ABSTRACT

Offshoring International Law? Australia and the Right to Seek Asylum

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For many years now, liberal democracies have pursued controversial asylum and border control practices to prevent and deter potential asylum seekers from accessing their in-country asylum systems. Australia is arguably the most extreme and visible proponent of this broader trend in its response to boatpeople arrivals. How can we explain Australia’s shift from implementing and supporting an onshore asylum and border control system (1950s to late 1990s) to one in which those practices are carried out offshore (2001 to present)? Understandably, most observers evaluate this development using arguments about domestic politics and self-interest to explain Australia’s shift in practices. Others maintain that these states actually acknowledge international law, but only because of its instrumental and strategic value. Finding prevailing accounts incomplete and unsatisfying, my dissertation takes a different approach. I use a longitudinal assessment of the relationship between the legal norm governing the right to seek asylum and Australia’s response to boatpeople over time. I argue that the legal norm both shaped and was shaped by Australia’s response to boatpeople. By straddling the divide between domestic and international levels of analysis and treating legal norms as dynamic, I find that Australia’s response to boatpeople can be more accurately explained using a constructivist theory of legal norms.
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LIST OF ACRONYMS

ALP- Australian Labor Party

CPA- Comprehensive Plan of Action

DIAC- Department of Immigration Affairs and Citizenship

DIMIA- Department of Immigration and Multicultural and Indigenous Affairs

DORS- Determination of Refugee Status Committee

EXCOM- Executive Committee of the UNHCR

HCA- High Court of Australia

ICCPR- International Covenant on Civil and Political Rights

ICG- Intergovernmental Consultative Group

IGC- Intergovernmental Consultations on Migration, Asylum, and Refugees

IOM- International Organization for Migration

IRO- International Refugee Organization

LNC- Liberal National Coalition

NAA- National Archives of Australia

NPC- National Population Council

OPC- Offshore Processing Centre

PRC- Peoples’ Republic of China

rca- regional cooperation arrangement

RCF- Regional Cooperation Framework

RRT- Refugee Review Tribunal

RSD- Refugee Status Determination
STC- Safe Third Country

UNGA- United Nations General Assembly

UNHCR- United Nations High Commissioner for Refugees

UNRRA- United Nations Relief and Rehabilitation Administration
CHAPTER 1: INTRODUCTION

Introduction

In late August 2001, a Norwegian container ship called the MV Tampa attempted to enter Australian waters and disembark some 433 boatpeople it had rescued. Australia’s Howard government stopped the boat and prevented the passengers from accessing its onshore asylum system. With his iconic statement, “We will determine who comes to this country and the circumstances in which they come,” observers describe Prime Minister John Howard’s response to the Tampa as an event “that changed everything” (Dimasi and Briskman 2010: 201). No longer would Australia allow boatpeople to access its onshore asylum system and offer determined refugees permanent residence. Instead, Australia used a combination of maritime interceptions, offshore processing, and regional cooperation to prevent boatpeople from arriving. At the time, the United Nations and refugee advocates criticized Australia’s response to the Tampa, prompting Australia to justify its response using legal reasoning. Other liberal democracies kept their distance not wanting to be embroiled in the legal dispute. How was this middle power, 1 liberal democracy, and member of the refugee regime able to change its asylum and border control policy so dramatically and controversially?

There are many explanations for Australia’s policy transformation. Some point to the rising phenomenon of mixed migration, a term introduced by the United Nations High Commissioner for Refugees (UNHCR) to describe the simultaneous movement of refugees, asylum seekers, and

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1 As a classic middle power, Australia should be expected to pursue multilateral solutions and compromise, and embrace notions of good international citizenship (Cooper et. al. 1993: 19).
irregular migrants (UNHCR 2007). Other observers draw attention to the contentious domestic politics of Australia. Both accounts are part of an explanation. But they are unsatisfying on their own. Neither considers the role played by the international legal norm governing the right to seek asylum and how that may have influenced Australia’s shift from an onshore to an offshore asylum and border control system. Here I adopt a constructivist theory of legal norms to conceive of Australia’s transformation. I argue that the universal human right to seek asylum both shaped and was shaped by Australia’s policy transformation to a surprising degree. Australia first accepted the collective interpretation of the legal norm governing the right to seek asylum that called on it to maintain an onshore asylum and border control system. By the late 1990s, however, Australia identified new challenges with the legal norm and contested that interpretation.

1.2. From Onshore to Offshore: Shifting Asylum and Border Control Practices

In the past, Australia received boatpeople onshore, processed their asylum claims domestically, and provided refugees with permanent residence. A range of practices characterized this onshore approach. At the height of the Indochinese boat crisis, that led to the displacement of some 3 million Indochinese over fifteen years (UNHCR 2000: 79), Australia formally created an onshore asylum system. Amidst the arrival of some 2,000 boatpeople from 1977 to 1981 and with the prospect of many more to come, Australia formally unveiled an onshore screening system for refugee status determination (Higgins 2017). Though it did not widely publicize its intention to do so, Australia passed legislation that established a practice of granting all determined refugees permanent residence (McAdam 2011: 58). These two practices constituted the foundation of Australia’s asylum policy. During the 1980s and 1990s, however, Australia introduced control practices around this onshore asylum system in response to boat arrivals. It did not receive a high
number of boat arrivals during these years but adopted control practices: mandatory detention for all unauthorized arrivals (Crock 1993); streamlining asylum processing in an attempt to reduce access to social services and judicial review (Bickett 2009) regional cooperation with other Asian countries with the aim of enabling more efficient returns of those found not to be refugees (Taylor 1995). All the while, Australia maintained the premise of its onshore system: in-country screening and permanent residence for determined refugees.2

By the late 1990s, Australia turned away from this onshore asylum system and pursued an offshore policy made up of a new set of practices. In 1999, the conservative Howard government replaced permanent residency visas with temporary protection visas for refugees who arrived by boat (Crock and Bones 2015). It established an interception arrangement with Indonesia where potential boatpeople were to be held and processed there with the help of the United Nations High Commissioner for Refugees (UNHCR) and the International Organization for Migration (IOM) (Taylor 2010). In 2001, the response to the MV Tampa made the transformation to an offshore policy complete. In what became commonly known as the Pacific Solution strategy, Australia intercepted boats at sea and turned them back to Indonesia when it was safe to do so. For those unable to be turned back, Australia negotiated two bilateral transfer agreements with Nauru and Papua New Guinea where boatpeople were sent to have their asylum claims assessed. Australia also set up a ministerial-led multilateral forum called the Bali Process in 2002 to initiate regional cooperation on the people smuggling and irregular migration. Howard pledged that no determined refugees would come to Australia and all determined refugees would be resettled in third countries.

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2One important qualification to this claim is that Australia operates a universal visa policy and imposes stiff fines on airlines that transport travelers without pre-authorized documentation. These restrictions prevent many asylum seekers from boarding an airplane and arriving in Australia to file an asylum claim (Feller 1989). But the policy does not affect an individual’s ability to take a boat from Southeast Asia to Australia.
When the Labor party replaced the Howard government in 2007, it promised to dismantle the Pacific Solution and restore a more traditional asylum and border control policy. Interceptions and turn backs were stopped, temporary protection visas were abolished, and Australia would no longer transfer asylum seekers to third countries for processing. When high numbers of boatpeople returned in 2009, however, the Labor government also sought to move Australia’s asylum and border control processes offshore. Rather than reverting to Howard’s Pacific Solution, however, the Labor government pursued an offshore strategy by building up the Bali Process and focusing more energy on refugee protection. In 2011, the members of the Bali Process agreed to adopt a UNHCR proposal to guide the region’s response to mixed migration. Under the plan, the agency now endorsed such practices as returns, regional processing centres, asylum seeker/refugee transfers, and even interception so long as Bali Process members committed themselves to building-up the region’s protection space over the long-term. Australia attempted to establish a regional processing centre in East Timor in 2010 and an asylum seeker/refugee transfer agreement with Malaysia in 2011-2012. Both initiatives failed and the continuing surge in boat arrivals led the Labor government to reinstitute offshore processing on Nauru and Papua New Guinea. While some have argued that the Pacific Solution simply represented an acceleration and intensification of a policy Australia had pursued since the 1970s (Interview F 2015), something important had changed. Both major political parties in Australia rejected the viability of an onshore asylum and border control system in favor of an offshore approach.

The transformation of Australia’s asylum and border control practices is representative of a larger trend occurring in other liberal democracies. Hathaway and Gammeltoft note that liberal states now pursue a general strategy of deterrence and non-entrée at their borders (2015). Australia is a member of a liberal community of states and its experiences as a receiver of mixed migration
are indicative of the pressures facing these states. Yet Australia is not just a representative single case study; it is an exceptional case worthy of sustained focus. While other liberal states have engaged in deterrence, Mathew Gibney states that Australia is “arguably the most unwelcoming country towards asylum seekers in the Western world” (2004: 167). Moreover, the domestic debate in Australia over how to respond to boatpeople has been the most sustained and intense of all liberal democracies. The issue has reached the top of the political agenda in three of the five federal elections from 2001 to 2013. The policy has been prone to seismic shifts and reversals depending on which political party is in power (Phillips 2017). If the Australian case is *sui generis*, however, it is only because the contours of the debate and the response are more accentuated there than in other liberal democracies. Focusing on Australia may help illuminate current debates in other liberal democracies.

1.3. Common Explanations and Second Thoughts

The shift in Australian practices has received significant academic scrutiny. Some commentators highlight the effort to control entry, the nature of these practices, and the fact that they require significant international cooperation as a natural response to the challenges posed by rising global migration and mobility (Gamlen and Marsh 2011: xxix; Hansen et. al. 2011: 10; Koser 2010: 301; Solomon 2005: 7; Channac and Thouez 2006: 370). Arguments about rising global mobility have theoretical foundations in classic functionalist claims about how rising interdependence prompts actors to pursue more international cooperation for efficiency gains (Mitrany 1933: 101; Keohane 1982). Another explanation is that domestic politics driven by Australian populism and securitization are responsible for the shift in practices (Burnside 2001; Kelly 2005; Carrington 2006: 195; Errington and Van Onselen 2007; Wear 2008: 626; Humphrey
2013; Neumann 2015; Maley 2016). Because immigration policy is generally an unpopular issue (Freeman 1995), politicians will be tempted to draw on public opinion for electoral support when it is politically expedient (Hampshire 2013: 16-35).

Scholars are right in identifying rising international migration and contentious domestic politics as part of an explanation, but these features are neither sufficient nor satisfying on their own. International migration has increased considerably over the last 30 years reaching 244 million in 2015 (UN News 2016). But the rate of international migration remains relatively stable, rising from 2.9 percent in 1990 to just 3.2 percent in 2013 (OECD 2013: 2). More specifically, Australia faced significant numbers of boat arrivals in the past but did not alter its response. During the late 1970s and early 1980s, more than 2,000 boatpeople landed in Australia within the context of the Indochinese boat crisis. At that time, the issue of people smuggling and the prospect of tens of thousands of more boat arrivals were present. How, then, can we explain the timing of Australia’s decision to move from an onshore to an offshore asylum and border control system? The rising number of boat arrivals was certainly an important factor, but it does not provide the whole story.

On the other hand, domestic politics and populism clearly influenced Australia’s policy transformation. But this explanation also fails to paint a complete picture because it lacks specificity. There has always been a disappointing political discourse about “illegal immigrants” stealing jobs, engaging in transnational crime, and threatening national culture in Australia. These sentiments are clearly present today, but they were also evident during the mid 19th century around the arrival of Chinese immigrants to work on the Australian goldfields, but also in Canada and the United States. Moreover, the same can said of many non-liberal societies that express anxieties about newcomers. Another problem is timing. Populist resentment in Australia emerged during the early 1980s yet it was not until the very late 1990s that this energy clearly influenced the
direction of Australian asylum and border policy. It was at this time that the traditional bipartisan consensus on the matter broke down and the positions of Australia’s two main political parties polarized. Both rising numbers of boatpeople and domestic politics are important pieces of an explanation, but they are incomplete.

The interesting and novel feature about the Australian case is the centrality of legal argumentation and discourse used to justify new policy practices. The existing international legal architecture of refugee law shaped and was shaped by Australian policy practices and discourse concerning the objective phenomenon of boat arrivals. Put slightly differently, the change in Australia’s policies under consideration here has not occurred on a “blank slate”. It may seem counter-intuitive to say that legal norms had an influence on Australia because it diverged so significantly from traditional practice. However, even the Howard government’s Pacific Solution strategy was positioned using a particular interpretation of both the right to seek asylum and what Australia’s international legal obligations were. Rising numbers of boat arrivals and domestic politics were important, but the centrality of the legal discourse was an important feature in Australia’s policy shift. A more complete explanation for the policy transformation should incorporate international law. Below, I describe what I mean by international refugee law and then review basic conceptions of international law as applied to the Australian response to boat arrivals.

1.3.1. National Sovereignty and the Human Right to Seek Asylum

Nation states have long recognized that one of the fundamental features of national sovereignty and identity is control over their borders and the entry of non-citizens. This linkage is evident through the proliferation of passports, identity documents, and immigration legislation in the U.S., Canada, and Europe during the late 19th and early 20th centuries (Torpey 1999: 93-103;
In the seminal decision of United States Supreme Court in *Ekiu v United States* (1892), Justice Gray made his classic statement about this linkage:

> It is an accepted maxim of international law, that every sovereign nation has the power as inherent in sovereignty, and essential to self-preservation, to forbid the entrance of foreigners within its dominions, or to admit them only in such cases and upon such conditions as it may see fit to prescribe.3

In 1901, the year of confederation, the Australian Parliament adopted the Immigration Restriction Act (i.e. the White Australia policy) empowering the government to control immigration. In 1906, the High Court of Australia (HCA) cited the *Ekiu* decision when it made a similar statement about border and immigration control being a fundamental feature of Australian sovereignty in *Robtelmes v Brenan*.4

The idea that states ever had a complete sovereign right to control their borders without any concern for international rules is questionable.5 But in the 20th century, liberal democracies voluntarily entered into international conventions that explicitly limited this classic understanding of national sovereignty. The 1951 Convention Relating to the Status of Refugees and its 1967 Protocol are the clearest examples of this development.6 The 1951 Convention defines a refugee in Article 1(2) as “[a] person who owing to a well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable, or owing to such fear … unwilling to avail himself of

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3The decision was preceded by the United States Supreme Court’s decision in 1889 with *Chae Chan Ping v United States* (Chinese Exclusion Act) upholding the U.S. Congress’s power to exclude non-citizens from the United States. *Ekiu v United States* [1892] 142 U.S. 651, 659.
4*Robtelmes v Brenan* [1906] 4 CLR 395.
5Orchard documents the rise of an international response to refugees and identifies an early statement of refugee protection in the Peace of Westphalia of 1648, the putative event marking the creation of the nation state system. The Treaty introduced the notion of *jus emigrandi*: that individuals who faced religious persecution had the right to leave their own state and seek sanctuary elsewhere (2014: 45).
the protection of that country”. Most of the Convention’s 46 articles are rights to be accorded to refugees in asylum countries, but it also contains two key legal principles that shape how states control their borders. Article 31 prohibits states from imposing penalties on refugees for illegal entry so long as refugees present themselves to authorities without delay and show good cause for illegal entry. However, the most central obligation of the regime is Article 33(1): “No Contracting State shall expel or return (‘refouler’) a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion”. The 1951 Convention is a widely ratified treaty with some 145 states parties, and the UNHCR argues that non-refoulement has achieved the status of a customary law obligation (i.e. binding on all states).

These rules place limitations on a state’s ability to exercise absolute unilateral border control. Both Articles 33 and 31 of the 1951 Convention prohibit states from returning refugees to a place of persecution and penalizing refugees who enter illegally. These rules limit the options available to states parties; refugee status has been likened to a “trump card” over normal migration controls (Hathaway 1991: 231-233). The rules around refugee protection create a permissive environment in which all individuals have an “autonomous right to disengage from an abusive society and seek asylum abroad” (Hathaway 1993: 687). The right to seek asylum is an essential part of human rights law. Madsen describe it as the “ultimate human right,” given the disregard of human rights by many states (Madsen 1980: 11). Yet, by carving out laws and rules governing the

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7The Convention Relating to the Status of Refugees was adopted on 28 July 1951 and entered into force on 22 April 1954 following the ratification of the Australian government.
8The right to property (Article 13), access to courts (Article 16), association (Article 15), employment (Articles 17 and 18), housing (Article 21), education (Article 22), support and assistance (Articles 23 and 24), freedom of movement (Article 26), identity papers (Article 27), and travel documents (Article 28).
9Two elements are required for a principle to be considered customary international law: consistent State practice and opinio juris. “UNHCR is of the view that the prohibition of refoulement of refugees, as enshrined in Article 33 of the 1951 Convention and complemented by non-refoulement obligations under international human rights law satisfies these criteria and constitutes a rule of customary international law” (UNHCR, 2007b).
protection of a special class of migrant – refugees – the right to seek asylum implicitly acknowledges the sovereignty of nation states to control the entry of “non-refugees” or regular migratory movement. States also exercise national sovereignty in being the grantors of asylum and are responsible for determining asylum claims. The tension between national sovereignty and human rights has always been inherent in negotiations and debates over refugee protection. The interaction between human rights and national sovereignty has meant that the right to seek asylum is a dynamic and evolving area of international law.

1.3.2. Theoretical Explanations and Puzzle

If we accept the importance of international law in explaining Australia’s policy transformation, what theoretical approach is most compelling? Most conceptions of international law are founded on the primacy of formal treaties and conventions with soft law or non-binding declarations ranking a distant second (Abbott and Snidal 2000; Weil 1983: 414-417). This traditional emphasis on formality creates some problems. Refugee advocates condemned Australia’s response to the *Tampa* and the Pacific Solution strategy as a violation of international law. It was true that Australia ignored much of the soft law around the interpretation of the 1951

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10 Though included in Article 14 of the non-binding Universal Declaration on Human Rights, the right to asylum has proven politically contentious. Following negotiations at the 1967 conference on territorial asylum, states promulgated the UN Declaration on Territorial Asylum but ensured that states remained the “grantors of asylum” (Goodwin-Gill 2012).

11 Hedley Bull paints a very stark picture of the relationship between human rights and national sovereignty: “Carried to its logical extreme, the doctrine of human rights and duties under international law is subversive of the whole principle that mankind should be organized as a society of sovereign states. For, if the rights of each man can be asserted on the world political stage over and against the claims of his state, and his duties proclaimed irrespective of his position as a servant or a citizen of that state, then the position of the state as a body sovereign over its citizens, and entitled to command their obedience, has been subject to challenge, and the structure of the society of sovereign states has been placed in jeopardy. The way is left open for the subversion of the society of sovereign states on behalf of the alternative organizing principle of a cosmopolitan community” (1977: 146).
Convention (Amnesty 2002: 19). However, legal scholars admitted that it was difficult to categorically impugn the strategy using the formal provisions of the 1951 Convention (Crock 2003: 70). For instance, Magner states that, “despite concerns regarding treatment of asylum seekers on Nauru and PNG, Australia met its obligations under the letter of the law of the Refugee Convention. Whether it complied with the spirit of the Convention in offering protection in camps while screening asylum applications is a matter of considerable debate” (2004: 85). What are we to make of the controversy created by the Howard government’s actions despite its apparent adherence to the formal provisions of refugee law?

Much of the controversy surrounding Australia’s policy transformation can be attributed to the expectations and shared understandings actors had about Australia’s obligations to the right to seek asylum. Even though it was not explicitly stated in the formal provisions of the 1951 Convention, other states, international organizations, and domestic actors expected Australia to receive boatpeople onshore, process their claims there, and locally integrate determined refugees. When Australia broke from that shared understanding and practice, controversy ensued and for good reason. Roughly 85 to 90 percent of the world’s refugees reside in the global south; scholars argue that Australia’s system of offshore asylum and border control practices further shifts responsibility for the care of refugees onto underdeveloped countries (Taylor 2005; Thielemann 2005; Junker 2006; Uçarer 2006; Roper and Barria 2010). The Pacific Solution strategy, therefore, was inconsistent with actors’ understanding of the right to seek asylum at that time. Yet, if we only conceive of international law by looking at the formal provisions of the 1951 Convention, the

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12For example, the 1967 UN Declaration on Territorial Asylum and the 1977 Draft Convention on Territorial Asylum are both considered soft law. Each of these instruments discusses the scope of the non-refoulement obligation and prohibits states from practicing “rejection at the frontier”. Article 3 of the Draft Convention covers asylum seekers “at the frontier” and prohibits “non-rejection at the frontier, return or expulsion, which could compel him to remain in or return to a territory with respect to which he has a well-founded fear of persecution”. UN Draft Convention on Territorial Asylum, UN Doc. A/CONF.78/12, 4 February 1977.
Pacific Solution did not clearly violate a formal reading of the 1951 Convention. I argue that looking at formal treaties only is too limited a way of thinking about international law. A more effective approach is to take a sociological perspective that treats law as at least partially socially constructed.

A pervasive cynicism exists within refugee studies regarding the relationship between international law and liberal democracies. There is now a large critical sociological turn among scholars who depict the rise of control practices as enabled by law’s inherent ambiguity and malleability. They point to notions like legal interpretation and discourse as a way in which powerful states shroud their power and national sovereignty behind a veneer of legitimacy (Koskenniemi 2011; Sinclair 2010). Clare Inder argues that Australia’s legal argumentation within the context of the Pacific Solution represented a disingenuous attempt at engaging with legal reasoning and interpretation (2010). This basic approach enjoys much popularity in the refugee and migration studies literature.13

Yet if refugee law is merely a cover for power and everyone knows it, why does international law continue to attract support? Why do liberal democracies not withdraw from the 1951 Convention? Why do other states, international organizations, and civil society continuously work towards building more and more law? And why do actors make legal arguments and justifications. As Johnstone points out, “if no one can say with authority what the law is… what would be the point of making legal arguments at all?” (2011: 7). To account for liberal states shift

13 At the extreme end of his critical spectrum, there is a strand of theoretical inquiry inspired by the “decisionist” approach of Carl Schmitt. From this perspective, during crisis situations a sovereign exerts power and influence to make exceptional decisions without constraints of law. When normal conditions return, however, legality does not revert to its pre-crisis configuration and the exception becomes the norm until the next crisis when the process repeats itself. Giorgio Agamben’s work on refugees borrows explicitly from Schmitt’s work (1998: 170). These insights have led to a cottage industry of refugee and migration research examining biopolitics and the politics of exception whereby scholars see changes in border and migration controls as occurring “outside the law” (Noll 2003; Steyn 2004; Pratt 2005; Salter 2008; Vandvik 2008: 28).
in practices without formal violations of refugee law, a growing number of scholars invoke arguments about self-interest to describe why states support the right to seek asylum (at least rhetorically). It is said, that liberal democratic states welcomed the arrival of refugees and supported asylum law during the Cold War because it was in their self-interest to discredit the Soviet regime (Hathaway 1991: 8; Loescher 1996: 21; Chimni 1998; Hollifield 2000: 80-82; Gibney and Hansen 2003).

After the Cold War, however, liberal democracies no longer had such an incentive. The goal now, according to Hathaway and Gammeltoft, is in conveying the image of adherence:

> Whether the goal is to placate domestic humanitarian constituencies, to avoid the unraveling of the international law regime, or to be seen standing shoulder-to-shoulder with the poorer states that actually make refugee protection work, optics are at the core of what matters. Powerful states therefore see value in showing their commitment to refugee law but would prefer—to the greatest extent possible—to avoid being subject to its practical strictures (Hathaway and Gammeltoft 2015: 240).

Rational choice scholars have long recognized reputational benefits in hypocrisy; rhetorically supporting human rights with no intention of adhering (Hathaway 2002). Reputational theories of international law emphasize that actors want to appear to be compliant so that other actors will adhere to their obligations or enhance the prospects of cooperation on other issues that might lead to gains and benefits (e.g. improved trading relations) (Guzman 2008). Without explicitly stating so, Hathaway and Gammeltoft appear to be applying this logic. Western states support refugee law to encourage the Global South to continue hosting large numbers of refugees. If Western states withdrew from the regime, global south states would presumably pull back leading to destabilizing global security and economic relations (Hathaway and Gammeltoft 2015: 240).

While influential in many respects, I believe the approaches highlighted above are limited for a number of reasons. First, Australia did not simply assert its position unilaterally and ignore the law. Australia’s controversial practices acknowledged refugee law to some degree. From 1999
to 2003, Australia also worked to persuade other relevant international actors about the merits of its legal grievances and its preferred solutions. Australia’s entrepreneurialism involved significant costs and evidence indicates that the strategy affected the thinking and beliefs of other actors, including the UNHCR, leading to new rules, understandings, and practices. Second, arguments about the end of the Cold War leading to a retreat from asylum law must consider that more expansive control practices emerged in the early 1980s. Scholars have correctly pointed out that the United States was among the first liberal democracies to impose stricter asylum and border controls when it responded to Haitian arrivals during the early 1980s (Zolberg, et. al 1989: 192-198). And liberal democracies were applying controversial practices like detention during the 1980s. Third, reputational arguments about adhering to law must be assessed in light of the fact that Australia’s Pacific Solution was seen as actually harming Australia’s image in the region and beyond (Evans 2008a: 6). Australia’s controls were exceedingly costly. From 2001 to 2007, Australia paid $1 billion to process fewer than 1,700 asylum seekers at offshore locations; that is roughly $500,000 per person (Bem, et. al 2007). Debates about boatpeople were front-and-centre during the 2001, 2010, and 2013 federal elections, sacrificing attention to many other important issues. Australia also initiated sophisticated transgovernmental networks throughout Asia covering the costs of many delegates from Global South countries. Australia initiated regular meetings and non-binding agreements investing intellectual energy into these outcomes. If the goal were merely to prevent and deter spontaneous arrivals, why not focus on unilateral controls such as turning boats back only? The freed up financial resources could be used to encourage countries in the Global South to host refugees.

14 Although outside the scope of this dissertation, it is interesting to note that Australia spent $4 billion in 2017 for border protection policies, including offshore detention and processing, border enforcement, and onshore detention and compliance (Karp 2018).
From this assessment, law appears to be more than just an external constraint and/or a veneer of legitimacy behind which power is exercised. I believe a constructivist theory of legal norm contestation modeled over time provides a more complete explanation for Australia’s policy transformation and enhances our understanding of how law works. The approach integrates other arguments about rising numbers and domestic politics into a more comprehensive explanation. Constructivist and constructivist inspired legal scholars treat international law as at least partially constructed through social interaction. Such an approach goes beyond identifying international law strictly in formal treaties and instructs observers to examine other features like soft-law, practices, and even discourse if we are to more effectively identify law. This approach can be helpful in making some sense of the conundrum described at the outset regarding the Pacific Solution. Many observers criticized the Pacific Solution, but it was actually difficult to identify clear-cut violations of the 1951 Convention. From a constructivist perspective, widespread criticism about Australia’s strategy was not because it violated formal sources of law. Controversy ensued because Australia’s Pacific Solution contravened the shared understandings and intersubjective expectations that had been built up over time.

Most accounts of Australia’s asylum and border control policies that involve theories of international law describe them as efforts to enhance power or self-interest. It is challenging to clearly rule out these arguments. At specific points in time each provides useful insights into Australia’s behavior and rhetoric. But they have trouble accounting for the gradual shift in Australia’s practices and the overall trajectory of how liberal democracies understand and implement their obligations to the right to seek asylum. Constructivism holds more promise here. From a constructivist theory of legal norms, power and self-interest are not the analyst’s primary concern. A constructivist approach probes questions like how legal norms are created through
persuasion and interaction, how these developments shape the identities and interests of participant actors, and how those actors can in turn reshape law. By evaluating these questions in the context of Australia and the right to seek asylum, we can see how legal norms influence an actor and how an actor influences the legal norm.

My dissertation is divided into six chapters and examines how the evolving shared understandings and internationally recognized right to seek asylum shaped Australian policy practices. In turn, I also assess how Australia helped to shape those shared understandings and the right to seek asylum. In the second chapter, I elaborate on my theoretical framework and argument drawing from a constructivist theory of legal norm contestation. Chapters 3, 4, and 5 provide the empirical support. In chapter 3, I explore how the right to seek asylum emerged and how a particular interpretation of this right shaped Australia’s response to boat arrivals from the 1970s to the late 1990s. In chapters 4 and 5, I turn to a more agency-inspired approach. I argue that increasing numbers of boat arrivals from 1999 to 2001 created uncertainty within the legal norm characterized by the identification of ambiguities and unintended consequences about legal rules. As questions came to Australia’s attention and uncertainty prevailed about how to respond to boatpeople, domestic political cleavages began to form between left-and-right-of-centre parties regarding what policy was needed to resolve uncertainty. Each party had its own version of the legal norm and promoted it using a different vision of Australian national sovereignty and identity. In Chapter 6, I conclude with a brief discussion of my findings, how they relate to different scholarly literatures, and what they say about the current developments in Australia and in Europe.
2.1. A Longitudinal Theory of Dynamic Legal Norms

In this chapter, I develop a longitudinal constructivist theory of dynamic international legal norms to account for the empirical trend I am interested in: the transformation of Australia’s asylum and border control practices from an onshore to an offshore system. I argue that the legal norm governing the right to seek asylum played an important and largely unacknowledged role in Australia’s policy transformation. First, as a member of the normative community governing refugee protection, Australia came to accept a particular interpretation of the legal norm governing the right to seek asylum. This interpretation called on it to receive boatpeople onshore, process them domestically, and offer determined refugees permanent residence. During the 1980s and 1990s, liberal democracies worked to adapt this legal norm while retaining the interpretation of in-country processing and permanent residence for determined refugees. By the late 1990s, however, Australia rejected this interpretation and replaced its onshore asylum and border control framework with an offshore policy. By placing Australia within a larger and evolving legal normative context, we can see how the legal norm and shared understandings governing the right to seek asylum shaped, but was also shaped by, Australian practices. This chapter provides the theoretical storyline for how this occurred.

I divide the chapter into a number of sections. I first highlight basic constructivist insights about legal norms that I will use in my theoretical framework. I then move on to discuss how a dynamic legal norm develops and adapts over time with the help of an entrepreneur and a normative community. Next, I explain how (and possibly why) an actor decides to contest an interpretation of a legal norm. In doing so, I distinguish between two forms of legal norm dynamism and change, adaptation and contestation, and highlight some examples from the
Australian story to clarify these points. Thirdly, I describe my methodology. And finally, I conclude with a discussion of the benefits of this theoretical approach.

2.2. Dynamic Legal Norms

Constructivists are generally interested in the ongoing processes of co-constitution between structure and agency. Actors with particular beliefs, practices, and identities interact to create intersubjective ideas, shared understandings, and norms, which in turn shape those beliefs, practices, and identities (Hoffmann 2013: 138). Constructivism provides a forceful critique of, and alternative to, the traditional bias towards rational choice theory in International Relations (IR), in which interests are assumed and deduced from an actor’s position within the structure of constraints and opportunities. Constructivists believe that interests are at the very least partially constituted through social interaction. Early research into legal norms defined them as “standards of appropriate behavior for actors with a given identity” (Finnemore and Sikkink 1998: 891). But legal norms also involve associated shared understandings about the “need for normativity” (Brunnée and Toope 2011: 309) and collective background knowledge such as cause-effect relationships and specialized knowledge about the governed phenomenon (Bernstein and Adler 2005: 303; Brunnée and Toope 2010: 64). Legal norms tell actors how to behave, who they are, what they want, and what they care about.

First generation research into legal norms focused on how static legal norms emerge, diffuse, and are internalized by actors. Norms themselves were treated as static. The norm that emerged was the same norm that was internalized or accepted later on. And once a norm was accepted and rules became taken-for-granted, the cycle was complete. The assumption about static norms is difficult to sustain, however. For instance, the legal rules and shared understandings that
emerged with the 1951 Convention Relating to the Status of Refugees were geographically and temporally limited. By the 1960s and 1970s, however, states and the UN oversaw the universalization of the right to seek asylum. By the late 1970s, we see the acceptance by a normative community of liberal democratic states a stable interpretation of the right to seek asylum: in-country status determination followed by the offer of permanent residence for determined refugees. This approach remained largely unchallenged until the very late 1990s. Both the Howard and the Labor governments contested this interpretation and entrepreneurially promoted a new interpretation defined by interception, offshore processing, and third country resettlement.

A second generation of constructivist research into legal norms examines how legal norm dynamism works (Hoffmann 2005; 2011; Wiener 2008; Sandholtz and Stiles 2009; Brunnée and Toope 2010; 2017). These observations imply that legal norms are better conceived of as dynamic “moving pictures” (Sandholtz and Stiles 2009). In the following sections, I draw from this existing research to identify three different processes behind legal norm dynamism. The first is legal norm acceptance in which a norm entrepreneur promotes a stable interpretation of a legal norm that is accepted by a normative community. The second I call legal norm adaptation in which new shared understandings emerge within the normative community about the governed phenomenon that requires the introduction of rules and practices designed to retain the original interpretation. The final process I identify is legal norm contestation in which one actor (or a small subset of actors) entrepreneurially challenges the original interpretation of the legal norm and attempts to replace it with a new paradigm. Norm entrepreneurs and normative communities play particular roles in shaping each process. I clarify these theoretical points using empirical examples drawn from Australia’s experience with the legal norm governing the right to seek asylum.
2.2.1. Legal Norm Development and Acceptance

A legal norm does not exert influence simply through the creation and ratification of a formal multilateral treaty. Legal norms must be reflected in the shared understandings and legal practices of a normative community of actors. Legal norm emergence, development, and acceptance typically involve the persuasive behavior of a norm entrepreneur. This process is one of constructivism’s most familiar contributions and is often associated with Finnemore and Sikkink’s influential norm life-cycle model (1998). Unlike the norm life cycle model that treats norms as static, a legal norm is dynamic reflective of the co-constitutive process between structure and agency.

Norm entrepreneurs promote and introduce clear ideas about a phenomenon as a way to persuade actors to alter their beliefs and practices. They work to build support for a legal norm and a particular interpretation because they have strong beliefs about appropriate and desirable behavior. Entrepreneurs draw attention to an issue through the creative use of language and by framing problems within the existing beliefs and practices of states. Altruism is traditionally thought to motivate entrepreneurs (Finnemore and Sikkink 1998: 898) and characterizes the behavior of the various individuals appointed as High Commissioners to the UNHCR during its early years. But given Australia’s entrepreneurial actions around contesting the legal norm by the late 1990s and its reputation for the harsh treatment of boatpeople, it is difficult to categorize all entrepreneurial behavior as altruistic. I simply emphasize the characteristic of “ideational commitment” to describe what motivates an entrepreneur. An entrepreneur’s ability to persuade actors is important in determining whether these actors accept an interpretation of a legal norm. As actors are persuaded, they will come to acquire an identity with respect to the legal norm and
this will shift their beliefs, practices, and ultimately preferences. In his study of persuasion, Checkel emphasizes scope conditions that make persuasion more or less likely. These conditions include the uncertainty about a situation and whether a persuadee has few prior beliefs inconsistent with his or her message. But these conditions also include an entrepreneur’s status as an “authoritative member of the ‘in-group’” and the need for deliberation in less politicized settings (2001: 562-563).

From the 1950s to 1970s, the UNHCR promoted the legal norm governing the right to seek asylum and has been regularly identified as an entrepreneur by scholars (Loescher 2001; Betts 2010; Orchard 2014). The agency’s high commissioner’s proved capable and knowledgeable on refugee matters and won the confidence of states by persuading them to support the UNHCR’s agenda. This outcome was the result of framing matters appropriately, highlighting the need for new rules, proposing an interpretation of legal norms, and assisting actors in developing their legal and technical expertise. The UNHCR interacted with the Australian government through its field office there on issues relating to the correct interpretation of the 1951 Convention, knowledge about country of origin conditions, the causes of refugee movement, and how to effectively determine the status of asylum claims.

Some constructivists question the entrepreneurial approach to legal norms saying it does not adequately account for normative communities. They argue that it is only when entrepreneurs draw on shared background knowledge or norms within a normative community that a legal norm gains acceptance and cultivates a sense of legal obligation (Brunnée and Toope 2010: 86). To be sure, entrepreneurialism is not just about persuasion it is also about building and expanding a normative community to include a broader range of members (Adler 2005: 16-19; Brunnée and

15 Other processes also factor into norm acceptance like socialization, but this process relies on a different form of logic (Keck and Sikkink 1998; Risse et. al. 1999; Goodman and Jinks 2004).
Legal norms are not only in relation to the attraction of particular ideas and rule sets; it is also reflective of how legal norms represent the shared understandings and rules governing a community of actors. There is an alignment between the shared understandings about the need for rules and the nature of the governed phenomenon, on the one hand, and the practices and rules of the legal norm, on the other. Rather than coercion or self-interest, then, actors accept legal norms because they come to see them as legitimate (Franck 1990: 38; Chayes and Chayes 1995: 27; Hurd 1999). International organizations tend to be sites or spaces for legal interaction, where ideas are developed, approved of and implemented (Johnstone 2011).

Yet there is nothing inherently contradictory about discussing entrepreneurs and normative communities simultaneously. While normative communities involve actors with common identities who deliberate, certain members of these communities will often be more knowledgeable, motivated, persuasive, and influential than other members. But entrepreneurs must indeed work within existing logics of appropriateness and shared understandings to convince and persuade actors within the normative community about the merits of their interpretation. Both entrepreneurs and normative communities are interdependent concepts in the emergence and acceptance of legal norms.

One of UNHCR’s most important but unheralded accomplishments during its early years was its creation of a normative community in the form of its annual Executive Committee (EXCOM) meetings. The EXCOM served as the first normative community for asylum and refugee issues and helped shape Australia and other liberal democracies’ implementation and application of the legal norm. Much like other liberal democracies, as Australia participated in the EXCOM it came to accept a universal definition of a refugee, experienced the emergence of a legal discourse, and saw the development of a cadre of civil society groups that supported refugees.
Australia also developed bureaucratic practices, executive orders, and policies during the 1960s and 1970s that drew on its participation in EXCOM. By the late 1970s, Australia and other liberal democracies came to accept that they were obliged to receive asylum seekers at their territorial borders, process their claims domestically, and provide determined refugees with permanent residence. The development of an onshore asylum system was remarkable considering it came during the height of the Indochinese boat crisis during which hundreds of thousands of people were displaced and Australia received more than 2,000 boatpeople and anticipated the arrival of tens of thousands more. These observations problematize arguments about rising numbers of boatpeople or domestic political calculations driving Australia’s efforts to deter boatpeople (Stevens 2012: 532). The UNHCR’s entrepreneurialism and the EXCOM had an important influence on Australia’s policies.

So far, this story is indicative of a traditional constructivist approach to legal norms. However, it is important to point out that while Australia and other liberal states converged around a stable interpretation of the legal norm and developed in-country asylum systems, the legal norm was dynamic and not static. The quality of the shared understandings, practices, and rules that emerged during the 1951 Convention conference were different from those that were accepted by the late 1970s. During these years, the legal norm revealed dynamism.

2.2.2. Legal Norm Change: Adaptation and Contestation

Once a normative community accepts an interpretation of a legal norm and it is reflected in shared understandings and legal practices, that interpretation may be relatively stable or subject to change. Regardless of whether an interpretation of a legal norm is stable or changing, it is always dynamic. In this section and the ones that follow, I describe two separate but related processes that
can occur following the acceptance of an interpretation of a legal norm: legal norm adaptation and contestation. Adaptation occurs by introducing new practices to retain the existing interpretation of the legal norm, while contestation is an attempt to fundamentally change that interpretation.

Because rule-makers cannot predict every possible contingency, relatively stable interpretations of legal norms do not “specify all the situations which an actor might meet with, nor could do so; rather they provide for generalized capacity to respond and influence an indeterminate range of social circumstances” (Giddens 1984: 22 in Hoffmann 2013). When new events and developments arise, actors often shift their beliefs and shared understandings about the nature of the governed phenomenon. This shift in shared understandings and beliefs exposes gaps and ambiguities in the legal rules, creating a degree of uncertainty about how to proceed. Legal norms are continuously being defined; this is inherent in the co-constitutive process linking structure and agency, whereby one does not completely determine the other. So, uncertainty will always be present to some degree. Hoffmann describes how uncertainty emerges:

To be sure, actors are not passive. Both constructivists and complexity theorists consider that all political actors have an adaptive nature, reacting to what they see and experience continually updating their understanding of their context. They react to their own evaluations of what is happening around them and to new information making uncertainty in the feedback process inevitable (2011: 63).

Actors interpret the general boundaries of legal norms and what behavior is called for in light of their normative commitments. Uncertainty creates opportunities for new ideas and innovative practices to emerge (Sheingate 2003: 191; Hoffmann 2011: 63).

