-137; *Hirisi v Italy*, (2012) 55 EHRR 21 at [70]-[82].

12 *Sale* (1993) 509 US 155, 193 (Blackman J, in dissent) (emphasis added).

13 *Vienna Convention on the Law of Treaties* (1969) 1155 UNTS 331 (***Vienna Convention***)

14 *Vienna Convention* Art 31(1). See also *Applicant A v Minister for Immigration and Ethnic Affairs* (1997) 190 CLR 225 at 277 and fn 189 (Gummow J); *Minister for Immigration and Multicultural and Indigenous Affairs v QAAH of 2004* (2006) 231 CLR 1 at 14-16 [34] (Gummow ACJ, Callinan, Heydon and Crennan JJ) and 27-28 [74] (Kirby J); *Minister for Home Affairs v Zentai* (2012) 246 CLR 213 at 230 [36] (French CJ).

15 *Vienna Convention* Art 31(3).

words 'return ("*refouler*")', then the burden of proof rests on it to establish that the contracting States intended that special meaning.[16] UNHCR submits that there is no apparent basis for such a construction.

18. The ordinary meaning of 'return' includes to 'send back', and to 'bring, send, or put back to a former or proper place'.[17] English translations of the French word '*refouler'* include to 'repulse', 'repel', or 'drive back'.[18] The ordinary meaning of the terms 'expel', 'return' and '*refouler'* do not support an interpretation which would restrict its scope to conduct within the territory of the State concerned.[19] Further, Art 33(1) proscribes the return ("*refouler*") of a refugee 'in any manner whatsoever'.[20] These words plainly suggest the intention that the prohibition has a wide scope of application and confirm that there are multiple ways in which *refoulement* may occur, and that all are prohibited.

19. Article 33 is the fundamental provision of the Refugee Convention. If it were to be construed as applying only to a person physically in the territory of a contracting State, its protective effect would be significantly diminished. Any interpretation which construes the scope of Art 33(1) of the Refugee Convention as not extending to measures whereby a State, acting outside its territory, returns or otherwise transfers refugees to a country where they are at risk of persecution would be fundamentally inconsistent with the humanitarian object and purpose of the Refugee Convention.[21]

20. Recourse to the drafting history of Art 33(1) is not strictly necessary given the unambiguous wording of this provision. Nevertheless, the *travaux préparatoires* may be of some assistance in confirming the meaning and scope of Art 33(1).

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16 See, for example: Sinclair, *The Vienna Convention on the Law of Treaties* (2nd ed, 1984) at 126-127; Aust, *Modern Treaty Law and Practice* (2000) at 196.

17 *Miriam-Webster Online Dictionary* (10th ed). See also, UNHCR, *Advisory Opinion* (2007) at [27].

18 *Sale* (1993) 509 US 155 at 180 (Stevens J, for the Court), 192 (Blackmun J, dissenting).

19 UNHCR, *Advisory Opinion* (2007) [27].

20 UNHCR, *Advisory Opinion* (2007) [28].

21 UNHCR, *Advisory Opinion* (2007) [29]. The humanitarian object of the *Convention* is reflected in its preamble, which records, among other things, the contracting States' consideration that the United Nations had 'manifested its profound concern for refugees and endeavoured to assure refugees the widest possible exercise of … fundamental rights and freedoms', and their recognition of the 'social and humanitarian nature of the problem of refugees': Lauterpacht & Bethlehem, 'The scope and content of the principle of non-refoulement: Opinion', in Feller et al (eds), *Refugee Protection in International Law, UNHCR's Global Consultations on International Protection* (2003), at 107.

The *travaux* provide significant evidence that the drafters intended to prohibit any acts or omissions by a Contracting State which have the effect of returning a refugee to territories where he or she is likely to face persecution or danger to life or freedom.[22] During the discussions of the Committee, for example, the representative of the United States stated that:

> [w]hether it was a question of closing the frontier to a refugee who asked admittance, or of turning him back after he had crossed the frontier, or even expelling him after he had been admitted to residence in the territory, the problem was more or less the same. Whatever the case might be, whether or not the refugee was in a regular position, he must not be turned back to a country where his life or freedom could be threatened.[23]

21. UNHCR's approach to Art 33 is consistent with the general approach to extraterritoriality of various complementary and mutually reinforcing legal regimes, including but not limited to the *International Covenant on Civil and Political Rights* (the **ICCPR**) and the *Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* (the **CAT**).[24] Under those instruments, contracting States are subject to additional *non-refoulement* obligations which apply whenever they are exercising their jurisdiction, including extraterritorially (for example where they effectively control places or persons).[25]

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22 UNHCR, *Advisory Opinion* (2007) [30].