Some critics argue that these latter observations cause the opposite problem to that of treating legal norms as static, because actors have too much interpretive leeway. This point is a common refrain among those who argue that legal interpretations emerge through either domestic level actors competing in their own self-interest (Hurd 2017) or simply states acting strategically
(Sanders 2012). Or worse yet, some maintain that legal norms are infinitely malleable enabling national sovereignty to be exercised as a form of legitimate power (Koskenniemi 2011; Sinclair 2010). It may be tempting to argue that because there is no world government, we should expect such outcomes. Indeed, key questions along these lines, such as explaining how legal interpretations can be stable but also when and how we should anticipate change, confront second-generation constructivists. To respond to this challenge, I highlight the important role played by norm entrepreneurs and normative communities in providing stability and steering change during periods of norm adaptation and contestation.

2.3. Adaptation: Incremental Change and the Normative Community

Once a relatively stable interpretation of a legal norm is accepted, the normative community serves an enhanced role in maintaining the legal norm. Normative communities are responsible for the process of adapting legal norms to meet new shared understandings of the governed phenomenon. There are sophisticated approaches to the general concept I refer to as normative communities. But I treat this concept in a somewhat underspecified manner and this may be unsatisfying for communitarian constructivists. I do this for two reasons. First, treating normative communities thinly will maintain conceptual space for my interest in Australia and how agency works within legal norm contestation (the next section). On the other hand, by acknowledging the importance of normative communities, I recognize the importance of these features in the continuously dynamic intersubjective context that shapes the practices Australia

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16 I draw generally from two approaches: Johnston’s interpretive communities and Adler’s communities of practice. Johnston discusses normative communities using the concept of an interpretive community he borrows from Fish: “The interpretive task is to ascertain what the law means to the lawmakers collectively, rather than to any one of them individually or in the abstract” (2011: 40). Adler and others also discuss normative communities through the concept of communities of practice in which actors share an interest in learning and applying common practices (2005: 14-15).
uses to respond to boatpeople and how those practices shape the legal norm. Normative communities, I argue, serve two roles within legal norms. First, normative communities are responsible for developing and updating shared understandings and legal practices alongside new information. Second, they are sites in which deliberation occurs and where discourse and ideas are adjudicated.

Though entrepreneurs initiate and disseminate ideas about a phenomenon, the need for rules, and a particular interpretation of those rules, normative communities are where these ideas acquire intersubjectivity and legitimacy. Actors interact within normative communities to socially construct knowledge and “truth” or “epistemic validity” concerning a governed phenomenon (Adler and Bernstein 2005: 303). Normative communities should be inclusive, bringing in a diversity of actors like states, international organizations, and civil society. But sometimes they are insular potentially subject to accusations of technocratic or hegemonic influence. For communitarian constructivists, a normative community need not share a single belief system, but just be engaged in a “joint enterprise” in which actors share an understanding of “what they are doing and why” (Adler 2005: 20; Brunnée and Toope 2010: 80). Normative communities also promote the internalization of shared understandings and legal rules into the domestic social, political, and legal context through what Koh calls the transnational legal process (1998).

Normative communities can be places in which shared understandings and practices evolve, but only when actors practice the law. Brunnée and Toope describe how “deeds and rhetoric” constitute legal practices (2010: 284). Because there is no international government, law operates through a “justificatory discourse”, a practice linked to the search for the intersubjective meaning of law (Kratochwil 1989; Brunnée and Toope 2010; Johnston 2011: 22). Decision-makers have common expertise and are often legally trained and therefore tend to share common
understandings about the quality of legal arguments. Shirley Scott is worth quoting here:

[I]nternational lawyers serve as guardians of the relative autonomy, cohesion and consistency of international law... Their role as the guardians of the distinction between law and politics acts as the ultimate constraint on the political agency of international lawyers. Lawyers have a keen sense of when the indeterminacy of international law is being taken too far and when the justification given is too far-fetched to be considered plausible (2007: 420).

Participants of legal normative communities are often lawyers or have significant legal experience. The normative community’s adjudicative role is central to Johnston’s concept of an interpretive community as “the arbiter of what constitutes a good legal claim; it represents the institutional mechanism closest to an impartial arbiter that most international disputes provide” (2011: 44). A normative community composed of specialized and/or legally trained actors helps to distinguish arguments made in good and bad faith, deciding which to accept and which to reject.

As actors practice law, they will also create collectively approved policy practices. These include diplomatic practices, warfare practices, global financial practices (Adler 2005: 18) and asylum and border control practices. Policy practices relate to the “shared expectations for all relevant actors within a community about what constitutes appropriate behavior which is encapsulated in... policy” (Park and Vetterlein 2010: 13). As IR scholars looking at the concept of identity point out, engaging in these practices not only indicates an actor’s commitment to a legal norm but it is also a signal of their membership in a normative community. Participating in these practices is thought to be desirable since it typically leads to recognition of this identity by other actors (Katzenstein 1996; Ruggie 1998; Abdelal, et. al. 2006: 697). Policy practices are phased in and out alongside shifting shared understandings and those shared understandings are

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Franck was among the first to identify legitimacy criteria that were believed to compel actors to adhere to law even when it was not in their immediate self-interest: determinacy; symbolic validation; coherence; and adherence (1990). More recently, Brunnée and Toope’s interactional international law theory uses eight criteria of legality from Lon Fuller (2010).
Normative communities can, therefore, foster intersubjectivity and provide legitimacy to rules and practices, dampening criticism about moral relativism whereby one actor’s interpretation is just as valid as another’s. Certain standards should be met if an argument is to be persuasive and a practice viewed as legitimate.

Once a normative community accepts an interpretation of a legal norm, that community will play a central role in a process I call legal norm adaptation. Legal norm adaptation is descriptively characterized by a collective shifting of shared understandings leading to the development of new policy practices and the evolution of the legal norm. New shared understandings emerge through deeper intellectual deliberation often prompted by new experiences and observations about the governed phenomenon. Actors may observe that the rules do not provide adequate guidance, or that rules even generate unintended consequences that have negative effects in addition to the desired outcome. These concerns alter shared understandings if the normative community accepts them as legally germane and valid. They will compare these new shared understandings to the existing set of rules in place and reflect on their continued appropriateness in guiding states’ behavior. The normative community will inevitably note gaps and ambiguities in the legal norm because rule-makers cannot predict every possible scenario in which rules will be applied.

To resolve the incongruence between new shared understandings and the pre-existing set of rules and practices, the normative community will develop new practices. This adaptation is typically an incremental process comparable to amending legislation because the fundamental premise of the legal interpretation is retained. Indeed, new practices are designed partly to maintain

\[\text{It is tempting to exaggerate the effects of material changes because of the influence of exogenous shocks in the academic literature. But material changes will always be perceived through the intersubjective context.}\]
this interpretation. According to Johnston,

> normative evolution tends to succeed best when old rules are extended incrementally rather than torn
down and replaced; interpretive communities set the parameters of discourse within which that
incremental normative process occurs (2011: 50).

Brunnée and Toope share this expectation but go one step further and state that such reform is
often necessary:

> [Actors] will adjust the law so that the impulse to fundamentally question its underlying social
premises is minimized... Continuing practices of legality constantly, and typically incrementally,
reshape law while maintaining a basic level of stability, thereby accounting for law’s relative
robustness... (2017: 19-20).

This description implies that legal norm adaptation is a necessary maintenance process to promote
congruence between the shared understandings and legal rules and practices. If a legal
interpretation is too rigid and cannot be adapted, the legitimacy of the norm may be weakened.
Ironically then, dynamism helps retain the stability of a legal interpretation. Actors work to not
only re-align the norm to meet new shared understandings, they also do so to maintain their
identities as members in good standing of the normative community.

In chapter three, I will draw on evidence supporting this storyline. Liberal democracies
received increasing numbers of asylum seeker arrivals during the 1980s and 1990s and deliberated
about their experiences. They first initiated dialogue about their concerns within the UNHCR’s
EXCOM, the only existing normative community concerning asylum and refugees at the time.
However, liberal democracies also established less formal arrangements for collaborations. The
result of these deliberations was a shift in shared understandings regarding the changing nature of
asylum seeker movement, the real and/or perceived abuse of their asylum systems from *non bona
fide* refugee claimants, and the need for new practices to respond. Liberal democratic states
collectively developed practices like detention, expedited returns, safe third country rules, and
many others. These states also urged the UNHCR to become more humanitarian and provide
protection in regions of origin via new practices like temporary protection, prevention, and voluntary repatriation.

Most scholars describe these developments as driven by either power or strategic self-interest. The practices certainly raise many pressing legal and moral questions. The most common among them is that following the end of the Cold War, liberal democracies lost the strategic incentive to offer asylum to refugees fleeing the Soviet Union (Hathaway 1997: xix; Chimni 1998). But using a constructivist theory of legal norms, I discuss evidence that presents a plausible alternative to this common narrative: liberal democratic states sought to adapt the legal norm governing the right to seek asylum in light of new circumstances. They did not, therefore, immediately experience a preference shift following the Cold War. To begin with, the trend towards greater control emerged prior to 1989, problematizing the argument about Cold War compliance. Moreover, liberal democratic states worked to retain their in-country asylum systems through the introduction of new (and indeed controversial) practices. But the fundamental premise was retained. With the exception of the U.S. policy towards Haitian boat people, liberal democracies did not attempt to ambitiously intercept asylum seekers nor process them offshore. Finally, these states raised justifiable concerns. If their asylum systems were being abused and practices were not introduced to mitigate this problem, the balance between upholding national sovereignty and their legal obligations to the right to seek asylum would be undermined.

Despite receiving virtually no boatpeople during the 1980s and only a few hundred each year during the 1990s, Australia introduced policies like mandatory detention, curbing asylum seekers’ access to social services and federal courts, and more expedited return arrangements for those found not in need of protection. Rising numbers of boat arrivals cannot account for this shift; the Indochinese boat crisis was a far more severe situation and Australia did not pursue such
practices then. Similarly, claiming that the populist turn in Australian politics was responsible for the introduction of deterrence practices like detention (Higgins 2017) ignores larger developments occurring within the normative community at this time. The shifting shared understandings around refugee movement and the fact that other liberal democracies were adopting similar practices raises questions about the domestic politics argument. As a member of the normative community, Australia was influenced by this shifting intersubjective context.

Finally, I argue that legal norm adaptation occurs under at least two conditions. First, incongruence must emerge between the shared understandings regarding the governed phenomenon and the existing legal rules that creates uncertainty. However, perceptions of this uncertainty will not be severe. Unintended consequences may come to the attention of the normative community and may lead to negative outcomes in addition to the desired outcome. But unintended consequences will largely be understood as resolvable. Actors will try to work out any ambiguities and gaps in the rules through incremental adjustments rather than by resorting to more fundamental changes. The second condition involves the capability of the normative community to respond to uncertainty. If actors have confidence in the ability of the normative community to respond to these concerns, they will be more likely to pursue adaptation and less likely to contest the legal norm. The normative community’s responsiveness in the context of the legal norm governing the right to seek asylum can be defined as the ability to resolve legal questions that crop up. Responsiveness can also involve the capacity to organize collective action and burden/responsibility sharing. The perceived severity of uncertainty and the responsiveness of the normative community are two conditions to consider when identifying adaptation.

2.4. Legal Norm Contestation, Domestic Politics, and Change
Though most constructivists are interested in how actors converge around common understandings of legal norms, recent research looks at how divergence occurs among actors who accept an interpretation of a legal norm (Hoffmann 2005; 2013; Wiener 2007; Sandholtz and Stiles 2008). Sometimes legal norms will be adapted through a gradual and collective process of change highlighted above. At other times, one actor or small subset of actors may perceive that an interpretation of a legal norm generates such severe uncertainty that they will become entrepreneurial and actually contest it. Unlike norm adaptation in which uncertainty is limited, entrepreneurs emerge and become important actors during legal norm contestation. Norm entrepreneurs take on a disproportionate amount of the intellectual work during the process and so a close look at the internal or domestic features of that actor is required to understand what drives this process. The general boundaries of the legal norm will continue to structure the entrepreneur’s behavior and rhetoric and the actor must attempt to persuade the normative community. However, contestation involves a more fundamental challenge to the existing interpretation of the legal norm compared to adaptation. Whereas adaptation is about preserving the interpretation, contestation is about altering it.

In this section, I discuss legal norm contestation that involves four phases: 1) an actor or a small subset of actors shifts its beliefs about the governed phenomenon as severe uncertainty emerges about the appropriateness of an interpretation of a legal norm; 2) this uncertainty enables domestic level forces to step in to resolve uncertainty leading to legal norm contestation through a pattern of delegitimization and relegitimization practices; 3) if the entrepreneur is successful in his or her efforts, we should be able to identify a new interpretation emerging among key actors within the normative community; and 4) acceptance of new shared understandings and legal rules. I see this process of legal norm contestation as a stronger lens through which to explain Australia’s
policy transformation from the late 1990s to 2013 than explanations based on domestic politics and shifting numbers of boat arrivals. The approach also provides an alternative to IR theories that use power and self-interest.

The first step in legal norm contestation occurs when one actor or small subset of actors notes severe dissonance between its perceptions about the nature of the governed phenomenon and the rules in place to guide their behavior. This awareness is often prompted by closer intellectual engagement with the norm resulting from new experiences and the identification of changed circumstances. For example, unintended consequences of rules are often a source of uncertainty. But unintended consequences leading to contestation may not only create negative outcomes in addition to the desired ones. Sometimes unintended consequences create perverse incentives in which the rules are actually seen to make the situation worse.¹⁹ Dissonance between an actor’s beliefs regarding the governed phenomenon and the rules in place may not only take the form of gaps and ambiguities in the rules but also internal contradictions that cannot be reconciled by incrementally building on the existing framework. During 1999 to 2001, Australia received a surge in boatpeople from the Middle East and it uncovered new and fundamental problems with the prevailing interpretation of the legal norm governing the right to seek asylum. It noted new trends in secondary movement and the centrality of an increasingly sophisticated people smuggling industry within contemporary refugee movement. While these challenges had been identified before, Australia pointed to an intensification of problems that it believed could not be reconciled by incremental adjustments to its onshore asylum system.

The second step involves two dynamics: the decision to contest and the actual effort to

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¹⁹Some have referred to perverse incentives as the “Cobra Effect” (Horst 2001). In British ruled colonial India, the government offered a reward for every dead cobra. Though initially successful in reducing the number of deadly snakes, the program led to large-scale breeding of cobras and a far worse problem.
contest the legal norm. During legal norm adaptation, the normative community is a major source for resolving uncertainty. During legal norm contestation, the contester sees the normative community as not offering sufficient solutions to meet its concerns. During legal norm contestation, as I define it here, the actor turns to the domestic or internal level to overcome its perception of uncertainty. For Hoffmann, an actor will turn to their subjective understandings of what the legal norm calls for (Hoffmann 2013: 138). Because the normative community is not providing effective responses, the actor will engage in an internal conversation: “because they possess personal identity, as defined by their individual configuration of concerns, they know what they care about most and what they seek to realize in society” (Archer 2003: 130 as cited in Hoffmann 2013). By looking internally or within the state, we can see how new ideas, practices, strategies, and interpretations emerge. Legal norm contestation is amenable to classic “second image reversed” models whereby international structural developments feed-back to create domestic political implications (Gourevitch 1978). One of the most well-known examples of this dynamic is Rogowski’s analysis of political cleavage formation in response to changing exposure to international trade (1987). In this respect, perceptions of uncertainty within the legal norm influences domestic political competition and enables actors to pursue diverging strategies.

Scholars identify a range of domestic level features to explain interpretive divergence like material, ideational, and institutional factors (Hoffmann 2007: 8-9; Betts and Orchard 2014: 13-14). I acknowledge there are diverse factors at play in the Australian context. In particular, rational incentives to use uncertainty for political gains are readily apparent (e.g. Howard’s re-election in 2001). But ideational features are also important. The legal norm in question is not the only norm or identity that pulls on an actor; he or she has multiple overlapping identities related to other patterns of interaction (Wendt 1992: 398). Afterall, the legal norm governing the right to seek
asylum involves liberal rights for refugees and national sovereignty rights for nation states. Instead of focusing on rationalist insights then, I look at how different Australian governments used competing conceptions of national identity and sovereignty to interpret the legal norm and resolve uncertainty. This two-level dynamic is similar to Putnam’s rational actor model. However, rather than material gains about self-interest, an ideational argument looks at how actors play “conceptual games” bargaining about who gets to impose meaning on material reality and socially construct the situation in their own image (Adler 2002: 109). To be clear, I do not deny that actors in democracies attempt to pursue their rational self-interest by competing for electoral support. But this approach ignores the extent to which those interests are socially constructed in the first place. Actors do not simply select the most efficient course of action when given interpretive space: “they follow rules that associate particular identities to particular situations, approaching individual opportunities for action by assessing similarities between current identities and choice dilemmas and more general concepts of self and situations” (March and Olsen 1998: 951).

During the 1999 to 2001 period, Australia perceived that its national sovereignty to control migration and its traditional onshore asylum system could not be maintained simultaneously. Unlike the 1990s when Australia saw this tension as being reconciled with the existing interpretation of the legal norm through incremental reforms, Australia no longer saw this approach as capable of alleviating its concerns. At the time, Australia was led by John Howard, a politician with a reputation for appealing to populist ideas. The combination of uncertainty about the continued viability of the prevailing interpretation of the right to seek asylum and a government in Australia willing to engage in populist rhetoric finally led Australia to pursue an offshore policy, disrupt a tradition of bipartisanship, and diverge from the normative community. Later on, the Australian Labor Party (ALP) responded to the Howard government’s approach by invoking a
different asylum and border control policy based on its distinctive understanding of national identity and sovereignty. Interestingly, both parties used the same Australian cultural themes such as “mateship”, “a fair go for all”, and “battlers” to promote different interpretations of national sovereignty.

While most studies of legal norm contestation look at interpretive variation across countries, the Australian case reveals variation within one country regarding an appropriate asylum and border control policy. By opening up the “black box” of the state we can assess how uncertainty about a legal norm interacts with domestic politics and actors. Most boil down the divergence between the ALP and LNC parties to strategic maneuvers designed to capture electoral support in the lead up to federal elections. This assessment is certainly not wrong. But we cannot ignore the fact that it was also about searching for an appropriate response to uncertainty within the legal norm by invoking different understandings of Australian national sovereignty and identity. The tension between the LNC and ALP was not just about rational calculations of self-interest; it was a competition over the meaning of the right to seek asylum and Australian national identity and sovereignty.

The act of contesting a legal norm to a discerning normative community involves two dynamics: delegitimization and relegitimization. Johnstone argues that the persuasive burden rests upon those actors who seek to deviate from collective understandings of the law (2011: 33-34). The entrepreneur will seek to persuade the normative community because they serve a gatekeeping function, evaluating legal claims and judging policy practices. The entrepreneur will first attempt to delegitimize an interpretation of a legal norm by persuading actors in the normative community that it is no longer viable. The contester may draw attention to other norms, contradictions, and pressing issues with specific rules in doing so. Even if the entrepreneur makes
a persuasive case, however, they cannot simply walk away from their obligations. The entrepreneur remains a member of the normative community of actors that continues to adhere to the traditional interpretation. Delegitimization places a normative burden on the actor who may enter a domain of what Reus-Smit calls “rule without right” (2007: 163). The contester must then work to relegitimize the legal norm by “recalibrating the relationship between its social identity, purposes, and practices” and introduce a new interpretation that resonates with the actor’s identity as a member of the normative community (167). Sandholtz and Stiles remind us that an entrepreneur’s efforts to contest a legal norm are somewhat like litigants trying to persuade a jury of their peers with the best legal argument (2008: 13). Contestation will provoke counterarguments and disputes because each actor interprets ambiguities in different ways.

Norm entrepreneurs tend to be transnational organizations, non-governmental organizations, individuals, academics, private foundations, etc. But Australia exhibited entrepreneurialism domestically and internationally concerning the legal norm governing the right to seek asylum and what a more appropriate response should be. Though entrepreneurs often act altruistically, Australia was motivated simply by its “ideational commitment”. Senior Immigration Department bureaucrats and the Immigration Minister Phillip Ruddock engaged in delegitimization and relegitimization strategies at various multilateral meetings such as the EXCOM but also the Intergovernmental Consultations on Refugees, Asylum, and Migration (IGC), bilateral channels with other members of the normative community, and domestically. The LNC government combined its conception of Australian national sovereignty with an uncertain legal norm to develop a harsh critique of the prevailing interpretation of the right to seek asylum.

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20 Because I am only focusing on Australia, it is impossible to explain why Australia and not other liberal democracies contested the legal norm at this time. Such an investigation would require a comparative analysis of other liberal democracies.
What was more, the LNC government argued that the 1951 Convention was out of date and the UNHCR was infringing on Australian national sovereignty. The Immigration Department even compiled its views into a lengthy book entitled, *Interpreting the Refugees Convention: An Australian Contribution* and published it in 2002.

The goal of a constructivist theory of legal norm contestation should be to not only examine how interpretive variation and contestation occurs, but also to assess if an entrepreneur was successful in altering shared understandings and legal practices of other members of the normative community. The third analytical step is to evaluate how legal norm contestation feeds back to reconstitute or reshape the norm of interest. Much like legal norm adaptation, successful contestation involves a change to the normative rules, shared understandings, and practices.\(^1\)

Through debate and contestation, actors discover the meaning and scope of application of social rules (Sandholtz and Stiles 2008: 103). For Reus-Smit, resolving legal norm contestation involves quieting the major actors and relevant audience by negotiating away the underlying sources of contention (2007: 168-171). In contrast to legal norm adaptation’s incremental reform process, legal norm contestation is resolved when a new interpretation comes to the fore and is accepted by the normative community. Sometimes this new interpretation is crystallized in a key document, declaration, or even a treaty. In the end, a new interpretation of the legal norm emerges that is more specific than the previous interpretation.

I describe how Australia played an important and generally unacknowledged role in influencing a shift within the normative community from 1999 onwards. Following Australia’s implementation of the Pacific Solution, Immigration Department officials consulted closely with the UK. Prime Minister Blair then proposed a similar strategy for Europe that was hammered out

\(^1\)It is important to note here that agency is often being exercised in international relations, but most of it is not particularly successful.
in a document called the “New Vision”. In the end, the “New Vision” was too radical a departure for a number of European states, particularly Germany, and it was rejected. The UNHCR also made significant efforts towards reform beginning in about 2001 and concluding in 2007. The process involved many consultations with a diversity of stakeholders and led to the Convention Plus Initiative that was followed closely by a more pragmatic and condensed document called the “10-point plan to address mixed migration”. The 10-point plan highlighted the challenge between managing asylum and migration and highlighted a range of practices to respond: more cooperation with and support for regions of origin; increases to resettlement; and more robust and coordinated development assistance contributions. These practices were familiar ground. What was new, however, was the UNHCR’s support and involvement in a range of new enforcement practices and rules like the return of asylum seekers found not in need of protection, guidelines on regional/extraterritorial processing, asylum seeker/refugee transfers, and even interception. The similarities between the UK and UNHCR proposals were striking and their substantive content and rationale could be traced back to Australia.

The fourth and final step in legal norm contestation involves implementing new shared understandings and legal practices. For Brunnée and Toope, “stating a norm, even through formal means like treaty or custom, may be a step in creating law; but without the mutual engagement of social actors in a community of practice, the formal norm will not exert social influence” (2010: 351). Actors must actually use these new shared understandings and practices if the law is to remain relevant. If new shared understandings, practices, and rules only exist at the international level among states and international organizations, actors may be unable to implement the new interpretation. New interpretations of legal norms must, in the words of Koh, be “brought home” through internalization or implementation:
governments, intergovernmental organizations, nongovernmental organizations, and private citizens argue together about why nations should obey international human rights law. Through this vertical dynamic, international rules that are developed at a government-to-government level gradually work their way down and become internalized into domestic legal structure” (1999: 1406).

When a new interpretation of a legal norm is accepted by the public (social), political elite (political), and represented in law and judicial decisions (legal) (Koh 1998), we should expect the legal norm to possess influence. Once new shared understandings and legal practices are accepted by a broader swath of society at the domestic level, states will be more likely to obey law.

Despite Australia’s reputation for harsh asylum and border control policies, from 2009 to 2012, the country actually made efforts to implement the new shared understandings and practices developed within the normative community. In 2007, Australians elected the ALP to office on a platform pledging to restore fairness and compassion to Australian politics after more than 10 years of the Howard government. The ALP government came to office with a different understanding of the meaning of Australian national sovereignty compared to the Howard government. It reintroduced a more traditional onshore asylum and border control policy and the UNHCR even praised it as a “model asylum country” (Evans 2009). From 2009 to 2013, however, boatpeople returned to Australia this time reaching about 50,000 for the entire period (Phillips and Spinks 2013: 2). Instead of reintroducing the Pacific Solution strategy, Australia pursued a multilateral burden sharing approach through a regional forum called the Bali Process that had been initiated by the Howard government. Australia worked with international organizations like the UNHCR and regional states in Asia to promulgate a non-binding framework in 2011 called the Regional Cooperation Framework (RCF). It was an ambitious effort to implement some of the new shared understandings, legal practices, and rules developed within the normative community during the 2002 to 2007 period. The RCF provided a roadmap for enhancing the “protection space” in the region but it also put on the table control practices such as returns, regional processing centres,
asylum seeker/refugee transfer arrangements, and even interceptions. The RCF was non-binding but it included the support of Asian states, most of which were not signatories to the 1951 Convention or 1967 Protocol. In the end, the Labor government was unable to implement the RCF domestically and in 2013 Australia re-invoked the Pacific Solution.

I posit that legal norm contestation occurs under at least two conditions. First, the actor must identify severe or fundamental problems with the prevailing interpretation of the legal norm. They may be unintended consequences that are perverse or internal contradictions in the rules. But these issues will be more intense than those detected by the normative community during norm adaptation. The second condition is that the actor will diverge from the normative community that continues to adhere to the traditional interpretation of the legal norm. The actor will come to see the problem through a different lens and work to entrepreneurially persuade the normative community to accept its approach.

To conclude, legal norm adaptation and contestation represent two processes that can occur following the acceptance of a relatively stable interpretation of a legal norm. I argue that both are part of the same dynamic legal norm process whereby norms are continuously defined and redefined as a result of the co-constitutive process between structure and agency. Both processes share similarities but also differences (Table 1). Adaptation and contestation arise from uncertainty between shared understandings and beliefs about the governed phenomenon and existing legal practices. They are both attempts to respond to these uncertainties so that the legal norm is reformed to meet new understandings and conditions. Both processes should result in the emergence of more specific shared understandings and legal practices.
Table 1 - Two Types of Legal Norm Change and Their Characteristics

<table>
<thead>
<tr>
<th>Type of Change/ Characteristics</th>
<th>Legal Norm Adaptation</th>
<th>Legal Norm Contestation</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Location/Source of Change</strong></td>
<td>Group level</td>
<td>Agency/Entrepreneurialism</td>
</tr>
<tr>
<td><strong>Degree of Change</strong></td>
<td>Incremental</td>
<td>Paradigm Change</td>
</tr>
<tr>
<td><strong>Mechanism</strong></td>
<td>Community Learning</td>
<td>Persuasion</td>
</tr>
<tr>
<td><strong>Initiators</strong></td>
<td>Negative Outcomes</td>
<td>Perverse Incentives</td>
</tr>
<tr>
<td><strong>Uncertainty</strong></td>
<td>Low/Modest</td>
<td>High/Severe</td>
</tr>
</tbody>
</table>

These two processes are differentiated by their degree of intensity. Adaptation is more gradual, ongoing, and less severe compared to the fundamental challenges characterized by legal norm contestation. Legal norm adaptation seeks to retain the existing interpretation of the legal norm while contestation works to overhaul it. Adaptation is an incremental process occurring among a group of states within the normative community. Contestation brings domestic politics back into a norm-based explanation. It describes how an entrepreneur identifies new problems with the legal rules and sees the normative community as no longer providing effective remedies. While norm change arises from within the normative community during adaptation, contentious domestic politics and competing conceptions of national identity are typically the source of change within norm contestation. While different features characterize both processes, adaptation and contestation both pass through the normative community if a new interpretation is to be accepted. Norm entrepreneurs must target their arguments towards the normative community and the normative community must accept the entrepreneur’s logic.

2.5. Methodology

My dissertation aims to examine and explain the relationship between the legal norm governing the right to seek asylum and Australia’s asylum and border control practices. I am interested in how this relationship affected Australia’s transformation from an onshore to an
offshore asylum and border control system. But I am also interested in how Australia’s beliefs and practices helped to shape the international legal norm. My dissertation is, therefore, a dual story about changes to the international legal norm governing the right to seek asylum and how Australia fit into that process. I found that at times Australia acted more as a “norm taker” and at other times it acted as a “norm maker”.

Traditional IR explanations tend to treat actors like Australia or the legal norm governing the right to seek asylum as independent or dependent variables. In terms of X and Y, X either affects Y or Y affects X. But this approach does not really provide an effective depiction of how constructivists see legal norms changing. Because of the co-constitutive process between structure and agency, constructivists always see variables as mixing to a certain degree. However, we can still say the variables affect each other by performing a longitudinal study and showing how they change over time and affect each other in an overlapping way. At any point in time the legal norm governing the right to seek asylum will partially constitute Australia’s identity and interests and in turn the legal norm will reflect Australia’s beliefs and practices.

I use a longitudinal constructivist approach to examine the mutually constitutive relationship between the legal norm and shared understandings on the one hand and Australian practices and beliefs on the other. The relationship between the variables is more about how they overlap whereby agency is partially constituted by structure and structure informed by agency. In other words, the legal norm shapes Australia as an actor governed by the norm, but the norm also responds to the behavior and discourse of actors it governs, including Australia. Lupovici points out that a longitudinal depiction of this relationship is more accurately depicted as X1 (structure)
affecting Y1 (agent) affecting X2 affecting Y2 affecting X3, and so on (2009: 209). Once new ideas and understandings are introduced into a normative community and are reflected in the legal norm, there is no returning to the original norm. As scholars argue, “you can stir jam into pudding but you cannot stir it out” (Pierson 2004: 157). By focusing on a “how possible” question (how was Australia able to alter its asylum and border control practices despite a legal norm and a normative community telling them to do otherwise?), we may actually be providing an answer to a “why” question (why did Australia alter its asylum and border control practices?). This line of reasoning supports the notion of constitutive causation (Wendt 1998; Kurki 2006; Lebow 2014).

My dissertation explores individual agency and decision-making within an evolving international social structure and context. By focusing on Australia, however, my dissertation is ostensibly a single case study that could fall prey to the usual critiques: “loosely framed nongeneralizable theories, biased case selection, informal and undisciplined research designs, weak empirical leverage (too many variables and too few cases), subjective conclusions, non-replicability, and causal determinism” (Gerring 2007: 6). To respond to these concerns, I use a “within-case-analysis” and a longitudinal assessment. “Within-case-analysis” emphasizes developing or extending existing theoretical propositions rather than strictly testing hypotheses. “Within-case-analysis” is increasingly common and involves an assessment of causal processes and mechanisms (Bennett and Checkel 2015). Process tracing is the most common methodological approach in this respect because it seeks to causally connect independent and dependent variables that is not possible through correlational analysis (Waldner 2012: 5-9). Process tracing, according to George and Bennett, “attempts to identify the intervening causal process—the causal chain and

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22This approach shares similarities with what Alexander Wendt once called “structural-historical” research. From this perspective scholars focus on structural analysis to ask, “How action X is possible?” and then turn to history to assess “why X happened rather than Y?” (Wendt 1987: 361-365).
causal mechanism—between an independent variable (or variables) and the outcome of the dependent variable” (2005: 206). In doing so, the researcher focuses on sequence and traces political processes back through time to identify interactions and contextual factors that influence the outcome of interest: how and why Australia designed asylum and border control policy the way it did.

Process tracing requires first developing a clear chronological narrative about the sequence of events behind the practices introduced by Australia and the broader developments in the legal norm. In this respect, I used what some call a “soaking and poking” approach in which I immersed myself in the case through available secondary and primary material and updated my research design and research questions along the way (Fenno 1978; George, et. al. 2005: 89-90). The next step is to investigate whether the descriptive qualities of these processes and their initiating conditions actually developed as articulated.

To systematically trace the process between the variables of interest, we must look more closely at the three processes identified (acceptance, adaptation, and contestation). Above I outlined the descriptive analytics of each process and how to distinguish one from another (Table 1). I will not restate these theoretical points here, but I will describe when we should expect each to occur and what to be on look for in the empirical data (i.e. the initiating conditions).

1) Legal Norm Acceptance: Following legal norm emergence and diffusion with the help of an entrepreneur and a normative community, an actor will accept a coherent interpretation of a legal norm. To identify legal norm acceptance and its influence on an actor and not some other reason a number of conditions should be met. First, we must identify the existence of a coherent interpretation of a legal norm and a normative community. Is there a normative community? Is there foundation of shared understandings and practices among this community? Second, we should also expect to see a general alignment or agreement between the shared understandings about the nature of the governed phenomenon and the rules and practices of the legal norm. Third, these shared understandings and rules should be reflected in an actor’s beliefs and practices. In this case, assessing whether Australia adhered to the legal norm or whether it continued to prioritize national sovereignty and border control is a relatively straightforward determination. If the legal norm did not play
a role, we should expect to see the actor retain its preferences from prior points in time.

2) *Legal Norm Adaptation:* Once a legal norm is accepted, actors may seek to adapt it to new circumstances and shared understandings. To assess whether an actor’s behavior reflects an adaptation process, I argue that we must be on the lookout for at least three initiating conditions. **First,** the actor will have new experiences and come to alter its beliefs about the nature of the governed phenomenon and appropriateness of the existing practices to respond. **Second,** the actor must see these new beliefs as reconcilable with the adoption of incremental reforms and not pose major barriers to retaining an actor’s support. **Third,** other actors within the normative community must have similar experiences and come to the same conclusions about the necessary response. **Fourth,** the new practices and shared understandings should not deviate from the previous interpretation of the legal norm. Distinguishing between adaptation and other explanations can be challenging in this context because border and immigration control practices are often automatically conceived of as contrary to the legal norm governing the right to seek asylum. But without some ability to control migratory movement, the alignment between the legal norm’s shared understandings and practices would be disrupted.

3) *Legal norm contestation:* Contestation is about an actor (or small subset of actors) diverging from the normative community to entrepreneurially contest the interpretation of the legal norm through delegitimization and re legitimization practices. A key defining feature of legal norm contestation is that it requires scholars to open up the “black box” of the state to examine how the legal norm affects domestic politics and how domestic politics feeds back to reconstitute the legal norm as discussed above. A theory of legal norm contestation involves a number of initiating conditions to be on the lookout for. **First,** similar to adaptation, the actor will have new experiences and come to alter its beliefs about the nature of the governed phenomenon and the appropriateness of existing practices to respond. **Second,** these new beliefs will create severe uncertainty about how to respond and the actor will identify problems with the existing interpretation of the legal norm that it believes are irreconcilable. **Third,** the actor notes that the normative community does not share, is slow to recognize, or is unsympathetic to its new beliefs and concerns. Legal norm contestation assumes an actor has reasons for engaging in this behavior that are more legitimate than just seeking to preserve self-interest.

We should expect to see an actor influenced by each of these processes when the conditions discussed here are present.

This investigation involved a close assessment of what the legal norm called for at different points in time and how Australia understood its governance context. In doing so, I assessed the arguments and justifications that elite actors (policymakers and politicians) provided for the practices and policies they engage in. Why was Australia doing what it was doing or what did it
think it was doing and why? This approach enabled me to assess how these actors understood and
applied legal norms or what Wiener calls “meaning-in-use” (2008). Though it is impossible to get
inside the heads of actors to conclusively identify the reasons for their actions, I evaluate the stated
strategies and justifications of Australian elites in a variety of primary sources.

I also assessed the perspectives of other members of the normative community like the
UNHCR and Canada regarding Australia’s behavior. By evaluating the perspectives of these
actors, evidence was gleaned as to how divergent or convergent Australia’s actions were, the status
of the shared understandings and the legal norm, and the appropriateness of rules at particular
points in time. From there I noted the status of the legal norm in question (acceptance, adaptation,
or contestation). In making these evaluations, I noted when particular rules, practices, and shared
understandings remained taken-for-granted and when they shifted or were fundamentally
challenged. Process tracing is useful to identify “causal pathways” to explain how legal norms
shape and are shaped by actors (Gehring and Oberthur 2004: 29). With respect to my dissertation,
process tracing reveals how Australia’s variation in asylum and border control policy over time
interacted with the changing legal norm and/or domestic politics.

Finally, I will include some discussion and analysis of counterfactuals in each chapter to
help provide strength to my explanation. Those studying the possible effects and influence of legal
norms are encouraged to spend time making “explicitly relative assessments of alternative
explanations for the same events” (Legro 1997: 58). In this respect, counterfactual analysis calls
on the researcher to hold a particular observed independent variable constant and assess whether
the outcome of interest would have occurred in its absence (Lebow 2011). I have proposed that
the legal norm governing the right to seek asylum played an largely unacknowledged role in
Australia’s asylum and border control practices and the move towards an offshore policy. In this
particular case, the clearest counterfactual is that if Australia had not accepted the legal norm governing the right to seek asylum it would not have responded to boatpeople in the ways that it did. Counterfactuals cannot prove causation because doing so would require rerunning history and altering conditions to determine how precisely outcomes unfold. But counterfactuals analysis strengthened and provided clarity for my explanation.

I gathered a variety of empirical sources to probe these questions and implement my methodology. I reviewed the secondary literature (books and articles) on Australian asylum and border control policy over time and the refugee regime more generally from the literatures in political science, international law, and history. Though the literature on Australian asylum and border control policy is quite focused and limited allowing for a thorough assessment, the literature on the refugee regime and law is massive. To be practical, I focused largely on research into the development of key international institutions and forums like the UNHCR, IOM, etc. and major authors regarding asylum (Hathaway, Goodwin-Gill, Betts).

I also used a large amount of primary source material. Depending on which temporal period I was assessing, I had a different level of access to the material. For my research into the years following the Second World War until the early 1990s, I was unable to acquire much in the way of interviews for obvious reasons. But I used archival material from the National Archives of Australia (NAA) in Canberra to assess the internal deliberations and interventions made by the Australian delegation at the 1951 Convention Conference in Geneva. I also looked at archival documents from the 1950s to 1970s to assess whether the language of refugee law entered into bureaucratic discourse and if so, how. The online Australian Parliamentary Hansard was very useful in accessing statements from politicians around boat arrivals, refugee matters, and legislation. I also drew on primary source material cited by historians covering some of this period.
Claire Higgins’s work on the Indochinese boat crisis and Australia’s onshore asylum system from the late 1970s to the early 1990s was particularly helpful. Other notable historical contributions were David Palmer, Klaus Neuman, and Savitri Taylor.

For the more recent period (1990s onwards), I conducted 40 elite interviews with policy officials. From April to September of 2014, I travelled to Bangkok, Thailand, Canberra, Australia, and Jakarta, Indonesia for fieldwork. I spoke with current and retired Australian senior bureaucrats responsible for asylum and border control policy and a range of officials from the UNHCR, IOM, Indonesia, New Zealand, and Canada who had close knowledge of and/or relations with Australia. I used a snowball sampling technique in which I inquired about recommendations for future interviews in addition to raising substantive questions with each interviewee. I also developed a further list of potential interviewees to follow-up with. I conducted most of these subsequent interviews via Skype once I returned to Toronto, Canada.

I also had access to a large number of primary documents on my dissertation topic. During some of my interviews, I was fortunate enough to receive documents not available to the public on particular issues of interest. I acquired numerous documents from online institutional websites like the UNHCR, IOM, and various regional organizations/forums like the Bali Process. I also reviewed Australian Parliamentary committee reports produced by the Joint Standing Committee on Migration, the Senate Standing Committees on Legal and Constitutional Affairs, and the Senate Standing Committees on Foreign Affairs, Defence, and Trade. While these reports provided further detail into specific policies like detention, offshore processing, and the response to the *Tampa* in 2001, they also canvassed opinions from diverse stakeholders. These views provided insights into justifications for certain policies and revealed divergent opinions; of particular interest were the voices of the Australian bureaucracy, civil society groups, and the UNHCR. I also looked through
the Parliamentary Hansard during periods in which new legislation was introduced or when Australia responded to boatpeople in a controversial manner to evaluate debates among politicians.

To conclude, my research design and theoretical approach come with an important caveat. The Australian experience represents an extreme example of a larger phenomenon occurring in other liberal democracies towards more ambitious and assertive asylum and border control policies. I have proposed that the legal norm governing the right to seek asylum plays an important role in understanding how Australia’s asylum and border control policy has developed over time. But in doing so, I am also saying that this explanation highlights something more generally since the legal norm was accepted by other liberal democracies. While historically and culturally contingent, the explanation and insights from the Australian case should provide hypotheses to examine in other liberal democracies as well.

2.6. The Added Value of a Theory of Dynamic Legal Norms

How does a theory of dynamic legal norms represent an improvement over existing explanations for Australia’s policy transformation? First, and most obviously, the theory absorbs explanations about increasing numbers of boat arrivals and domestic politics into a broader explanation. This approach aligns with second-generation constructivist research that focuses on a two-level analysis involving how diverse actors interpret legal norms (Acharya 2004; Wiener and Puetter 2009; Betts and Orchard 2014) and engage in legal norm contestation (Keeley 1990; Hoffmann 2005; 2011; Wiener 2007; 2008; Sandholtz and Stiles 2008).23 Australian policymakers conceived of boat arrivals through an established interpretation of the legal norm governing the right to seek asylum. Domestic political debates were important but not simply as strategic power

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23The literature on this subject is almost too large to cite, but these are some of the more significant ones.
games aimed at capturing seats in parliament. Nor were policy changes a straightforward response to fluctuating numbers of arrivals. These explanations work better when they are integrated into a theory of the legal norms outlined above. This position is also given credibility because unlike age-old debates about national security and xenophobia, the debates occurring in Australia around asylum and border control during the period under study were explicitly legal.

Second, some scholars propose a two-step approach to studying the interplay between international legal norms and domestic politics: constructivism describes the general social structure of constraints and opportunities and rational choice explains how actors make choices within that context (Legro and Moravcisk 1996; Fearon and Wendt 2002; Hurd 2008; 2017). I do not sharply disagree with this approach. However, a two-level evaluation is also receptive to ideational accounts involving competing conceptions of national sovereignty held by domestic actors. A close evaluation of the Australian domestic context from 1999 to 2013 reveals that tension between the ALP and LNC parties was informed by electoral competition as rational choice would dictate. But something more foundational was also occurring. Both the LNC and ALP developed diverging asylum and border control strategies by promoting two different versions of national sovereignty and identity to Australians. Focusing on the ideas, culture, and identities circulating within the domestic context represents an underexplored angle in theorizing the relationship between international legal norms and domestic politics. Some argue that this approach is a more effective way to conceive of the relationship between international and domestic levels. Adler advocates a strong constructivist program stating that, “because instrumental action is prompted by expectations and intentions, which are drawn from previously constituted social structures, constructivism subsumes rational choice under its more general principles” (2002: 12).
Third, a dynamic theory of legal norms enhances our understanding of international law and qualifies the accurateness of competitor theories. Constructivism’s emphasis on interaction and intersubjectivity diverges from those conceptions that focus on formally ratified treaties and conventions. According to this approach, legal norms are more readily identified by assessing evolving shared understandings, legal practices (discourse and actions), and identities, than traditional assessments of compliance and non-compliance with respect to provisions of treaties. Johnston maintains that, “meaning is produced by neither the text nor the reader but by the interpretive community in which both are situated” (2011: 36). The implication is that the existence of formal treaties does not automatically equate to law. Brunnée and Toope maintain that soft law “may sometimes possess more obligatory force than norms derived from formal sources of law” because what matters is not the formal quality of law but whether law is underpinned by shared understandings and intersubjective rules (2010: 51). If law is not grounded in shared understandings or actors stop practicing legality, law may weaken and practices of non-compliance may spread (Brunnée and Toope 2010; Panke and Petersohn 2011). More solid ground can be found in Brunnée and Toope’s proposition (invoking Fuller) that law is an “enterprise” represented by its incomplete and aspirational quality (2010: 21-22). Actors must practice law so that shared understandings and new practices are updated to meet new challenges that can in turn then be practiced and updated. Conceiving of law in these terms can also make some sense of the conundrum identified in my introduction: widespread criticism of Australia’s Pacific Solution despite no clear-cut violations of the 1951 Convention.

Another benefit of the framework is that it moves beyond accounts that treat norms as external constraints. In these approaches, domestic actors and Transnational Advocacy Networks pressure state elites to uphold international legal rules (Keck and Sikkink 1998; Risse, et. al. 1999).
These accounts have been criticized as a “thin rationalism” because interaction only changes state strategies and not preferences (Checkel 2001: 558-561). A constructivist theory of legal norm contestation takes complex learning seriously whereby interests and identities are shaped through interaction, argumentation, and persuasion. Constructivists have long held that actors interact and create “social facts” which give the material world meaning (Searle 1995; Ruggie 1998). These social facts do “not merely constrain or empower actors, they define their social reality” telling actors what they want and care about (Adler 1997: 327). Because Australia is the only liberal democracy without a constitutionally enshrined bill of rights, civil society groups and legal advocates are unable to exercise as much pressure on elites and politicians as they might in Canada for example. Explanations about Australia’s adherence to law that rely on persuasion and learning should be stronger because material constraints are not as obvious.

Most explanations of liberal democracies’ asylum and border control practices that engage theories of international law focus on arguments about power and self-interest (Inder 2010; Gammeltoft 2014; Hathaway and Gammeltoft 2015). In some cases, these factors may be at work and new practices or interpretations will represent “bad norms” (Acharya 2004). However, legal obligation and legitimacy also serves an important function that is not adequately addressed. From this perspective, divergence from the normative community and past practices may indicate a breakdown in legal obligation because norms are no longer acceptable or are not being updated effectively. This distinction is not to say that actors have an excuse for not complying with the law. But it should emphasize the importance of practicing and updating legal norms to meet new challenges. I find evidence to support these points. Just because Australia sought greater control over its asylum system did not mean that it was retreating from international refugee law. Without some measure of enforcement, it is quite plausible that providing open access to in-country asylum
systems can undermine a state’s ability to control migration and with that, its sense of national sovereignty. This constructivist framework keeps open the possibility that adaptation and contestation may be necessary for the maintenance of a legal norm and its continuing legitimacy. However, this dissertation does not significantly explore the normative context beyond this acknowledgement.24

Finally, this framework offers insights into a constructivist theory of legal norm change. Some scholars argue that constructivism has a status quo bias because of its traditional emphasis on static norms but also because of such constructivist concepts like habit, routine, and socialization. They argue that constructivism must, therefore, be supplemented by rational choice to account for change (Hurd 2007; Abbott and Snidal 2013: 40-42). As I have proposed, shifting understandings of national sovereignty and identity can be used to account for change. I have depicted two forms of dynamism in constructivist theories of change in this chapter: legal norm adaptation and contestation. Both accept that norms are dynamic. During norm adaptation, the normative community incrementally adjusts rules through a collective learning process. A theory of legal norm contestation is more fundamental and turns to what some call the domestic determinants of change (Reus-Smit 1999; Risse et. al. 1999). Sikkink, for example, highlights the importance of finding a constructivist theory of agency whereby actors engage in the “alchemy of agency”: “actors do not mindlessly enact or perform scripts, they question them… Entrepreneurs often fuse older ideational structures with recent ideas to create something new” (2011: 12). This dynamic interaction speaks to the legal norm governing the right to seek asylum as underpinned by an evolving set of rights for refugees and rules of national sovereignty.

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24Brunée and Toope’s Interactional Theory of International Law is the most recent statement linking constructivism to more normative and explicitly legal criteria.
3.1. Introduction

From the Second World War through the late 1990s, Australia became an active participant in the international refugee regime. This regime was responsible for creating a universal right for all individuals to seek asylum abroad. The most visible indications of the legal right’s ascendance were the promulgation of the 1951 Convention and its 1967 Protocol Relating to the Status of Refugees. Because I am using a constructivist theoretical lens, I refer to this right as the legal norm governing the right to seek asylum. Through this lens, we can see how the shared understandings, rules, and practices of the legal norm developed and adapted in a gradual and incremental manner over time. To be sure, it was not until the late 1970s that a coherent interpretation of the legal norm governing the right to seek asylum took hold. Prior to this point, there was little understanding among liberal democracies about how to implement their legal obligations. According to this interpretation, all states were expected to develop in-country asylum systems that would receive and process asylum seekers in-country. Expectations also developed that determined refugees would be locally integrated with the offer of permanent residence. Australia accepted this interpretation as a member of an expanding normative community governing refugee protection. But Australia was also part of a more focused normative community of liberal democratic states with acquired liberal identities responsible for governing migration as a matter of national sovereignty. It is within these normative communities that Australia was involved in an ongoing process of deliberation and the exchange of experiences and policy practices.
In this chapter, I argue that the development and adaptation of the legal norm influenced Australia’s response to asylum seekers and particularly boat arrivals. I articulate this explanation through an evaluation of the legal norm’s development and adaptation alongside changes to Australia’s beliefs and policy moves regarding asylum and border control. I focus my attention on four key periods: the 1951 Convention conference; the expanding refugee regime during the 1960s and 1970s; the response to the Indochinese boatpeople during the late 1970s; and the development of new control practices during the 1980s and 1990s. I am interested in how Australia understood its normative context during each of these four periods. Australia’s interactions with the UNHCR and its participation in what would eventually become two separate but overlapping normative communities were important features in shaping how Australia understood refugee movements and the policy practices meant to respond to them. The argument outlined here provides a more complete explanation for Australia’s response to boatpeople and its major asylum and border control policy practices compared to contending explanations about domestic politics or rising levels of migration. I also make a modest attempt to compare arguments about Australia’s adherence to the legal norm based on a sense of legitimacy and appropriateness versus reputation and self-interest.

3.2. Australian National Sovereignty and the Emerging Right to Seek Asylum in International Law

Australia was the sixth country to accede to the 1951 Convention Relating to the Status of Refugees in 1954. But Australia’s support for the Convention came with some caveats. It did not anticipate that the rules around asylum seeking contained in the Convention would influence its ability to control its borders. The Convention only applied to refugees in Europe as a result of events occurring prior to 1951. Australia acceded to the rules of the Convention, but this was done
on the premise that the rules would not limit its ability to control entry and maintain its racially discriminatory immigration program. If and when the rules around the right to seek asylum conflicted with Australia’s sense of national sovereignty, it appeared to be prepared to withdraw its support. That said, Australia supported the humanitarian agenda of the refugee regime and was willing to serve as a country of resettlement but did not see itself as a country of asylum and a receiver of direct arrivals of refugees. Considering the arc of this investigation, Australia’s participation in the 1951 Convention conference reveals an interpretation of the right to seek asylum informed by national sovereignty in its most naked form. These insights are supported by evidence found in secondary material and the National Archives of Australia (NAA).

By the early 20th century, Australia saw control over immigration and its borders as synonymous with national sovereignty. Yet Australia depended on immigration for its development and is described as a prototypical “settler society” (Freeman 1995).25 At this time, Australia’s immigration policy was highly selective and racially discriminatory: British first, continental Europeans if necessary, and absolutely no Asians.26 This hierarchy was not merely a preference. Australia saw it as a matter of national survival. As a remote outpost of the British Empire settled by British colonialists, Australia’s national identity was shaped by its sense of geographical and cultural isolation. In his book, Fear of Security: Australia’s Invasion Anxiety, Australian historian Anthony Burke identifies the rise of Australia’s sense of self alongside a perception of a threatening other (2001). Australia was concerned about European powers in the region during the 19th century, but it was its fear of Asians, Burke argues, that shaped Australia’s

25The positive narrative around immigration is reflected in the country’s national anthem: “Advance Australia Fair” written in 1878 which includes the following line: “For those who come across the seas, we’ve boundless plains to share”.
26It is little surprise then that once Australia achieved formal statehood in 1901, one of the first initiatives the new government undertook was to pass the Immigration Restriction Act of 1901, otherwise known as the White Australia policy.
understanding of national sovereignty.

Australian national sovereignty was closely linked with maintaining firm control over immigration policy as a matter of nation building. This powerful linkage was legally recognized in 1906 with the landmark case of *Robtelmes v Brenan* mentioned in the introduction. The framers of the refugee regime realized that states would continue to demand control over the admission of foreigners; so the rules governing the right to seek asylum were designed to accommodate this form of movement by limiting, but also acknowledging, the sovereign right of states to control their borders. Australia’s participation in the Convention conference reveals a clear concern for this understanding of national sovereignty; its acceptance of the 1951 Convention was based on its ability to continue maintain control over its immigration program.

There were a number of precursors to the 1951 Convention that set the context. Following the Bolshevik Revolution, the First World War, and nationalist movements throughout Europe, states developed a shared understanding about the need for creating a special category of persecuted international migrant: the refugee (Hathaway 1984: 348). There were several international refugee treaties and organizations created from 1919 to the late 1940s. The 1933 Convention was the first instrument articulating the importance of not returning refugees to a place of persecution (*non-refoulement*) and served as a model for the 1951 Convention (Orchard 2014: 116-117). After the Second World War, states and the newly created United Nations (UN) created the UN Relief and Rehabilitation Administration (UNRRA) and the International Refugee Organization (IRO) to resettle European refugees and displaced persons. But the UNRRA and the

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27 Though I do not engage with a comparative study, Jupp goes further and states that Australia was unique among other settler societies like Canada and the US because of the pronounced role of the state in the planning and implementation of immigration policy (2007: 1). For instance, in *Tyranny of Distance*, the Australian historian Blainey states that because Australia had to compete with Canada and the US for immigrants, the state was involved in effectively recruiting and paying prospective migrants to come to Australia (1966: 153-155).

IRO proved to be temporary institutions.

Australia supported international efforts to respond to refugees but only as a country of resettlement and not asylum. Admirably, it accepted some 15,000 Jewish refugees from Europe in 1938, which is in contrast to the US and Canada (which rejected Jewish refugees). By the end of the War, Australia involved itself in the work of the UNRRA and IRO. Its most important contribution to the emerging regime was its acceptance of some 200,000 European “refugees and displaced persons as prospective migrants”. Australia did provide asylum on rare occasions, but it was not clearly informed by international law. Indeed, for the Australian historian Klaus Neumann, refugees had a better chance of being accepted for permanent residence by Australia if they could convince officials that they met immigration criteria. During the Second World War, Australia accepted about 15,000 asylum seekers (including some 6,000 Asians) but it fully expected them to return home after the war (Neumann 2015: 70).

The story behind Australia’s large resettlement program appears to support the narrative of national sovereignty rather than any sense of legal obligation to the right to seek asylum. The 1951 Convention was not in place when Australia initiated its resettlement program. Australia treated resettlement as an immigration program and had complete control over who was selected (in contrast to how UNHCR has significant sway over refugee resettlement today). Australian politicians and the public saw mass European migration as necessary for economic expansion. But Australia also saw it as a matter of national survival. During the Second World War, Australia experienced Japanese attacks on Darwin and Sydney and its traditional protector in the region, the

29Recommendations adopted by full Inter-Department Committee on Migration. 5 October 1944, NAA: A461, A349/1/2 Part 5.
British Navy, failed to provide assistance evoking feelings of vulnerability and resentment. Australia’s first Immigration Minister Arthur Calwell promoted mass migration as a matter of national survival:

There is no need for nations to the north of us to cast covetous eyes on Australia and fight a way into it if the present trend continues, because they need wait only a generation or two until we are so reduced in numbers that they will be able to walk into Australia in much the same way as Captain Cook did 150 years ago against the boomerangs and spears of the aborigines (Calwell 1941: 416).

Calwell dramatically called for a mass immigration program and promoted it using the slogan “populate or perish”. He told parliament that Australia would not be a “white man’s country” unless it had a population of 40 million (Calwell 1942: 624). The IRO’s resettlement scheme was also cheaper than Australia’s traditional assisted passage program because of the IRO’s large fleet of ships. Australia and the IRO screened those resettled not according to any criteria defining a refugee but by their ability to take up a two-year work contract and to settle as permanent immigrants (Price 1998: 117).

By 1949, the UN tabled a report noting that new refugee crises were emerging and called for "a permanent international machinery" made up of an organization capable of operational support and a convention that could ensure legal protection for refugees in their countries of asylum (United Nations 1949: 73-74). Donald Kingsley, Director-General of the IRO, argued that the refugee “situation demanded a new organization corresponding to the facts” because refugees would lose protection once the IRO shutdown (Holborn 1975: 38-39). In December 1949, the UN General Assembly created the High Commissioner’s Office for Refugees on 1 January 1951 and Australia supported the initiative. At the same time, states began negotiating the Convention on

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30Australian perceptions of being exploited or abandoned by the British first emerged following the Gallipoli campaign during the First World War (Thomson 1993) and again during World War Two following Churchill’s Australia.
the Status of Refugees (Orchard 2015: 180-183). The 1951 Convention complemented Article 14(1) of the Universal Declaration on Human Rights from 1948. The Convention’s legal provisions raised many specific questions about the rules governing the right to seek asylum and how it would operate in practice. The Convention was silent about what practices should be used to implement the rules, who should provide refuge, and with what resources. The secondary literature and archival material provide an indication of Australia’s firm commitment to control entry as a matter of national sovereignty and lack of interest in the details of asylum law contained in the instrument.

Though Australia was one of the first states to accede to the 1951 Convention, it did not see the relevance of asylum law for its situation. The instructions to the Australian delegation to the 1951 Convention conference began with the following premise:

The draft convention is not of direct value to Australia since it does not result in a reciprocal exchange of benefits with other countries and it does not give benefits of any section of the Australian community which it does not already enjoy… the traditional refugee problem does not touch Australia closely. Traditional rights of asylum developed in Europe among countries with contiguous (borders). There have been isolated cases of asylum for Asians during the war, but it would be contrary to immigration policy to have a binding obligation written into the convention to accept the principle.

On the surface, nevertheless, the Australian delegation was instructed to avoid proposing amendments that would “offend Asian countries” and to play a positive rather than obstructionist role.

The instructions to the delegates and the notes of the delegation at the conference reveal Australia’s interest in retaining national sovereignty. The 1951 Convention’s long list of human

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31 Everyone has the right to seek and to enjoy in other countries asylum from persecution.
rights concerned Australia because it believed it could interfere with its two-year fixed work program for the 200,000 or so resettled Europeans. Australia, therefore, entered interpretive reservations to articles related to freedom of movement and employment (Article 17, 18, 19, and 26) and substantive reservations to the issuance of travel documents (Article 28) and the non-expulsion of refugees (Article 32).

Most of Australia’s concern focused on the application of the 1951 Convention. There were at least two drafts of the Convention, one with a narrow application and another with a universal application. If the universal application was accepted, Australia was worried that it could interfere with its White Australia policy. Delegates noted that the universal application “would be a direct negation of the immigration policy followed by all Australian Governments since Federation”.

Consternation was also evident around the negotiation of Article 31 that forbid states parties from imposing penalties on refugees who entered the country illegally. When Australia read this article against the broad application of the Convention, the delegation stated that it proved “wholly unacceptable” because of the possible influx of refugees from Asia:

I consider that the right to impose penalties upon unlawful entries whether refugees or otherwise could serve as a very strong deterrent against any mass entry of refugee migrants who could thereby secure virtually permanent residence without any penalty.

As the only liberal democratic state country located in the Asian region, the possibility that Australia might face a surge of refugees and migrants was reasonable. There were several million refugees in Asia as a result of a newly consolidated People’s Republic of China (PRC) and the

35 The article was seen as important because “a refugee whose departure from his country of origin is usually flight, is rarely in a position to comply with requirements of legal entry (possession of national passport and visa) in the country of refugee” (UN 1950).
36 Cable from delegation, 11th July 1951, NAA A1838 50/7/485.
recent partitioning of India and Pakistan.

Over the course of negotiations, some changes put the Australian delegation at ease and enabled them to support the Convention. Australia was not the only country concerned about the implications of Article 31. The French representative argued that the Article should not cover those who had already “found asylum… to move freely from one country to another without having to comply with frontier formalities”.

France was concerned that refugees located in Belgium might attempt to enter France: “To admit without any reservation that a refugee who had settled temporarily in a receiving country was free to enter another, would be to grant him a right of immigration which might be exercised for reasons of mere personal convenience”. When finally adopted, Article 31 included the important qualification “coming directly from a territory where their life or freedom was threatened in the sense of Article 1”. This inclusion balanced asylum and migration for the time being but tension would re-emerge later in discussions about secondary or onward movement.

There was also a decision made to geographically and temporally limit the Convention’s application to events occurring in Europe prior to 1951. Once it became clear that a broad definition would be abandoned in favor of a narrow one, Australia expressed its relief:

The most noticeable trend is the feeling that something might be done about amending Article 1… which provides that only those people who were refugees as a result of events occurring “in Europe” prior to the first of January 1951 should come within the scope of the convention. It will be remembered that it was the omission of the words “in Europe” which made the Convention quite unacceptable to us from the point of view of restricted migration and the White Australia policy since it opened the door to refugees from Communist China, India, Pakistan, and Indonesia.

38 Ibid. Other delegates, including the Danish representatives and High Commissioner for Refugees himself, argued that there might be good causes for refugees to leave a country of first asylum (Goodwin-Gill 2003: 192) but he French intervention held sway.
39 Cable from delegation, 11th July 1951, NAA A1838 50/7/485.
With the narrower definition secured, Australia saw the Convention as less threatening because of its limited coverage.

Australia’s support for Article 33 (non-refoulement) also revealed its adherence to the national sovereignty position. The non-refoulement obligation had the clearest potential to place a limitation on Australia’s ability to control its borders and returning refugees to persecution was seen by observers as “an exceptional limitation of the sovereign right of states to turn back aliens to the frontiers of their country of origin”. All participants acknowledged Article 33 as the crucial obligation. Because of the temporal and geographical limitations on the 1951 Convention, Australia did not see the 1951 Convention as imposing unduly on its national sovereignty and supported the Article. Australia noted that it “expected [the Convention] to operate so as to exclude most persons arriving in Australia seeking asylum”. The delegation stated that, “being a sea-girt country which a refugee could reach only after a long sea or air voyage, the Article was considered to have only very slight application [to Australia]”.

Australia’s support for the 1951 Convention and the emerging right to seek asylum seems remarkable considering it did not see the instrument as relevant to its situation. The legal norm governing the right to seek asylum was geographically and temporally limited. Yet Australia neither anticipated, nor wanted, the provisions contained in the Convention to limit its ability to pursue its White Australia policy and exclude both refugees and immigrants from its territory. Though we cannot know for certain, evidence of Australia’s internal conversation from archival

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40The French word was preferred over the English word “return” because it captured the actual meaning more precisely.
41Remark made by the Israeli delegate, Nehemiah Robinson. Ad Hoc Committee on Statelessness and Related Problems. First Session, 20th meeting. E/AC.32/SR.20, para 49.
43Heyes to Secretary, Department of External Affairs, 26 July 1954, NAA A1838 66/3381.
material suggests that Australia would likely have not supported a more universal right to seek asylum. The national sovereignty to control its immigration program appeared to be its most central concern during negotiations. Australia’s support for the Convention was primarily based on its sense of international solidarity. It saw itself as a country of resettlement and did not expect nor intend to accept responsibility for providing asylum.

3.3. Universalizing the Right to Seek Asylum and Australia

Over the next twenty years, the refugee regime evolved from a regional and temporally limited set of rights and responsibilities into a universal legal norm. This evolution was most visibly represented through the promulgation of the 1967 Protocol that Australia formally acceded to in 1973. Australia’s accession effectively meant that it was formally obliged to provide access to asylum for refugees arriving from Asia. Given the resistance voiced by Australia to a universal legal norm during the 1951 Convention conference, this apparent transformation in preferences was impressive. This section examines how the evolving shared understandings and practices around the right to seek asylum slowly influenced Australia’s asylum and border control policies. First, the UNHCR’s entrepreneurialism from the 1950s to the 1970s won the trust of states and was essential in universalizing the legal norm. During these years, UNHCR interacted with Australia regarding the implementation of the 1951 Convention. While the agency’s persuasive ability was an important feature of this story, the promulgation of the legal norm also benefitted from a receptive international political climate. Specifically, the growing human rights regime and decolonization created socialization and reputational pressures that compelled Australia to liberalize its immigration policy (Tavan 2005). I argue that this liberalization made the formal acceptance of a universal right to seek asylum possible.
The participants at the 1951 Convention agreed to a legal document that temporally and geographically limited the application of refugee rights. But the first four UN High Commissioners for Refugees understood the refugee problem differently: “They saw it as ongoing and global and sought to move the agency away from a Eurocentric focus and to engage with the developing world” (Orchard 2014: 190). The agency began as a small office with an annual budget of $300,000 (USD) and faced stiff institutional competition during the 1950s, particularly from the Intergovernmental Conference on European Migration (ICEM) created in 1951 or what would later become the International Organization for Migration (IOM). The United States favored the ICEM and empowered it with more financial support than the UNHCR during these years. Gradually, however, the UNHCR won the confidence of states by responding effectively to refugee emergencies in Europe (Germany, Hungary) and outside of Europe (Algeria, Tunisia, China-Taiwan) through its “good offices” and by appealing to states’ self-interest (Loescher 2001: 83-86, 93). In 1959, the United Nations General Assembly (UNGA) removed the stipulation that the agency required authorizations on a case-by-case basis to use its “good offices” mandate, thereby achieving a degree of autonomy. The UNHCR also took steps to broaden the application of the right to seek asylum. By the late 1950s and into the 1960s, it used its supervisory responsibility under paragraph 8(a) of its 1950 Statute to promote a universal legal norm. The agency became responsible for stateless persons and instigated and “promoted” the multilateral

44Good offices” was a concept initiated by High Commissioner Lindt that allowed UNHCR to assist refugees who fell outside the Convention but within its Statute and where the issue was of concern to the international community. It also allowed the office to make prima facie determinations (Goodwin- Gill and McAdam 2007: 24).
458(a): “Promoting the conclusion and ratification of international conventions for the protection of refugees, supervising their application and proposing amendments thereto.”
46Stateless persons were ascribed rights under the 1954 Convention on the Status of Stateless Persons followed by the 1961 Convention on the Reduction of Statelessness.
agreement on refugee seamen.\textsuperscript{47} The agency also tried but failed to include the “right to asylum” in the International Covenant on Civil and Political Rights (ICCPR) of 1966.

The UNHCR was responsible for overseeing the implementation of the 1951 Convention and extended its activities into the domestic spheres of individual states. States developed relationships with UNHCR representatives in their countries and saw them as possessing expertise and knowledge about refugee law. They began to defer to the agency on legal and procedural questions. During the 1950s and 1960s, Australia developed close relations with the agency, engaged in legal interactions, and worked to integrate protection practices into its normal immigration and border control functions.

The agency appointed its first representative to Australia in 1956. The High Commissioner instructed his Australian representative to be “responsible for liaison with Government authorities, the coordination of voluntary agencies’ activities in the field of refugee resettlement, and fund-raising activities in Australia and New Zealand”.\textsuperscript{48} At first, Australian officials were reluctant about the agency setting up an office there. The Minister of External Affairs commented to the Immigration Department about UNHCR’s presence in Australia: “This seems overdoing it – but I suppose it is their affair and not ours and we can do nothing but agree” (Neumann 2006: 71).\textsuperscript{49} By the 1960s and 1970s, a positive working relationship emerged. In 1963, High Commissioner Schnyder awarded Tasman Heyes, the former Secretary of the Immigration Department, with the Nansen Medal\textsuperscript{50} for overseeing the resettlement of roughly 300,000 displaced persons from Europe and for the role Australia played in the field of international cooperation (Canberra Times 1963).

\textsuperscript{47} The Conference on Refugee Seamen was held in November 1957 and negotiated the Hague Agreement on Refugee Seamen.

\textsuperscript{48} P.R. Heydon to Minister, 15 January 1959, NAA: A1838 861/8/5/3.

\textsuperscript{49} Casey to Heydon, 20 January 1959, on P.R. Heydon to Minister, 15 January 1959, NAA: A1838 861/8/5/3.

\textsuperscript{50} The Nansen Medal is awarded each year by the UNHCR to an individual, group, or organization in recognition of outstanding service to the cause of refugees, displaced or stateless people.
In a lead up to Schnyder’s arrival, Australia reciprocated by removing five of its seven reservations to the 1951 Convention.51

Through the 1950s into the 1970s, there were subtle but emerging practices around the legal norm governing the right to seek asylum. Australia set up an evaluation process for potential asylum applicants during the 1956 Olympics in Melbourne, but these individuals were treated as “defectors” who could serve intelligence and propaganda purposes, rather than “refugees” who claimed persecution on Convention grounds (Palmer 2006: 578). By the 1960s, politicians and bureaucrats began referencing the 1951 Convention in their discourse. For example, when a deportation order for three Portuguese sailors came to the public’s attention in 1962, a number of MPs intervened to block the action citing the definition of a refugee in Article 1 of the 1951 Convention: “It is a proud tradition of this country that we were willing to offer asylum where a person’s life is in danger because of his race, religion, nationality, or political opinions” (Nelson 1962). External Affairs Minister, Barwick stated that each sailor should be assessed according to his “political background” and “whether or not he would be penalized by his own Government for his political beliefs, should he be returned to his country of origin”52. The sailors were allowed to remain in Australia.

There were also cases in which Australia’s practices were more questionable but nevertheless, asylum law was cited and appeared to influence officials. The archival record describes an exchange involving a difference of legal opinion between the UNHCR and the Australian bureaucracy over the correct interpretation of Articles 32 and 33 of the 1951 Convention.53 In February 1968, Australia sent a cable to the UNHCR informing it of its

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51 Lyons to Secretary, Department of Immigration, 3 June 1963, NAA A432 1974/11015, Part 1.
52 Landale to Secretary, p2, 12 February 1962, attachment to Tange to Minister, 20 February 1962, in Palmer 2006: 579.
53 The interaction involved two “Yugoslav nationals” who were recognized as refugees in Italy then traveled to
deportation of two Yugoslavian men and its interpretation of the relevant articles of the 1951 Convention in carrying out the order. The agency replied in March stating that the UNHCR’s interpretation of these two articles “appears to differ” from the interpretation of the Immigration Department. The response caused the Immigration Department a pause for reflection. It requested clarification from the Attorney-General’s Department about its interpretation of these Articles. After a lengthy reply and explanation revealing its understanding of the details and relationship between these two Articles, the Attorney-General’s Department recommended that “UNHCR’s interpretation was to be preferred” and that the Immigration Department should accept this. Though Australia may have been wrong in deporting these two individuals, the process of using the 1951 Convention, requesting clarification from the UNHCR, and accepting their interpretation indicates Australia’s deference to UNHCR and that the legal norm was at play.

States do not just defer to norm entrepreneurs because of their expertise but often because of the uncertainty of a particular situation. One revealing example of the integration of asylum practices into Australian discourse and behavior was an unusual situation that occurred from 1962 to 1973. Decolonization and the Dutch withdrawal from Indonesia meant that Indonesians were now in control of the vast archipelago. In the remote region of West Papua, Indonesian officials led a violent crackdown on political dissidents there. Approximately 4,000 to 4,500 West Papuans crossed the border into the Australian governed territory of Papua New Guinea during these years (Palmer 2006: 584). Australia developed a policy to respond to these “border crossers”. It

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Australia. They were then convicted of a violent criminal offence in Australia and deported back to Yugoslavia when the Immigration Minister determined they would not face persecution there.

*The UNHCR maintained that Article 33 is applicable to all cases involving the forced repatriation from any country that is a party to the Convention and not only to individuals who arrived directly from a place of persecution.

**Hook, Attorney General’s Department to the Secretary of the Department of Immigration, August 1968, NAA: A432 66/33381; A.H. Body deputy Secretary of the AGD to Immigration Department, August 1968, NAA A432 66/33381.
interviewed border crossers and provided those in danger with temporary protection. Australian officials hoped to keep the matter quiet so as not to alert domestic rights groups, the UNHCR, or embarrass the newly independent government of Indonesia. It was a delicate situation that was contained for three years until the UNHCR got word of what was happening in 1965. Australia urged the agency to keep the matter quiet. Despite some internal debate, the UNHCR sympathized with Australia’s concerns and acquiesced on the one condition: that Australia provide the agency with regular briefings on the details of the arrivals and their reception. Australia agreed.

The attention from UNCHR appeared to have an impact. Several months after Australia announced its asylum procedures in Papua New Guinea to parliament:

Every person crossing the border into PNG is to be interviewed and if he can give no reasonable grounds on which he could claim special consideration for granting permissive residence in PNG, he is to be fed, well looked after, and returned across the border as expeditiously as practicable. Any apparent case for consideration as political refugees are to be closely questioned and reported on, and held for the time being at a nearby border station pending decision (Palfreeman 1970: 59).

Though the statement did not mention the 1951 Convention, asylum, or protection, Australian briefings to the UNHCR became increasingly detailed during the late 1960s and early 1970s regarding the conditions in which West Papuans were cared for. In 1969, Australian officials described the treatment of West Papuans and how these conditions adhered to various Articles in the Convention: accommodations in one of several open detention facilities in Papua New Guinea, access to permanently constructed timber barracks (Article 21-Housing); access to medical support (Article 23-Public Relief); full rations (Article 20-Rationing); and suitable employment and productive work (Articles 17, 18, and 19). By 1973, more than 500 West Papuan refugees were

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58Outward Cablegram from External Affairs to Australian Consulate General Geneva, 2 July 1969, NAA:
living in Papua New Guinea on five-year permits.59

Scholarly accounts of Australia’s response to the West Papuans are typically critical stating how Australia violated the 1951 Convention. They point to the opaqueness of the determination system, low recognition rates, and occasional collaboration with Indonesian officials (Neumann 2004: 72-74; 2006: 76; Neumann and Taylor 2010: 9). These were concerns, no doubt. But it was reported that by 1970, Canberra was refusing to exchange intelligence with Indonesia and asserted its right to grant protection to any it thought had sufficient grounds for refugee status.60 Indonesia also proposed the creation of “zones of hot pursuit” to allow it to apprehend asylum seekers but Australia rejected that plan.61 Of particular relevance, Australia had yet to accede to the 1967 Protocol. So, if we conceive of international law as confined strictly to formal instruments, we should be surprised that Australia engaged with the 1951 Convention to deal with refugees from Southeast Asia at all. Australia’s formal obligations to the 1951 Convention continued to have temporal and geographical limitations, but these emerging legal practices suggest that Australian officials were influenced by the growing regime and the UNHCR’s entrepreneurialism.

The UNHCR’s most visible success during these years was the formal universalization of the legal norm governing the right to seek asylum. In 1962, High Commissioner Schnyder drew states’ attention to the disparity in levels of support provided to “old” refugees in Europe as opposed to the “new” refugees in the developing world (Jackson 1999: 102-106). He even argued that the “old” refugee caseload had been solved and “new” refugees in Africa and Asia should

become the major concern for the UNHCR. Charles Schnyder warned that the regime was perceived as Eurocentric and could fragment into varying regional responses more in line with the views of these countries. The UNHCR initiated a conference in Belagio, Italy and a Protocol was agreed to that removed the temporal and geographical limitations of the 1951 Convention. The UNGA approved the Protocol in December 1966 and the instrument entered into force in 1967. Some criticize the Protocol as simply universalizing a Eurocentric conception of a refugee (Lentini 1985; Zolberg et. al 1989; Hathaway 1991). However, others say the Protocol ensured that the Convention had “a more legitimate claim to universality” and wider global acceptance (Smyser 1987: 13). Indeed, states now formally acknowledged that they were prepared to receive refugees from outside of Europe. Whether they would be recognized as refugees according to the 1951 Convention was another matter.

Australia acceded to the 1967 Protocol in 1973. According to Australian historian David Palmer (2006), no significant objections to accession were voiced. How can we account for this unproblematic acceptance of a universal right to seek asylum given the deep concerns the Australian delegation had during the 1951 Conference about potential influxes of Asian refugees? The bureaucracy stated reasons for accession including eliminating the discrepancy between the 1951 Convention and the UNHCR’s Statute, strengthening Australia’s claim to interest in the

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62 There were Angolan refugees in Tanganyika, Uganda, Burundi, and the Congo. By the mid-1960s, UNHCR was also providing assistance to refugees from Portuguese Guinea in Senegal, refugees from Mozambique in Tanzania, Zambia, Kenya, and Swaziland, refugees from Sudan in Uganda, Ethiopia, the Central African Republic and Congo, refugees from the Democratic Republic of Congo in Zambia, refugees from Burundi in Rwanda, and refugees from Ethiopia in the Sudan. In Asia, UNHCR was assisting Chinese in Hong Kong and Macao, Tibetans in India and Nepal, and Indochinese refugees fleeing colonial France due to independence struggles. Completion of Major Aid Projects- New and Revised Projects; Report submitted by the High Commissioner to the Second Special Session, 1964: UN doc. A/AC.96/218, p1;
63 The Organization of African Unity would eventually negotiate their own Refugee Convention by 1969; Asia and Latin America also saw the Convention as at odds with their specific needs (Davies 2007: 715-719).
welfare of refugees, avoiding accusations of racism, and encouraging further accessions (302). In Palmer’s interpretation, Australia’s fear of an influx of Asian refugees was likely put at ease because the Convention’s founders stated that the principle of non-refoulement did not apply to situations of mass migration (Robinson 1953) a position reiterated in the 1967 Declaration on Territorial Asylum. But it is surprising that Australian officials did not voice opposition based on the White Australia policy.

The reason for this lack of opposition to a universal right to seek asylum was in no small part due to the liberalization of Australia’s immigration policy. During the 1950s and into the 1970s, both major political parties took steps to abolish the White Australia policy and liberalize Australia’s immigration system. Tavan provides a thorough account of this process (2005) and similar developments occurred in the U.S. and Canada (Triadafilopoulos 2010). The basic argument behind these accounts was that following the Second World War a new normative context emerged in which ideas about racism and colonialism were delegitimized and replaced with ideas about human rights and decolonization. Australia, but also the U.S. and Canada, were compelled to accept these new ideas and normative structures through various pressures like international trade relationships, reputation, and domestic activists. Placed within this context, Australia’s formal accession to the 1967 Protocol in 1973 was one outcome in a larger liberalization process occurring in Australia during these years.

Gough Whitlam became leader of the Australian Labor Party (ALP) in 1967 and formally liberalized the party’s platform. Whitlam was a product of the reform movements of the 1960s, an anti-colonialist and liberal internationalist. He was instrumental in dropping “White Australia”

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65 Article 3(2), 1967 UN Declaration on Territorial Asylum: “Exception may be made to the foregoing principle only for overriding reasons of national security or in order to safeguard the population, as in the case of a mass influx of persons.”
from the party’s platform and officially adopted multiculturalism in 1971 (Tavan 2005: 192).

When elected Prime Minister in December 1972, he stated his liberal worldview:

    Our thinking is towards a more independent Australian stance in international affairs and towards an
    Australia which will be less militarily oriented and not open to suggestions of racism, an Australia
    which will enjoy a growing standing as a distinctive, tolerant, cooperative, and well regarded nation
    not only in the Asian and Pacific region but in the world at large (Whitlam in Hawkins 1989: 94).

Whitlam was rhetorically and symbolically ambitious. Calling the Immigration Department
outmoded, outdated, and “incurably racist” he even merged it with the Department of Labour
(Whitlam 1985: 503). Whitlam’s Minister responsible for Immigration, Al Grassby, declared in
1973 the White Australia policy “is dead… give me a shovel and I will bury it” (Tavan 2004: 564).
Grassby later recalled in an interview,

    the decision to abolish all forms of discrimination in every aspect of public life, that was done very
    publicly… it was known to all concerned, particularly those who didn't approve. First of all, we had
    a great deal of pride in abolishing racial discrimination and secondly, we wanted to tell our neighbors
    (Grassby in Tavan 2005: 203).

    During Whitlam’s brief three-year tenure, the government entered into over 133
    international treaties, including fifteen significant human rights treaties (Kirby 2010: 3-7).
    According to retired High Court of Australia judge, Michael Kirby, Whitlam saw the enactment
    of international law in domestic legislation as a way to amend an out of date Australian
    Constitution (2010: 71-72). For Tavan, Whitlam faced little resistance because most Australians
    had come to accept that a measure of non-discrimination in immigration policy was now inevitable
    and even desirable (2005: 210-211). Conservatives also acknowledge Whitlam’s importance in
    Australia’s development. Paterson, deputy executive of the Australian conservative think tank, the
    Institute of Public Affairs noted that “No prime minister changed Australia more than Gough
    Whitlam. He was a transformative prime minister” (Bagshaw 2014). Australia’s liberalization
transformation gained further momentum during the late 1970s and early 1980s.