23 Statement of Mr. Henkin of the United States, UN Doc. E/AC.32/SR.20 (1 February 1950) [54]–[55].

24 See, for example, UNHCR Executive Committee, *Conclusion No 79* '*General'* (1996); *No 81 'General'* (1997); and *No 82 'Safeguarding Asylum'* (1997), which specifically refer to the prohibition of return to torture as embodied in the CAT (noting the 'complementary nature of international refugee and human rights law as well as the possible role of the United Nations human rights mechanisms in this area…').

25 Relevantly, CAT Art 3(1) provides that '[n]o State Party shall expel, return ('refouler') or extradite a person to another State where there are substantial grounds for believing that he [or she] would be in danger of being subjected to torture'. ICCPR Art 7 has also been construed by the Human Rights Committee to include a non-refoulement component, being an obligation not to 'expose individuals to danger of torture or cruel, inhuman or degrading treatment or punishment upon return to another country by way of their extradition, expulsion or refoulement': General Comment No 20 (1992), HRI/HEN/1/Rev 1, 28 July 1994, at para 9.

22. With respect to the ICCPR, the Human Rights Committee has stated that: [26]

> States are required by Article 2(1) of the ICCPR to respect and to ensure all Covenant rights to all persons who may be within their territory *and to all persons subject to their jurisdiction*. This means that a State party must respect and ensure the rights laid down in the Covenant to anyone within the power or effective control of the State Party, *even if not situated within the territory of the State Party* [emphasis added].

23. Likewise, the UN Committee against Torture has affirmed that the *non-refoulement* obligation in Art 3 of the CAT 'appl[ies] to, and [is] fully enjoyed by, all persons under the effective control of its authorities, of whichever type, wherever located in the world' [emphasis added].[27] The UN Committee against Torture has further recognized that:

> …"any territory" [in Art 2 of the Convention] includes all areas where the State party exercises, directly or indirectly, in whole or in part, de jure or de facto effective control, in accordance with international law. The reference to "any territory" […] refers to prohibited acts committed not only on board a ship or aircraft registered by a State party, but also during military occupation or peacekeeping operations and in such places as embassies, military bases, detention facilities, or other areas over which a State exercises factual or effective control.[28]

24. In *JHA v Spain* the UN Committee against Torture observed that Spain had control over persons on board a vessel from the time the vessel was rescued in international waters by Spanish authorities and throughout the identification and repatriation process that then took place. On the basis that the individuals were

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[26] UN Human Right Committee, 'General Comment No 31: the Nature of the General Legal Obligation Imposed on States Parties to the Covenant', UN Doc CCPR/C/21/Rev.1/Add.13(26 May 2004) [10] (emphasis added). That statement reflects jurisprudence of the Human Rights Committee to the effect that States can 'be held accountable for violations of rights under the ICCPR which its agents commit on the territory of another State, whether with the acquiescence of the Government of that State or in opposition to it': *Lopez Burgos v Uruguay*, Human Rights Committee, UN Doc. A/36/40 (29 July 1981) [12.1]-[12.3]; *Celbierti de Casariego v Uruguay*, Human Rights Committee, UN Doc CCPR/C/13/D/56/1979(29 July 1981) [10.3]; *Pereira v Uruguay*, Human Rights Committee, UN Doc CCPR/C/18/D/106/198(31 March 1983) [5].

[27] Committee against Torture, *Conclusions and Recommendations: United States of America*, UN Doc. CAT/C/USA/CO/2 (25 July 2006) [20] (emphasis added).

[28] Committee Against Torture, 'General Comment No. 2: Implementation of Article 2 by States Parties', UN Doc. CAT/CGC/2 (24 January 2008) [16].

within the jurisdiction of Spain, albeit outside its physical territory, Spain was obliged to respect the prohibition of *refoulement* in Art 3.[29]

25. The extraterritorial applicability of comparable human rights treaties is also firmly established by the International Court of Justice,[30] as well as at the regional level by, for example, the Inter-American Commission on Human Rights[31] and the European Court of Human Rights.[32] The European Court of Human Rights in particular has acknowledged the extraterritorial applicability of the European Convention on Human Rights explicitly in situations of interception at sea, including in the case of *Hirsi Jamaa v Italy* concerning Italy's 10 'push-back' operations on the high seas.[33]

26. From the above it is clear that the weight of opinion at international law is that the principle of *non-refoulement*, including under Art 33(1) of the Refugee Convention applies, wherever a State exercises jurisdiction, and whether it is exercised *de jure* or *de facto.*

27. The UNHCR is only aware of one superior court decision that is inconsistent with this understanding, being the decision of the US Supreme Court in *Sale*.[34] In that case a majority of the Supreme Court held that an executive order that the US Coast Guard should intercept Haitian asylum seekers on international waters and 'return' them to Haiti was not inconsistent with the obligation on 20 contracting States under Art 33(1) not to 'expel or return ("*refouler*")' refugees to the place of feared persecution. The majority appeared to be of the view that

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29 *JHA v Spain*, Committee Against Torture, UN Doc. CAT/C/41/D/323/2007 (21 November 2008) [8.2].

30 See: *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* [2004] ICJ Rep 136, 180 [111]: 'The Court considers that the [ICCPR] is applicable in respect of acts done by a State in the exercise of its jurisdiction outside its own territory'; and, *Armed Activities on the Territory of the Congo* [2005] ICJ Rep 168, 242-243 [216].

31 *Coard v the United States*, Inter-American Commission on Human Rights (Case No. 10.951, Report No. 109/99, 29 September 1999) [37]

32 *Öcalan v Turkey (Preliminary Objections)* (2003) 37 EHRR 10 at [93]; *Ilascu v Russia and Moldova* (2005) 40 EHRR 46 at [382]-[394]; *Issa v Turkey* (2040) 41 EHRR 567 at [71].

33 *Hirsi Jamaa v Italy* (2012) 55 EHRR 21 at [81]. See also, *Medvedyev v France* (2010) 51 EHRR 39 at [67].

34 *Sale* (1993) 509 US 155.

the term 'return (*refouler*)' refers only to persons who are 'on the threshold of initial entry'.[35]

28. In contrast Blackmun J, delivered a dissenting opinion. He held that, properly construed, Art 33(1) applied to the United States Haitian interception operations.[36] UNHCR submits that the reasoning and conclusion of Blackmun J should be preferred on the basis that it is reflects clearly established principles concerning State responsibility and extraterritorial jurisdiction, as outlined above, which are near universal in their consistency.

29. The majority in *Sale* erred by focussing exclusively on an examination of the meaning of the words 'return' and '*refouler'* without considering the circumstances in which a State may exercise its jurisdiction in relation to a person outside of its territory. The issue is not properly framed by asking whether Art 33(1) applies extraterritorially. UNHCR submits, and the *Eritrea Case* decided, that the obligations in Art 33(1) apply when a contracting State exercises its jurisdiction. Where the impugned conduct of the State is the active return of a refugee to the place of persecution, consideration of jurisdiction and attribution (rather than territorial limits) advances the humanitarian purpose of the Refugee Convention.

30. Finally, a subsequent judgment in relation to the same facts before the Inter-American Commission on Human Rights explicitly rejected the views of the US Supreme Court. The ACHR stated that it shared the view advanced by UNHCR in its *amicus curiae* submissions before the Supreme Court to the effect that the operation of Art 33 had no geographical limitations.[37]

31. *Sale* has been cited in several judgments in this Court in support of a different proposition, namely that the Refugee Convention does not give a right of asylum.[38] The construction advanced by UNHCR does not create or assert a

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35 Sale (1993) 509 US 155, 180. Cf Blackmun J at 191.

36 *Sale* (1993) 509 US 155, 193 (emphasis added).

37 *The Haitian Centre for Human Rights. v United States, Inter-American Commission on Human Rights* (IACHR) (Case 10.675) (13 March 1997) [155]-[157].

38 *Applicant A v Minister for Immigration and Ethnic Affairs* (1997) 190 CLR 225 at 273 (Gummow J); *Minister for Immigration and Multicultural Affairs v Haji Ibraham* (2000) 204 CLR 1 at 45 [137] (Gummow J, with whom Gleeson CJ and Hayne J agreed); *NAGV and NAGW of 2002 v Minister for Immigration and Multicultural and Indigenous Affairs* (2005) 222 CLR 161 at 171 [21]; *Plaintiff M47/2012 v Director-General of Security* (2012) 86 ALJR 1372 at 1429 [273] (Heydon J) and 1470 [486] (Bell J).

right of asylum derived from Art 33; rather, it asserts a limitation on a State's ability to return refugees to places of persecution 'in any manner whatsoever'. This Court has not had occasion to decide the meaning of the words 'expel' or 'return ("*refouler*")' in the context of extraterritorial State action nor, it follows, the correctness of the majority opinion in *Sale* on that question.[39] Observance of the *non-refoulement* principle is a 'specific and fundamental protection, independent from the question of admission or the grant of asylum'.[40]