The rise of international human rights norms during the 1960s and 1970s and the influence they had on Australia reflect more of a socialization dynamic than the dialogic process of interest here. Consider the counterfactual. If Australia had not liberalized its immigration policy, it would have faced mounting tensions with its regional neighbors, more accusations of racism, and domestic political movements all of which involved clear material costs. Socialization involves a different dynamic compared to how persuasion occurs. Persuasion involves the importance of quality of the arguments, the perceived expertise of the entrepreneur or normative community, and the discrete nature of the interaction. Nevertheless, it would be unwise to ignore the liberalization of Australia’s immigration policy as an outcome of socialization. This development undoubtedly influenced Australia’s ratification of the 1967 Protocol. A revealing piece of evidence was the final decision to ratify the Protocol. To celebrate the 25th anniversary of the Universal Declaration on Human Rights, Whitlam was set on making Australia party to as many human rights instruments as possible by December 1973. As an indication of his motivation but lack of specific understanding of refugee issues, Whitlam wrote a note to the Foreign Affairs Minister in December and scrawled in the margins “Ratify 1951 Protocol!” [and not Ratify the 1967 Protocol] (Palmer 2006: 304). On December 13th, 1973, Australia formally acceded to the 1967 Protocol and signaled its acceptance of a universal legal norm governing the right to seek asylum.

Within the context of these larger developments occurring during the 1960s and 1970s, the legal norm governing the right to seek asylum was universalized through the 1967 Protocol. This development fits the assumption of legal norms as dynamic. The UNHCR and Australia exhibited

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Socialization generally focuses on how reputational pressures come to bear on an actor for reasons related to his/her sense of esteem and even self-interest. Checkel once remarked that it would not be inaccurate to characterize constructivist research that looks at socialization theories as thin rational choice (2001: 558).
a degree of reciprocity in their relations and Australia appeared to learn about asylum rules in the process. The bureaucracy now considered asylum law in executing immigration decisions and developed an informal reception system in PNG that acknowledged some protection principles. I should restate again, though, that these were very modest developments. Australia was not a receiver of significant numbers of asylum seekers and receiving boatpeople was not a public discussion. But the legal norm now appeared to influence Australia’s asylum and border control policy placing at least some limitations on its national sovereignty to control its borders. However, the major premises of the legal norm had yet to be fully accepted by Australia. Australia did not have a formal and transparent onshore asylum system that involved refugee status determination (RSD) and there was no convergence about whether refugees were to be provided with temporary or permanent residence.


Australia’s response to the Indochinese boatpeople during the late 1970s crystallized its understanding of the right to seek asylum and a coherent interpretation of this legal norm. By 1978, Australia established a formalized onshore RSD system and began offering determined refugees permanent residence. Oddly, many scholars explain Australia’s creation of an onshore reception system as an attempt to appease domestic pressure for controls and even as a deterrent to further boat arrivals from Indochina (Vivani 1984: 80; Stevens 2012: 532; Crock and Martin 2013: 141; Stats 2015; Neumann 2015). But a better explanation treats this development as part of a larger process of legal norm development. Australia’s establishment of an onshore asylum system represents an instance of both adherence to the existing legal norm and an extension and further clarification of it. Prior to this point, Australia understood it was responsible for observing asylum
law, but there was no formal system for determining refugee claims. There was also no belief that
refugees should be provided with permanent residence and temporary entry visas were the default
position. This situation changed from 1976 to 1981: Australia established an onshore status
determination system and began to offer permanent residence visas to those found to be refugees.
I gather evidence to support my argument from these secondary sources. Higgins is particularly
comprehensive with her use of NAA documents (2017; 2016). I supplement these sources with
some primary material of my own.

After the collapse of the South Vietnam in 1975, the communist regime began imposing its
authority over Vietnam. Many were sent to re-education camps and forced to endure indefinite
detention, hard labor, and restricted access to food and other necessities. Ethnic Chinese were often
the targets of nationalization policies and were placed in New Economic Zones (UNHCR 2000:
80-84). The Indochinese refugee saga would last for more than 20 years and lead to the
displacement of some 3 million people and the resettlement of more than 2.5 million in North
America, Australia, Europe, and the People’s Republic of China (PRC) (UNHCR 2000: 81, 102).
From 1976 to 1981, Australia received 2,059 Indochinese on 50 boats (Stevens 2012: 528) and the
prospect of tens of thousands of arrivals was discussed in public and within government. The
arrival of boatpeople started in 1976 with 111 people, rising to 868 in 1977 before falling to 746
and 304 in 1978 and 1979 respectively (Phillips and Spinks 2013: 22). It is within this context that
Australia established its onshore asylum system.

Despite its liberal internationalism, the Whitlam government resisted calls to resettle
Indochinese refugees in 1975. But the Liberal National Coalition (LNC) Fraser government came
to power in late 1975 and took a more sympathetic approach. In May 1977, Immigration Minister
Michael MacKellar announced Australia’s first formal refugee policy. Some argued that
Australia’s refugee policy was designed to meet domestic political interests around appeasing public calls for control and sending a message of deterrence. However, evidence reviewed here suggests that this explanation is too narrow. Australia’s policy changes were at least as much about implementing its legal obligations to the 1951 Convention and the 1967 Protocol. Australia had already received boatpeople from Indochina, but the majority of the Ministerial statement focused on Australia’s commitment to an ongoing resettlement program for individuals that met the refugee definition in Article 1 of the 1951 Convention. MacKellar described how those not falling under Article 1 but nonetheless faced with significant hardship could also be resettled. While Australia resettled refugees in line with its immigration criteria prior to this, the statement indicated an approach emphasizing human rights.

Australia had long seen resettlement as its primary contribution to the refugee regime, but resettlement was not clearly linked to a normative legal obligation. The 1951 Convention, on the other hand, outlined how states should respond to refugees who arrived at their borders. Towards the end of MacKellar’s ministerial statement, he made a brief reference to Australia’s reception of “illegal entries”. He highlighted that people claiming to be refugees enter Australia “illegally” from “time to time” in which case Australia would establish an interdepartmental body to evaluate such claims (MacKellar 1977). By late 1977 the details of the Determination of Refugee Status (DORS) Committee were worked out and the body began its work in early 1978. At first, Australia provided refugees arriving by boat with temporary visas, but as early as August 1976 it was decided that Australia would offer them sanctuary and permanent residence (Higgins 2017: 28). Prior to this, Australia preferred to offer refugees temporary visas as was the case with the Asian refugees during the Second World War and the border crossers in PNG during the 1960s and 1970s. Following the Indochinese arrivals and the large UN multilateral resettlement agreement
of 1979, Australia eventually created formal legislation to grant permanent residence to refugees and “strong compassionate or humanitarian groups” (McAdam 2011: 57).

Australia’s decision to offer permanent residence to determined refugees was not publicly declared. Afraid that a receptive attitude towards boatpeople might encourage others to set sail for Australia, MacKellar warned that boatpeople were not guaranteed permanent residence and would have to be screened (Higgins 2017: 31). Mick Young, Immigration Minister from 1987 to 1988, later admitted that since Asian countries had hosted so many Indochinese refugees, Australia had little choice but to resettle the small number of Vietnamese who reached Australia directly (49).

According to Higgins’s data, an interdepartmental task force was formed that produced recommendations on responding to further boat arrivals. As late as 1979, the task force recommended that Australia provide “sanctuary to genuine refugees within its territory” and had an obligation “not to forcibly return those genuine refugees to the country from which they have fled” (121-122). Australia, therefore, interpreted its legal obligations to the right to seek asylum as providing onshore RSD followed by the offer of permanent residence for determined refugees. These two components formed a coherent interpretation of the legal norm and was accepted by Australia and other liberal democracies.

From 1977 to 1980, Australia’s response to Indochinese boatpeople and its asylum policy adhered to the legal norm governing the right to seek asylum. Some maintain that Australia’s reception of Indochinese boatpeople and its construction of an onshore asylum system was guided by its reputation in the region and among other states (Stats 2015: 83). While reputation was likely involved and appears evident in some respects, a strong case can be made that Australia’s response and policy moves were consistent with an understanding that the legal norm governing the right to

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67Section 6A(1) was inserted into the Migration Act 1958 in late 1980.
seek asylum was legitimate and worthy of its obligation. At this time, the shared understandings and the legal rules around the right to seek asylum were largely aligned. I find evidence of this dimension in a number of sources: the Fraser government’s effort to build a positive narrative about boatpeople; Australia’s beliefs about boat arrivals as indicative of a refugee crisis; the absence of shared understandings about smuggling and irregular migration; and the anticipation of a multilateral burden sharing agreement. In short, Australia’s intentions to meet its obligations under the 1951 Convention and the 1967 Protocol shaped its practices. Boat arrivals from Indochina were seen as a manageable phenomenon. Australia believed the available legal practices could reconcile the protection of refugees with the management of migration.

The first feature indicating that the international legal norm shaped Australia’s response to the boat arrivals was the Fraser government’s attempts to attenuate public fears about boatpeople despite having much to gain from succumbing to political pressures. Government officials justified Australia’s response as following its international legal obligations. By late 1977, fear and anxiety built up among some groups in Australia. The opposition ALP argued for greater enforcement and control, claiming boatpeople were arriving undetected and would import drugs and spread infectious diseases (Colebatch 2015). One official even described the arrivals as an “armada” of refugee boats on their way to Australia (Neumann 2015: 277), an image that resonated with historical Australian fears of invasion. Some migrant communities worried that refugee boatpeople were taking places from their sponsored family members who had applied for family reunion (Higgins 2017: 37). And in March 1978, the Australian called boatpeople “queue jumpers”, a term that would re-emerge and that I will return to later (Stevens 2012: 531). Given the scale of displacement in Indochina and the prospect of tens of thousands of more arrivals, concern was not unjustified.
Instead of feeding into the anxiety, however, the Fraser government worked to assuage public concerns about the arrivals. In 1976, MacKellar stated that "Australia would offer sanctuary" and drew the public's attention to the boatpeople’s "harrowing experiences" in their homelands and during their journeys to Australia. The Fraser government maintained this position into the federal elections in late 1977 despite a surge in the number of arrivals. Foreign Minister Andrew Peacock and MacKellar issued a joint statement calling for politicians “not to subordinate the issues (raised by the arrival of Vietnamese asylum seekers) to electoral considerations, not to exaggerate the dimensions of the problem not to attempt to exploit the assumed fears of sections of the Australian public, and not to forget the human tragedy represented by these few small boats” (Neumann 2015: 279). The statement pledged not to “make examples” of boat refugees by indiscriminately turning back some of them” and not to “risk taking action against genuine refugees just to get a message across” doing so “would be an utterly inhuman course of action” (279).

Australia worked to reassure the public that the situation was under control and that boat arrivals were being dealt with effectively. In its 1978 Annual Report, the Immigration Department stated:

[T]he boatpeople were not illegal, their claims for protection had been properly assessed and the 1650 boatpeople who have arrived since 1975 only make up one-fortieth of people who are illegally in Australia (DIEA 1978: 28).

Government statements also conveyed Australia’s international legal obligations to uphold the right to seek asylum. In November 1977, MacKellar again appealed to Australians’ sense of national identity as a rule of law nation and as a humane country:

Australia, in accepting these people, is honouring its international obligations to provide sanctuary to refugees. I am confident that the Australian community will continue to support the Government’s efforts in helping these people to make a new life in a new and hospitable land (MacKellar in Higgins
The UNHCR’s representative in Australia at the time, Goodwin Gill, applauded these efforts in his report to agency headquarters:

[All the more admirable in view of loud opposition to refugee acceptance voiced in the media by some conservative as well as liberal sections of public opinion… particularly apparent in August/September/October when a large number of refugee boats landed on the shores of Australia thus raising questions of inadequate defences, fears of epidemic and of invasion by cheap labour, as well as a panic reaction to what some rumour mongers term “the peaceful invasion” (Goodwin-Gill in Doherty 2015: 22).]

The Fraser government’s actions and rhetoric are remarkable considering that Australian politicians in recent years often use federal elections as opportunities to get tough on boat arrivals. Throughout the 1990s and 2000s, Australian politicians stripped down and even eliminated Australia’s onshore asylum system in response to boatpeople. Yet during the late 1970s, the Fraser government built an onshore asylum system amidst boat arrivals and a massive refugee crisis in Southeast Asia. How did the Fraser government remain so poised in responding to boat arrivals and in its efforts to defuse public anxiety despite temptations to use the situation for adopting harsh controls?

Australia’s response is more intelligible if we assess the prevailing shared understandings and practices that characterized the legal norm governing the right to seek asylum at this point in time. These features shaped Australia’s beliefs, expectations, and policies around the Indochinese boatpeople, refugee movement more generally, and appropriate practices to respond. The Fraser government’s efforts to mitigate public concern suggest it saw the legal norm as legitimate and worthy of its adherence.

As a member of an expanding refugee regime, Australia’s beliefs and policies concerning refugee movement were shaped by the shared understandings and legal practices. Prior to the
1970s, the UNHCR’s entrepreneurialism was largely responsible for the success of the legal norm in attracting support. While the agency continued to promote its agenda through its field offices abroad, it increasingly relied on an expanding normative community for disseminating ideas and international standards. The most notable example of a normative community was the UNHCR’s annual Executive Committee (EXCOM) meetings. The EXCOM served as a forum where states, international organizations, and even civil society deliberated about protection issues. The EXCOM was a subsidiary of the UNGA and was composed of states or specialized agencies “with a demonstrated interest in, and devotion to, the solution of the refugee problem” (ECOSOC 1959). Though initially limited to reviewing funds and programs, authorizing the UNHCR to make funding appeals and approving budgets, the EXCOM began deliberating over protection issues during the 1960s. Following EXCOM meetings, formal texts were produced on international protection called “conclusions” that are generally recognized as a form of soft-law (Sztucki 1989: 293-295). The more important conclusions called for the adoption of general policy practices for protecting refugees.

As the shared understandings about refugee movement developed and expanded within the normative community, states and the UNHCR developed practices to meet these shared understandings and provide clarity about what their legal responsibilities actually were. The 1951 Convention provides rights to refugees, but only a right to seek asylum, not obtain it. The importance of refugee status determination is, therefore, essential in operationalizing a state’s legal obligations to ensure refugees are protected and those without protection needs are excluded. However, the 1951 Convention says nothing about how to achieve this (Goodwin-Gill 1996: 34).

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68This is not to say that there was no normative community concerning refugees prior to the 1960s and 1970s. To be sure, Western states had been negotiating rules and shared understandings on refugees since the Interwar period. However, UNHCR’s entrepreneurialism during the 1950s and into the 1960s appears to have held more sway over the development of the refugee regime than a normative community.
The deliberations within the EXCOM during the late 1970s addressed this issue squarely. In his opening statement to the 1977 EXCOM meeting, High Commissioner Aga Khan mentioned that about 60 percent of the EXCOM’s membership (19 of 31 states) had yet to develop “national legislation or well-defined administrative procedures on matters provided for in the two international instruments [1951 Convention and the 1967 Protocol]”. He stated that without the implementation of appropriate practices, “accession loses much of its meaning” (Khan 1977).

Following the meeting, EXCOM Conclusion No. 8 on the Determination of Refugee Status was promulgated. It noted that a number of states were developing RSD procedures, “expressed hope” that others would follow, and recommended standards that should be met by states relating to procedural fairness and that UNHCR should be given favourable consideration in such procedures. The UNHCR produced a Handbook on Procedures and Criteria for Determining Refugee Status in 1979 to help states in this regard.

Australia was involved in some inconsistent and informal screening practices during the 1960s and 1970s, but they did not adhere to transparent procedures of due process. During the early 1970s, the UNHCR’s legal representative in Australia recalled that the absence of formal procedures for determining claims meant that Australia exercised deportation practices that risked sending people back to persecution (in breach of Article 33) (Bauman in Higgins 2017: 17). Some scholars claim that Australia’s introduction of a formal status determination system was meant to discourage economic migrants, assert national sovereignty, and satisfy the demands of domestic groups calling for control. Yet the DORS Committee also worked to ensure refugees were not removed and exposed to possible *refoulement* as had likely occurred in the past. The truth is that both motives were at play. To emphasize RSD as a deterrent to boat arrivals and not highlight the

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important role it played in protecting refugees misses the importance of the legal norm in shaping Australia’s response to boat arrivals.

Australia also took steps to ensure the DORS Committee met the major procedural standards reflected in EXCOM Conclusion No. 8. Interdepartmental meetings were held in 1977, in which the UNHCR participated (Hyndman 1988: 727). The Immigration Department noted that the agency should be included because of the “numerous questions of principle and procedure which will need to be clarified” (Goodwin-Gill in Higgins 2017: 63). The DORS Committee was composed of voting representatives from four Departments: Immigration, the Attorney-General, Prime Minister and Cabinet, and Foreign Affairs. A second representative from Immigration chaired the meeting but would not cast a vote unless required to break a tie. The UNHCR was a non-voting observer on the committee allowed to offer expert advice on conditions in countries of origin and on the application of international law (Higgins 2016: 6). Once deliberation ended, the representatives would cast their votes in favor of one of five outcomes: (refugee status according to the 1951 Convention and 1967 Protocol), deferral for further investigation, rejection, inadmissibility, or “compassionate or humanitarian grounds” in cases that did not fit the Convention definition but nonetheless merited humanitarian concern (Crock and Martin 2013: 141). The DORS Committee was a non-statutory body and only made recommendations to the Minister who made the final decision. Some criticized the Committee’s process for appealing negative decisions because it did not involve adjudicators from outside Committee (Crock and Martin 2013: 141; Hyndman 1988: 728). The Committee was generally viewed positively by outside observers. In a July 1980 report, the UNHCR representative concluded that, “the DORS Committee takes its job of applying the 1951/67 definition of a refugee seriously” and “applied itself in a liberal manner” (in Higgins 2016: 6).
The establishment of the DORS Committee was also an indication of Australia’s beliefs about refugee movement and the expectation that it would not be a major receiver of direct arrivals of refugees. This belief was reflected in the Committee’s design. It was highly deliberative, limited in capacity, and only expected to process a few hundred cases each year. In 1990, Martin described RSD procedures in liberal democracies as having been “cobbled together” in the late 1970s and early 1980s, in “an era that permitted leisurely consideration of modest caseloads” (Martin 1990: 1252). A UNHCR report from late 1977 notes that when the DORS Committee was founded, its creators anticipated that it would assess roughly 300 cases per year, which likely indicates the number of cases received prior to that and the expectation that this would likely continue into the future (Higgins 2016: 11). If the purpose of an in-country asylum system was to maintain an open door for those fleeing persecution and violence, then Australia believed that it was unlikely to be a major receiver of refugees because of its remote location. Australia and other liberal democracies saw asylum seeker movement as an aberration and linked to exceptional abuses of political power. The small number of asylum seekers that arrived in liberal democracies from the 1950s through the 1970s was understood as relatively rare and their obligations to protect refugees were modest impositions on their national sovereignty.

It is also revealing to see what shared understandings about refugee movement were not included in the legal norm at this time. For example, there were no coherent shared understandings within the normative community about the problems posed by irregular migration, migrant smuggling, and onward secondary movement. At times, domestic groups and politicians in Australia and other liberal democracies expressed concerns about the Indochinese being illegal immigrants, stealing jobs, queue jumping, and posing health problems. But these concerns were localized and domestic and there was no intersubjective legal discourse within the normative
community concerning these potential issues. Liberal democracies would not be able to draw on a legal discourse and arguments to legitimize their border controls and immigration restrictions. Irregular migration was not the major concern it is today for liberal democracies and little comprehensive thinking was done at the international level on the subject.

Despite the creation of an onshore asylum system, Australia still saw itself as primarily a country of resettlement not asylum. This belief was clearly reflected in Australia’s participation in the 1951 Convention. But even after accession to the 1967 Protocol in 1973 and its acceptance of a universal right to seek asylum, Australia continued to see its major contribution to the refugee problem through resettlement not the provision of asylum. The vast majority of MacKellar’s 1977 policy statement discussed Australia’s resettlement program and just a few sentences were devoted to Australia’s reception of boatpeople. In 1980, UNHCR’s Goodwin-Gill reflected on Australia’s response to boat arrivals and noted that “for a nation more accustomed to receiving refugees through formal resettlement programs, the arrival of boats on the northern coastline—and hence a prominent role as a country of ‘first asylum’—had ‘proved something of a shock’ to Australia” (in Higgins 2017: 18).

The Indochinese boatpeople did pose questions to Australia about its perception of itself as a country of resettlement. But Australia generally saw the arrival of boats to its shores as symptomatic of a massive refugee crisis not an enduring phenomenon. The crisis was severe, no doubt about that. But with effective and appropriate responses, Australia appeared to believe it could be resolved and then go back to the status quo in which it made resettlement contributions and processed very small numbers of asylum claims on its own. To be fair, though, no Australian official clearly articulated this belief. But assessing policies and discourse provide evidence to
support this story. In the Immigration Department’s annual report from 1978, the Department described Australia’s appraisal of the situation in Indochina and its response:

> Australia had little choice but to play its part in solving a crisis that was not of its making... We are locked into international obligations towards refugees which, we dare say, never envisaged the movement of people on the large scale now being experienced... Australia’s credibility and status as a civilized, compassionate nation are under test” (DIEA 1978: 26).

Australia’s understanding of the Indochinese boat arrivals of 1976 to 1981 as exceptional and related to a crisis is given further support in the activities of the DORS Committee. Because the DORS Committee was only designed to deal with a few hundred cases each year, a backlog of asylum applications arose during the 1978 to 1979 period. According to historian Claire Higgins (2017: 78-85), an informal policy was developed to alleviate pressure for a period of time whereby no Indochinese arriving by boat was to be turned down for permanent residence no matter how dubious the claims. Other asylum caseloads, such as those from the Middle East, were assessed and turned down when they did not meet the criteria set out in the 1951 Convention (83). What can we infer from this finding? First, and most obviously, the informal policy appears to indicate the realization that the committee did not have the capacity to cope with a significant influx of boatpeople. Secondly, the decision to suspend screening suggests that Australia saw the arrivals as part of a temporary crisis situation. Policy reforms were neither proposed nor passed to overhaul the DORS Committee to make it more capable of screening higher numbers of asylum applications. This observation suggests that Australia saw the situation as temporary. After all, if no Indochinese were to be refused permanent residence what would be the point of a screening system? In the end, Australia’s expectations of the Indochinese boat arrivals proved accurate and only 30 boatpeople on one boat made the journey from Southeast Asia to Australia from 1980 to 1989 (Phillips and Spinks 2013: 22).

Finally, a significant factor enabling Australia to establish an onshore asylum system under
these strenuous conditions was its anticipation of a major multilateral burden sharing agreement. Multilateral agreements and burden sharing were common occurrences during the early years of the refugee regime and were helpful in resolving displacement crises. Australia played an integral role in the successful resettlement of displaced persons after the Second World War. It was also involved in resettling Hungarian and Czechoslovakian refugees. Australia resisted resettling Ugandan Asians but did provide some support to the Chilean refugees during the early 1970s. In each case, the UNHCR proved itself to be an effective and reasonable authority in organizing multilateral responses to these crises. It is likely Australia saw these largely successful responses as evidence that the Indochinese refugee crisis would receive similar support.

Australia also had confidence in the UNHCR’s ability to broker an agreement. This confidence is understandable. By the 1970s, the agency was the premier institution and forum for refugee issues and competition from other agencies like the ICEM receded. In 1973, the Whitlam government pulled out of the ICEM completely, a significant blow to an organization that depended on Australia for 22.5 percent of its budget (Loescher 2001: 152). Meanwhile, the UNGA resolutions expanded the UNHCR’s authority and responsibilities into areas of “special humanitarian tasks” involving coordination roles for traditional refugee crises, but also natural disasters and wars. The agency now oversaw development assistance and was responsible for coordinating the activities of states, UN agencies, intergovernmental organizations, and voluntary agencies. It now oversaw budgets in the hundreds of millions of dollars (150). Its own budget rose from $3 to $4 million annually during the 1960s, to $8.3 million in 1970, to $69 million in 1975 (143, 151). In Loescher’s detailed history of the UNHCR, during the late 1960s and 1970s the agency achieved a level of “independence and credibility it had not enjoyed before” (2001: 140).
Given the current complex institutional environment in which the UNHCR is currently embedded, it is likely that the UNHCR’s profile reached its height during the 1970s.

Another new feature of the governance landscape at this time was the rise to prominence of international civil society groups. Once marginal actors during the 1950s, international civil society grew in strength during the 1970s. For example, Amnesty International grew from 3,000 members in 1967 to 50,000 in 1974. National and international policy makers grew interested in human rights issues and NGOs brought human rights violations to the public’s consciousness (Keck and Sikkink 1998: 89-90). In his announcement of Australia’s refugee policy, MacKellar detailed the administrative apparatus needed to resettle and integrate refugees in Australia and the importance of voluntary agencies in this process. Civil society groups in Australia consolidated their efforts in 1967 under a new organization called “Australian Care for Refugees” (AUSTCARE). AUSTCARE raised funds for refugee assistance and helped promote and sustain the public’s concern for refugee protection (UNHCR 1975). Civil society groups were expected to play a more central role in the resettlement and integration of refugees. The increasing capacity of intergovernmental organizations and the enthusiasm of civil society groups likely increased Australia’s sense of confidence in responding to this refugee crisis and its capacity for resettling refugees.

While Australia initially saw its resettlement and multilateral contributions to the refugee regime as a matter of international solidarity, it saw its onshore asylum system and its resettlement program as linked during the Indochinese boat crisis. In November 1977, MacKellar sent a team of immigration officials to Malaysia and Singapore to select refugees for resettlement. The UNHCR said the move caused some Indochinese to postpone their departure from Malaysia.

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70 Immigration Secretary Armstrong to Immigration Minister, 15 October 1971. NAA: A1838, p4.
(Neumann 2015: 275). MacKellar also stated that Australia needed to establish a “regular refugee intake” to remove the need for risky boat journeys to Australia (in Higgins 2017: 87). Australia now saw resettlement as supporting its onshore asylum policy. In May 1978, MacKellar outlined Australia’s response to boat arrivals:

Australia has set out on a two-pronged approach to this problem. Firstly, we seek to internationalize it by seeking agreement from more countries throughout the world to resettle the refugees in Thailand and Malaysia. It is unfair to expect any one country to accept the full burden of refugee resettlement. This massive problem will not be overcome until a greater international effort is mounted to resolve this present situation. Secondly, we would hope that governments in the area would cooperate with Australian authorities to delay vessels for a short period to enable the Australian authorities to interview people on board the ships and put them through the process of selection in those countries (MacKellar 1978).

MacKellar announced Australia’s pledge to resettle 9,000 Indochinese refugees and toured Southeast Asia in July 1978 to rally support for providing temporary protection and encouraged UNHCR to pursue regional engagement with Asian states (DIEA 1978: 28). At the time, Immigration officials perceived the Indochinese boatpeople as a temporary situation and believed that they could “process them all, and then the job would be finished in a year” (Higgins 2017: 90).

The refugee crisis persisted and intensified through 1978. In November, a large steel hulled boat called the *Hai Hong* entered Indonesian waters. Prior to this point, Australia received small fishing boats of Indochinese, but the *Hai Hong* carried about 2,500 passengers, mainly South Vietnamese ethnic Chinese. The vessel represented what would later become labeled migrant smuggling and the development intensified pressure on Australia to find a multilateral solution. During the 1978 EXCOM meeting and in the days after the *Hai Hong*’s appearance, Robinson

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71MacKellar’s statement provided a preliminary framing for Australia’s response to boat arrivals for many years to come: encouraging Southeast Asian states to provide first asylum in exchange for orderly resettlement in the liberal democratic states.
credits Australia with “spearheading” the organization of the “Consultative Meeting with Interested Governments on Refugees and Displaced Persons in Southeast Asia” in December 1978 (1998: 153). In his opening statement Minister MacKellar expressed his view of the situation:

These consultations have been arranged to consider a crisis, and that word is justified... These consultations have been arranged because so large and so rapid a movement of people is now putting intolerable strains on the nearby countries of first refuge and also challenging the capacities of countries of final settlement (1978).

One of the main goals of the consultations was to generate resettlement pledges from liberal democratic states to encourage Southeast Asian states to host refugees temporarily. But the Association of Southeast Asian Nations (ASEAN) states were not convinced. The Malaysian representative called the contributions a “drop in the ocean” (Loescher and Scanlan 1986: 139). The number of departures from Vietnam continued to increase and reports of more vessels like the Hai Hong increased anxiety. In 1979, ASEAN states took harsher measures to repel boats, with Malaysia threatening to “shoot on sight” new arrivals and ship out to sea the 70,000 already in camps (99).

Some scholars call the actions of Southeast Asian states to repel boat arrivals “refugee manipulation”, designed to compel liberal democracies to provide material assistance to the refugees and resettlement places (Davies 2008). Whatever their motivations were, more ambitious efforts to solve the Indochinese displacement followed suit. The UNHCR organized a meeting in Geneva during July that was hosted by UN Secretary General Kurt Waldheim. The meeting was the largest on refugee matters ever held with 66 first asylum and resettlement countries and 27 states represented at the Ministerial level (DIEA 1980: 46). The U.S., U.K., Australia, France and Canada increased their resettlement pledges to 260,000 more than doubling the December 1978 pledge of 125,000 (46). Vietnam agreed to a moratorium on the outflow of boatpeople and to
implement an Orderly Departure Programme for those not meeting the 1951 Convention definition. The Indochinese arriving in first asylum countries of Southeast Asia were designated as *prima facie* refugees and resettled in advanced liberal democracies without screening (UNHCR 2000: 84). For Helton, the 1979 landmark agreement “brought a modicum of order” to the situation “and a sense of purpose in the efficacy of available solutions” (Steiner et. al. 2003: 26).

From 1976 to 1982, Australia resettled nearly 70,000 Indochinese and about 80,000 came afterwards through the Orderly Departure Program and immigration channels (DIAC in Stats 2015: 71). Australia’s involvement in promoting a multilateral response to the Indochinese boat crisis indicated its desire for and confidence in the UNHCR to play a significant role. It was also an indication of its belief that the normative community of liberal democratic states would step in to resolve the crisis as it had done before. Had a multilateral solution to the refugee crisis not transpired or Australia not been confident in the agency’s abilities, it is quite conceivable that Australia would have seen its highly deliberative DORS Committee as impractical and taken harsher unilateral measures to deter boatpeople.

It should also be mentioned that there was bipartisan support for Australia’s refugee policy at this time. The ALP was initially critical of the Fraser government’s reception of boatpeople. But following the creation of clearer asylum and border control policies, the shadow ministers for immigration accompanied Ministers MacKellar and his successor MacPhee when they promoted Australia’s refugee policy and sought public support (Jupp 2002: 125; Viviani 1984: 114). Department Secretary, Menadue credited bipartisanship for helping to ensure “there was no significant opposition” to refugee intake during the campaign (Menadue in Higgins 2017: 50). Bipartisanship on this issue suggests that both of Australia’s major political parties saw the issue as being effectively addressed. The rupturing of bipartisan support for Australia’s asylum and
border control policy would be one of the significant features later on as both major political parties diverged about how to handle boatpeople.

To conclude, the explanation I present here provides evidence to support the notion that the legal norm governing the right to seek asylum shaped Australia’s response to boat arrivals. The UNHCR and the normative community developed more clarity around how the legal norm was to be implemented. Australia’s onshore asylum system was not simply an attempt to convince domestic audiences that boatpeople were being properly screened. The formation of the DORS Committee observed the EXCOM conclusion on RSD. Though Australia’s calculations about its reputation in Southeast Asia likely had a role to play in its response to the Indochinese boatpeople, the evidence presented here supports the notion that Australia also saw the legal norm as legitimate. Informed by the shared understandings about refugee movement at the time, Australia believed that it would not be a significant receiver of refugees. The Indochinese boatpeople clearly challenged the belief that direct arrivals would be modest and rare. But Australia saw the arrivals as symptomatic of a massive refugee crisis that was temporary and resolvable through multilateralism. It was not an enduring condition. Some call this pattern of governance *ad hocism* whereby refugee crises are resolved through large multilateral “burden sharing” agreements after which states revert to their individuated responsibilities (Hathaway and Neve 1997: 141-151; Betts 2008: 5-6). Given these conditions, the decision to establish an onshore asylum system amidst massive human displacement in Southeast Asia makes more sense.

3.5. Legal Norm Adaptation and Australia’s Response to Boatpeople During the 1980s and 1990s

After its establishment, Australia’s onshore asylum system remained untouched throughout the 1980s and there were no recorded boat arrivals during these years. However, Australia made
changes to this system from 1989 to 1999 ostensibly in response to the arrival of boatpeople (Table 1). These changes included the introduction of mandatory detention, expedited asylum processing, safe third country legislation, swifter returns of those found not in need of protection, regional cooperation, and others. Most observers explain the emergence of these practices as the consequence of domestic politics and rising numbers of boat arrivals. These explanations have merit. It would certainly be peculiar (but not inconceivable) for Australia to adopt a range of control practices if it had not received boatpeople. And it was clearly national governments that passed legislation, identified potential problems, and introduced practices to regulate immigration and control their borders.

Table 2 - Boat Arrivals to Australia 1981-1998

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<td>6</td>
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<td>3</td>
<td>18</td>
<td>7</td>
<td>19</td>
<td>11</td>
<td>17</td>
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<tr>
<td>People</td>
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<td>214</td>
<td>216</td>
<td>81</td>
<td>953</td>
<td>237</td>
<td>660</td>
<td>339</td>
<td>200</td>
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Sources: Phillips and Spinks 2013: 22.

From a constructivist perspective, however, I argue that the legal norm governing the right to seek asylum shaped Australia’s response in at least two respects. First, during the 1980s and 1990s, Australia became very concerned with ensuring that economic migrants did not abuse its obligations to refugee protection and providing asylum. Australia’s control practices were designed to more effectively govern its immigration program while simultaneously maintaining its obligations to the legal norm governing the right to seek asylum. Once again, this legal norm was interpreted as involving in-country screening followed by the offer of permanent residence
for determined refugees. Had Australia not accepted this interpretation and been a member of the normative community concerning refugees, it is fair to say that these practices would not have emerged as they did. Australian officials rhetorically justified Australia’s control practices based on this logic. This point is nuanced, but important. While domestic level arguments are not clearly wrong, they are incomplete because they ignore the ongoing co-constitutive relationship between structure and agency whereby one does not completely determine the other. Australia’s control practices were, therefore, at least partially structured by the legal norm governing the right to seek asylum.

Second, it is possible that Australia could have independently come to the realization that without close regulation of its asylum system it would have trouble dealing with migratory movement and so it designed its own practices to respond. In some respects, the control practices adopted by liberal democratic states were relatively straightforward; detention, returns of those found not in need of protection, and curbing access to appeals required little intellectual work. Australia had its ideas about how to manage its onshore asylum system based on its understanding of the legal norm. Yet we must be recognize that Australia adopted many of the same policies of other liberal democracies who interacted regularly within a normative community. Australia participated in meetings and forums and shared its concerns but also learned from other participants. During these years, the normative community of liberal states shifted their shared understandings about the nature of asylum and migration movement and introduced new control practices to respond.

Other control practices involved more intellectual engagement. The emergence of ideas about secondary movement and the Safe Third Country concept particularly, required significant deliberation in international forums. Another important development during the 1980s and 1990s
was the proliferation of informal and discrete meetings for collaboration. Rather than the large and public UN multilateral meetings, Australia became involved in and even initiated other meetings to discuss asylum and migration matters beyond the traditional EXCOM meeting or the UN General Assembly. The normative community was no longer exclusively located within the UN; it was represented by multiple and overlapping communities. During these years, the adjudicative role of the normative community begins to become more evident in terms of its approving of appropriate practices, rejecting extreme proposals from members of the normative community, and generally overseeing the maintenance and adaptation of the legal norm. To conclude, from the early 1980s to the late 1990s, the normative community adapted the legal norm to new migration pressures but continued to accept the traditional interpretation of in-country screening followed by the offer of permanent residence for determined refugees.

3.5.1. Indochinese Boat Crisis 2.0 and the Comprehensive Plan of Action

Given its proximity to Southeast Asia, Australia was closely involved in the second response to Indochinese boat departures. Australia’s integral involvement in the process helped shaped its beliefs about asylum and migration. After the conclusion of the 1979 UN agreement on Indochinese refugees, some voiced optimism that the crisis would be solved. The UN High Commissioner for refugees Poul Hartling noted in April 1982 that, “we may well be witnessing the beginning of the end of what was a major international refugee problem” (Suhkre 1983: 103). Attitudes among liberal democratic states and UNHCR field officers on the ground were not as sanguine. During 1981, an article was published in the Far Eastern Economic Review that cited anonymous UNHCR field officers stating that “The high resettlement quotas and the ease with which (Indochinese) refugees pass through the pipeline are blamed as the principal pull factors
encouraging and perpetuating the exodus.” It was now believed that the majority of departures
from Indochina were “economic migrants” and not refugees. Officials complained that they were
participating in a migration service rather than responding to a refugee crisis (Smith 1981: 26-27).
This article was followed by an internal UNHCR report in the early 1980s that found that about
two-thirds of the Vietnamese were not refugees, did not have a claim to international protection
under the 1951 Convention, and could be sent back to their home country (Robinson 1998: 178).

Australia was very sensitive to the possibility that economic migrants were using the 1979
agreement as a way to migrate and was one of the first to alter its practices. In 1982, Immigration
Minister MacPhee stated Australia’s position:

A proportion of people now leaving their homelands were doing so to seek a better way of life rather
than to escape from some form of persecution. In other words their motivation is the same as over one
million others who apply annually to migrate to Australia. To accept them as refugees would in effect
condone queue-jumping as migrants. In all of this, the Government’s primary concern is to maintain
the humanitarian focus and integrity of Australia’s obligations accepted by our commitment to the

Assessments will be made by Australian officials who will be operating under criteria which is quite
consistent with the United Nations Convention definition. These new procedures will replace the former
practice of relying on mandate status accorded by UNHCR. While in no way derogating from the helpful
role played by UNHCR in assisting us with determinations in the past it is entirely appropriate that
Australia should now employ its own procedures (MacPhee 1982).

According to one Australian official interviewed by historian Courtland Robinson, the elimination
of group-basis determinations for Indochinese found in the 1979 agreement and adoption of a case-
by-case decision-making procedure marked a “new paradigm” in the whole process (1998: 155).

Concerned that prima facie refugee recognition was now attracting economic migrants and
serving as a pull factor, liberal democracies party to the 1979 agreement set up their own
consultations outside the auspices of the UN. The arrangement was called the Intergovernmental
Consultative Group (ICG) and first met in 1983 in Hawaii. The ICG met roughly twice a year
behind closed doors and included Australia, Canada, the U.K., the U.S., and Japan, while the
UNHCR was brought in as an observer. Among its priorities, the ICG worked to ensure that international efforts to resettle Indochinese refugees went to the protection of persons genuinely in need and not all who sought asylum (Robinson 1998: 155). *Prima facie* recognition can be helpful during refugee emergencies allowing for faster access to asylum, but ascribing refugee status to all Indochinese by virtue of arrival in Southeast Asia was now seen to be a problem. Hathaway referred to the assumption that all Indochinese were worthy of the *prima facie* refugee designation as “inaccurate” and that the 1979 UN agreement constituted “unbridled inclusion” (1993: 687, 689). According to officials, Australia used the ICG to apply its new regulatory paradigm internationally: *bonafide* refugees continued to be resettled, but those found to be economic migrants would be sent home (Robinson 1998: 155).

The ICG called for greater scrutiny and regulation to promote the integrity of asylum while enabling control over migration. At a 1985 ICG meeting in Canberra, Australian policy makers and other ICG participants produced what came to be known as the “Canberra Paper”. It outlined the idea of a regional screening program, with third-country resettlement for those who were screened in and repatriation for those screened-out (Robinson 1998: 155). During the late 1980s, the number of departures surged and most officials now held the view that a large number were “economic migrants” not 1951 Convention refugees. According to Davies, Southeast Asian states resorted to “refugee manipulation” again, pushing boats back out to sea in the hopes that

72 It is interesting to note that according to one Canadian participant in the ICG, Australia was recognized as the most assertive among liberal democratic countries about controlling migratory movement (Interview P 2017). This observation is also supported by documents I reviewed at the Library and Archives of Canada concerning Canadian views of Australia’s firm position that those found not to be refugees should be returned to Vietnam. Library and Archives Canada (LAC). Indochina, part one. Indochinese Consultative Group Meeting, File 85-29-24, Ottawa, 7-8 April, 1988; LAC. Internal/Confidential Summary of “Tokyo ICG Meeting [Intergovernmental Consultations on Indochinese Refugee Problem, Tokyo, 14-15 November 1988]- November 14 Second Session”, 15 November 1988. File 85-29-4. Document titled “Basic Country Positions: Comprehensive Plan of Action.”

73 Ethnic Chinese were no longer blatantly persecuted as they were during the late 1970s, but Hathaway (1993) makes a case for recognizing these people as refugees in light of other human rights violations like being blocked from attaining certain jobs and access to education.
The UNHCR arranged a number of high-level meetings from 1988 to 1989 and the multilateral Comprehensive Plan of Action (CPA) was adopted in Geneva in June 1989. The CPA involved the same regulatory practices included in the Canberra paper. Southeast Asian states provided temporary protection and RSD for Indochinese arrivals. Liberal democratic states pledged resettlement places for determined refugees and Vietnam accepted the repatriation of those without claims under the 1951 Convention.

From 1989 to 1996, the CPA ran its course and was seen to end the Indochinese displacement episode. The CPA led to new practices like refugee status determination in first asylum countries, temporary protection, and the return and reintegration of non-refugees. The agreement became a model for responding to the needs of refugees and in deterring economic migration. For instance, speaking to a CPA steering committee in 1991, High Commissioner Ogata highlighted this deterrent role:

> Let us remember that we are dealing here with human beings and with their expectations. In fact, we are confronting expectations built up over fifteen years of history, almost a generation. For those persons who managed to leave, their expectations had evolved into the certainty of resettlement to western countries. From the very beginning, one of the CPA’s principal challenges, a challenge which continues to be felt to this very day, has been the difficulty in reversing these expectations (Ogata 1991).

Ogata would go on to promote the CPA as a policy for Europe:

> A regional arrangement, which combines the commitment to provide protection to those who need it, with clear policies for immigration and development assistance, as well as a coherent information strategy, could be helpful in formulating an appropriate response to the problem of mixed movements of refugees and migrants in Europe (1992: para 34-35).

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74 What Davies does not mention is that these tactics were only successful because liberal democracies had a particular set of interests tied to the promotion of human rights and the protection of refugees. These actions would not likely have evoked such a reaction in non-liberal states.
What are we to make of the argument that liberal democracies’ disenchantment with the 1979 agreement to “compassion fatigue”? The Australian Immigration Department questioned this position stating in its annual report of 1984 that it was not compassion fatigue but “an emerging view that large-scale resettlement will not by itself resolve refugee problems and that other alternatives must be found” (DIEA 1984: 33). This evidence supports the point that without some control over migratory movement, states would have trouble honoring their obligations to asylum and refugee protection. In the end, the 1989 CPA led to 74,000 Vietnamese refugees and 51,000 Laotians being resettled and some 88,000 Vietnamese and 22,400 Laotians returned to Vietnam (UNHCR 1996). Some voiced legitimate concern that the CPA’s focus on the 1951 Convention for screening was too narrow, but the CPA is commonly regarded as a successful instance of multilateral cooperation (Betts 2008). With respect to the argument pursued here, the CPA process was an important learning experience for liberal democracies and the UNHCR. I conducted an interview with Gervais Appave, an Australian representative who worked on the multilateral response to the Indochinese boat crisis. He stated that the CPA was a turning point in states’ understanding of asylum movement. He went so far as to say that the experience enabled a “global consciousness” to emerge about the tensions between asylum and migration and the practices needed to respond to this tension (2016).

3.5.2. Responding to New Asylum and Migration Pressures within the Broader Normative Community

Outside of Southeast Asia, Australia was engaged in a wider normative community of

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75Davies finds that the term was first used by ASEAN states to describe Western states’ reluctance to continually accept Indochinese refugees (2008: 153).
76Hathaway (1993) has made a compelling case that the CPA only used the 1951 Convention to make RSDs and might not recognize that other human rights instruments could apply to many Indochinese. Towle (2006) has also been critical of the CPA.
liberal democracies who began to wrestle with pressures on their newly created asylum systems. When liberal democracies first established their asylum systems during the 1970s, they received very few asylum applications. Gibney states that some 13,000 asylum applications were typically filed in Western European states annually during the 1970s (2004: 3). In Australia the number was reportedly a few hundred each year (Higgins 2016: 11). The small numbers of asylum seeker arrivals allowed for lengthy deliberations around protection claims. Even if an applicant was found not to require protection, return was often more trouble than it was worth. The interpretation of the right to seek asylum involving onshore screening and providing determined refugees with permanent residence were not major impositions at this time. If the number of arrivals did surge, it was typically tied to a refugee crisis that could be resolved through an ad hoc multilateral agreement, as we saw with both Indochinese crises. The beliefs and shared understandings of liberal democratic states about the nature of asylum seeker movement were adequately addressed by an approach to providing asylum and protection that involved in-country screening and the local integration of refugees. This situation changed during the 1980s and 1990s.

In the early 1980s, liberal democracies began receiving increasing numbers of asylum seeker arrivals. From April to September of 1980, for example, 125,000 Cuban boatpeople came to the US in the context of the “Mariel Boatlift”. According to statistics provided by the UNHCR’s Jeff Crisp, the liberal democracies of Europe, North America, Australia and New Zealand received a combined 150,000 asylum applications each year during the early 1980s. That number increased to 250,000 in 1987 and surged to 850,000 in 1992. During the 1990s, the number of asylum seeker arrivals leveled off at about 500,000 to 600,000 each year (Crisp 2003: 7). In the ten years between 1985 and 1995, Gibney found that liberal democracies received a total of 5

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77 The U.S. scrambled to respond and public concern grew concerned when it was learned that Cuba intentionally released prisoners and mental health patients into the exodus (Hawk et. al. 2014).
million asylum applications (2004: 3). Innovations in transportation and communications technology enhanced the mobility of asylum seekers. Whereas in the past, asylum seeker arrivals were relatively localized in their regions of origin, “jet age” asylum seekers now moved around the world.

The increasing number of arrivals and the complexity of their motivations put pressure on industrialized countries’ asylum systems which were accustomed to responding to modest caseloads and relatively simple determinations. But liberal democracies in particular faced unique pressures. Some scholars boldly stated that they were simply unable to control “unwanted migration” because of their liberal constitutions and domestic judiciaries (Birrell 1992; Cornelius, Martin, and Hollifield 1994; Freeman 1995; Jacobsen 1996; Sassen 1996). These systems were expensive and limited in the number of applications they could process. Making matters more difficult, asylum seekers often destroyed their identity documents making determinations more complex. Asylum seekers who passed through a lengthy determination process and did not receive a positive outcome typically appealed the decision at the administrative and federal levels. During that time, claimants were supported at the public’s expense, allowed to work, and lived in the community. Moreover, if a claimant was eventually found not to be a refugee in need of protection, it was noted that removal rarely occurred (Carens 1997; Gibney and Hansen 2003). Liberal democracies realized that their in-country asylum systems could create unintended consequences like pull factors. But they also noted the challenges in maintaining these systems and removing those not in need of protection.

Unlike many other liberal-democratic countries, Australia does not have a constitutionally enshrined bill of human rights. But its experience in carrying out removals was indicative of other liberal-democratic states. From 1974 to 1987, the Immigration Department embarked on a
deportation policy because the previous approach of issuing amnesties was believed to be perpetuating the problem of “illegal immigration”. While the number of removals each year increased, the government stated that the size of the “illegal immigrant” population in Australia rose from 50,000 in 1984 to 90,000 in 1990 (DIEA 1984: 45; DIEA 1990: 31). The major challenge in removing individuals who did not qualify for asylum was believed to be judicial review. In 1977, Australia passed the Administrative Decision (Judicial Review) Act that paved the way for the creation of oversight bodies with statutory power. Furthermore, non-citizens had access to these channels of review under Section 75 of the Australian Constitution.78 As early as 1984, the Immigration Department noted that,

The Department’s activity against illegal immigrants has become much more time consuming and costly because of the very high proportion of those detected who avail themselves of the various avenues of review open to them. It has not been uncommon for illegal immigrants to take action simultaneously or sequentially through the Courts, the Immigration Review Panel, the Ombudsman, the Human Rights Commission, and under the Freedom of Information Act. Few succeed in their appeals to overturn decisions that they not be allowed to remain. Nevertheless, the enforcement of immigration controls is accepted by the Department as an essential element of a controlled migration program and a large scale visitor intake (DIEA 1984: 46-47).

By the late 1980s, the government was concerned that the courts had become too influential in deciding who a refugee was. The decision in Chan Yee Kim vs. Minister for Immigration (1989) was a landmark case in this respect because it broadened the definition of a refugee.79 According to Evan Arthur, of the Immigration Department, the court’s interpretation of the definition of a refugee in this case was set to produce “a numerical outcome which would exceed what the public was prepared to accept” (Arthur 1991: 15). On the other hand, lawyers and judges argued that

78Non- citizens had access to six oversight mechanisms: the Administrative Review Council, the Administrative Appeals Tribunal, the ombudsman, and the Determination of Refugee Status committee. The government also established the Human Rights Commission in 1980 (to be renamed the Human Rights and Equal Opportunity Commission in 1986) and the Immigration Review Panels in 1982.

79The Court found that persecution involved “not only the existence of real fear by the applicant, but also objective circumstances which indicate a real chance that the applicant would be persecuted” (O’Neil et. al. 2004: 717).
Australia was relying too heavily on policy guides that did not have legislative force and should draft legislation to address their control concerns (Cronin 1993: 98-99). Australia and other liberal democracies became conscious of not only the challenges posed by increasing numbers of people on the move, but also of the unintended consequences of their newly established in-country asylum systems.

In response to the challenges of conducting removals and the broadening definition of a refugee, Australia passed a number of amendments to the Migration Act from 1989 to 1994. Some changes focused on the immigration system, but the 1994 amendment focused on making refugee determinations more bureaucratic and insulated from political discretion of Ministers. It was the first time the 1951 Convention’s definition of a refugee was inserted into the Migration Act and was enforceable by law as opposed to the previous system of ministerial discretion (Germov and Motta 2003: 44). The Labor government created the Refugee Review Tribunal (RRT) a statutory body expected to reduce appeals to the federal court, be less costly, fairer, and more transparent (73-74). Though the government introduced temporary visas for refugees, it reversed this decision in 1993-94 believing it caused too much uncertainty for refugees and the government returned to offering permanent residence to refugees (Schloenhardt 2000: 46).

The most well-documented and controversial control practice introduced by Australia during the 1990s was the mandatory detention of asylum seekers during the determination of a protection claim. Though Australia did not receive boatpeople during most of the 1980s, from 1989 to 1992 slightly more than 400 boatpeople from Cambodia arrived to seek asylum. Immigration Minister Hand described the government’s rationale for the mandatory detention policy:

I believe it is crucial that all persons who come to Australia without prior authorization not be released

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However, some criticized the RRT because the rate of positive determinations declined from 31.8 percent in 1990 to 11.4 percent and 5.8 percent in 1991 and 1992 respectively (Schloendardt 2000: 47).
into the community. Their release would undermine the Government’s strategy for determining their refugee status or entry claims… The Government is determined that a clear signal be sent that migration to Australia may not be achieved by simply arriving in this country and expecting to be allowed into the community… Australia will, of course, continue to honour its statutory and international obligations as it always has done. Any claims made by these people will be fully and fairly considered under the available processes, and any persons found to qualify for Australia’s protection will be allowed to enter (Hand 1992).

This statement highlights the restrictive approach, but it also indicates the government’s belief that it could effectively regulate migration while simultaneously adhering to the traditional interpretation of the right to seek asylum. The Immigration Department justified detention as necessary to mitigate the perceived pull factor of its asylum system:

[D]irect movement into the community following health and identity checks, with permission to work, full access to social security, and without reporting requirements could be expected to make Australia an attractive destination (DIEA 1993: 17).

How can we make sense of the adoption of a detention policy to respond to such a modest number of boatpeople? A useful point of comparison is the discussion about detention during the late 1970s in the context of the Indochinese arrivals. Amidst the boat arrivals of the late 1970s, Australia consider adopting a detention policy but decided not to. Higgins probes an exchange occurring within Australia about creating a detention centre for boatpeople in 1978. The Secretary of the Immigration Department, Engledow, stated that a detention facility would require a “philosophy of management” that meant it could only be a “last ditch or long-term solution” (Higgins 2017: 149). He went on to state the following: “A decision to build that camp would signal to the world that we saw the refugee problem as an ongoing one and would indicate that we intended to deal with it in much the same way that the Malays, the Thais, the Indonesians and, indeed, various European countries ever since World War II have dealt with it” (Higgins 2017: 150). These brief statements support the point that during the 1970s Australia saw boat arrivals as a symptom of a temporary and resolvable refugee crisis and not a long-term and ongoing issue.
Fast forward to 1989: Australia now saw boat arrivals as part of an ongoing and complex phenomenon. Australia’s beliefs about asylum and migration, and the policies in place to respond to them, created the possibility for more restrictive approaches.

The adoption of mandatory detention in 1992 presents a puzzle. The number of boatpeople arriving to Australia was higher during the late 1970s than it was between 1989 and 1992. Yet during the late 1970s, Australia created an onshore asylum system and did not detain a single person. There were also cases of large-scale migrant smuggling operations like the Hai Hong and the prospect of receiving many more boatpeople was present. Similar to the late 1970s, a large multilateral agreement was also in place in the form of the CPA. Higgins argues that rising populism in Australia is what motivated the government to act as it did. Though I agree with Higgins that rising numbers of boat arrivals cannot explain the difference in responses, I question the argument that rising populism was the principal force behind Australia’s reforms of the 1990s.

Mandatory detention was thought to enable Australia to control and deter economic migration while also honoring its obligation to process boatpeople onshore and offer determined refugees permanent residence. The legal norm helped shape this policy. Moreover, mandatory detention enjoyed bipartisan support and it was adopted by a Labor government which was also the subject of criticism for being too cosmopolitan and elitist.

During the 1980s and 1990s, other liberal democracies also shifted their views about the nature of asylum seeker movement and adopted similar practices to respond. Liberal democracies shared their experience within the EXCOM and other forums. During the EXCOM meetings and the UNHCR’s working groups, states took stock of the increasing numbers of arrivals of asylum seekers. In 1983, the UNHCR hosted an informal seminar on the “Integration of Refugees in Europe,” and liberal democratic states noted that RSD and issues around manifestly unfounded
asylum claims were an urgent problem (Oelgemoller 2011: 117). They were concerned about abuse of their asylum systems. This challenge was given further voice at the October 1984 EXCOM meeting which was attended by 35 member states, NGOs, and other intergovernmental organizations. At the meeting, states encouraged the UNHCR to establish a smaller working group on “Irregular Movements” and the agency agreed. In May 1985, the UNHCR set up the “Intergovernmental Consultations on the Arrival of Asylum Seekers and Refugees in Europe” (IGC). At this point, the IGC was located within the UNHCR’s headquarters in Geneva and was made up of liberal democracies of Europe, North America, Australia and New Zealand. UNHCR had significant authority to set the agenda but liberal states also exercised influence over the direction of the meetings. By 1991, however, the IGC left the UNHCR’s office to become a more autonomous organization guided by liberal democratic states as the migratory pressures from the end of the Cold War intensified (119-120). So not unlike the emergence of the ICG in the context of Southeast Asia, the IGC arose from concern about managing asylum and migration movement. Both organizations existed outside the UN’s auspices.

As liberal democracies received more asylum seekers, they looked closely at the motivations behind the new arrivals. In my interview with Appave, who became the IGC coordinator from 1996 to 2001 and was the Special Advisor to the IOM’s former Secretary General William Lacy Swing, he mentioned that liberal democracies came to see asylum seeker movement as defined by three major categories during these years. There continued to be refugees who met the 1951 Convention definition. But they were now seen to make up a much smaller proportion of the overall number of asylum seekers. There were so-called non-1951 Convention refugees or people fleeing war, generalized violence, and other human rights abuses that were not formally covered by the definition of a refugee in Article 1. These people were clearly at grave risk and
should be protected, but there were no clear legal guidelines about how to respond. Lastly, many arrivals were seen to be economic migrants with no claim to international protection at all (Appave 2016). As Gibney points out economic migration is a spectrum, with those fleeing desperate economic situations and poverty on one end and business elites on the other end (2004: 11).

Australia’s views about refugee movement shifted along with other liberal democratic states. In 1989, Ian Simington, lead bureaucrat for Australia’s refugee policy during the Indochinese boat arrivals, wrote that migration from under-developed to developed countries was an increasing phenomenon: “for millions of people the proposition is simple. Rather than stay at home and starve or suffer… you move to another country in the hope of a better life” (1989: 97). Two years later, the National Population Council (NPC) reviewed the refugee issue and charted a path forward for Australia. The NPC emphasized the importance of an onshore asylum system because of “the potential for a refugee crisis in Asia, the humanitarian values that underpin national life, and Australia’s legal obligations” (12). The 239-page NPC report represents a sophisticated statement of Australia’s understanding of asylum seeker movement at the time and the perceived policies needed. The report cited a remarkable statistic: “experience to date suggests that at least 10 to 15 percent [of asylum seekers] will be found to be such [1951 Convention refugees]” (NPC 1991: 45). But the majority of contemporary asylum seekers were thought to be fleeing refugee-like situations and would more appropriately be provided with temporary protection and the remaining individuals with no claim to protection would be removed (44). The NPC indicated that if Australia could not control migratory movement, it would face a domestic “groundswell” of resistance towards its migration program (46). The experiences of other liberal democracies was similar.

Throughout the 1980s and 1990s, the normative community of liberal democracies shared
their experiences about these challenges in forums like the EXCOM, but increasingly in more discrete settings like the ICG and the IGC. They developed practices to respond and worked to adapt the legal norm governing the right to seek asylum to address their concerns about migration. They developed new practices not to fundamentally alter the legal norm but to incrementally adjust it to control migration while retaining their domestic asylum systems. This is not to say that liberal democratic states mindlessly adopted control practices discussed within the normative community. These states considered how to respond to the new dynamics of asylum seeking on their own, based on their obligations to the prevailing interpretation of the legal norm and their maintenance of their in-country asylum systems. Yet they also shared their experiences with other members of the normative community and learned from each other.

The use of detention for asylum seekers was a major discussion within the normative community during the 1980s and 1990s. Liberal democracies came to the view that detention was useful in balancing their obligations to the right to seek asylum while enabling control over economic migration. For example, Gerry Van Kessel, Director General of the refugee branch of Citizenship and Immigration Canada from 1995 to 2001 and coordinator of the IGC from 2001-2005, noted that states found detention useful because it denied asylum seekers access to the labor market and employment. He pointed to previously mentioned policy research discussed within the IGC that identified a correlation between the application of detention and an increase in positive RSD outcomes suggesting that detention had the desired deterrent effect in reducing economic migration. Van Kessel pointed out that detention helped “clean the asylum system out” (2015). Naturally, this is a not uncontroversial observation, but it reveals the understanding of a key liberal democratic country and an official who oversaw the IGC.

Liberal democratic states’ interest in using detention was not shared by the UNHCR.
Goodwin-Gill stated that liberal democracies were disappointed that UNHCR did not see detention as a remedy to deal with those using fraudulent or destroyed documentation, mass influxes, ‘irregular movements’, or during status determination (1996: 249). The UNHCR had good reason to be very concerned about the rising use of detention because it had the potential to expose refugees, who had significant rights under the 1951 Convention, to harsh treatment. The agency urged states to make clearer distinctions between “asylum seekers” and “ordinary aliens” or otherwise risk punishing refugees for illegal entry forbidden under Article 31(1) of the 1951 Convention. UNHCR used the EXCOM to introduce Conclusion (No. 44) on the Detention of Refugees and Asylum Seekers in October 1986 about the use of detention. The Conclusion expressed “deep concern” about the detention of asylum seekers for illegal entry and maintained that it should normally be avoided (a-b). However, it went on to state the limited set of conditions in which detention might be applied (e.g. verify identity, determine the basis of an asylum claim, deal with national security, and others).81

Understandably, mandatory detention prompted a hue and cry from Australian civil society and UNHCR. Yet Australia and other liberal states argued that without detention “ordinary aliens” would be motivated to become “asylum seekers” because of the social welfare benefits and the labor market access they could acquire by virtue of filing an asylum claim. Australia pointed out that other liberal democracies had detention policies. But the UNHCR responded by stating, “What differentiates Australia from other Western countries is the lack of modulation, the lack of flexibility in the system, the lack of limits to detention” (JSCM 1994: 120). Indeed, under the

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81EXCOM Conclusion No. 44 did not allow for the detention of asylum seekers for the duration of a determination. It cited that detention should “normally be avoided” but noted in point (b) that detention is justified on grounds prescribed by law to verify identity; to determine the elements on which the claim to refugee status or asylum is based; to deal with cases where refugees or asylum seekers have destroyed their travel/identity documents or have used fraudulent documents in order to mislead authorities in the State in which they intend to claim asylum; or to protect national security or public order.
Australian legislation, all asylum seekers were to be detained and the courts were unable to order their release. As stated above, however, detention did have some legal basis, but for limited application (113). Australia’s approach was not accepted by the UNHCR or the legal community and other liberal democracies pursued more selective detention practices.

The issue of prolonged detention, a risk in the Australian legislation, also raised concerns in light of other legal instruments like Article 9 of the ICCPR and prohibiting arbitrary detention. The Joint Standing Committee on Migration’s (JSCM) 1994 report on Australia’s detention policy admitted that this was a problem and advocated that temporary bridging visas be issued if detention exceeded six months (JSCM 1994: xiv). If Australia were to retain legal adherence, it would have to ensure that detention remained closely monitored and limited. The Immigration Department recognized this stating, “Australia’s policy of detaining unauthorized arrivals was based on an assumption that the determination of claims to enter Australia can be processed within a reasonable time limit” (DIEA 1993: 20). For the next several years, Australia appeared to adhere to this pledge. According to the Department’s statistics, the mean days in detention began to decline, from 1201 days in 1989-90 to 701 days in 1990-91 and 446 in 1991-92. By 1994-95, the number had dropped to an average of 255 days (ANAO 1998: 36). In 1997-98, the department provided further statistics on the duration of detention: a quarter of detainees were released in less than 2 weeks, half in less than 2 months, and over three-quarters within 6 months (JSCM 1998: 8). Of course, detention times were not the only legal issue at stake here. The conditions of detention and the location of facilities were other factors contributing to the policy’s controversial nature.

The normative community discussed other issues and responses towards managing

82There were specific instances of individuals being detained for several years even when the government affirmed the need to avoid prolonged detention. See the cases of two Chinese asylum applicants, Ms. Z and Mr. SE (LCRC 2000).
migration during the 1980s and 1990s. For instance, the EXCOM became increasingly used as a forum for legal deliberation. The deepening intellectual content of the legal norm governing the right to seek asylum was revealed by the fact that from 1980 to 1999, the EXCOM promulgated over 70 Conclusions on international protection. During annual meetings, Australia and other EXCOM members formulated statements indicating their views about the state of refugee protection and asylum law. With respect to the challenges facing the traditional interpretation of the legal norm governing the right to seek asylum, Australia’s statement to the 1993 EXCOM meeting revealed its understanding of the challenge and its policy direction:

The phenomenon of mass and irregular migration is made more difficult for governments to deal with by the frequently close association with refugee movements. Most notably when people with no valid claim to international protection utilize asylum procedures to enter or extend their stay where immigration laws would otherwise exclude them. This is a development which threatens the institution of asylum itself. It certainly creates significant backlog pressures, diverts scarce resources and delays the recognition, and therefore rehabilitation and integration of genuine refugees. We believe multilateral approaches will assume increasing importance and that management tools such as the concepts of safe third country, safe country of origin, limitation on repeat applications and fast track procedures for abusive claims will inevitably come to the fore (Australia 1993).

During the early 1990s, Australia received boatpeople from the People’s Republic of China.

Though the numbers remained modest, Australia adopted additional control practices. Following the NPC report of 1991 and in light of EXCOM Conclusion No. 30 (1983),83 the Immigration Department established a priority screening process to deal with “manifestly unfounded claims” and maintained secondary screening for more complex cases. Expedited screening prevented those without plausible asylum claims from entering the formal screening process but was dependent on arrivals not raising significant protection concerns. In an interview, the

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83EXCOM Conclusion No. 30 (1983) concerning ‘The Problem of Manifestly Unfounded or Abusive Applications for Refugee Status or Asylum’ recommends the establishment of expedited processes for status determination when a claim appeared “clearly abusive” or “manifestly unfounded” and recognized the problem as both ‘burdensome to the affected countries and detrimental to the interests of those applicants who have good grounds for requesting recognition as refugees’.

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Department’s Deputy Secretary at the time, Mark Sullivan, stated:

I’m sure the smugglers are much cleverer these days [implying that smugglers would later instruct boatpeople how to communicate with immigration officials so that they have the best chance of being accepted], but the typical interview forms of these boatpeople referenced reasons for departure such as to seek a better life for their children and that Australia was a better place to live than China. In rare cases, people referenced their religion or China’s one child policy and these people would then enter the secondary screening process. So it was very obvious who should receive secondary processing (Sullivan 2015).

Liberal democracies also recognized that irregular or secondary movement of refugees and asylum seekers was an increasing problem. Recall that the words, “coming directly” were inserted into Article 31 during the 1951 Convention conference very deliberately to deal with the issue of refugees migrating from an asylum country. The issue was the subject of ongoing discussion within the IGC during the 1980s (Oelgemöller 2011) and constituted the basis of EXCOM Conclusion No. 58:

The phenomenon of refugees, whether they have been formally identified as such or not (asylum seekers), who move in an irregular manner from countries in which they have already found protection, in order to seek asylum or permanent resettlement elsewhere, is a matter of growing concern. The concern results from the destabilizing effect which irregular movements of this kind have on structured international efforts to provide appropriate solutions for refugees.

During the 1980s and 1990s, Europe negotiated the Dublin Convention requiring Eastern and Southern European countries to take back refugees and asylum seekers who had moved onwards to Western Europe. The challenge, however, was in identifying whether asylum seekers and refugees actually had reason to move onwards or whether they could be returned. EXCOM Conclusion No. 58 provided some broad guidelines on identifying these principles such as “protection from refoulement”, permission to stay, and treatment in accordance with “basic human standards” until a durable solution was found (f[i-ii]). The UNHCR emphasized the importance of safeguards and insisted that it be involved in negotiating readmission agreements.
of irregular movement of refugees and asylum seekers.\textsuperscript{84} This discussion led to the formation of the Safe Third Country (STC) concept.

By the mid 1990s, Australia began receiving boatpeople from China, many of whom had been resettled there through the CPA. Australia amended the Migration Act in 1994, enacting STC legislation\textsuperscript{85} and struck a STC agreement with China in January 1995. China accepted the resettlement of some 280,000 Sino-Vietnamese refugees under the CPA and the UNHCR’s regional representative advised Australian authorities that it was a “historical fact” that the Sino-Vietnamese refugees were resettled and protected in China (Fontaine 1995: in Millbank 1995: 10). The legislation and agreement with China enabled swifter returns of Chinese boatpeople arriving to Australia with the help of people smugglers. Though some observers criticized Australia’s STC agreement with China McKenzie (1996, 813); Poynder (1995, 82-85), the practices were accepted by the UNHCR.

By the mid 1990s, Australia embarked on an ambitious effort to engage regional actors in its response to boat arrivals. Regional cooperation was thought to have an important role to play in bringing Australia’s asylum and border control practices together. Though some critics argued regional cooperation was a waste of resources and inefficient at deterring boatpeople, it provided the wider strategic context for what Australia was trying to accomplish. After all Australia was not simply trying to deter boatpeople altogether, it was trying to balance its obligations to providing asylum while continuing to exert unilateral control over its immigration program. For one senior

\textsuperscript{84} First, prior to return to a third country an asylum seeker should receive some basic screening if there is any reasonable doubt about the safety of that country for the applicant. Second, receiving states should send asylum applicants to safe third countries but also ensure those found to be refugees actually obtain protection there. Third, UNHCR encouraged states to seek the support and assistance of UNHCR in facilitating agreements for handling asylum applications (UNHCR 1995: 125-127).

\textsuperscript{85} Australian STC legislation was devised in consultation with the UNHCR and outlined conditions within which Australia could declare a country a STC: compliance with relevant international law concerning protection of persons seeking asylum, relevant human rights standards for the persons in relation to the country prescribed as a safe third country, and the willingness of the country to allow entry (Section 91 D).
Some people said these arrangements didn’t do anything, but in some ways they didn’t have anything to do other than to build relationships, develop comprehension and understanding of the complexity of the issues and how they might play out. Regional meetings were the fabric on which the other bits and pieces (bilateral agreements, capacity building, safe third country agreements, etc.) got embroidered (Bedlington 2015).

Once the CPA came to an end, Australia anticipated a multilateral vacuum in the region and decided to initiate informal regional consultations with Asian states. Senior officials in the Immigration Department believed that continuing boat arrivals were “inevitable” and recalled that, “while the region was not faced with great pouring of people across borders and no crisis at this stage, we needed to set up the dialogue and relationships for how to respond to a crisis when it happened” (Interview F 2015). Regional cooperation then, was not about simply exerted national sovereignty to control immigration movement. It was about sustaining Australia’s legal obligation to its onshore asylum system in light of new shared understandings about asylum and migration movement.

In 1996, Australia and the UNHCR set up the Asia Pacific Consultations on Refugees, Displaced Persons, and Migrants (APC) designed to “encourage continued regional dialogue on refugee issues in the wake of the CPA for Indochinese Refugees which concluded in June” (DIMA 1996-1997). Following the first meeting, Australia and the UNHCR made efforts to institutionalize the arrangement. Participants set up meetings outside the annual plenary such as “Sub Regional Meetings” for the Mekong region, South Asia, and South Pacific, an annual Geneva meeting on

the margins of the EXCOM, and Expert group meetings (APC 2002). A full-time coordinator’s position was created located in the UN office in Bangkok, Thailand who set themes to be discussed and hosted meetings. UNHCR’s lead in the APC, Jahanshah Assadi stated the long-term goal:

It was hoped that the APC would encourage capacity building through the training of officials and lawyers, building institutions to deal with migrants and asylum seekers, develop information sharing and common databases, all with the end goal of developing more sophisticated asylum systems for future crises and possibly even accession to the Convention (2015).

While Southeast Asian states were reluctant to participate in any such activities, Australia also launched a series of other regional initiatives to deal with migration, particularly the criminalized side or irregular migration: the Pacific Immigration Directors’ Conference (PIDC), which involved 18 Pacific Island States; the Manila Process on migrant trafficking; and the Bangkok Declaration on Irregular Migration in 1999. Australia received more diplomatic traction with Southeast Asian states when it came to addressing the criminalized dimension of irregular migration, particularly around smuggling and trafficking. The senior Australian Immigration Department official who led negotiations for the Bangkok Declaration described her goal as follows:

The Bangkok Declaration was very much balancing the feelings of countries of first asylum and the transit countries so that they accepted that they were part of the picture. So, it was getting a framework that was about systemic thinking, that everyone would accept that they were part of a bigger picture. There were things that they needed to do, that it wasn’t solely a destination country issue, because they all felt that Australia is a big rich destination country why on earth should we bother? So, a lot of the background discussion was had about why it was a bad thing for them to be a transit country. What the downside was for them (Bedlington 2016).

The Declaration makes repeated reference to the different roles and responsibilities of “origin, transit, and destination countries”. The Declaration identified “the obligations of the country of origin to accept its nationals back, and the obligation of the countries of transit and destination to provide protection and assistance where appropriate, in accordance with their national laws”
(paragraph 12). The Bangkok Declaration established a context which could allow Australia to remove those not found to need protection and persuade Southeast Asian states that smuggling and irregular migration could create problems for them. If Australia did not have an obligation to provide access to its onshore asylum system, there would not be much of a motivation for initiating and investing in these meetings. But Australia had accepted its legal obligations and developed an onshore asylum system. Without international cooperation, Australia would have trouble removing those found not in need of protection.

The proliferation of regional cooperation was also something called for by the normative community. At the 1994 UN International Conference on Population and Development, delegates included Chapter X of the Conference’s Programme of Action. Chapter X called for “more cooperation between sending and receiving countries” to find durable solutions to the plight of refugees and displaced persons.87 That same year, the IOM sponsored a conference titled the “International Response to Trafficking in Migrants and the Safeguarding of Migrant Rights” in Geneva. The conference attracted the participation of some 230 representatives from 70 states and 40 intergovernmental and non-governmental organizations and research institutes. The conference was chaired by Mark Sullivan, Deputy Secretary of Australia’s Immigration Department, and indicated the central role Australia played in these circles. The participants called on IOM to organize dialogues on a regional basis that focused on specific issues of migrant trafficking and the protection of migrant rights (Gunatilleke 1994: 602-603). IOM was also behind the creation of numerous regional meetings and provided technical support by writing documents and operating websites to promote continuity from meeting to meeting. IOM helped establish and provided administrative support to the Budapest Process and Vienna Process in 1991 and the International

Centre for Migration and Policy Development (ICMPD) in 1993 to cope with an influx of irregular migrants and asylum seekers from East to West after the Cold War. In 1996, a further four regional meetings were established in Asia, Europe, and the Americas.  

Australia’s efforts to regulate its asylum system amidst its new beliefs about boat arrivals appeared to be a success. From 1991 to 1996, Australia returned over 1000 boat people to China (York 2003), and the estimated number of people living in Australia unlawfully decreased slightly from 51,300 in 1995 to 47,600 in 1996 (DIMA 1996). Australia’s system of detention, priority screening, and returns was seen to be an effective response to boat arrivals. And though detention was controversial and problematic from UNHCR’s perspective, Australia worked to maintain a generally acceptable policy. From 1995-1998, there were 1434 people who arrived on 54 boats, most of whom were from the PRC. According to statistics cited by Corlett and Manne, 170 of these people were accepted as refugees, 18 were granted bridging visas, and 1246 were removed (2003). Australia’s efforts to deter boatpeople during the 1990s seemed to have the desired effect. From 1996 to 1998, only 589, 365, and 157 asylum seekers arrive by boat annually to Australia (Phillips and Spinks 2013: 23) and senior Immigration Department officials spoke of the Chinese caseload ‘drying up’ (Bedlington 2015). During these years, Australia largely followed the path of other liberal democracies in reforming its asylum and border control policies. If there was anything unique about the Australian case, it was its sensitivity to small numbers of boat arrivals and its emphatic commitment to mandatory detention. But Australia continued to accept the legitimacy of the interpretation of the right to seek asylum that emerged in the late 1970s around in-country

In the Asia Pacific region the Asia Pacific Consultations on Refugees, Displaced Persons, and Migrants and the Manila Process on Trafficking were created. The North and Central America states created the Regional Conference on Migration (Puebla Process) and elsewhere Western and former Soviet Union governments established the CIS Conference to discuss displacement, analyze displacement situations, and devise comprehensive strategies to cope with involuntary movement coming from that region.
asylum processing.

During this adaptation process, the normative community provided guidance regarding new practices and served an adjudicatory role, accepting some practices and rejecting others. The most prominent example of harsher measures being introduced but rejected by the normative community was the U.S. response to Haitian boat arrivals beginning in the early 1980s. In 1981, the Reagan government began a program of interdicting Haitian boatpeople on the high seas to prevent them from accessing the United States and filing asylum claims there. The U.S. Immigration and Naturalization Service provided for screening of refugee claimants onboard U.S. Coast Guard vessels. Those raising a credible fear of persecution were to be transferred to the U.S. mainland for full RSD. One study found that of 23,000 Haitians interdicted by the U.S. between 1981 to 1990, only 6 were transferred to the U.S. for full screening (LCHR 1990: 4). The policy continued throughout the 1990s, when the U.S. began using Guantánamo Bay as a location for processing. By 1994, the U.S. introduced a “safe haven” policy whereby asylum seekers would not be returned automatically, but those with refugee claims would not be transferred to the U.S. (Ghezelbash 2018: 105-108). The U.S. policy prompted significant criticism at the time. Though the U.S. did provide for some screening, it also claimed that its non-refoulement obligations did not extend outside U.S. territory. This position was remarkably upheld by the U.S. Supreme Court in 1993 in Sale v Haitian Centers Council (Legomsky 2006: 679-83). The UNHCR responded to the Sale decision condemning it as “a setback to modern international refugee law” (UNHCR 1993). Legal scholars also criticized the outcome as undermining non-refoulement because many interdicted Haitians did not receive proper screening against the 1951 Convention definition of a refugee, if any screening at all (Frelick 1993; Goodwin-Gill 1994).

The U.S. Haitian policy represented the most forceful position among liberal democratic
countries in responding to asylum seekers. Other states, of course, did share the U.S.’s concerns about responding to asylum and migration. But they did not follow the United States and the U.S. remained alone in holding the position that non-refoulement did not apply extraterritorially. Some actors did feel that more radical change was necessary. In 1986, Denmark introduced a draft to the UNGA for the establishment of “Transit Processing Centres” for asylum screening and resettlement. But the proposal failed to receive sufficient support (Noll 2003: 311). In 1993, the Dutch Secretary for Justice, Aad Kosto, proposed reception centres in regions of origin to European states. Under the plan, arrivals in Europe would be returned to centres for processing. According to O’Nions, states did not support this plan (2014: 177).

The issue of third country processing and interdiction was considered by the IGC in 1994-95. The Dutch chair of the IGC put the issue on the agenda that year. In an August 1995 meeting, the IGC secretariat tabled an exploratory paper assessing the viability and desirability of interdiction and offshore processing by probing the U.S. Haitian policy and the CPA as case studies. IGC states expressed skepticism and reluctance about offshore processing in the following excerpt:

Comments and reactions to the 1994 IGC Report from a variety of sources indicate that the suggestion of protection in an ‘exclusive’ location faces significant moral (political and humanitarian) and legal obstacles. Politically, it is a controversial scheme that would possibly have a very negative impact on public opinion. Moreover, it contravenes a number of relevant provisions of International Law and also appears to be incompatible with Constitutions and internal systems in many participating States. On the practical side, it may encourage human trafficking on forged identities and nationalities. Careful examination of these impediments therefore leads to the conclusion that the ‘exclusive’ option is not feasible and as such, does not deserve further elaboration (IGC 1995: 7).

The quality of the legal discussion in the paper was of a high level and indicates the understanding within the IGC about how asylum law worked and the barriers to implementing offshore screening at this time. In deciding that offshore processing was inappropriate and unworkable, the normative community revealed its role as an adjudicator of shared understandings and practices.
Liberal democratic states continued to see the traditional interpretation of the legal norm as an appropriate and workable basis for upholding their obligations to the right to seek asylum throughout the 1980s and 1990s. The U.S. policy towards the Haitian boatpeople continued to be the exception rather than the rule. Instead, liberal democracies continued to build control practices into their in-country asylum systems in the hopes of deterring irregular migration while maintaining those systems. During his years working on the CPA and as coordinator of the IGC, Appave recalled that there was “never any serious consideration given to jettisoning the 1951 Convention” (2016) and rejecting the traditional interpretation of the right to seek asylum that all asylum seekers were to be processed in-country and convention refugees provided with permanent residence. In addition to this adjudicative role, the normative community enabled liberal states to compare their experiences and practices with one another. In some cases, these meetings led to common standards such as the EXCOM conclusion regarding the use of detention. In other cases, these interactions led to the emergence of new ideas and concepts like secondary movement and the Safe Third Country principle that would become implemented in domestic legislation. Liberal democratic states, and UNHCR to some degree, oversaw the development of new control practices designed to retain the traditional interpretation of the right to seek asylum.

The last point I will make is just to highlight that shifting shared understandings led to adaptations in other areas of refugee protection during the 1980s and 1990s and not just liberal states’ asylum systems. The normative community debated the definition of a refugee, it developed new protection practices like prevention, temporary protection, and voluntary repatriation, and the UNHCR took on a more humanitarian role in the regions where refugees originated. Given the growing number of non-Convention refugees, the prospect of broadening the formal definition of
a refugee was raised but resisted. Australia’s NPC report explicitly stated the problem here:

If the international community were to be obliged to provide full protection to all people fleeing the root (or predisposing) causes of mass movements, the potential numbers that could be involved, and the burdens they would impose on a relatively small number of receiving countries, could be enormous and fatally undermine the whole system of protection (25).

This perspective was taken forward by Australia to the EXCOM in 1994:

The answer is not to seek to widen the refugee definition in order to bring this group within the scope of the 1951 Convention. The concept of persecution remains at the heart of the Convention. It would not be helpful to those who are the subject of persecution to be placed in a wider category with others not sharing their plight. Moreover, the Convention as such is not the answer, because the protection needs of these persons and the solutions they require are qualitatively different from those relevant to refugees. We consider, in particular, that what has been called the “exile bias” of the traditional approach to refugee asylum cannot be in the interest of those whose distress to leave is matched only by their anxiety to return home (Bedlington 1994: 3).