32. Intercepting a refugee in international waters and taking him or her back to the place of persecution would violate the 'spirit' of the Refugee Convention, a matter explicitly recognised by the majority in *Sale*. It may be doubted whether construing Art 33(1) in such a way as to permit this consequence conforms with the principle that treaties are to be interpreted in light of their objects and purposes, or with the principle of *pacta sunt servanda*.[41]

33. UNHCR notes that this Court would generally seek to adopt an interpretation of the Refugee Convention that conforms with any 'generally accepted' construction adopted in other countries that subscribe to the Refugee Convention.[42] However, the construction of Art 33(1) preferred by the majority in *Sale* is not generally accepted in other Contracting States.[43] As noted above, the construction preferred by the majority in *Sale* cannot be reconciled with the United Kingdom Supreme Court's recent decision in the *Eritrea Case*. It has also attracted widespread criticism among learned jurists.[44]

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39 Cf *Minister for Immigration and Multicultural Affairs v Khawar* (2002) 210 CLR 1 at 15 [42]-[44] (McHugh and Gummow JJ).

40 Goodwin-Gill, 'The Haitian Refoulement Case: A Comment' (1994) 6(1) *International Journal of Refugee Law* 103, 109. Cf *Minister for Immigration and Multicultural Affairs v Khawar* (2002) 210 CLR 1 at 15 [42]-[44] (McHugh and Gummow JJ).

41 See: *Vienna Convention*, Arts 26 and 31(1).

42 Cf *Minister for Immigration and Multicultural and Indigenous Affairs v QAAH of 2004* (2006) 231 CLR 1 at 15 [34] (Gummow ACJ, Callinan, Heydon and Crennan JJ).

43 See the discussion in paragraphs 34 to 39, below, concerning state practice and customary international law.

44 See, for example: Foster, 'Protection Elsewhere: The Legal Implications of Requiring Refugees to Seek Protection in Another State' (2007) 28 *Michigan Journal of International Law* 223, 251-261; Legomsky, 'The USA and the Caribbean Interdiction Program' (2006) 18 *International Journal of Refugee Law* 677, 686-693; Goodwin-Gill, 'The Haitian Refoulement Case: A Comment' (1994) 6(1) *International Journal of Refugee Law* 103, 103-109; Lauterpacht and Bethlehem, 'The scope and content of the principle of non-refoulement: Opinion', in Feller et al (eds), *Refugee Protection in International Law: UNHCR's Global Consultations on International Protection* (2003) 110-111; Hathaway, *The Rights of Refugees under International Law* (2005) 336-339; Wouters, *International Legal Standards for the Protection from Refoulement* (2009) 50.

Non-refoulement under customary international law

34. The prohibition of *non-refoulement* is accepted as a norm of customary international law. An international custom crystallises into a legally binding norm meeting the description in Art 38(1)(c) of the *Statute of the International Court of Justice* where there is a pattern of State practice conforming to that norm that amounts to a 'settled practice', and where there is also 'evidence [of] a belief that th[e] practice is rendered obligatory by the existence of a rule of law requiring it'.[45] Although the practice should be 'settled', there is no need for 'absolutely rigorous conformity with the rule'.[46]

10 35. State practice may be constituted in myriad forms including, without limitation:

(a) acts of States, including correspondence and policy statements;[47]

(b) widespread participation in a treaty regime or series of them (which can itself be sufficient to crystallise a norm of customary international law) or a pattern of treaties in the same or similar form;[48]

(c) recitals in international instruments, comments at drafting conventions or on International Law Commission drafts;[49]

(d) acts and resolutions of relevant international organisations and organs,[50] including the United Nations General Assembly;[51] and

(e) judicial decisions, and domestic law.[52]

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45 *North Sea Continental Shelf Case* [1969] ICJ Rep 3 at 44.

46 *Paramilitary Activities in and against Nicaragua (Merits)* [1986] ICJ Rep 14, 96. See also *Fisheries Jurisdiction* [1974] ICJ Rep 3 at 23-26; *Roma Rights Case* [2005] 2 AC 1, 35.

47 *North Sea Continental Shelf Case* [1969] ICJ Rep 3, 44; *Reservations to the Convention on Genocide (Advisory Opinion)* [1951] ICJ Rep 15, 25; *Case Concerning the Right of Passage Over Indian Territory (Merits)* [1960] ICJ Rep 6, 40, 43.