While some argued that providing the same bundle of rights to these refugees would be too onerous and argued for a narrow definition of a refugee (Martin 1991; Price 2009) and states resisted expanding the formal definition of a refugee, practice was to provide identical status to that of 1951 Convention refugees (McAdam 2009: 242). Australia and other liberal democratic states’ perspectives towards a broadened definition of a refugee reveal their concern that the right to seek asylum did not become too onerous an obligation.

UNHCR’s prominence and role also began to shift during the 1980s and 1990s as it took on more humanitarian activities. High Commissioner Ogata issued a Note on International Protection to the UNGA in 1992 emphasizing new measures the agency would pursue to deal with refugee pressures closer to their region of origin such as prevention, temporary protection, and voluntary

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89 More expansive definitions of a refugee that included other threats that compelled refugee movement were acknowledged in soft law or regional agreements such as in the Organization of African Unity Convention Governing the Specific Aspects of Refugee Problems in Africa (1969), the Cartagena Declaration on Refugees (1984), and Bangkok Principles on the Status and Treatment of Refugees (2001).
Ogata saw preventive strategies as a way to “both attenuate causes of departure and reduce or contain cross-border movements or internal displacements”. Through attention to root causes, the agency pledged to be more engaged in measures like preventive diplomacy, human rights promotion, economic and social development, protection of internally displaced persons (IDPs), coordination with other international agencies, and efforts in peace negotiations (UNHCR 1992: para 26). By doing so, the agency dramatically increased the number of people it sought solutions for. While the number of international refugees fell from 17 million in 1990 to 12 million in 1997, the UNHCR took on protection responsibilities for some 32 million IDPs by 1997 (IDMC 2015). From 1990 to 1993, however, UNHCR doubled its organizational size and increased its budget from US$564 million in 1990 to US$1.3 billion in 1993 (UNHCR 2000: 163). The agency’s budget only dropped below the $1 billion mark once during that period, falling to $887 million in 1998.

Following the Indochinese experience, third country resettlement underwent a decline in prominence among UNHCR’s three durable solutions. By 1985, the agency was openly stating its order of preferences whereby “voluntary repatriation is the happiest of durable solutions, resettlement in third countries may be the solution of last resort” (cited in Fredriksson and Mouge 1994: 6). Following the end of the Cold War, High Commissioner Ogata took office in 1991 and proclaimed the 1990s “the decade of repatriation.” Some 9 million refugees repatriated from 1991-1996 to various African, Central American, and Asian countries, a significant increase over the

91These numbers do not take into account contributions of goods such as tents and medicines, or assistance with transportation and other services. If these were taken into account, the figures would be significantly higher.
92While there was “disenchantment” with resettlement during the 1980s, it would remain a valuable and durable solution in very specified circumstances towards protection needs and often involved smaller numbers as indicated to the EXCOM in 1991 and 1994 (Fredriksson and Mouge 1994: 6).
1.2 million repatriated from 1985-1990 (UNHCR 1997: 143). In Southeast Asia the UNHCR oversaw more than 370,000 returned to Cambodia as part of the Paris Peace Accords, and 109,000 Vietnamese returned to Indochina from 1989-1996 under the CPA (Zieck 1997: 85). The growing interest in repatriation also complemented a turn towards temporary protection during the early 1990s. As a result of the mass influx of 500,000 Yugoslavian refugees to Europe, temporary protection was thought to guarantee refugee safety and ensure refugees were prepared to return when conditions improved.

Liberal democracies supported and advocated for the UNHCR’s growing humanitarian agenda in regions of origin. At the 1992 EXCOM meeting, Australia described the agency at a “crossroads” in its history and endorsed its shift away from

its traditional role as an organization narrowly concerned with the ‘correct’ application of the 1951 Convention and issues of protection to that of an international organization with a heavy operational focus… We have reached a point where in the face of situations not envisaged in 1951 we must look beyond the provisions of the Convention (Australia 1992).

Australia, like other liberal democracies, supported the UNHCR’s work as necessary in responding to new refugee movement. But these states also saw this move as attenuating pressure on their domestic asylum system. During its 1993 statement to the EXCOM, Australia made the point:

We also see value in taking a comprehensive burden sharing approach focused on taking asylum places to those in need, rather than simply maintaining domestic asylum systems for those best able to access them. We have increased our resettlement program from 10,000 to 12,000 and this year increased it again to 13,000. A handful of countries offering humanitarian resettlement can only have a limited impact on mass and irregular migration, but we believe there would be considerable advantages if more countries took asylum places to those in need of protection. If we can reach a stage where the great majority of refugees and others in humanitarian situations have their asylum needs met closer to the source there will be correspondingly less need for them to use domestic asylum systems (Wensley 1993).

The effort of liberal democratic states to update the rules and practices of the legal norm and resolve uncertainties and questions about responding to asylum and migration pressures helped to sustain the interpretation of the right to seek asylum that cohered in the late 1970s. Without the
ability to adapt the legal norm to respond to changing beliefs about asylum and migration movement, Australia might have lost its sense of legal obligation towards maintaining an onshore asylum system. As Brunnée and Toope describe, adjusting the rules and practices can reduce the “impulse to fundamentally question its (the legal norm’s) underlying social premises” (2017: 19). By believing it could resolve ambiguities and gaps in the legal norm governing the right to seek asylum and noting that other members of the normative community were responsive to these matters preempted the likelihood of significant political tensions arising domestically. For example, Australia’s response to boat arrivals from the late 1970s to the late 1990s was achieved through bipartisan consensus. There was no sustained political debate about boatpeople because Australia’s beliefs about asylum seeker movement were adequately met by the available policy practices. The LNC government of Malcolm Fraser introduced Australia’s onshore asylum system and a decade later it was the ALP government of Bob Hawke and Paul Keating who passed mandatory detention legislation and other controls. In both cases, opposition parties supported each set of policies. In 1993, McAllister stated that “each successive party government had honored the sometimes substantial [policy] changes made by its predecessor and retained an effectively unpopular policy” (1993: 176). Prime Minister Hawke stated that, “I don’t think there is any other issue of importance on the Australian political agenda of which it can be said there is such an implicit pact between the two major groups” (Kingston 1993: 10).

Australian politicians and government officials saw the value in maintaining bipartisanship on this issue. For LNC Senator Jim Short, maintaining bipartisanship was about “not scratching too hard” for fear that a “dark underbelly of Australian opinion, fed by racism, resentment at outsiders demanding resources, and fear of queue jumpers… could explode into an ugly and uncontrollable force in Australian politics” (1993: 9). I asked Mark Sullivan about his
perspective on the issue of bipartisanship during the 1990s:

Boat arrivals were not the subject of political debate at this time. As a government official you briefed the opposition in almost the same way as you briefed the government as to what was going on, and therefore there wasn’t a political climate that saw the issue flare in a major way… It didn’t get any political wind behind it because the politicians would be briefed by the department and they’d go away and agree not to say anything. That was there for this policy to occur (2015).

Of course, maintaining bipartisanship involved a degree of domestic political will and choice. But legal norm adaptation was an important and perhaps even more fundamental factor in maintaining this consensus. Without the ability to adapt the legal norm to new circumstances using practices approved of by the normative community, politicians could more easily question the fundamental premises of the legal norm, a situation that could result in more idiosyncratic and harsher practices being applied. On the other hand, if Australia believed its concerns about asylum and migration movement were being adequately addressed, then domestic politicians would have less of a basis to publicly question the continuing legitimacy of its onshore asylum system. In short, the normative community helped to contain debate on this issue.

I have argued that a theory of legal norm adaptation provides a more complete explanation for Australia’s shifting beliefs and practices towards boatpeople compared to straightforward arguments about domestic politics or rising numbers of arrivals. Australia adopted a range of control practices like detention, expedited screening, STC legislation, a return agreement with China, and regional cooperation. Of course, Australia’s concerns about national sovereignty and maintaining unilateral control over its immigration program were major motivations behind the introduction of these practices. But Australia’s acceptance of an interpretation of the legal norm governing the right to seek asylum and its participation in the normative community were also important in shaping these practices. Had Australia not established an onshore asylum system and seen this as an appropriate way to uphold its legal obligations then these practices would not likely
have emerged as they did. The normative community helped to shape Australia’s policy changes from 1989 to 1999 by adjudicating what practices were appropriate and inappropriate and by developing new thinking like the STC concept and standards regarding detention and expedited screening. These practices were introduced incrementally to adapt the legal norm governing the right to seek asylum while retaining its fundamental interpretation: all boatpeople would be processed onshore and determined refugees offered permanent residence.

While I have found constructivism helpful in providing a more complete explanation for Australia’s shift in beliefs and practices regarding boatpeople during the 1980s and 1990s, it is less conclusive about whether these practices were normatively fair and appropriate. Australia and other liberal democracies received new information about the rising prominence of migration, prompted by deeper intellectual deliberation and new experiences. They expressed concerns about their in-country asylum systems becoming a “backdoor” for migration and therefore changes needed to be made. This point seems entirely reasonable. But many legal advocates, academics, and, at times, the UNHCR, criticized Australia’s practices and those of other liberal democracies for undermining their legal obligations in favor of national sovereignty. Some argued that liberal states’ efforts to address asylum and migration pressures was a way to “contain” refugees in regions of origin and pull back from providing asylum (Chimini 1998). Others identified an emerging non-entrée regime aimed at deterring asylum seekers and not just economic migrants (Hathaway 1993: 719; Hassan 2000). The UNHCR recognized this possibility and urged liberal democracies not to withdraw from providing asylum:

Prevention must not be pursued as an alternative to asylum, but rather in addition to it… While I am encouraged by the developments to provide temporary protection in situations of large-scale movements, I am also concerned by the fact that major reversals can be observed in the commitment to asylum. The cardinal principle of non-refoulement is being flouted in some parts of the world, by those very States which support our international action most generously elsewhere (Ogata 1993: para 22).
Moreover, liberal democracies were accused of interacting in less transparent and more discrete venues like the IGC and ICG where views were shaped and practices disclosed (Oeglemöller 2010). Australia, nevertheless, continued to maintain an onshore asylum system for boatpeople. And its practices were not idiosyncratic; they were generally in line with what other liberal democracies were doing at this time. Constructivism is helpful in showing that Australia’s shift was part of a broader trend among liberal states and that it generally adhered to the prevailing interpretation of the legal norm governing the right to seek asylum established during the 1970s. But whether these liberal states were justified in adopting these practices or whether the advocacy community was fair in its criticism is not a simple issue. A constructivist approach, on its own terms, has trouble grappling with it.

3.6. Conclusion

In this chapter, I described and explained the development and adaptation of a coherent interpretation of the legal norm governing the right to seek asylum and Australia’s acceptance of that interpretation. Along with the UNHCR, liberal democracies were the major founders of the refugee regime in the form of the 1951 Convention and the 1967 Protocol. But it was not until the 1970s that coherent shared understandings and legal practices emerged that brought clarity to the meaning of the legal norm and how it ought to be implemented. Australia and other liberal states accepted that they should receive asylum seekers, process them domestically, and offer determined refugees permanent residence. Their positions were based on a particular understanding of asylum seeker arrivals as primarily being made up of refugees.

During the 1980s and 1990s, rising international migration and the new dynamics of asylum seeker movement created uncertainty among liberal democratic states about how to
respond. Liberal states shifted their shared understandings accordingly and identified a need for new practices to respond. Though more radical options were considered, liberal democratic states decided to continue building on the existing legal interpretation that all asylum seekers would be received, processed domestically, and determined refugees offered permanent residence. It was believed that the introduction of new practices would allow liberal democracies to control migration while enabling them to retain their obligation to the traditional interpretation of the right to seek asylum. I argued that these practices had an international legal origin and were not simply informed by domestic politics, rising populism, and self-interest. Without exercising control and national sovereignty over asylum seeker arrivals, the legitimacy of the legal norm could have been harmed. The question of whether these practices (particularly detention) were the right way to strike the balance between national sovereignty and providing asylum, however, was more contentious.

4.1. Introduction

In the previous chapter I argued that Australia’s introduction of immigration and asylum reforms were part of a gradual shift in the shared understandings among members of the normative community regarding the nature of asylum seeker movement and the appropriate response. Though Australia encountered some controversy particularly around detention, it continued to adhere to the interpretation of the legal norm that emerged during the late 1970s: all boatpeople would be processed in Australia and those in need of protection would be offered permanent residence. In September 2001, Australia broke from this traditional approach and diverged from the normative community and domestic bipartisanship on the issue. Boatpeople arriving to Australia would no longer be allowed to access its in-country asylum system. Instead, boatpeople were to be intercepted at sea, transferred to offshore processing centres, and determined refugees resettled abroad. The well-known and controversial strategy became known as the Pacific Solution.

How can we explain the Australian Howard government’s divergence from the normative community and a break from previous practices? Most accounts of Australia’s dramatic departure from past practice and the normative community rely on arguments about domestic politics, a surge in the number of boatpeople (Table 1), and the 9/11 terrorist attacks in the U.S. These are of course important elements in an explanation, but why did Howard wait until August 2001 before implementing this strategy? And what gave Howard this opportunity? In this chapter, I argue that the surge in boat arrivals, domestic politics and post-9-11 security concerns were joined by
considerations regarding how to interpret the legal norm governing the right to seek asylum in a period of profound uncertainty about the appropriateness of prevailing legal practices. A theory of legal norm contestation adds needed nuance and accuracy to explanations for the Pacific Solution. In particular, uncertainty regarding how to interpret the legal norm governing the right to seek asylum influenced domestic politics by creating opportunities for actors to respond in ways that reflected their distinctive positions on sovereignty and national identity.

Table 1 - Boat Arrivals from 1996-2004

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<td>19</td>
<td>11</td>
<td>17</td>
<td>86</td>
<td>51</td>
<td>43</td>
<td>1</td>
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<tr>
<td>People</td>
<td>660</td>
<td>339</td>
<td>200</td>
<td>3721</td>
<td>2939</td>
<td>5516</td>
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<td>53</td>
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*Source: (Phillips and Spinks 2013:22)*

I proceed in three steps. First, I discuss the early years of the Howard government. Despite harboring populist sympathies, it responded to boatpeople in a relatively restrained manner until August 2001. The Howard government appeared to accept that its obligations to the legal norm governing the right to seek asylum entailed that boatpeople would be processed by its onshore asylum determination system. Second, I describe how an accepted and relatively stable interpretation of a legal norm becomes destabilized. I note that the spike in arrivals between 1999 and 2001 led the Immigration Department to detect problems with the traditional interpretation of the right to seek asylum. These problems came in the form of gaps, ambiguities, and contradictions in the legal norm. Even though Australia’s onshore asylum system found the vast majority of boatpeople to be refugees, the Howard government maintained that they were “queue jumpers” and secondary movers. They also argued that migrant smugglers exploited Australia’s onshore system.
for financial profit. These issues created uncertainty about how Australia should respond. The Immigration Department used its knowledge and expertise to devise new ideas and solutions for resolving the situation and entrepreneurially promoted these to the normative community. The Immigration Department found a sympathetic and motivated executive branch. Both the senior civil servants and Minister Ruddock worked together entrepreneurially to contest the existing interpretation of the right to seek asylum and promoted new practices. In the third section, I discuss how Australia’s need to respond to uncertainty regarding the legal norm led to forceful political action on the part of Howard government. By August 2001 and in the midst of rising boatpeople arrivals, the Howard government decided to break from the normative community and domestic bipartisanship by introducing an offshore asylum and border control policy in the form of Pacific Solution strategy. Rising uncertainty about how to respond gave the Howard government an opportunity to channel its vision of national sovereignty into a particularly minimal interpretation of what it believed constituted Australia’s legal obligations to the right to seek asylum.


To recall, the right to seek asylum consists of both a liberal human right enabling refugees to find protection and a national sovereignty right allowing states to control regular immigration. In this respect, a state’s particular vision of national sovereignty and identity can have an impact on that state’s interpretation of the right to seek asylum. The rise of John Howard, and what I call a populist version of Australian national sovereignty, was important for the direction of the country’s asylum and border control policy. When uncertainty emerged from 1999 to 2001, the Howard government’s populist sympathies came through because it was willing to take forceful and bold action to respond.
What did a populist version of national sovereignty look like? John Howard became the Liberal Party leader in January 1995 and then Prime Minister of Australia in March 1996. It was the first time in 13 years that the right of centre party controlled the nation’s highest office. Howard had a controversial history and an association with populism. He first came on the Australian political scene during the 1980s and received attention for his criticism of multiculturalism, political correctness, and what he saw as an overly high rate of Asian immigration. By the time Howard became an influential politician, the White Australia policy had already been dismantled during the 1960s and then officially so by 1972 by Australian Labor Party (ALP) government led by Gough Whitlam. The Liberal National Coalition (LNC) Fraser government forcefully endorsed multiculturalism from 1975 to 1983. During the 1980s, however, multiculturalism became subject to a populist critique. In a series of lectures and a 1984 book called *All for Australia*, the Australian historian, Geoffrey Blainey, laid out the populist position on the country’s political system. John Howard, a rising LNC representative saw Blainey as courageous for speaking out and channeled Blaney’s critique into the political sphere.

Blainey’s critique consisted of two main points. First, immigration policy was too closely wedded to Australia’s developing relationship with Asia and disproportionately favored Asian immigration at the expense of European and particularly British immigration. Blainey asserted that recent immigrants had more difficulty integrating into Australia, stole jobs, threatened Australia’s tolerance and British cultural heritage, and brought undemocratic ideals with them (1984: 54-55). Second, Blainey claimed to be reacting to what he saw as an “anti-democratic liberal orthodoxy of multiculturalism that branded all critics and opponents as racists and xenophobes” (123). Multiculturalism, Blainey argued, had attained bipartisanship at the political level but it was missing tri-partisan support, namely from the public at large (12). The essence of Blainey’s
position was that immigration policy was not representative of the larger Australian community; it was being developed by elites in backrooms in Canberra and worked against the interests of the country (65).

The first point about Asian immigration was arguably racist and would prove difficult to sustain in the long-term. This observation speaks to the changes in Australian national identity or demography that occurred over the previous forty-years. During the late 1940s public political comments about racial preferences for immigration were common. By the late 1980s and 1990s, however, such comments created controversy and were generally condemned by mainstream politicians. The second point regarding elitism would be more enduring. Though Blainey had hoped to stimulate public debate in the lead up to the December 1984 federal election, few politicians were willing to take up his mantle. Some pointed out that Blainey’s insights about Asian immigration were substantiated with dubious data. Mainstream politicians distanced themselves from his commentary because of the racist sentiment it might provoke among the public. Some noted that Blainey was snubbed by many of his fellow academics at the University of Melbourne. Yet for some within the LNC, such as John Howard (Deputy Leader at the time), Blainey’s treatment was seen as unfair. Howard applauded Blaney for his courage in initiating what he saw as an important public debate. Others said that regardless of the accuracy of Blainey’s complaints, he had uncovered a “feeling” in Australian society that was not being represented in politics or the media (Manne 2009). Yet, there would be no public debate during the federal election of 1984.

Jakubowicz (1985) criticized Blainey’s contribution on a number of key points. First, the statistics on Asian immigration were exaggerated. From 1975 to June 1984, Australia had only taken in about 90,000 Indo-Chinese refugees and Asian migrants still represented less than 2 percent of the Australian population. Second, the decline in British and Northern European immigration had declined on its own and any notion that Asian immigration was taking precedence over that were wrong. Third, public opinion polls found that Australian opinion on Asian immigration was virtually the same as it was twenty years before when the White Australia policy was being rescinded. Lastly, research indicated that immigration has a neutral or slightly positive effect on employment.
This “feeling” would be reignited following the release of the Fitzgerald Report of 1988, a public inquiry into the country’s immigration program. The Labor Government established the Committee to Advise on Australia’s Immigration Policies (the Fitzgerald Committee Report) at the request of ethnic communities who believed Australia’s immigration program had become too “economically rational”. When the Committee released its Report in 1988, surprisingly it actually voiced a number of Blainey’s key concerns (Birrell and Betts 1988: 261). It identified a waning of public support for immigration, a need to focus on human capital and skills criteria, the curtailing of the country’s humanitarian intake from Indochina as well as the family reunification, and, controversially, a reduction in Asian immigration (Jupp 2007: 44). Furthermore, “multiculturalism,” the report stated, “is seen by many as social engineering which actually invites injustice, inequality, and divisiveness” (CAAIP 1988: 3). Perhaps the most influential recommendation was the call to insulate immigration policy-making from sectional interests because the increasingly pluralist Australian culture was undermining a coherent immigration policy (4). These recommendations would inform the 1989 legislative amendments discussed in the previous chapter. However, the refugee program was seen in a highly favorable light: “Helping refugees is part of Australians’ view of themselves… The refugee program is perhaps the greatest cause for confidence that in the long run we can be extremely successful in managing the social dimension of immigration” (69). No attention was devoted to Australia’s onshore asylum system or the possibility that this system could be subject to abuse and a backdoor for migration.

Howard, now leader of the LNC, seized on the Fitzgerald Report’s findings to re-open his attack on Labor’s immigration policy as “aimless and divisive”. This time Howard announced his replacement for multiculturalism: “the ‘One Australia’ policy in which loyalty to Australia, her institutions, her values and her traditions transcend loyalty to any other set of values anywhere in
the world” (Jupp 2007: 106-107). Howard publicly commented that to support “social cohesion” the rate of Asian immigration should be “slowed down a little” (Errington and Van Onselen 2007: 157). According to historian James Jupp, Howard’s comments divided opinion within the LNC party and undermined Howard’s standing amongst established LNC party figures, including federal and state Ministers (2007: 107). In response, Prime Minister Hawke proposed legislation to affirm that race or ethnicity would not be used as immigration selection criteria. Several LNC MPs abstained from the vote while others crossed the floor to voice support for the amendment.

In 1989, Howard was removed from the Liberal leadership; many Liberals recalled that Howard’s position on immigration was instrumental in forcing him out (Kelly 1994). Andrew Peacock took over the LNC leadership and underscored the point that immigration policy was to be non-discriminatory. Howard’s initial efforts to implement a populist agenda concerning immigration did not prove to be sustainable and suggested the resilience of multiculturalism. It also indicated that the country’s national identity had changed following the transformative processes of the 1960s and 1970s.

Following a political re-shuffling within the LNC during the early 1990s, Howard saw an opportunity to make another leadership run. He regained the position in 1995 and eventually won the 1996 federal election. Some referred to Howard as the ‘last man standing’ (MacCallum 2004: 60) and even Howard called himself Lazarus rising from the dead (2010). For George Meglagensis in *The Longest Decade*, however, his success was contingent on an explicit rejection of his past association with racist sentiment. Howard atoned for his former attitudes towards Asians and ceased denigrating Australia’s multiculturalism policy. In January 1995, Howard made his apology in *The Weekend Australian* in an article headlined, “I was wrong on Asians, says Howard”. The piece was seen as an apology to Asians, a tacit commitment to multiculturalism, and an attempt on
the part of Howard to position himself as a “tolerant conservative” (Meglagensis 2008). Howard also had to be strategic. In his own electorate, the number of non-white voters had increased; to succeed politically, he would have to tone down his previous positions. According to Gwenda Tavan, Howard endorsed the broad principles and policy directions set down by the Hawke Labor government in the 1980s, while simultaneously attempting to limit multiculturalism from within (Tavan 2006: 17). He folded the Office of Multicultural Affairs into the Immigration Department, changed its name from the Department of Immigration and Ethnic Affairs to the Department of Immigration and Multicultural Affairs, and decreased government funding for the Federation of Ethnic Communities Councils of Australia. Howard did not ambitiously promote multiculturalism, but he was no longer willing or able to attack the policy as he had during the 1980s. He regained the leadership position in no small part by abandoning an explicitly racial critique of immigration and multiculturalism. Despite Howard’s effort to critique multiculturalism and Australia’s demographic transition, there appeared to be no rewinding of history on this issue.

The second strand of the populist critique concerning elitism was more valuable for Howard. This argument resonated with some of the negative perceptions emerging from the neoliberal economic changes driven by the Hawke and Keating governments: the dollar was floated; the financial system was deregulated; state-owned businesses were privatized; national competition policy was introduced; centralized arbitration was weakened; and protections for manufacturing and agriculture were dismantled (Manne 2004). Howard argued that these economic changes were designed by wealthy and well-educated elites and created winners and losers, set the cities against the countryside, and pitted the educated against the uneducated. For Australian historian Robert Manne, a “chasm opened up between ‘elites’ and ‘ordinary people’” enabling Howard to capture support from blue-collar Labor voters, dubbed the ‘Battlers’ (2004:
4). The LNC party gained a 29-seat swing in the 1996 federal election and received a 45-seat majority, the second largest majority in Australian history (after Fraser’s 55-seat majority in 1975).

Howard won the 1996 and 1998 federal elections without explicitly revisiting any of the racialized sentiments he was known for during the 1980s. Yet he did promote a version of Australian national identity informed by a critique of elitism. Howard accused the sitting Prime Minister, Paul Keating, of being “engaged in an attempted heist of Australian identity” (Howard 1995 in Johnson 2007: 195). He said that under Keating the “great egalitarian innocence, that egalitarian spirit… the birthright of most Australians only a short time ago, had significantly disappeared.” Keating had betrayed “the battlers of Australian society” (Howard 1995 in Dyrenfurth 2007: 217). In contrast, Howard argued that Australian identity did not arise from political correctness or social engineering; it came from the taken-for-granted conceptions of “Australianess” that emerged organically from Australian history (Johnson 2007: 196). Nick Dyrenfurth notes that Howard cultivated a self-image of the average Australian that contrasted with the “elitism” of Keating during the 1996 election:

Howard’s well-documented love of cricket, earthy nationalism, plain speak (his description of “bbq stoppers”), dress (his gaudy tracksuits and humble attire are a conscious contrast to Keating’s publicized predilection for Italian suits), and consumption/lifestyle preferences (Howard previously made the point of staying at the same beach town of his holidays each year) all give the appearance of a politician not only in touch with ordinary experience, but embodying such imagined national character (2007: 215).

Scholar Judith Brett echoed these observations:

Where Keating spoke to the nation, Howard spoke from it—straight from the heart of its shared beliefs and commonsense understanding of itself. This is revealed in the images which surround the two men. Keating’s are of foreignness… Howard’s are of suburban ordinariness—barbeques, cricket, the annual holiday at the same beachside resort, jogging in a shinny tracksuit festooned with logos.
Howard’s populist interpretation of Australian national sovereignty and national identity looked to tap into the sensibility of the average person. For Peter Chambers, “Howard’s art was his ability to present his responsiveness to community feeling as a democratic honouring of the ‘will of the people’” (Chamber 2017: 103).

Of particular importance here was Howard’s perspective on international institutions and law. Howard objected to the Keating government’s “resort to the alleged moral superiority of international treaties” (Howard 1995 in Johnson 2007: 199). His attacks on the UN system would only increase later on. Furthermore, he argued that Australian democracy should determine Australian values thereby rejecting “further entrenching the language and culture of rights in our public discourse (Howard 1995 in Johnson 2007: 199). Some observers said that the government unnecessarily pitted universal human rights against the popular sovereignty of Australia (Kelly 2005: 16). This discourse would come to fore during the late 1990s onwards when Australia became the subject of criticism for its response to boatpeople.

While Howard abandoned the racialized critiques, he emphasized Australia’s British heritage: “To Australians, the British heritage is immense. Britain’s most enduring gift to Australia has been the institutions which have tooled our natural instinct for democracy” (Howard 2003 in Johnson 2007: 198). Highlighting his commitment to democracy Howard was also speaking to those elites he criticized as designing and implementing public policy behind the scenes. This traditional conception of Australian national sovereignty also compelled Howard to channel themes from Australia’s history. For instance, the notion of “mateship” that was established at the Gallipoli campaign during World War One, was deployed by Howard during his speeches. For Dyrenfurth and Quartly, “mateship” formed part of a populist trope of abstract visions of solidarity, collectivism, and mutuality (2007: 212). “Mateship” was also linked to the Australian notion of a
“fair go” whereby egalitarianism and not class shaped national character and individuals’ understanding of the opportunities open to them. The irony, of course, was that “mateship”, “a fair go”, and “battlers” were tropes that the ALP had developed during the late 19th and early 20th centuries. According to Dyrenfurth, since the 1960s, Labor attempted to distance itself from these ideas because of their association with racism and sexism (2007: 213). Howard now seized on these ideas to connect with Australians on a primordial level, seeing them as ingrained in Australian historical culture. He proved successful in doing so.

On immigration, the Howard Government continued with the reforms initiated by Labor in light of the Fitzgerald Report of 1988. Both the Hawke and Keating governments passed legislation to make Australia’s immigration policy more consistent and insulated it from the pressures of lobbying through Ministerial discretion. According to historian Katherine Betts, Howard continued these reforms. He proposed and then implemented a reduction in the skilled immigration stream by about half because of an economic recession. Howard also introduced tests for migrants’ English ability and established a six-month waiting period before migrants could apply for welfare (Betts 2003: 176). According to opinion polls cited by Betts, 71 percent of the public thought the number of migrants coming into the country was too high in 1996 (2002: 25), and there was public concern about new migrants’ use of welfare programs (White et. al. 1997: 13). Howard’s ability to tap into the Australian public’s concerns about migration would eventually pay political dividends in the 2001 election.

The Howard government unquestioningly accepted the interpretation of the right to seek asylum established during the late 1970s. From 1996 to 1999, the Howard government continued to receive boatpeople onshore, processed asylum claims and offered permanent residence to determined refugees. There were no public debates about asylum and border control during either
the 1996 or 1998 federal elections. An indication of the Howard government’s acceptance of the traditional interpretation of the right to seek asylum can be seen in Immigration Minister Ruddock’s comments about temporary protection visas (TPVs) in 1998. Howard was not the only politician who had populist sympathies; the former LNC member Pauline Hanson formed her own party called One Nation in 1997. In 1998 she proposed replacing Australia’s offer of permanent residence following a positive refugee determination with temporary protection and repatriation once the situation was resolved (Pauline Hanson’s One Nation 1998: 14). To this, Ruddock responded, “I regard One Nation’s approach as being highly unconscionable in a way that most thinking people would clearly reject (Ruddock 1998 in Mansouri and Leach 2002: 103). In late 1999, Ruddock would controversially introduce TPVs.

There were signs, however, that the Howard government took the enforcement of migration amidst asylum seeker movement more seriously than previous governments. In 1996, Ruddock attended the UNHCR’s annual EXCOM meeting as one of the only (and likely Australia’s first) Minister to attend, indicating the importance the Howard government placed on the subject. Most liberal democracies sent senior bureaucrats and not an elected official or Minister to the EXCOM meeting. Ruddock’s EXCOM statement in 1996 reaffirmed its commitment to an onshore asylum system for boatpeople and continued the previous government’s approach of enforcing this:

The Office of the UNHCR has acknowledged the problem of people attempting to use asylum systems to circumvent normal migration criteria. We are concerned to ensure that we offer protection to those in genuine need, that is, the most deserving in vulnerable situations in camps overseas, rather than to those who are best able to access the system.

While we intend to maintain a transparent and fair determination process, I nonetheless believe that it is important for us to reduce the processing time and cost of the system, as this clearly impacts on our ability to assist genuine refugees and to carry out other important matters such as settlement services… Attempts to add extra layers of review beyond those already provided will add costs and delays and could ultimately undermine Australia’s comprehensive refugee determination system. The government will not allow this to occur (Ruddock 1996).
Ruddock also continued the ALP’s trend of making the onshore asylum system more efficient by reducing its costs and limiting access to appeals. In 1996, Ruddock announced the linking of its onshore and offshore Humanitarian Program “to improve program management” (DIAC as cited in Karlsen 2011: 4). The Howard government created a ceiling of 2000 places for onshore refugee claims. For every onshore asylum seeker accepted as a refugee beyond the 2000 allotment, the Department would subtract one from its annual offshore resettlement intake. The policy applied the concept of queue jumping because onshore applicants were now seen to be literally taking places away from those refugees resettled from abroad who may have waited years for a durable solution.

During the first years of the Howard government, Australian asylum and border control policy proceeded along the path of previous governments and did not diverge from the practices of the normative community. Howard’s populist brand of Australian national identity and sovereignty did not translate into major changes to asylum and border control policy. The Howard government accepted that maintaining an onshore asylum system for boatpeople was part of its identity as a member in good standing of the normative community concerning refugee protection. What was missing from 1996 to 1999, I argue, was an enabling environment. At this time, boatpeople were not seen as the problem they were from 1999 onwards. As I will describe below, Australia identified problems with the shared understandings and practices of the legal norm from 1999 to 2001 and uncertainty about how to respond built up around the continued viability of its onshore asylum system. This uncertainty created an opening for the Howard government to invoke

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94Recall from the late 1970s, Australia implemented a refugee policy which meant refugees could be provided with asylum through two processes. The first was its obligation to provide asylum to refugees who filed successful claims in Australia. The second was Australia’s orderly resettlement process of accepting UNHCR recommended refugees from abroad based on Australia’s annual pledge.
its populist interpretation of national sovereignty in a more socially acceptable and legitimate fashion.

4.3. Australia and Contesting the Legal Norm Governing the Right to Seek Asylum

Despite its populist understanding of national sovereignty, the Howard government could not escape the influence of the legal norm governing the right to seek asylum. It came into power in 1996 and accepted the existing assumptions behind Australia’s asylum and border control policy. Beginning in 1999, however, things changed. Australia began receiving a new group of boatpeople from the Middle East. Rather than just implementing a more restrictive approach, as the United States had done with the Haitian boatpeople, Australia engaged in entrepreneurialism both domestically and with the normative community. According to the lead Australian bureaucrat responsible for designing and implementing the response,

We made major contributions along these lines to every UNHCR forum possible (ExCom, Standing Committees, bilateral, and other multilateral discussions). This was a planned marketing exercise which also included all donor countries (U.S., U.K. and other Europeans)… I think one of the most interesting aspects of all this is how a policy analysis can be diffused through the international community through concerted marketing and diplomatic action, supported by practical projects on the ground (Bedlington 2015)

Legal norm contestation involved developing legal arguments based on the existing rules and shared understandings in place and introducing new ideas. In this case, Australia’s legal norm contestation followed a pattern of delegitimizing the shared understandings and existing interpretation of the legal norm governing the right to seek asylum and then relegitimizing an alternative version. The point worth emphasizing is that Australia did not simply walk away from its obligations to the right to seek asylum; it struggled to have its concerns heard and its alternative responses to the challenges of irregular migration considered. Norm contestation was driven by
Australia’s need to reconcile its obligations while maintaining its sovereign right to control its borders.

The relationship between the Immigration Department and the Executive branch of the government played an important part in Australia’s entrepreneurialism. The Immigration Department included a group of knowledgeable and experienced bureaucrats trained in asylum law and policy. They participated in the normative community with immigration bureaucrats from other liberal states. These officials were closely involved in the expert policy networks and intellectual space of the IGC and UNHCR’s EXCOM. From the perspective of one former Immigration Department official working at the time, the Department had an influence on shaping the ideas and beliefs of the Howard government and Minister Ruddock regarding asylum and border control (Interview O 2018). The Executive provided the political support for these perspectives. According to Bedlington, “[the Howard] government was prepared to take hard decisions to counter smuggled boat arrivals of secondary movers” (2016). Without an Executive capable of taking forceful political action, a few senior Immigration Department bureaucrats would not have had the same entrepreneurial influence in pointing out the flaws in the system and providing new ideas. From 1999 to 2001, the bureaucracy and Minister Ruddock worked together closely.

4.3.1. New Boatpeople and New Questions: Rising Uncertainty and Delegitimizing the Right to Seek Asylum in Australia

In late 1999, Australia saw a surge in boat arrivals leading to 3721 asylum requests that year. In 2000, the number dropped slightly to 2939 before rising again to 5516 in 2001 (Table 1). These sudden arrivals compelled Australia to take a close look at the nature of the arrivals, leading to new insights and beliefs about the challenge. Though Australia received boat arrivals before, the 1999
to 2001 arrivals were qualitatively different. The government could conceive of itself as a first asylum country for boatpeople from different parts of Southeast Asia or even East Asia, but the majority of boatpeople arriving to Australia during these years were from outside the region, primarily Iraqis, Afghans, and Iranians. Unlike the majority of Chinese boatpeople during the 1990s, these boatpeople had strong claims to refugee status. Senior Immigration Department officials interviewed the asylum seekers to get a sense of their decision-making process. Jennifer Bedlington, the Immigration Department’s lead bureaucrat with responsibility for managing Australia’s onshore asylum system, recalled the following:

> What were the dynamics of the flow? In speaking to the Iraqis in Port Hedland [detention centre] to see what made them choose Australia and what pushed them out—we looked at what was going on in Pakistan, what their level of effective protection was, and what their capacity to contribute was. We did work with UNHCR to see if some aid intervention at the country of first asylum could actually help. But the great majority of these people were not primary movers they were secondary movers. They were quite openly admitting that they wanted to utilize their refugee status to get the migration outcome…Ironically, it was our efficient RSD process that attracted these boat arrivals in the first place. They saw that they could receive an outcome very quickly if they came to Australia and filed a claim (Bedlington 2015).

These observations began to create uncertainty about whether Australia’s traditional interpretation of the right to seek asylum was appropriate.

While uncertainty within legal norms is always present to some degree, norm contestation emerges from a severe sense of uncertainty. In short, the perceived incongruence between an actor’s beliefs and experiences, on the one hand, and what is called for according to the legal norm, on the other, will be more severe than what occurs during adaptation. An actor or small subset of actors no longer sees uncertainty as being managed or kept at bay through incremental adaptations. Severe uncertainty may take the form of unintended consequences emerging from the legal norm that are not simply negative but also perverse (i.e. the rules may make the problem worse). The actor may detect gaps and ambiguities but also internal contradictions in the rules. For example, Australia saw
the traditional interpretation of the right to seek asylum as not only susceptible to abuse, but actually promoting secondary movement and people smuggling. This problem undermined Australia’s ability to manage its migration program. While Australia’s reception of boatpeople from 1999 to 2001 led to high refugee recognition rates, Australia argued that these were secondary movers and so were involved in migrating rather than fleeing persecution. However, based on the existing rules and shared understandings, Australia could not return them. In short, Australia saw maintaining an in-country asylum system as an excessively onerous obligation.

Australia argued that the boatpeople already had a decent level of protection in the first asylum countries they departed from. In November 1999, Ruddock warned that “as many as 10,000 people could be packing up now in the Middle East, with a viewing to trying to access Australia” (Sara 1999). In a speech delivered to the Anglican Synod in July 2001, Ruddock described the arrivals:

These are secondary movers, in that many have spent long periods, in some cases up to 20 years, in countries of first asylum where they have been living in safety. Most would never have been assessed by the UNHCR as being in need of resettlement. Where the protection they have enjoyed continues to be effective, they have made a choice to forsake it. They are seeking a migration result that may otherwise not be available to them. In a sense, they are trading on refugee status to achieve a durable solution (2001).

Asylum law practitioners and observers long recognized that secondary movement should not be considered refugee movement. Indeed, this point was acknowledged through the inclusion of the words “coming directly” in Article 31(1) of the 1951 Convention. But this did not mean Australia was free to ignore the asylum claims of these people. A small but emerging body of soft law was developing around safe third countries (STCs) and effective protection. EXCOM Conclusion No. 58 for instance, identifies the challenge of onward movement but also the general conditions in which secondary movement occurs. According to this 1989 EXCOM Conclusion, refugees or asylum seekers are protected against refoulement and to be treated in accordance with basic human
standards until a durable solution is found.95 Australia could find further support for its position in EXCOM Conclusion No. 85 (1998), “Conclusion on International Protection” that stated some very broad guidelines to be adhered to if a refugee and/or asylum seeker was to be returned to a third country. According to EXCOM Conclusion No. 85 it should be established that the third country will treat the asylum seeker in accordance with accepted international standards, will ensure effective protection against refoulement, and will provide the asylum seeker with the possibility to seek and enjoy asylum.96

Though these EXCOM conclusions provided rough guidelines, there was no agreement about the specific conditions constituting “effective protection” that would enable return. The notion of “accepted international standards” in EXCOM Conclusion No. 85 or “basic human standards” in EXCOM Conclusion No. 58 were very general and vague. In Europe, states pursued STC principles within the context of the Dublin Convention and the UNHCR supported the EU’s approach but emphasized the importance of ensuring safeguards.97 It was one thing, however, to negotiate STC arrangements among other European countries where the asymmetries in effective protection were relatively low or even as Australia did with China during 1995. But declaring either Iran or Pakistan STCs and returning them on that basis was far more contentious.

Even if Australia was able to establish that the boatpeople had effective protection in Iran and Pakistan, securing a return agreement would have been very difficult. According to Bedlington, negotiations with Iran and Pakistan about the return of Afghans and Iraqis were unsuccessful. She recalled:

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95 Paragraph F (1-2) of Conclusion No. 58 (1989).
96 Paragraph z(aa) of Conclusion No. 85 (1998).
97 First, prior to return to a third country an asylum seeker should receive some basic screening if there is any reasonable doubt about the safety of that country for the applicant. Second, receiving states should send asylum applicants to safe third countries but also ensure those found to be refugees actually obtain protection there. Third, UNHCR encouraged states to seek the support and assistance of UNHCR in facilitating agreements for handling asylum applications (UNHCR 1995: 125-127).
Iran and Pakistan had been hosting millions of these people for years, without adequate international support, including from UNHCR. I think the way UNHCR handled those first asylum countries, in the international donor community, was lacking. They were not telling destination countries that this was something that had to be resolved otherwise it’s going to create secondary flows down the track. Not surprisingly, Iran and Pakistan were very resentful because by and large they had shouldered this burden without much support. So when we said, these people had effective protection, under international law, we’d like you to take them back because we don’t owe them a protection obligation, they just laughed. Not unreasonably (Bedlington 2016).

One could argue that Australia should have attached development assistance or incentives to encourage these countries to accept the returns. However, liberal democracies had long been wary about doing so for fear of having their liberal values exploited.98

There was no question that many of those leaving Afghanistan99 and Iraq100 were refugees that faced difficult conditions going back to about 1980. Each group fled to a variety of countries, but the majority sought asylum in neighboring Iran and Pakistan. In 2001, Pakistan hosted 2 million Afghan refugees of whom UNHCR assisted 1.2 million (UNHCR Global Report 2001: 280). Iran hosted almost 1.5 million Afghan refugees and 386,000 Iraqi refugees and UNHCR was assisting virtually all of them (UNHCR 2001: 284). From 1980 to 2000, Iran and Pakistan consistently hosted at least 3 million Iraqi and Afghan refugees. Voluntary repatriation of Afghans and Iraqis had been successful over the years101 and UNHCR believed it to be the most promising

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98The notion that developing countries may exercise power over Western states because of their liberal values is the topic of Kelly Greenhill’s 2010 book, Weapons of Mass Migration. Greenhill collects data on close to 50 instances in which a refugee hosting or producing state creates a displacement crisis in the hopes of extorting aid and money from Western countries.

99In Afghanistan, refugees have faced difficult conditions going back to the 1970s with the Soviet occupation in 1979-1989 and then the rise and consolidation of control by the Taliban during the 1990s. In 2000, the Taliban controlled 95% of the territory, exacerbating ethnic nature of the conflict and the climate of fear (UNHCR 2000a: 270). With 4 million refugees located in Iran, Pakistan, and other countries, Afghan constituted the largest historic caseload of refugees. There are numerous reasons why Afghan displacement has been so sustained: ongoing fighting and persecution; human rights atrocities on both sides; ethnic and religious persecution by the warring parties; the failure of the peace process and influence of neighboring countries and supply of arms; fear of landmines; severe drought. Afghanistan. 2000. Human Rights Watch World Report. Available at https://www.hrw.org/legacy/wr2k/ accessed on January 13 2016.

100In Iraq, the Iran—Iraq war from 1980—1988, the Gulf War in 1991, and economic sanctions since 1990 contributed to conditions in which violence, persecution of minorities (Kurds, Turkomans, Shia Muslims), and drought forced many from the country. By 2001, The United States Committee on Refugees and Immigrants estimated that between one and two million Iraqis with a well-founded fear of persecution were estimated to be living outside Iraq (USCRI 2001).

101The number of Afghans in Pakistan declined from 3.2 million in 1990 to 1.3 million in 2000. The number of Afghans in Iran also declined from 3 million in 1990 to 1.3 million in 1999. The number of Iraqis living in Iran declined from 1.1 million
durable solution. While many Iraqis and Afghans voluntarily returned to their countries of origin, UNHCR reports that many were also forcibly deported by first asylum countries in conditions that did not reflect effective protection. Historically, Iran and Pakistan were relatively generous towards Afghan and Iraqi refugees, allowing most to live within the community, and many to seek gainful employment, receive health services, and attend school. But refugees were sometimes subject to government crackdowns and forced returns. By 1999–2001 worsening conditions and donor fatigue led Pakistan and Iran to adopt restrictive policies creating push factors for these groups. Australia pointed out that both countries took on a disproportionate amount of the refugee burden relative to the size of their economies and received very little donor and international support. So the situation facing the boatpeople arriving to Australia was not exactly refugee

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102 More Afghans were indiscriminately deported in 2000 than in the previous year (75,000 reported in 1999). Screening was not conducted on a scale broad enough to meet the needs of many additional potentially deserving asylum applicants living in areas (including Tehran) not served by screening centres (UNHCR 2001: 278). Some 286,000 refugees were repatriated to Afghanistan in 2000 and according to UNHCR reflect growing reluctance on the part of Iran and Pakistan to continue to provide asylum with dwindling support from donors (UNHCR 2001: 267). Although UNHCR did not actively promote repatriation, thousands of Afghans decided to repatriate voluntarily from Iran to Taliban controlled areas of Afghanistan (UNHCR 2000c: 213). The concern was that repatriation occurred because of worsening conditions in these first asylum countries and not because of genuine desire to return home. Forced deportations declined when Iran and UNHCR implemented a voluntary repatriation program for Afghans in Iran. The six-month program led to 130,000 returned, each was screened to ensure voluntariness and provided with financial assistance and transportation. In total, some 210,000 people went home as compared to 1999 (UNHCR 2001: 267). The Iraqi government issued a decree in June 1999 exempting from prosecution nationals who had left the country illegally and UNHCR was assisting in this respect (UNHCR 2000c: 208). Following the collapse of the Taliban, the signing of Bonn Agreement, and the establishment of Interim Administration, a new spirit of optimism and generous international offers of help set Afghanistan back on its feet and prospects for solutions to the problem of Afghan refugees looked promising.

103 Iran is a signatory to the 1951 Convention and 1967 Protocol. During late 1990s and early 2000s, however, declining economic conditions and the high cost of providing support to Afghan refugees, reduced the government’s ability to provide support to refugees. Of the outflow, Iran claimed that it spent US $1.5 billion on refugees annually with each refugee costing US $730 while international aid to Iran was only US $12 per year for each refugee (Refugees Daily 1999). High unemployment, low levels of donor support, complaints about a lack of NGO involvement, and a public perception that Afghans were responsible for an increasing drug problem all contributed to a withdrawal of official support for the position of Afghan refugees. Pakistan is not a signatory to the 1951 Convention or 1967 Protocol. UNHCR stated in 1999 that many Afghan refugees in Pakistan had reached a certain degree of self-reliance, but vulnerable groups were still dependent on humanitarian assistance. Any decrease in assistance would damage relations with the government and worsen the already poor public image of refugees, leading indirectly to protection problems. Despite encouraging progress in community-based education and health services, deteriorating economic situation in Pakistan represented a growing economic and social threat, especially to the most vulnerable refugees. According to UNHCR, “its budget cuts and resulting suspension of key activities conveyed a perception (which UNHCR tried to assuage) that Pakistan would be left to shoulder the burden almost single handedly in the event of a new influx” (UNHCR 2001: 281).
movement because they were not clearly arriving directly from a place of persecution. But as a
country with obligations to the right to seek asylum, Australia could not just ignore their claims
and had to allow them to submit claims and make RSD decisions.

When the Immigration Department screened the 1999 to 2001 arrivals, the refugee
recognition rate was over 90 percent (JSCFADT 2001: 238). Even though the majority of these
individuals were refugees, requiring that Australia accept responsibility for them was still not a
simple matter. On the one hand, the mixture of conditions in first asylum countries and the absence
of international consensus on specific benchmarks indicating effective protection created
uncertainty about whether refugees were justified in pursuing onward movement. If effective
protection was available, then these individuals would fit the category of secondary mover and
should be returned. But since clear and agreed upon standards did not exist yet, determining this
question was difficult.

On the other hand, if conditions did not constitute effective protection, these people would
have had a justification for seeking onward movement. While the case for Australia assuming
responsibility could be stronger, it was not clearly Australia’s obligation to provide access to its
in-country asylum system. First, even if these people were refugees, Australia saw boatpeople as
engaged in migration because of the other countries they passed through. They had transited
countries prior to reaching Australia and did not arrive “directly” from a place of persecution or
danger. Bedlington said that:

You’re looking at the pipeline. Malaysia had a visa free policy for anyone coming from the Islamic
states. The smugglers would then take them to Indonesia, usually by boat, where the boat smuggling
arrangements were very institutionalized. The asylum seekers met with Indonesian smugglers in broad
daylight at the cafés in Jakarta to arrange departure details (Bedlington 2015).

One Australian Immigration Department official working on the issue at the time recalled the
situation in stark terms:

We were not a country of first asylum for these people. They have opportunities, they may not be very good ones, but they do have opportunities to be in other places, and they decided, or the smugglers have made a choice about where they would go. So now it becomes difficult to tell who’s moving for what reason… If someone is in a situation where they are protected (that is they are not going to be sent home to persecution) and they’re poor, do they have a bigger or better right to move on than someone who’s just poor? (Interview F 2015).

The Australian government saw the boatpeople of 1999 to 2001 as involved in economic migration rather than refugee movement. One might argue that Australia should provide these people with asylum as a matter of what was then called “burden sharing”. But Australia pointed out that the UNHCR had been trying to repatriate these individuals and that resettlement was only an option for fewer than 30 percent of them (JSCFADT 2001: 238).

Australia also highlighted the increasing sophistication of the people smuggling networks. People smuggling had long been a concern for governments and international organizations in responding to complex asylum and migration flows. IOM and governments had engaged in discussions about how to tackle smuggling. The impact of smuggling on the right to seek asylum was not clearly understood at this time. As an organization that dealt with refugees, UNHCR was not an integral player in these negotiations. Though the agency did acknowledge smuggling “had taken on enormous proportions” and endorsed calls to combat smuggling from a multilateral perspective (Ogata 1999), the agency remained on the margins of these meetings. The UNHCR was of the view that the rise in smuggling was directly correlated with states’ efforts to control their borders, meaning that people unable to achieve mobility on their own would be forced to seek out the services of smugglers:

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During the Indochinese boat crisis, people smugglers enabled refugees and migrants to leave Indochina with the episode of the Hai Hong being among the most noteworthy. From 1978 to 1980, the Australian government passed legislation to deal with potential “rackets involving clandestine importation of illegal immigrants flouting the laws of the country of entry” (Macphee 1980; Smit 2010).
Emphasis on (control) measures has led to a dramatic increase in human trafficking, which in turn prompts States to further tighten control in a worsening spiral which does not resolve the problem (Ogata 1998).

High Commissioner Ogata’s statement reflects the perspective shared by legal advocates and most scholars.105

Though it is true that people in desperate circumstances will turn to smugglers who may provide a necessary service, Australia also discovered a second dynamic linked to the smuggling phenomenon. In its conversations with asylum seekers, Immigration Department officials developed an “economic model” of smuggling. One senior official described the situation in the following terms:

How does the smuggling market work? It’s a transnational crime but it’s actually a straightforward economic market. The smugglers were generating demand for the product (life in Australia) through a lot of misinformation about what they would get when they got to Australia. There was heavy recruiting in countries of first asylum and they even moved to recruiting in villages in countries of origin like Afghanistan. So, we looked at trying to counter misinformation and stepping up law enforcement among transit countries (Bedlington 2015).

From this perspective, people smuggling exacerbated irregular movement, not only providing the means for clandestine movement but also generating demand about the life people could attain in Australia. The smugglers were making exorbitant profits and charged between $12,000-$15,000 to travel by plane and boat to reach Australia (Koser 2009: 12). The implication was that without smugglers boatpeople would not have made the journey to Australia in the first place because individuals would rely on self-organization. From this perspective, Australia saw its sophisticated onshore system as a significant pull factor helping fuel the “people smuggling industry”.

105This causal relationship is made explicitly by Kyle and Dale who argue that as governments apply tighter border controls, they unintentionally push the so-called ‘mom and pop’ smugglers out of business in favor of larger, full time criminal enterprises (Kyle and Dale 2001).
These observations led to the emergence of a counter narrative around smuggling. Immigration Minister Ruddock portrayed smugglers not simply as benign providers of services for refugees who cannot obtain protection in source or countries of first asylum. Smugglers, he argued, created problems for governments such as corruption and acquired large profits through the exploitation of the fears and hopes of migrants. Moreover, migrants and refugees often became indentured workers to repay loans provided to cover transportation costs, and some even died in the process:

We are not facing a new problem—people have been moving around the world uninvited for centuries…the current illegal movement of people, however, is of a significantly different character, and requires a significantly different response. Unless we act decisively, illegal travel across borders and people smuggling is a problem that represents a major threat to the international protection framework, national sovereignty, and political stability. People smuggling is a lucrative activity involving little risk for the criminal, yet causes significant fiscal and social costs to governments and can threaten lives (Ruddock 2000).

Ruddock challenged the portrayal of smugglers by the human rights and academic community:

Some commentators present a romanticized view of people smugglers, suggesting that they fulfill an altruistic function in enabling refugees to flee persecution…Let there be no mistake: the modern people smuggler is exploiting people for very substantial profit and is often part of organized crime, with links to drug smuggling and money laundering. The vast majority of their clients are not in immediate danger where they are, but do face considerable danger in their journey. Traveling in unsafe boats is not a measure of their desperation, but more likely of being misled and exploited by smugglers…The fight against people smugglers diverts resources away from capacity building, integration and resettlement assistance in source countries or CFAs (countries of first asylum) (Ruddock 2001b).

Though scholars and UNHCR saw the overall demand to migrate as constant and smuggling as a symptom of growing restrictions, the Immigration Department developed an understanding based on an “economic model” of smuggling that inverted this relationship. Smugglers generated demand and encouraged the movement of individuals who might not have been inclined to move in the first place. The involvement of transnational organized crime meant that irregular migration was no longer just an outcome of individuals’ decisions but was being generated through
misinformation and propaganda. Though we typically conceive of forced migration as driven by push factors, these observations highlighted the importance of pull factors.

Throughout the 1990s, smuggling began to emerge in the public’s consciousness creating a more receptive environment to pursue tougher control policies. Smuggling had likely been around since states began imposing restrictions on the entry of outsiders, but the professionalization of smuggling increased dramatically during the 1990s. Previously, smuggling was not considered such a problem. On the rare occasions in which people reflected on the subject, it was often seen as a positive phenomenon enabling people to escape danger or political persecution. For instance, in the movies *Casablanca* and the *Sound of Music* smugglers actually had positive roles. During the 1990s, however, the dangers and dark side of smuggling came to the public’s attention popularized through movies like *Lethal Weapon 4* in 1998 focusing on the exploitation of undocumented migrants by Chinese snakeheads. In speaking to immigration officials working at the time, Chinese smuggling networks were very active at this time. Following that, HBO’s *The Wire* also portrayed smugglers and traffickers as sinister criminal instruments.

Though smugglers continued to serve as escape valves for refugees seeking protection, they also took on these more organized and problematic characteristics. The smuggling industry had grown substantially in terms of revenue accrued by smugglers. In 2001, David Kyle and Rey Koslowski (2001: 4) cited a statistic from the IOM estimating that trafficking revenues grew from $3.5 billion in 1994 to $7 billion in 1997. IOM argued that trafficking in humans was gradually overtaking earnings from drug trafficking. And unlike the risks involved in the drug trade for losing drugs, there was no comparable risk for people smugglers (IOM 2000). Smuggling was also becoming increasingly dangerous for refugees and migrants. People travelling to destination countries utilizing the services of migrant smugglers risked injury and even death. Among those
attempting to reach Australia by sea from 1999 to 2001 using smugglers, the Border Crossing Observatory at Monash University put the number of deaths at sea at over 700 (BCO 2017).

While Australia was developing its economic model of smuggling argument, there was neither legal clarity around the international response to smuggling nor a framework for integrating asylum law into a response. To be sure, migrant smuggling and human trafficking were often discussed interchangeably throughout the 1980s and 1990s and the problem was not clearly understood. In 1998, states entered into negotiations to create multilateral treaty–based mechanisms to tackle the challenge comprehensively. These negotiations led to the UN Convention against Transnational Organized Crime and its supplementary Palermo Protocols on Smuggling and Trafficking. Negotiators of the Protocols sought to create clarity by distinguishing between smuggling and trafficking. In short, those who are trafficked are victims of a crime while smuggled migrants are willing participants.\textsuperscript{106} In attempting to integrate the right to seek asylum with responding to smuggling and trafficking, states and the UNHCR agreed to include a “saving clause” that underscored the consistency of the Protocols with the rights of individuals under international humanitarian and human rights law. In particular, the Protocol identified the imperative to observe the \textit{non–refoulement} obligation under the 1951 Convention and 1967 Protocol. The Protocols targeted smugglers and traffickers and Article 5 of the Protocol forbade governments from prosecuting migrants themselves.\textsuperscript{107} At the time Australia was experiencing an

\textsuperscript{106}Article 3A of the migrant smuggling protocol states that smuggling “shall mean the procurement, in order to obtain, directly or indirectly, a financial or other material benefit, of the illegal entry of a person into a State Party of which the person is not a national or permanent resident”. Article 3A of human trafficking protocol states that the practice means “the recruitment, transportation, transfer, harbouring, or receipt of persons by the means of force or coercion, of abduction, of fraud, of deception, of abuse of power or of a position of vulnerability” “for the purpose of exploitation” such as “sexual exploitation, forced labour or services, slavery or practices similar to slavery”.

\textsuperscript{107}These international legal instruments also called on governments to develop closer information sharing arrangements, bilateral and multilateral agreements, and the adoption of legislation consistent with the Protocols. For a more nuanced discussion see “Fact Sheet: Distinctions Between Human Smuggling and Human Trafficking”. 2006. United States State Department. January 1. Available at http://www.state.gov/m/ds/hstcenter/90434.htm accessed on January 6 2016.
increase in boat arrivals, however, the Palermo Protocols were very new instruments that had yet to be implemented and worked out in practice. It was difficult to see the Protocols as substantially alleviating Australia’s immediate sense of uncertainty around how to respond the 1999 to 2001 boat arrivals.

Finally, Australia’s sense of uncertainty about responding to these arrivals also derived from a heightened awareness about the challenges of managing its in-country screening systems. As discussed in the previous chapter, Australia believed that the practices it adopted during the 1990s would enable it to more effectively manage its in-country RSD system. However, the boat arrivals of 1999 to 2001 re-opened these questions. Australia came to believe that its in-country asylum system, as presently constituted, was unsustainable for various reasons. These included the time required to complete RSD, the high costs involved in operating these systems, the obstacles of removing those without protection claims, and the observed disparities between what boatpeople received in Australia and what was available for the majority of refugees abroad. Because of these challenges and the perceived inability of previous practices to achieve the desired outcome, Australia came to the belief that it could no longer allow boat people unfettered access to its in-country asylum system because it was unsustainable, excessively costly, and created inequities.

Concerns about managing in-country screening were familiar. During the 1980s and 1990s, Australia noted challenges in operating its RSD system and the multiple layers of appeal and review of negative decisions. 108 What was different during the late 1990s, however, was a growing

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108 By the 1990s, asylum seekers filed an asylum application with the Immigration Department which made a primary decision. If that decision was negative, individuals could appeal the decision with the Refugee Review Tribunal. If that failed, they could continue to appeal the decision with the Administrative Appeals Tribunal, the Federal Court, and the High Court of Australia.
sense of futility around making onshore RSD more streamlined. In 1992 and 1994, Australia adopted legislative amendments to the Migration Act which created Part 8 and established a review process whereby appeals would first be heard by the Refugee Review Tribunal (RRT). The intention was to make recourse to judicial review less attractive and to speed up the process of RSD. Ironically, however, Part 8 would become what one legal scholar described as

    the engine room of the 1990s for the growth and extension of administrative law principles in Australia. More often than not, the litigation focused on how decisions were being made and explained by tribunals, rather than on whether visa criteria had been correctly construed (McMillan 2002: 335).

In response, the Howard government introduced a legislative amendment in 1998 called the Privative Clause. The amendment was meant to constrain access to the lower courts and reduce the availability of access to appeals. However, the High Court of Australia (HCA) remained available to review RSD decisions under its original jurisdiction provided for by Section 75 of the Constitution. The High Court justices grew concerned about being overwhelmed by immigration and asylum appeals (Crock 2000: 197). In 1999, Part 8 came under judicial scrutiny in two HCA cases in which the justices upheld its constitutionality but admonished the government for creating serious inefficiencies and potentially high costs for the HCA.109 The government’s goal of restricting judicial review would not be achieved at this stage. Ultimately the Australian Constitution guaranteed appeals beyond the RRT.

    Filing a refugee claim and proceeding through the administrative and appeals apparatus typically required five-years (Hughes 2016). This process was not only lengthy and expensive, but

109In the case of Abebe v Commonwealth (1999) the High Court judges confirmed the legality of Part 8 but emphasized their strong concern over the wisdom of Part 8. Similarly, in Minister for Immigration v Eshetu (1999), the High Court quashed an attempt by the Full Federal Court to overrule Part 8 (Sackville 2000: 195). Concern expressed by Justice McHugh was that without access to the Federal Court but with the right to appeal to the High Court, the latter would become overwhelmed with such appeals.
once the determination was complete, returns of those without grounds for protection was a challenging endeavor. As we can recall from the previous chapter, without an effective system to return those not entitled to protection, states’ commitment to their in-country asylum systems could be undermined. What was different about this period, though, was that despite their ambitious efforts during the 1980s and 1990s, liberal democracies were unable to return those not entitled to protection. By the late 1990s and early 2000s, practitioners and scholars underscored the rarity of returning those found not to be refugees. In their review of returns from Canada, the U.K., and Germany during the 1990s, Gibney and Hansen note that return and readmission of non-refugees were a rare occurrence (2003).

Minister Ruddock, a lawyer by training, gave public addresses and wrote academic articles criticizing Australia’s in-country RSD system. He argued that judicial review for asylum and migration decisions created an exceptional problem:

> Immigration is probably the only area of administrative law where delaying a final determination is beneficial to the applicant, as they remain in Australia while the case is being processed. Delay is therefore an end in itself (1997: 13).

Ruddock criticized the judicial branch for contributing to the long wait times:

> Much of the growth in applications for judicial review has come from the refugee area; that is, appeals from the RRT to the Federal Court. I see this high level of litigation, particularly by onshore asylum seekers, as highly undesirable given the associated costs and delays, and for those in detention, significantly longer periods of detention. I am also concerned that, given around 49% of applicants in all migration cases withdraw before hearing, there are substantial number using the legal process as a means to extend their stay in Australia (1997: 17).

Ruddock said that Australia’s in-country asylum system placed too much emphasis on procedural due process at the expense of other important considerations:

> [T]he refugee determination system comprises more than a mechanism for judicial review of administrative action. As Margaret Allars acknowledges, many disciplines impinge upon administrative law, such as political and organizational theory, and social psychology. Associated with
these disciplines are values other than legal norms such as the rule of law, including public accountability, fiscal responsibility, administrative efficiency and, in the migration area, international comity. The courts, charged with responsibility for the rule of law, are clearly not in a position to weigh the relative influence of these values in the refugee determination system (Ruddock 2000b: 7).

Ruddock even threatened members of the RRT with non-renewal of their contract and accused the courts of “rewriting” the definition of a refugee (Crock 2000: 216).

Ruddock marshaled statistics to support his position. He pointed to the upward trend in judicial review with 400 applications in 1994-95, 600 in 1995-96, 740 in 1996-97, 800 in 1997-98, and upwards of 1000 in 1998-99 (Ruddock 2000b: 9). The Australian Law Reform Commission also found that the Federal Court’s caseload was disproportionately slanted towards migration matters, constituting 67 percent of the its caseload in 1997-98 (ALRC 2000: 493). It was also found that appeals were most often ineffective with some 86 percent of appeals outcomes upholding previous decisions (SLCLC 1999: 1.4). Ruddock also criticized lawyers who were running class actions involving large numbers of refugee claimants (Crock 2000: 214-215).

Ruddock also spoke to how these developments were contributing to the high costs of the system. For example, according to Immigration Department annual reports, the government’s onshore asylum system cost $27,338,000 in 1993-94 and $25,127,000 in 1994-95 (DIEA 1995: 55). But as the number of boat arrivals increased in 1999-2001, the issue of processing became perceived as increasingly burdensome with Minister Ruddock stating in 2001 that continued delays in RSD led to costs of approximately $300 million for the year 2000 (Research Note 2003-04: 2).

On the other hand, civil society groups pointed out that making the system more “efficient” could reduce the thoroughness of screening and put Australia at risk of breaching the fundamental principle of non-refoulement (Amnesty 1998). They also highlighted statistics and argued that increasing instances of judicial review was a result of weaknesses in the primary RSD process (SLCLC 1999: 1.15. to 1.17). UNHCR did not, however, challenge Australia’s efforts to
streamline its RSD system:

The present system is widely held to be a model structure for the determination of refugee applications. This said, we should like to reiterate that restriction of judicial review through the introduction of a privative clause does not, ipso facto, contravene any agreed international standards relating to the protection of refugees.

While UNHCR considers access to third tier review through the courts to be a useful supplement to the RSD process, the Office notes that it is, by international standards, an additional layer of protection to the agreed requirements under international law (UNHCR 1997: para 14 and 10)

The vast majority of RSD decisions were made abroad and outside of countries with sophisticated status determination systems. They were decided through the UNHCR’s field determinations which involved a very lean process of first instance determinations followed by one opportunity for review. As one might imagine, UNHCR’s field determinations also produced lower refugee recognition rates as compared to status determination systems in Australia and other liberal democracies. However, the thoroughness and sophistication of refugee status determinations in liberal countries made significant contributions to the development of asylum law and jurisprudence that UNHCR’s field determinations could not. While there were inefficiencies and management problems with these systems, they did make valuable contributions to defining who a refugee was and the rules around asylum.

During the early 1990s, Australia noted the high costs of its onshore asylum system compared to what was available for the majority of refugees abroad. By the late 1990s, however, the Immigration Department calculated the distribution of funds in a more detailed fashion. Minister Ruddock was one of the few elected officials who regularly attended the annual EXCOM meetings and during his 2000 statement he put a compelling statistic to the committee:

At a conservative estimate, western states are spending, each year, USD 10 billion on determining refugee status for half a million asylum seekers within their borders, of whom only a small percentage are refugees. This is the cost of individual asylum determination in developed systems of administrative law with layers of review.
In contrast, UNHCR has an under-funded budget of only USD 1 billion with which to correspond to the needs of more than 20 million refugees and people of concern. It should be noted that savings of just 10% of asylum determination costs would release funds which if provided to UNHCR, could amount to a doubling of UNHCR’s current budget (Ruddock 2000c).

The logic was difficult to argue with and many governments at the EXCOM had not thought about the regime in just those specific terms. The Canadian representative at the time, Gerry Van Kessel, who eventually became the coordinator of the IGC from 2001 to 2005, recalled Australia’s statement:

that statistic really pushed the file along quite a bit as people began thinking about the budgetary implications of what was going on. I used that statistic a lot in my dealings with other governments. The argument I used was that if you took a look at the 10 billion we spent and then looked at the actual number of convention refugees flowing out of that process, then what we are spending per refugee in contrast to what UNHCR was given was remarkable (Van Kessel 2016).

If the refugee regime that emerged following the Second World War and the Cold War had become fraught with inefficiencies. If those inefficiencies could potentially create unintended consequences or perverse incentives, then a case could be made for fundamental reform.

Australia’s experience with boat arrivals from the Middle East during the 1999 to 2001 period shifted its beliefs about the nature of refugee and migration movement and the appropriateness of available practices to respond to it. Prior to 1999, Australia saw the arrival of boatpeople as a manageable phenomenon and provided access to its onshore asylum system without questioning the relevance of this system. This perspective was shared by other liberal democracies. Yet, Australia’s experience with boatpeople from 1999-2001 challenged this acceptance. The boatpeople were no longer arriving in Australia from its immediate region. They were traveling long distances from the Middle East with the help of people smugglers. No longer were boatpeople driven by their own decisions and choices about their situation; smugglers were increasingly shaping their decisions. Even if these refugees were fleeing declining conditions of
effective protection in first asylum countries, Australia’s continuing to provide access to its onshore asylum system could become unsustainable. To continue adhering to the status quo, Australia argued, was not only unfair, it created perverse incentives and contributed to the profits of people smugglers. Beginning in 1999, Australia worked to delegitimize the existing interpretation of the right to seek asylum to both change its policies and to shift the shared understandings of the normative community.

4.3.2. Relegitimating the Right to Seek Asylum

Australia’s attempt to delegitimize the existing interpretation of the right to seek asylum and draw attention to its inherent problems caught the attention of other liberal democracies and the UNHCR. While uncertainty did emerge, Australia could not simply walk away from its normative obligations and it could not expect other liberal states to do so either. Without an alternative approach to implementing the legal norm, legal norm contestation would be ineffective in resolving these problems. Moreover, if Australia only delegitimized the prevailing interpretation of the right to seek asylum without providing an alternative approach, it could be putting its identity as a liberal democratic state in jeopardy. Australia remained part of the normative community of liberal democracies, that continued to believe in the validity of the traditional interpretation. By delegitimizing the traditional interpretation of the right to seek asylum, a normative burden was placed on Australia because it would be acting within a domain of what Reus-Smit calls “rule without right” (2007: 163). Australia was therefore compelled to pursue a relegitimization strategy in which it entrepreneurially promoted a new interpretation of the legal norm governing the right

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110James Hathaway acknowledges this point in a far more eloquently than I have here. In his 2002 article exploring the legal questions around Australia’s response to boatpeople in 2001, Hathaway expresses a degree of understanding for the challenges facing Australia and that asylum law should not be confused with immigration law (2002).
to seek asylum. This new interpretation was rhetorically deployed alongside the implementation of various practices designed to control and restrict the access boatpeople had to Australia’s protection obligations. Below I discuss how Australia worked to relegitimize its preferred interpretation while implementing innovative practices from 1999 to 2001.

Australia’s goal of shifting the shared understandings and practices of the legal norm governing the right to seek asylum was ambitious. Australia was not simply pushing for further adaptation of the legal norm or building on the existing base of shared understandings and practices. It was calling for a fundamental change in the way asylum and protection was understood and provided, and in highlighting the unique responsibilities of different states implicitly promoting the principle of Common but Differentiated Responsibilities (CBDR). However, Australia continued to provide access to its onshore asylum system and boatpeople were processed domestically. Australia exercised entrepreneurialism in UNHCR forums, particularly in the EXCOM, but also within the more discreet confines of the IGC. Bedlington described Australia’s policy shift and the influence of its marketing campaign on the UNHCR:

The transformation of Australia’s policy to a systemic approach to refugees within a more general people movement framework taking into account developments in transnational crime and security concerns… the differentiation between secondary movement and primary refugee flows was integral to these shifts in policy and (eventually) to changes in UNHCR’s position (Bedlington 2016).

The legal interpretation promoted and adopted by Australia emphasized regional cooperation, interception, and temporary protection visas.

Senior Immigration Department officials working at the time noted that, Australia introduced this framework to the EXCOM but most explicitly to the IGC. In 2001, Australia took over the rotating chair’s position at the IGC and Gervais Appave (a former Australian senior civil servant) was completing his tenure as IGC coordinator that year. Meaning that in 2001, the IGC
had both an Australian Chair and Coordinator. Although Appave now represented the IGC and not Australia, his understandings of the issue aligned with Australia’s. Australia could set the agenda for the year through the chair’s position. And even though Appave no longer formally represented Australia, his in depth understanding of the Australian experience was thought to help ensure the Australian message was communicated to other IGC members clearly (Interview F 2015). The IGC held two major meetings, the Mini-Full round and the Full Round of Consultations, in which it first laid out its idea for the “Comprehensive Integrated Approach for the Management of People Movement” (Interview F 2015). The proposal was loosely based on ideas contained in two sources of intellectual inspiration, the Comprehensive Plan of Action (CPA) for Indochinese refugees and James Hathaway and Alexander Neve’s 1997 proposal to reform the refugee system. In both policy frameworks, the CBDR principle was an integral organizing feature. The Australian approach diverged from these models, however, in that it also promoted interception and provided a legal basis for doing so.

The first source of intellectual inspiration behind Australia’s proposal was the 1989 CPA on Indochinese refugees. The Indochinese boat crisis had a formative influence on Australia’s asylum and border control policy as discussed in the previous chapter. As the reader may recall, the CPA was the second of two ad hoc UN multilateral responses to the protracted Indochinese boat crisis. Once states saw the 1979 UN agreement as creating incentives for migration, Australia and other states helped negotiate the 1989 CPA. A large literature debates the CPA, but it is generally recognized as a model of international cooperation to manage mixed migration flows (Helton 1993; Hathaway 1993; Robinson 1998; Loescher and Milner 2003; Towle 2006; Betts 2006; Davies 2008). The UNHCR’s Sergio Vieira de Mello, the principal actor responsible for the CPA, described the formal multilateral agreement as
a model for multilateral cooperation, built on the principles of international solidarity, burden sharing and proper acceptance of responsibilities. Its purposes were to end the ongoing tragedy on the high seas and to preserve asylum while reducing incentives for further mass outflow. It has been successful (UNHCR in Robinson 2004: 321).

According to Mark Sullivan, the Deputy Secretary of the Immigration Department from 1995 to 2000:

The comprehensive plan of action was seen as a robust solution that met international law requirements, drew in many stakeholders, and was very practical and operationally focused… The whole comprehensive plan of action was a trigger point for Australia in saying, look, if we face this again what principles do we take from this? We saw the intellectual input and principles informing the CPA as helpful in dealing with our own challenges in a more sustained and long-term way. And if you look at the response to the illegal movement from the Middle East it is based on the same principles, even though they may have thrown away some of the finesse (2015).

The CPA implicitly invoked the principle of CBDR, assigning liberal countries a donor/support and resettlement role for determined refugees. First asylum countries in Southeast Asia provided temporary asylum and processing, and the origin country of Vietnam accepted back their nationals not in need of protection. While the CPA was an ad hoc multilateral agreement running from 1989 to 1996, Australia promoted its systemic vision as part of its asylum and border control policy.

The second intellectual inspiration behind Australia’s proposal was Hathaway and Neve’s reformulation of international refugee law in their 1997 article. According to the senior official organizing the government’s response to the 1999 to 2001 boat arrivals:

[F]rom my point of view, the biggest connection was with Jim Hathaway’s work. Jim would strongly contest the idea that what we did was what he was talking about. But if you look at the bare bones of what Jim was proposing, it was the first early steps to something that could look more like a regional solution… It was a much more fraught and practically difficult environment, but we tried to keep as many of the elements as we could. In terms of thinking about how it might work, Jim’s paper was highly helpful (Bedlington 2016).

111In addition to Hathaway and Neve’s seminal article, Hathaway put together an edited volume with contributions from various scholars (Hathaway 1997).
Hathaway and Neve’s proposal attempted to correct two problems typically raised by liberal democracies concerning the existing interpretation of the right to seek asylum: the perception that their asylum systems were becoming a “backdoor” for migration and the imbalance among states in the provision of resources, protection, and durable solutions. Hathaway and Neve re-affirmed the centrality of the 1951 Convention and the right to seek asylum, but proposed a system based on regional cooperation linked to the CBDR principle, temporary protection, and voluntary repatriation. They proposed that CBDR would replace what they called “individuated state responsibility” in which all countries processed and locally integrated refugees on their own. This approach leads to abuse through migration and is prone to states invoking restrictions and a “race to the bottom” (Hathaway and Neve 1997: 143). CBDR suggests that, “different states have differing capabilities to contribute to a collectivized process of refugee protection” and states should contribute in ways that correspond to their relative capacities and strengths (210-211). Refugee protection was also to be grounded in the provision of temporary protection with the preferred durable solution as voluntary. Countries of origin and asylum, along with UNHCR, would work towards voluntary repatriation (184), and Global North countries would provide financial aid and temporary protection for those repatriating and resettlement for those unable to return (205). This system would be held together through “interest convergence groups”, cooperation among regional partners that also included extra-regional participants (188).

Following the arrival of the first boatpeople from the Middle East in late 1999, Minister Ruddock introduced temporary protection visas (TPVs). TPVs had been previously proposed in

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112 The idea of providing temporary protection as opposed to local integration leading to permanent residency is derived from Article 1C(5) of the 1951 Convention. The provision indicates that the cessation of the application of the Convention to a person who “can no longer, because of the circumstances in connection with which he has been recognized as a refugee have ceased to exist, continue to refuse to avail himself of the protection of his country or nationality”.
1998 by the populist politician Pauline Hanson but Ruddock rejected the idea as “highly unconscionable” (Ruddock 1998 from Mansouri and Leach 2008: 103). Nevertheless, Ruddock now justified the introduction of this new practice as a deterrent:

there has been a very rapid escalation in unauthorized arrivals to Australia…The fact is that they are often people—unlike those we have seen before who have not been able to sustain asylum claims—notwithstanding our generosity in relation to Iraqis and Afghans in accommodating them through the regular refugee program, who have been living in security and safety for a number of years in third countries, and are now seeking to get to the front of the queue for asylum places in Australia. I am determined—and so is the government—to protect Australia’s places for those who are genuinely in need and not to stand by while the system is exploited by those who do have alternatives and while those who have no alternatives miss out… it is important that we do more to reduce the attractiveness of Australia as an option for those who seek to come here unlawfully (Ruddock 1999).

The idea to transition to TPVs as opposed to permanent residence was justified in two ways. First, and following the business model of people smuggling, Australia believed that depriving boatpeople of access to permanent residence and citizenship would make the country a less attractive destination (Bedlington 2016). And secondly, but less well-recognized, a great deal of pressure was coming to bear on Australia’s asylum processing system as a result of the increase in numbers boatpeople. Australia held firmly to a mandatory detention policy that required it to detain all unauthorized entries (boatpeople) until their claims for protection were reconciled. TPVs would allow for speedy recognition of refugee status which required release into the Australian community. By avoiding lengthy periods of detention, Australia reduced the growing risk that detention would lead to human rights abuses and incidents of self-harm (Interview O 2018).

Drawing from Hathaway and Neve’s article, Australia promoted temporary protection to the IGC in 2001, arguing that the 1951 Convention did not require states to provide refugees in their territory with permanent residence. Australia drew attention to Article 1C(5) of the 1951 Convention which provided for the cessation of the application of the Convention when a person “can no longer, because of the circumstances in connection with which he has been recognized as
a refugee have ceased to exist, continue to refuse to avail himself of the protection of his country of nationality”. From this perspective, repatriation or return becomes possible, eliminating the incentive to achieve migration outcomes through secondary movement.

Unlike previous applications of temporary protection for mass influxes or for those fleeing armed conflict and war, Australia used TPVs as a deterrent and not as a way to expand protection as was previously the case. This rationale made TPVs controversial inside and outside of Australia. They prevented refugees from accessing permanent residency, prohibited family sponsorship and reunification, and denied people travel documents. Every three years, the government said it would reassess protection based on current conditions in the refugee’s country of origin. The practice of providing local integration of refugees in the West emerged because it was believed to be unfair and undesirable to keep refugees in legal limbo. But the practice also developed at a time when refugee arrivals to the West were historically modest and secondary movement and people smuggling were not major concerns. Providing local integration to spontaneous arrivals of refugees was not thought to be a problem. As we have seen, Australia saw the offer of permanent residence as fitting into the people smugglers’ business model and therefore sought to undermine this incentive. At the same time, however, Australia continued to offer access to its onshore asylum system and did not intercept boatpeople.

The Australian proposal required a major shift in shared understandings and practices. Australia recognized this would take time and noted that there would continue to be secondary movement from first asylum countries. Unlike the CPA and Hathaway and Neve’s framework, therefore, Australia’s proposal also called for enhanced border control and a doctrine around interception. The government pointed out that increased preventive measures and support to

113 An example of Australia providing temporary protection to expand protection included the response to the Kosovars and the East Timorese (Ruddock 1999).
countries of origin and first asylum to deal with push factors would not be enough to cope with secondary movement. Australia discussed how transit countries between the countries of first asylum and destination should be brought into the fold. Australia recommended that IGC states provide support for transit countries by funding IOM and UNHCR to conduct identity checks and ensure protection needs were met, enhance anti-smuggling legislation, support the negotiation of readmission agreements between transit and first asylum countries where they had effective protection, and expand policing cooperation (Bedlington 2015).