48 *North Sea Continental Shelf Case* [1969] ICJ Rep 3[70]-[71].

49 *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970)*, Advisory Opinion [1971] ICJ Rep 16, 47 (the "Namibia case").

50 *Reservations to the Convention on Genocide (Advisory Opinion)* [1951] ICI Rep 15 at 25; *Paramilitary Activities in and against Nicaragua (Merits)* [1986] ICJ Rep 14 at 100-103.

51 *Reservations to the Convention on Genocide (Advisory Opinion)* [1951] ICI Rep 15 at 25; *Paramilitary Activities in and against Nicaragua (Merits)* [1986] ICJ Rep 14 at 100-103; *Legality of the Threat or Use of Nuclear Weapons (Advisory Opinion)* [1996] ICJ Rep 226 at 254-255;

52 *Fisheries Case* [1951] ICJ 16 at 131.

36. UNHCR submits that there is evidence of a sufficiently uniform practice, and that that practice also gives rise to an inference of the existence of the requisite *opinio juris*, so as to justify the conclusion that there exists a rule of customary international law which prohibits States from returning a person to a place where he or she has a well-founded fear of persecution on one of the grounds of the kind described in the Refugee Convention or of suffering serious harm of one of the kinds described in the CAT and the ICCPR.[53] Moreover, UNHCR submits that that norm extends to the conduct of States whenever and however they exercise their jurisdiction, including where they exercise jurisdiction outside of the territory of the State.

37. State practice is expressed, *inter alia*, through numerous Executive Committee Conclusions[54] that attest to the overriding importance of the *non-refoulement* principle in Art 33(1) of the Refugee Convention irrespective of the geographic location of the refugee.[55] The Executive Committee has emphasised the fundamental importance of fully respecting the principle of *non-refoulement* for people at sea,[56] highlighting that:

> interception measures should not result in asylum-seekers and refugees being denied access to international protection, or result in those in need of international protection being returned, directly or indirectly, to the frontiers of territories where their life or freedom would be threatened on account of a

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53 A comprehensive survey of state practice and *opinio juris* in relation to non-refoulement is found in Lauterpacht & Bethlehem, 'The scope and content of the principle of non-refoulement: Opinion', in Feller et al (eds), *Refugee Protection in International Law, UNHCR's Global Consultations on International Protection* (2003).

54 The persuasive value of ExCom conclusions has been recognised in several New Zealand decisions: *Attorney-General v E* [2000] 3 NZLR 257, 285 [94]; *Attorney-General v Refugee Council NZ* [2003] 2 NZLR 577, 609 [100]; *Zaoui v Attorney-General (No 2)* [2005] 1 NZLR 690, 701 [35].

55 See, for example, ExCom Conclusion No. 6 (XXVIII), 'Non-refoulement' (1977), at para (c) (reaffirming 'the fundamental importance of the observance of the principle of non-refoulement – both at the border and within the territory of a State …'); ExCom Conclusion No. 15 (XXX) 'Refugees without an Asylum Country' (1979) paras. (b) and (c) (stating that '[a]ction whereby a refugee is obliged to return or is sent to a country where he has reason to fear persecution constitutes a grave violation of the principle of non-refoulement' and noting that '[i]t is the humanitarian obligation of all coastal States to allow vessels in distress to seek haven in their waters and to grant asylum, or at least temporary refuge, to persons on board wishing to seek asylum.'); ExCom Conclusion No. 22 (XXXII) 'Protection of Asylum-Seekers in Situations of Large-Scale Influx' (1981), at II.A.2. ('In all cases the fundamental principle of non-refoulement – including non-rejection at the frontier – must be scrupulously observed.'); ExCom Conclusion No. 53 (XXXIX) 'Stowaway Asylum-Seekers' (1988) [1] (providing *inter alia* that "[l]ike other asylum seekers, stowaway asylum-seekers must be protected against forcible return to their country of origin.').

56 ExCom Conclusion No. 89 (LI) (2000).

> Convention ground, or where the person has other grounds for protection based on international law.[57]

38. State practice is also evidenced by other international instruments drawn up since 1951, none of which places territorial restrictions on States' *non-refoulement* obligations.[58]

39. As to *opinio juris*, in 2001 the Contracting States to the Refugee Convention adopted a declaration which acknowledged that application of the 'core principle of *non-refoulement'* is 'embedded in customary international law'.[59] The United Nations General Assembly passed a unanimous resolution welcoming that declaration,[60] and has repeatedly noted the customary nature of the *non-refoulement* principle.[61]

Indirect *refoulement*

40. The *non-refoulement* obligation in Art 33(1) and under customary international law applies most clearly in relation to the return of a person to the country in relation to which the person has a well-founded fear of persecution. However, the obligation also requires that a State not take steps that ***indirectly*** return a person to such a country.

41. Thus, although the principle of *non-refoulement* does not give rise to a right to asylum in a particular State, it does mean that a State exercising jurisdiction in relation to an asylum seeker must implement measures that do not result in their removal, ***either directly or indirectly***, to a place where their lives or

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57 ExCom Conclusion No. 97 (LIV) (2003) [(a)(iv)].

58 Discussed at paragraphs 21 to 23 above.

59 *Declaration of States Parties to the 1951 Convention and or its 1967 Protocol relating to the Status of Refugees, UN Doc. HCR/MMSP/20010/09 (16 January 2002).*

60 UN General Assembly, 'Resolution 57/187', UN Doc. A/Res/57/187 (15 December 2001).

61 United Nations General Assembly Resolutions 32/67 (1977); 33/26 (1978); 34/60 (1979); 35/41 (1980); 36/125 (1981); 37/195 (1982); 38/121 (1983); 39/140 (1984); 40/118 (1985); 41/124 (1986); 42/109 (1985); 43/117 (1988); 44/137 (1989); 46/106 (1991); 47/105 (1992); 48/116 (1993); 49/169 (1994); 50/152 (1995); 51/75 (1996); 52/103 (1997); 52/132 (1999); 53/125 (1998); 54/146 (1999); 55/74 (2000); 56/127 (2001); 57/187 (2001); 58/151 (2003); 59/170 (2004); 60/129 (2005); 61/137 (2006); 62/124 (2007); 63/148 (2008); 63/127 (2009); 65/194 (2010).

freedom would be in danger on account of their race, religion, nationality, membership of a particular social group or political opinion.[62]

42. Indirect *refoulement* occurs where a person is returned to a country which, although not the country in relation to which the refugee fears persecution, will not afford the person claiming asylum effective protection against return to the place where he or she has a well-founded fear of persecution. The principle is well accepted in international law[63] and in Australian judicial decisions.[64]

A duty of inquiry

43. A State's *non-refoulement* obligation requires it to establish, prior to returning a person to another country, that the person who they intend to return is not at risk of those harms that are covered by the *non-refoulement* obligation.[65] If such a risk exists, the State is precluded from involuntarily returning the individual concerned.

44. Thus for the involuntary removal of a person to a place to be lawful, the returning State must first determine whether such removal would result in a breach of its *non-refoulement* obligation. To satisfy this obligation two inquiries are necessary:

(a) first, the removing State must inquire whether the person seeks asylum; if such a claim is made, the person is entitled to the benefits of *non-refoulement;*[66]

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62 This could include, for example, removal to a safe third country or some other solution such as temporary protection or refuge under certain circumstances. See Lauterpacht and Bethlehem, 'The scope and content of the principle of non-refoulement: Opinion', in Feller et al (eds), *Refugee Protection in International Law: UNHCR's Global Consultations on International Protection* (2003) [76];UNHCR, *Advisory Opinion* (2007) [8].

63 Human Rights Committee, 'General Comment 31 The Nature of the General Legal Obligation Imposed on States Parties to the Covenant' , UN Doc. A/59/40 (2004) [12]; *Hirsi Jamaa v Italy* (2012) 55 EHRR 21 at [146]-[147]; *T.I. v. The United Kingdom* [2000] INLR 211; UNHCR Executive Committee, *Conclusion* No 97 (LIV) 'Protection Safeguards in Interception Measures' (2003) para [(a)(iv)].

64 See *Plaintiff M61/2010 v Commonwealth* (2010) 243 CLR 319 at 339 [27] (the Court).

65 See *Plaintiff M61/2010 v Commonwealth* (2010) 243 CLR 319, 339 [27] (the Court). See also: *Hirsi Jamaa* (2012) 55 EHRR 21 at [146]-[148]; *MSS v Belgium and Greece* (2011) 53 ECHRR 2 at [286], [298], [321], [315], [359]; *Roma Rights Case* [2005] 2 AC 1, 38 [26]; *C & Ors v Director of Immigration & Anor* (HK Court of Final Appeal, 25 March 2013) [56], [64].

66 See discussion in paragraph 11, above.

(b) second, if the State proposes to take or send the person to a third country prior to a determination of the person's refugee status, the State must ensure that the third country offers, amongst other things, sufficient guarantees to prevent the person concerned being removed to the country where he or she fears persecution without an assessment of whether that fear is well-founded; and a guarantee that if the person is assessed to be a refugee he or she will not be returned.[67]

45. The latter obligation is all the more important when the third country is not a party to the Refugee Convention.[68] However, even if the third country is a party to the Refugee Convention or other relevant human rights instruments, the removing State cannot assume that such protections are in place. Rather the removing State must carry out an assessment of the law and practice in the third country.[69] This assessment by the removing State is required irrespective of which third country is envisaged.

Application of Australia's international obligations in the present case

46. It appears from the agreed facts in the Special Case that:[70]

(a) The plaintiff is a person of Tamil ethnicity and Sri Lankan nationality, who claims to have a well-founded fear of persecution in Sri Lanka.

(b) In June 2014, the plaintiff embarked from India on an Indian flagged vessel bound for Australia.

(c) Australia intercepted the plaintiff in the contiguous zone approximately four nautical miles from Australia's territorial waters and detained him, for a short period of time on the Indian flagged vessel, and then for a period of weeks on an Australian flagged vessel.

(d) Australia intercepted and detained the plaintiff for the purpose of taking him to India, in circumstances where it had not assessed the plaintiff's refugee claim. Nor had it assessed whether taking the plaintiff to India may involve indirect *refoulement*.

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67 UNHCR, *Guidance Note on bilateral and/or multilateral transfer arrangements of asylum-seekers*, May 2013.

68 *Hirsi Jamaa* (2012) 55 EHRR 21 at [146]-[148]; UNHCR, *Submission by the United Nations High Commissioner for Refugees in T.I. v. The United Kingdom* (European Court of Human Rights, Application No. 43844/98, 7 March 2000)(4 February 2000) [14].

69 See *MSS v Belgium and Greece* (2011) 53 ECHRR 2 at [359].

70 Special Case at [2], [4]-[6], [12]-[13], [19]-[20], [24].

47. The plaintiff was, for the duration of the whole period of detention, or at least for the period of detention on the Australian flagged vessel, in Australia's effective custody and control. Thus Australia was exercising jurisdiction in relation to the plaintiff (conversely, the plaintiff was subject to Australia's jurisdiction). Having regard to the principles outlined above, Australia was therefore bound to comply with the *non-refoulement* obligation (both direct and indirect) in Art 33(1) in relation to the plaintiff.

Proper construction of s 72(4) of the Maritime Powers Act

48. It is well settled that, as a general proposition, a statute is to be interpreted and applied, so far as language permits, so that it is in conformity, and not in conflict, with established rules of international law.[71] Put another way, legislative provisions are to be interpreted by reference to the presumption that Parliament did not intend to violate Australia's international obligations.[72] The principle is analogous to the principle that legislation is presumed not to interfere with fundamental common law rights in the absence of clear words or necessary intendment — and that general words will not suffice.

49. The Maritime Powers Act itself recognizes the role of international law in relation to the matters with which it deals. Section 7 states that '[i]n accordance with international law, the exercise of powers is limited in places outside Australia'.

50. Application of that rule in the present case requires that the Maritime Powers Act be interpreted, if possible, so that it is consistent with Australia's international obligations as set out above. In particular, it requires that ss 72(4) and 74 of the Maritime Powers Act be interpreted so as not to authorise the direct or indirect *refoulement* of a person intercepted at sea. That is, the 'place' to which a person may be removed in the exercise of power under s 72(4) is to

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71 *Polites v Commonwealth* (1945) 70 CLR 60 at 68-69, 77, 80-81; *Maloney v The Queen* [2013] HCA 28; 298 ALR 308 at [134] (Crennan J).

72 This principle was first stated in the Commonwealth context in *Jumbunna Coal Mine No Liability v Victorian Coal Miners' Association* (1908) 6 CLR 309 at 363. It has since been reaffirmed by this Court on many occasions: see, eg, *Chu Kheng Lim v Minister for Immigration* (1992) 176 CLR 1 at 38 (Brennan, Deane and Dawson JJ); *Minister for Immigration & Ethnic Affairs v Teoh* (1995) 183 CLR 273 at 287; *Re Minister for Immigration and Multicultural and Indigenous Affairs ex parte Lam* (2003) 214 CLR 1 at 33 (McHugh and Gummow JJ); *Coleman v Power* (2004) 220 CLR 1 at 27 (Gleeson CJ), 91-4 (Kirby J). *Plaintiff M70/2011 v Minister for Immigration and Citizenship* (2011) 244 CLR 144 at 234 [247] (Kiefel J). Despite his stringent criticism of the rule in *Al-Kateb v Godwin* (2004) 219 CLR 562 at [63]-[65], McHugh J acknowledged that 'it is too well established to be repealed now by judicial decision.'

be read as not including a place where the person fears persecution or a place that will not afford the person protection against *refoulement*. Such a place is not a place where the relevant officer can be satisfied that it is 'safe for the person to be in that place', as required by s 74.

51. If ss 72(4) and 74 are interpreted in this way, then Australia cannot remove a person to a country unless and until Australia is satisfied that that country is not a place where the person has a well-founded fear of persecution on one of the five Refugee Convention grounds, and has satisfied itself that the country — at a minimum — will afford the person protection against *refoulement*.

52. In relation to the decision to take the plaintiff to India, it is accepted on the facts that Australia made no inquiries or assessment as to the circumstances of the plaintiff's departure from Sri Lanka or from India. Nor did Australia make an assessment whether India would afford the plaintiff protection from *refoulement* to Sri Lanka, in circumstances where it was known that India is not a party to the Refugee Convention. This failure to ascertain whether the plaintiff would be protected from *refoulement* upon return to India meant that the relevant officer could not be satisfied that the place where he proposed to place the plaintiff was a safe place within the meaning of s 74. Thus the officer could not, at the relevant time, take the plaintiff to India; hence he could not be detained for the purpose of taking him to India.

Scope of non-statutory executive power

53. Question 3 is directed to the non-statutory executive power of the Commonwealth. UNHCR's submissions on this issue are based on the assumption that, as a matter of Australian law, a power to intercept a person seeking to enter Australian territory (including the territorial sea) and remove that person to another place exists as an aspect of the Commonwealth's non-statutory executive power under s 61 of the Constitution and that an incidental power to detain a person for the purposes of such removal also exists. However, UNHCR contends that such powers are constrained by Australia's international obligations under the Refugee Convention and/or customary international law.

54. A purely executive power to detain a person, and to remove him or her to a place to which he or she does not wish to go, is an extraordinary power[73] and one that must, where it exists, be subject to constraints. Section 61 of the Constitution is not an unlimited power to do whatever is in the national interest. Further, the power postulated by Question 3 in the circumstances of this case is a power for Australia to act outside Australian territory, in an area governed by the law of nations. These two matters point towards Australia's *non-refoulement* obligations under international law as constraints on any purely executive power to detain and remove on the high seas or in the contiguous zone. This is not a limit on Australia's sovereignty; for the argument is not that Australia (through the Parliament) *cannot* authorise executive conduct in breach of international law; it is that the Parliament has not done so, and no purely executive power to do so exists.

55. If the purely executive power of the Commonwealth to detain a person on the high seas and remove him or her to another place is constrained by Australia's *non-refoulement* obligations then that power cannot be used to remove a person to a country unless and until Australia is satisfied that that country is not a place where the person has a well-founded fear of persecution on one of the five Refugee Convention grounds, and has satisfied itself that the country will — at a minimum — afford the person protection against *refoulement*.

56. In relation to the decision to take the plaintiff to India, no inquiries or assessment were made as to whether he sought asylum and whether India would afford him protection from *refoulement* to Sri Lanka, in circumstances where it was known that India is not a party to the Refugee Convention. This failure to ascertain whether the plaintiff would be protected from *refoulement* upon return to India meant that the plaintiff could not be taken to India; hence he could not be detained for the purpose of taking him to India.

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[73] As Brennan J observed in *Re Bolton; Ex parte Beane* (1982) 162 CLR 514 at 523, the law of Australia 'is very jealous of any infringement of personal liberty'; see also Deane J at 528-9. Authorities in this Court have held that the executive power of the Commonwealth is not sufficient to authorise various coercive actions on the part of the Commonwealth executive: see *Ex parte Walsh; Re Yates* (1925) 37 CLR 36 at 79; R v Barton (1975) 131 CLR 477; *McGuiness v Attorney-General (Vic)* (1940) 83 CLR 73; *Vasiljkovic v Commonwealth* (2007) 227 CLR 614 at [32] (Gleeson CJ). See also, Leslie Zines, 'The Inherent Executive Power of the Commonwealth' (2005) 16 Public Law Review 279, 286-7, 291-2.

PART VI ESTIMATE OF TIME

57. UNHCR estimates that presentation of its oral submissions will take 20 minutes.

Date of filing: 15 September 2014

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