The first public reference to interception made by Australia came during the EXCOM meetings in 1998, notably before the arrivals from the Middle East. Australia’s target audience was the normative community, particularly liberal states, but also the UNHCR. From Bedlington’s perspective, many of the other liberal states did not detect these problems or did not want to (2015). The real challenge for the Immigration Department and the Howard government was in convincing the UNHCR about its grievances, that its proposal had merit, and that the agency should become more involved. Australia’s EXCOM statements during this period support this point. As early as 1998, Australia called on the EXCOM members and the UNHCR to begin thinking along these lines:

[Int]erception and timely, orderly and humane return of rejected asylum seekers can have the effect of reducing pull factors, deterring people traffickers—who exploit and endanger genuine refugees as much as irregular migrants—and, ultimately, of serving to safeguard the institution of asylum itself…

A role for UNHCR is required where States are not signatories to the Refugees Convention or do not have established refugee status determination systems, in order to ensure that the protection needs of intercepted individuals are met (Bedlington 1998).

The following year, Australia encouraged the UNHCR to become involved with its strategy:

UNHCR is a key player in any partnership to address the protection needs of those who fall prey to traffickers. Yet UNHCR remains largely unengaged, either because it is concerned at being seen to be part of interception or because transit countries fail to provide an acceptable level of cooperation. It is beyond dispute that UNHCR’s mandate is to ensure protection to refugees. Correctly, its mandate does
not extend to direct involvement in the interception of those who have sought the assistance of traffickers or smugglers. But it is no longer tenable for UNHCR to maintain a narrow view of its necessary role in ensuring protection for intercepted, trafficked refugees. UNHCR must become engaged to ensure that their protection needs are properly identified and addressed (Bedlington 1999).

Aside from promoting an interception doctrine more generally, Australia also implemented practical measures. In particular, Australia set up an interception arrangement with Indonesia in 2000, called the regional model of cooperation (it was eventually renamed the regional cooperation arrangement [rca]). Australia had good relations with Indonesia during the 1990s and sought to build on these ties to deal with boatpeople and the smuggling issue. The government introduced information campaigns to counter the message that arriving in Australia would lead to permanent residency. The Australian Federal Police (AFP) stepped up law enforcement cooperation with Malaysia and Indonesia. This allowed Australia to generally know when boatpeople were departing. According to Deputy Secretary of the Immigration Department, Markus Sullivan,

cooporation was very much in terms of sharing information about reports of vessels leaving Indonesia and course material. Indonesia was always relieved when we didn’t ask them to stop and hold boatpeople because it had difficult experiences during the CPA days in terms of detention. From a policy and operational perspective, they wanted to avoid holding boatpeople if they could (Sullivan 2015).

However, by 2000 and with the surge in boatpeople from the Middle East and Southwest Asia, attitudes appeared to shift. Australia was prepared to approach the Indonesians about interception and Indonesia was willing to listen. Bedlington, the senior official responsible for designing the arrangement, noted:

The AFP and the Indonesian police had good relations and we often had a good idea about when boats were being put together. So, it seemed to me that we could properly intercept these people – remember this is in the context of secondary movement. Indonesia acknowledged that the flows were creating difficulties for them in terms of illegal immigration, crime, and corruption. From my point of view interception was a better way to go because you prevented the possibility of boats going down. And it should give them (boatpeople) the same outcome if they had a proper refugee determination and

114 Australians deliberated used lower-case acronyms to deemphasize the formality of the arrangement.
resettlement... we saw it as a double-edged strategy. If they’re not refugees they end up back where they came from asking the smugglers for their money back (Bedlington 2016).

It was out of this serious consideration for the competing pressures of managing migration and asylum issues and people smuggling networks that Australia established its arrangement with Indonesia. Given the Indonesians’ reluctance to intercept and hold people on their way to Australia, one must ask why the change in perspective? We can only surmise, but this shift appears to lend support to the idea that Australia’s efforts to engage the region through the APC, the Bangkok Declaration, and Australia’s other channels of entrepreneurship had some impact in shifting the beliefs of other Asian governments about the nature of the problem.

The rca involved Australia, Indonesia, the IOM, and the UNHCR and worked as follows. Indonesian authorities agreed to intercept people thought to be travelling irregularly to Australia and to refer them to IOM for ‘support intervention’. The IOM supervised and cared for asylum seekers in Immigration Detention Centres (IDCs) set up throughout Indonesia. The IOM also assisted with training Indonesian police and immigration officials and developed information campaigns about people smuggling (IOM Indonesia 2010). IOM facilities funded by Australia provided migrants with a level of care beyond what they would have received in an Indonesian jail, where they would have been placed otherwise (Bedlington 2015). Of course, had Australia not pursued this strategy, there would be no need to detain people in the first place. The IOM also assisted with training Indonesian police and immigration officials in how to respond to irregular migration and developed information campaigns about people smuggling (IOM Indonesia 2010). Indonesia was not party to the 1951 Convention or the 1967 Protocol, so Australia sought the

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115 Some IDCs were closed, preventing mobility and others were open, enabling intercepted boatpeople to come and go. Australian funded accommodation under IOM management were located in five areas: Cisarua/Ciyapyung (West Java Province), Jakarta (Jakarta Province), Medan (North Sumatra Province), Pontianak (West Kalimantan Province) and Lombok (West Nusa Tenggara Province) (Nethery et. al. 2012: 95).
cooperation of UNHCR to conduct RSD if individuals who were intercepted requested asylum. When someone was found to be a refugee, Australia and the UNHCR worked to find resettlement places among liberal states, including Australia. The involvement of international organizations like IOM and UNHCR enhanced the legitimacy of the arrangement because it ensured that Australia did not excessively infringe on Indonesian national sovereignty and that the principle of non-refoulement was maintained. The UNHCR’s involvement ensured that refugees had access to screening and a basic level of care.

In terms of promoting the rca, however, the Australian government was discreet and did not make specific reference to the arrangement. The success of the rca was predicated on the need to ensure it operated behind the scenes. Yes, people were being intercepted before they could reach Australia which represented a restriction and could discourage further movement. But if the message reached the smugglers that access to Indonesia would lead to resettlement in a liberal democracy faster than it did in a first asylum country, then the rca’s deterrent effect would be negated (Bedlington 2015). During its chairmanship of the IGC in 2001, the Australian delegation gave presentations about its interception strategy to IGC states and described the rca in detail. In an attempt to drive its point home, Australia organized a meeting between members of the APC and IGC while immigration officials travelled to Australia for the full round meeting of the IGC in April. Australian officials mentioned the joint APC-IGC meeting as an important moment in illustrating to other liberal democracies the challenges to the right to seek asylum and its proposal about what should be done (Bedlington 2015; Bickett 2015).

The UNHCR’s response to Australia’s interception doctrine was somewhat complicated. When the senior official began laying the groundwork for the rca, she recalled UNHCR’s response:

UNHCR was very wary of the arrangement [rca] given what Australia was doing on temporary protection visas and they believed interception was against everything the 1951 Convention stood for.
However, they also needed to be pragmatic. UNHCR had no presence in Indonesia and the regional model [rca] gave them status and reasons for being there and working with and influencing the Indonesian government (Interview E 2015).

In a practical way, then, the UNHCR’s reluctance was partially overcome by convincing the agency that it could broaden its mandate in the region and the non-signatory state of Indonesia.

On the other hand, there was a legal case around interception that was compelling. One senior official working on the Australia’s promotion of interception recalled that “interception was entirely consistent with our international obligations because the arrivals were secondary movers who had safety in countries of first asylum and the choice to move on to Australia was an economic one” (Interview O 2018). Shortly after its decision to become involved with the rca, the UNHCR issued its first statement on interception in June 2000 outlining the safeguards needed to make interception consistent with international law. Its statement reiterated the principles required concerning the need for the determination of refugee status; the search for durable solutions and resettlement where possible; measures to criminalize smuggling; training and capacity building for RSD in transit countries; return to countries of first asylum; and the promotion of the international refugee law. However, the UNHCR was adamant that interception not be carried out unilaterally and must be part of a comprehensive framework of refugee protection and burden sharing. Though some of these principles were captured by the rca, the rca had yet to be integrated into a comprehensive burden sharing framework.

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117 UNHCR defined interception as ‘encompassing all measures applied by a State, outside its national territory in order to prevent, interrupt or stop the movement of persons without the required documentation crossing international borders by land, air, or sea, and making their way to the country of prospective destination.’ UNHCR. 2000d. para 10.
Australia saw the promotion of better protection solutions abroad as an important component of its systemic approach to managing asylum and migration. Ruddock’s 2000 EXCOM statement described Australia’s strategy:

A high priority for Australia is the formulation and implementation of prevention strategies aimed at minimizing the need for outflows from countries of origin and first asylum. Australia is seeking to support countries of origin to help restore human rights and the rule of law and to provide assistance that will sustain people in their home countries. Australia believes it is imperative to work with other donors and countries of first asylum to assist them to provide temporary protection while durable solutions are developed… The goal of prevention is reflected in Australia’s overseas aid program that is designed to reduce poverty through sustainable development (Ruddock 2000).

In 1999, UNHCR had financial allocations of $17.7 million for Iran and $16.6 million for Pakistan to deal with approximately 3.5 million refugees (JSCFADT 2001: 241). In June 2000, Australia increased UNHCR’s budget in Southwest Asia by $1.5 million for self-reliance of refugees in Iran and Pakistan (241). In October 2001, Australia announced an additional $14 million (AUD) to bolster protection for Afghan refugees in the region (Bedlington 2001). The Immigration Department also allotted $20.8 million over four years from June 2000 for increasing support to Iraq and Afghanistan for sustainable repatriation (JSCFADT 2001: 242). In January 2001, Minister Ruddock announced postings of Liaison Officers in Iran, Jordan, and Pakistan with those governments, the UNHCR, and NGOs to enhance negotiations and support humanitarian caseloads.

Australia made modest increases in its resettlement program for Iraqi and Afghan refugees from 1999 to 2002. According to Bedlington, pledging to increase resettlement had two motives:

It was a demonstration of political capital to the other resettlement countries. When we were talking to them [resettlement countries] we could say that it doesn’t make sense for us to resettle these people because then they get what they paid the smuggler for. But we aren’t shirking our commitments because we’re increasing resettlement in countries of first asylum. So there was a quid pro quo. However, there was also a purer motive in that we saw that we had to do more across all parts of the flow, support for countries of first asylum including aid and resettlement, support for transit countries, etc. (Bedlington 2016).
Australia aimed to efficiently distribute resources to refugees in need and enhance effective protection to reduce the need for onward movement. In doing so, Australia could also more legitimately de-emphasize its onshore asylum system. These contributions were very modest. Bedlington admitted that such increases made little difference to the overall number of refugees in those countries:

If you looked at the numbers of Iraqi and Afghan refugees in Iran and Pakistan there will millions. And there was no way they were going to be resettled because the numbers were too great. There were also higher priorities in UNHCR and in our view for scarce resettlement places (Bedlington 2015).

Resolving this situation would require far more support from other states and the UNHCR to make noticeable improvements in the situation. There were roughly three million refugees in Iran and Pakistan and with an annual resettlement quota of 12,000-13,000 even tripling Australia’s resettlement commitment would have done little to alleviate the situation.

To conclude, the evidence presented in this section provides support for the notion that the legal norm governing the right to seek asylum influenced Australia conduct. Australia detected uncertainty within the traditional interpretation of the right to seek asylum and worked to entrepreneurially contest it. But it could not just walk away from its legal obligations. It sought to re-legitimize a new interpretation of the right to seek asylum that would reduce or reconcile this uncertainty. It encouraged other liberal democracies to see their in-country asylum and border control systems as not in isolation but as part of a larger burden (or responsibility) sharing framework. In the meantime, Australia promoted more assertive border control measures and emphasized its national sovereignty in doing so. If Australia could provide more protection in countries of origin, first asylum, and transit, it believed that it could reduce pressure on its onshore asylum system. This basic approach was similar to the ad hoc agreements of 1979 and 1989 around Indochinese refugees discussed in the previous chapter. Unlike those arrangements, however,
Australia’s approach was meant to be long-term and ongoing because shared understandings about the nature of refugee movement and migration had shifted.

4.4. Prolonged Uncertainty and the Howard Government’s Pacific Solution Strategy

Australia began its entrepreneurial push in late 1990s, but it took almost two years before the country finally diverged from the normative community and its past practices to implement the Pacific Solution strategy. This dramatic shift was triggered by the arrival of the *Tampa* in late August 2001 and the detection of severe uncertainty within the legal norm about the appropriateness of the existing system. The public standoff led John Howard to introduce the Pacific Solution strategy. Australia then worked to ambitiously prevent all boatpeople from accessing its onshore asylum system and constructed an offshore asylum and border control policy. The Howard government’s response to the *Tampa* and the subsequent Pacific Solution strategy are two of the most studied events in border control and refugee law research. Scholars have approached the event from the lens of refugee law (Mathew 2002; Hathaway 2002; Crock 2003; Magner 2004; McAdam and Purcell 2007; Mansted 2007) and human rights and maritime law (Peyser 2003; Wilheim 2003; Penovic and Dastyari 2007; Francis 2008). Social scientists have used theoretical frameworks like neocolonialism (Carrington 2006), critical legal studies (Inder 2010), decisionism (Isin and Rygiel 2007), Foucauldian governmentality (Bigo 2002), and, of course, rational choice (Millbank 2003). The most ubiquitous assumption among analysts is that Howard was primarily concerned with domestic politics and used the *Tampa* incident to become more competitive in the 2001 Australian federal election.

I do not deny that domestic politics played an important role in the response to the *Tampa* and in implementing the Pacific Solution. But a theory of legal norm contestation contextualizes...
the Howard government’s decisions within the broader international legal normative context. By linking international and domestic levels of analysis, this approach adds nuance and accuracy to domestic level accounts. The legal norm governing the right to seek asylum influenced domestic politics because Australia detected severe uncertainty as a result of the *Tampa* arrival. In the previous section, I described how Australia identified problems with the traditional interpretation of the right to seek asylum that created perverse incentives like secondary movement and people smuggling. Adding to this uncertainty was the fact that the normative community already expended significant resources and intellectual energy during the 1980s and 1990s into adapting the legal norm to meet new circumstances. The fundamental shift and resolution Australia called for would naturally take time. The normative community of liberal democracies and the UNHCR were not immediately responsive. Moreover, if Australia was going to set up this new system for itself, it would need substantial support from its regional neighbors. Most of these states were not parties to the 1951 Convention and had little to no history or experience with human rights and refugee law. This situation made effective responsibility and burden sharing difficult. All of these accumulated experiences and observations contributed to uncertainty about how to respond to the arrival of boatpeople.

Meanwhile boatpeople arrivals intensified leading up to the arrival of the *Tampa* in August 2001. In 1999, Australia received 3721 boatpeople decreasing to 2939 by 2000 but then almost doubling to 5516 in 2001 (Table 1). The number of boats actually declined meaning the number of people onboard a single boat increased significantly (Table 1). Using some simple math, we can note that in 1999, each vessel carried an average of 43 people. This number rose to 57 people in 2000 and then to 128 people in 2001. The smugglers continued to use coastal fishing boats on the open seas creating a safety of life at sea issue. Two boats reportedly went missing and were
presumed to have sank in March 2000, one with 80 passengers and another with 220 (BCO 2018). In 2001, Australia was on pace to exceed the previous two years of boatpeople arrivals combined. And by late August, some 1,212 boatpeople had already arrived in Australia in that month alone (DIMA 2001 cited in Betts 2001: 38).

The surge in arrivals created problems for Australia domestically but the Howard government continued to receive boatpeople onshore. The number of boatpeople in detention increased from 926 in 1998-99 to 4174 in 1999-2000 (Millbank 2001). As one Australian official recalled, when large numbers of people are held in detention “bad things happen” (Interview I 2015). The increasing numbers of arrivals and detainees put pressure on the existing capacity of Australia’s detention centres. In November 1999, the government opened a new detention centre in Woomera which became publicly controversial. In June 2000, there were protests, riots, and breakouts when 480 detainees escaped and walked into the township. Later that year, there were hunger strikes and several suicide attempts (McDermott 2008) which contributed to the intensifying atmosphere. Despite these problems, the Howard government continued to provide access to its onshore asylum system. On talk back radio on August 17th, 2001, the host pressed Howard on the government’s failure to respond to boat arrivals effectively. Howard stated that it would be impossible to intercept boatpeople at sea:

[B]ut when you say the strategies aren’t working, what is the alternative? The only alternative strategy I hear is using our armed forces to stop the people coming and turn them back... We don’t turn people back into the sea, we can’t behave in that manner (Howard in Chapman 2011).

So, as late as August 17th, 2001, Howard was still publicly resisting the Pacific Solution strategy. All of this set the stage for the standoff with the MV Tampa in late August. The arrival of the Tampa not only reaffirmed the problems Australia identified, it also brought to light new legal problems related to international maritime and criminal law.
On August 24, 2001, a 20-meter fishing boat with 438 (mainly Hazaras, but also Iraqis, Sri Lankans, and Pakistanis) became stranded in Indonesia’s search and rescue zone. The passengers intended to file asylum claims in Australia and travelled from Southwest Asia to Indonesia and towards Australia with the help of people smugglers. Australia notified Jakarta of the emergency situation. After Jakarta did not respond, Australian officials issued a call to private ships in the vicinity to assist. A nearby Norwegian flagged container ship, the *Tampa*, responded and rendered assistance. Australia, in agreement with Indonesia, instructed the *Tampa* to disembark the rescued passengers at the Indonesian port of Merak. When the *Tampa* turned to Indonesia, however, the passengers confronted the Captain and demanded to be taken to Christmas Island or they would jump overboard. The *Tampa* then turned towards Australia and intended to disembark the passengers on Christmas Island saying that the passengers were “in urgent need of humanitarian assistance” (Hathaway 2002: 38-40; Willheim 2003: 159-163).

Looking purely at the formal provisions of the 1951 Convention, Australia was required to provide protection to refugees and at the very least ensure they were not *refouled* because once the *Tampa* entered Australian territorial waters Australia had jurisdiction (Hathaway 2002: 43). From a constructivist perspective, however, the expectations on Australia were heavier. The shared understandings and practices of the legal norm at this time called on Australia to receive the boatpeople and process them onshore. Even though the Howard government saw this approach as being highly problematic, there were no shared understandings or practices that gave Australia the option of doing anything else legitimately. In the past, Australia had had the good fortune of participating in large multilateral agreements to address significant numbers of boatpeople as was the case in 1979 and 1989. In 2001, such agreements were not available.
The *Tampa* incident also revealed how the right to seek asylum overlapped with other areas of law that created further uncertainty about how to respond. It is not the place here to scrutinize these other legal issues closely. But I will highlight the situation to convey the point that the arrival of the *Tampa* created severe uncertainty for Australia. The Norwegian government, acting on behalf of the *Tampa*, took the position that since the rescue of the passenger onboard the *Tampa* was an Australian-led search and rescue operation, Australia should allow the persons rescued into Australia. But Australia argued that it acted because Indonesia did not and the rescue took place in the Indonesian search and rescue zone. Furthermore, arrangements were made to disembark the passengers at nearest feasible Port, the Port of Merak in Indonesia (Willheim 2003: 165). There was also the matter of piracy, as one Australian official pointed out to me:

> The Australian government really viewed this episode as a kind of piracy because the *Tampa* was on its way to Indonesia. It had landing permission at Merak. International Maritime law was that rescued people at sea go to the next available port. All that was happening. And then the people threatened the crew and the captain of the *Tampa* and he decided to turn around and go to Australia. And that was when Howard kind of blew his stack (Interview F 2015).

For legal observers, maritime law at the time (and arguably now), provides no clear guidance on the question of the point of disembarkation of those who do not wish to return home (Willheim 2003: 170; Marr and Wilkinson 2003: 51-53; Taylor 2005: 5). Confusion around this issue added to the uncertainty and widened the opening for Howard to impose his interpretation of an appropriate policy.

The *Tampa* standoff was a public affair and gave the Howard government the opportunity to express its populist inspired version of Australian national sovereignty. Howard’s use of

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118 In the past cases, such as the multilateral response to the Indochinese, *ad hoc* collective agreements were made to reconcile maritime law with refugee law.

119 The troubling implication should be stated here: had Australia known it would be responsible for the passengers onboard the *Tampa*, this expectation might have undermined its motivation to request a rescue.
national sovereignty played out in the context of the *Tampa*. After a three-day standoff, the *Tampa* entered Australian waters and forced a reaction. In response the Howard government did not deploy the coastguard or immigration officials but the Special Air Services (SAS) counterterrorism squad to take control of the vessel, prevent it from going any farther, and turned it back into international waters. Doing so conveyed an image of Australian national sovereignty that would not be constrained by ambiguous or unfair international rules. The second in command of the SAS at the time, Peter Tinley, recalled the event as a political maneuver rather than a military tactical situation:

> What, in fact, the guys (SAS) found when they got on board was 400-plus ordinary refugees, very hungry, some who needed some medical attention, very scared and uncertain about what was happening, a particularly concerned sea captain who just wanted to offload his human cargo and discharge his duty according to international law… We (SAS) were the meat in the sandwich to make the statement that the government of the day wanted to make, in relation to how it viewed border security (Tinley in Chapman 2011).

In his interview, Tinley even described the SAS’s actions as a form of piracy (2011).

Australia’s response to the *Tampa* and Howard’s exertion of his version of national sovereignty challenged the prevailing legal norm governing the right to seek asylum at this time. Populism, as will be recalled, is defined by a deep suspicion of international law and treaties designed by elite officials abroad or in the “back rooms of Canberra”. The Howard government directed its populist sentiment towards what it saw as an increasingly uncertain and excessively imposing legal norm. In response to the *Tampa*, Ruddock now came out and publicly challenged the whole validity of the 1951 Convention: “did the founders of the Convention envisage that it would become the enabling tool of organized crime?” (Ruddock 2001 in Amnesty 2002: 24). These comments conveyed a sense of resentment towards outsiders and the perception that elites were dictating unfair rules to Australia.
The tension between the UN and Australia came to the surface during the standoff with the *Tampa*. The UNHCR intervened and proposed a plan to disembark the passengers on Christmas Island (an Australian territory). Under what the agency called “a three-point plan”, the UNHCR offered to screen asylum seekers and noted that other liberal states made pledges to resettle those determined refugees (UNHCR 2001). Australia rejected the plan for two reasons. Even though boatpeople would be processed offshore, Australian officials believed asylum seekers would continue to have access to Australia’s onshore asylum system because Christmas Island was Australian territory. The second reason was that Australia believed the plan to resettle determined refugees from one liberal democracy to another was not legitimate. A Senior Immigration Department official stated that,

> it would be unprecedented, as an overt plan, for a Western signatory to resettle out of a country of another Western signatory, there would be no way that would happen. We had close relationships with the other resettlement countries and were unaware of any such resettlement plan (Interview C 2016).

These comments indicate a perceived lack of trust on the part of Australia regarding the UNHCR’s proposal. In fact, Ruddock came out publicly and stated that UNHCR’s proposal “was a trick in which Australia would end up shouldering all of the burden” (Overington and Taylor 2001 in Taylor 2005: 6). Australia’s reaction to the UNHCR’s proposal indicates its assumption about what the shared understandings of the right to seek asylum looked like at this time. Australia believed that if the *Tampa* was allowed access to Christmas Island then Australia would have sole responsibility for these people. Liberal states continued to operate on the premise of what Hathaway and Neve referred to as “individuated responsibilities” whereby a receiving country was solely responsible for refugees on its territory.

Australia’s approach to the UN and its deployment of the SAS fit the populist vision of national sovereignty that Australia was trying to get across. Australia would not be pushed around
by elites imposing unfair rules. Some, like Gelber and MacDonald, studied Howard’s use of national sovereignty to respond to boat arrivals, particularly the *Tampa*. They assessed the Howard government’s deployment of sovereignty to justify its policy actions using the traditional territorial integrity argument and a general “right to exclude” which they argue is inconsistent with the global human rights regime (2006: 273). They document various statements from Howard government Ministers. Foreign Minister Downer noted that “at the heart of this (the *Tampa* issue) is the protection of our territorial integrity” (Downer in Burke 2001: 322). In September 2001, Minister Ruddock stated that “the protection of our sovereignty, including Australia’s sovereign right to determine who shall enter Australia, is a matter for the Australian government and this Parliament” (Ruddock 2001). Ruddock also attempted to establish a linkage between the idea of national sovereignty and border control as firmly grounded in public sentiment:

> The Australian public has a clear expectation that Australian sovereignty, including in the matter of entry of people to Australia, will be protected by this parliament and the government. The Australian public expects its government to exert control over our borders (Ruddock 2001).

For Gelber and McDonald, these statements represent national sovereignty as the “right to exclude” which would not be encumbered by international law or any other international institution.

The Howard government clearly expressed a populist version of Australian national sovereignty. But Gelber and MacDonald’s argument ignores the extent to which the Howard government was influenced by international law even at this stage. The Howard government actually revealed a surprising degree of acknowledgment for international law within the context of the *Tampa* incident (and more clearly before the *Tampa*). Following the *Tampa*’s arrival, Howard stated the following:
We have taken this decision based on a proper understanding of our rights under international law. It is the right decision to take in Australia’s national interest. I hope that, amongst other things, it sends a message to people smugglers and others around the world that, whilst this is a humanitarian, decent country, we are not a soft touch and we are not a nation whose sovereign rights in relation to who comes here are going to be trampled on (Howard 2001 in Chambers 2017: 115).

At about the same time, Howard argued that, “we’re trying to balance our legitimate right to preserve our border integrity with our very legitimate concern as a nation that for generations has taken refugees from all around the world” (Howard 2001). These statements pose questions for Gelber and MacDonald’s argument about Howard’s use of national sovereignty and its incongruence with international human rights law. But did the Howard government’s actual policy response reflect these claims?

In assessing the *Tampa* stand-off and Australia’s subsequent policy response, Australia carefully observed its *non-refoulement* obligation, the most central obligation of refugee law. After Australia prevented the *Tampa* from accessing Christmas Island and the UNHCR’s 3-point plan was rejected, Australia did not simply push people back out to sea. The Howard government transferred the boatpeople to the troopship *HMAS Manoora* (Wilheim 2003: 160). Australia negotiated with New Zealand to accept 150 of the *Tampa* asylum seekers. On September 10, Australia negotiated a transfer agreement with the small Pacific Island nation of Nauru to have the remainder of the *Tampa*’s passengers’ claims assessed there (Taylor 2005: 6-7). On 26 September, the Howard government passed seven bills related to asylum and border control, three of which constituted what was publicly known as the Pacific Solution strategy.120

Under the first piece of legislation, the Australian Defence Force was tasked with maritime interception under the code name “Operation Relex”. Relex marked a shift in Australia’s border

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120 During his tenure (1996-2004), Howard was very ambitious in reforming Australia’s asylum and migration legislation. One author noted at least 50 amendments to the Migration Act compared to 47 amendments to the same Act over the previous four decades (1958-96) (Carrington 2006: 180).
protection strategy from reactive detection, interception, and escort of unauthorized boats to a strategy that extended border protection beyond the physical border (McAdams and Purcell 2008: 97). The government also passed the Migration Amendment (Excision from Migration Zone) (Consequential Provisions) Act 2001 enabling offshore processing of asylum seekers’ protection claims. The legislation was based on the ‘safe third country’ principle and gave the government power to take an ‘offshore entry person’ to a ‘declared country’ so long as they had access to effective RSD and protection for refugees, and the country met relevant human rights standards in providing protection (McAdam and Purcell 2008: 107). Even if boatpeople evaded interception and arrived in Australia, the government passed a third piece of legislation excising a number of Australian territories and islands from its “Migration Zone”. According to the Explanatory Memorandum: “The purpose of excising the places and installations from the migration zone in relation to unlawful non-citizens is to prevent such persons from making a valid visa application simply on the basis of entering Australia at such a place or installation” (Explanatory Memorandum 2002: 2).

Although these new practices were meant to emphasize Australia’s sovereign right to control its borders, they continued to acknowledge refugee law to a degree. The Navy intercepted boatpeople on their way to Australia and transferred them to Offshore Processing Centres (OPCs) on Nauru and eventually Manus Island, Papua New Guinea, under another agreement struck in early October. Ruddock justified offshore processing as a way to deter boatpeople from coming to Australia and accessing its more generous asylum system:

The model that has operated over a long period of time in Australia with Australian jurisprudence, which has led to larger proportions of people being accepted as refugees who would not have been accepted if their claims had been dealt with elsewhere (Ruddock 2002).

121 The amendment excised Christmas Island, Ashmore Reef, Cocos Islands, and offshore sea and resource installations in Australian territory from the migration zone under the Migration Act 1958.
Australia did not only transfer boatpeople to OPCs, it worked to turnback and escort boatpeople to Indonesia when they deemed it safe to do so. Under Operation Relex, the Maritime Commander, Rear Admiral Smith, stated his orders:

From the commencement of Operation Relex on 3 September, the initial policy that we were given to implement was to intercept, board, and hold the UAs (unauthorized arrivals) for shipment in sea transport to a country to be designated. With SIEV 5 (with the arrival of the fifth suspected illegal entry vehicle), we received new instructions which were to, where possible, intercept, board, and return the vessel to Indonesia (SSCICMI 2002: 26).

According to the Senate Committee report, Suspected Illegal Entry Vehicles (SIEVs) 5, 7, 11, and 12 were escorted back to Indonesia. Indonesia was reluctant to accept some of the boats returned under Operation Relex, but sought Australian guarantees of silence about the two countries’ cooperation (Howard 2010: 403). SIEVs 4, 6, and 10, the other boats, sank at some point during the interception or tow-back process and the boatpeople were rescued and taken to Nauru and PNG for processing (SSCICMI 2002: 28). A number of Australian officials I interviewed stated that the turnbacks of boatpeople to Indonesia were the major deterrent, even more so than offshore processing. Those returned to Indonesia ended up demanding their money back from the people smugglers and the departures stopped very quickly (Interview F 2015; Interview O 2018). The number of boatpeople arriving to Australia declined significantly after the adoption of the Pacific Solution strategy (Table 1).

The final component of Australia’s response to boatpeople was the creation of the Bali Conference on Smuggling and Trafficking in February 2002. Though the agreements with PNG and Nauru to establish OPCs resulted in significant financial assistance to both countries from the
Australian government,\footnote{Australia contributed $20 million to Nauru in September 2001, $10 million in December 2001, another $14.5 million in December 2002, and $22.5 million in February 2004 in return for using asylum seeker processing centers (Taylor 2005: 19-24). Papua New Guinea was an Australian territory but in 1975 became independent. Nevertheless, Australia contributed $300 million to the country in bilateral aid each year on the condition that it remain a friend and/or client (Windybank and Manning 2003: 10; Lewis and Roberts 2003).} cooperation was seen as largely instrumental and disingenuous. The Howard government aimed to engage Asian governments on equal terms by investing in regional diplomacy with the partnership of Indonesia. Australia and Indonesia initiated the Bali Ministerial Meeting in February 2002, in what would be another iteration of the state-led regional cooperation that Australia worked towards during the 1990s. Representatives of thirty-eight countries, UNHCR, IOM, and the United Nations Office on Drug and Crime (UNODC), and other observers attended the first meeting. The outcome document referenced the valuable work of the APC and Bangkok Declaration and pledged to focus on the issue of migrant smuggling. In 2004, Indonesia’s Foreign Minister at the time, Hasan Wirajuda, asserted the importance of establishing the regional forum: “Our shared success in previous regional initiatives has taught us many important lessons. One of them is that regional cooperation does defuse sensitive bilateral issues and it can even transform potential conflicts into successful joint efforts” (Wirajuda in Wesley 2007: 199).

Wirajuda conveyed these sentiments to me in a 2014 interview:

Our bilateral relationship with Australia was very bumpy, we often experienced a sudden up and sudden down. The migrants who were transiting Indonesia were adding to the complications of bilateral relations and we didn’t want to see the coming of refugees to create further problems. The solution did not lie between Australia and Indonesia, but the solution must be involving countries of origin, countries of transit, and countries of destination. That was why I initiated the Bali Process in 2002 (Wirajuda 2014).

By establishing a regional arrangement, Australia would be restating what it had long been promoting to Indonesia and other Southeast Asian states: that an appropriate response to boatpeople required countries of origin, transit, and destination to cooperate.
The Pacific Solution created controversy inside and outside Australia, but it was actually difficult to pin down as a clear breach of the formal provisions of refugee law. First, maritime interception was clearly a controversial approach because of its association with the United States’s Haitian interdiction program. While there were similarities in terms of offshore processing, Australia made a concerted effort to distinguish its approach from the U.S. policy, labeling it “interception” as opposed to “interdiction” (the term used by the Americans) (Interview F 2015). The U.S. was a country of first asylum for the Haitians, so the U.S. was using interdiction to deal with direct arrivals. Australia promoted its interception strategy as distinct because it was grounded in a legal discourse about secondary movement, migrant smuggling, refugee screening by the UNHCR, and eventually resettlement or return. Indeed, the boatpeople were not fleeing Indonesia or anywhere in Southeast Asia like previous cohorts of boatpeople. They were arriving through a complex smuggling network beginning in the Middle East. Australia pitched its interception strategy as part of a broader multilateral effort to support countries of origin and first asylum. Therefore, Australia’s interception strategy did not carry the same refoulement risks that came with the American interdiction policy. And as described earlier, the UNHCR was also developing some doctrine around interception at this time so it appeared to have some legitimacy.

Once interception was conducted, however, international refugee law impinged on Australia. Numerous EXCOM Conclusions and the 1967 UN Declaration on Territorial Asylum

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123In the last chapter I briefly discussed the United States’ approach to Haitians that had attracted strong claims to protection and were not being properly screened leading to some 21,000 returned to Haiti. Following a surge in departures in 1991, the government established accommodations at the U.S. Naval Base at Guantanamo Bay for screening. These facilities were quickly filled and President George H.W. Bush issued Executive Order 12807, declaring that U.S. non-refoulement obligations did not extend outside U.S. territory. This policy was challenged in the United States Supreme Court in Sale v Haitian Centers Council (1993) and upheld the government’s policy (Legomsky 2006: 680-681).
124EXCOM Conclusions No. 22, 81, 82, 85, 99, and 108.
clearly stated the act of rejection at the frontier must be avoided. But in this case, Australia turned to ‘safe third country’ principles stating that those boatpeople turned back to Indonesia were not facing persecution there and so it was not refouling refugees. Indonesia did not have formal obligations to the 1951 Convention, however. And so, observers were naturally concerned that return could lead to ‘chain refoulement’ (Matthew 2002: 667) in which consecutive countries expelled the boatpeople until they eventually reached the original place of persecution. However, the Immigration Department drew attention to its rca of 2000 as constituting protection:

[W]e provide support for [the International Organization for Migration] to provide support to asylum seekers. We provide assistance to the UNHCR to operate their refugee assessment process in Indonesia. As a matter of practical fact, we are confident that the Indonesian government is allowing these people to stay within their territory while they go through that process and, if they are found to be refugees, while they await international resettlement arranged by the UNHCR. With those elements addressed, there is no need to consider some form of tracking mechanism for individuals (LCRC 2002: 36-37).

NGOs and legal observers stated that the arrangement between Australia and Indonesia was not sufficient to remove the obligation for monitoring by Australia of those processed and returned (LCRC 2002: 36). The absence of a clear legal document indicating responsibilities made this evaluation difficult to determine. Actions were taken to promote the legality of Australia’s interception and turnback policy.

On the issue of offshore processing, Australia took steps to adhere to its legal obligations. In its review of Australia’s OPCs, the UNHCR made two submissions to the Senate Legal and Constitutional References Committee in which it compared Australia’s practices to “relevant international instruments and EXCOM Conclusions” (UNHCR 2002c: 1). The agency did not find that Australia’s acts of transferring and processing of asylum seekers on Nauru and Manus Island, Papua New Guinea, a violation of international law. UNHCR affirmed the principle of transfer as

125 Article 3(1) states that “No person referred to in Article 1, paragraph 1, shall be subjected to measures such as rejection at the frontier or, if he has already entered the territory in which he seeks asylum, expulsion or compulsory return to any State where he may be subjected to persecution.”
consistent with Conclusions No. 85 (1998) and Conclusion No. 87 (1999), so long as safeguards were in place such as a guarantee of effective protection against *refoulement*, access to fair and effective asylum procedures, and treatment in accordance with international refugee law and international human rights standards. However, legal scholars criticized the transfer as relying on ‘a particularly extreme version of ‘safe third country’ notion because the boatpeople had neither transited nor had a connection to those countries (McAdam and Purcell 2008: 104; Foster 2007). The UNHCR conceded though that, “even in the absence of a valid link, international law does not as such seem to bar a country from negotiating with another country the admission of asylum seekers for asylum purposes” (UNHCR 2002: 6). From this perspective it was difficult to condemn the transfers as a clear violation of formal law.

When it came to RSD on Nauru and Papua New Guinea, the UNHCR was more circumspect. It is true that Australian lawyers could not represent asylum seekers, and they would not have access to the RRT, Australian federal court, or Ministerial discretion. However, the UNHCR stated that “the denial of access to the onshore asylum processing in Australia was not a penalty within the meaning of that Article” (UNHCR 2002c: 1). The agency did say, however, that having two different determination systems was “discriminatory and undesirable” (UNHCR 2002c: 4). Nevertheless, the agency stated that “UNHCR has worked closely with DIMIA (Department of Immigration) on Nauru on the processing of asylum claims and it appears that generally a fair and effective refugee status determination system is in place. DIMIA has advised that a similar system is applied on Manus Island, PNG” (7). As stated by UNHCR previously,  

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126 Interestingly enough, no fuss was made about Nauru not being a signatory to the 1951 Convention at this time. One can only surmise, that UNHCR did not flag this as an issue because it operated RSD in many non-Convention countries.
Australia was not required to provide multiple levels of appeal beyond the RRT. However, Australia’s constitution required it to do so.

To conclude this section, I draw attention to two points from the presentation of evidence. First, the Howard government’s response to the *Tampa* and the subsequent Pacific Solution strategy created controversy among legal observers. I argued, however, that this strategy actually adhered to the formal features of international refugee law while offending the shared understandings and practices of the legal norm. This observation is nuanced but important. The finding raises significant questions for those legal scholars who treat formal law as the end all and be all of international law. Australia took steps to contest the traditional interpretation of the legal norm and invested significant energy and resources in doing so. But there had yet to be the requisite shift in shared understandings and collective practices for the Pacific Solution strategy to be seen as legitimate. Second, a constructivist theory of legal norm contestation integrates international and domestic levels of analysis into a unique and coherent explanation. The Howard government perceived that the prevailing interpretation of the right to seek asylum created severe uncertainty about how to respond appropriately to boat arrivals. When the *Tampa* arrived in late August 2001, this uncertainty proved too much for the Howard government and it deployed the Pacific Solution. The standoff and subsequent policy changes allowed the Howard government a more legitimate basis on which to invoke its populist version of national sovereignty and identity. Without clear rules and practices for resolving uncertainty, the Howard government was able to implement its own interpretation of the right to seek asylum.

4.5. Conclusion and Assessment

The theoretical approach I used here explains how Australia – a member of the normative community governing the right to seek asylum, middle power, and liberal democracy – diverged
from this community and past practice to pursue the Pacific Solution strategy. The explanation focuses on the Howard government’s rise to power and its acceptance of the traditional interpretation of the right to seek asylum. The chapter then looked at how Australia detected uncertainty within the legal norm and contested that approach entrepreneurially. Finally, I look at how this uncertainty gave the Howard government the opportunity to impose its vision of national identity and implement an asylum and border control policy using a very minimal interpretation of its legal obligations. My explanation also provides insights into traditional why-type questions concerned with causality. I challenge the notion that domestic politics was the sole driver of this transformation. Howard held populist sympathies to be sure. But the election of John Howard in 1996 did not immediately lead to the Pacific Solution strategy. From 1996 to 1999, Australia continued to process boatpeople onshore and offer refugees permanent residence. Following the arrivals of 1999 to 2001, Australia first introduced new practices like TPVs and entrepreneurially contested the right to seek asylum. But it continued to receive boatpeople onshore and process their claims there. Some also argue that the 9/11 attacks on Washington, DC and New York City led to Australia’s shift, but the transformation began much earlier and the first offshore processing centre agreement was struck on September 10th 2001 with Nauru. This is not to say that these explanations do not hold important truths. Howard’s vision of national sovereignty was important and his efforts to strategically position himself in the lead-up to a tightly contested federal election were likely important as well.127 Implementing the Pacific Solution was popular with Australians and it is believed to have allowed Howard to win the 2001 election. But my position is that these

127: Howard’s LNC government was losing popularity in the polls because of dissatisfaction with its economic reform program, high oil prices, and a scandal involving branches of the Liberal party cheating on tax returns. The ALP had won a series of state and territory elections and looked primed to take the nation’s highest office.
explanations cannot be sustained on their own and must be integrated into a broader theory of legal norms.

Despite the controversy and accusations surrounding the Pacific Solution strategy, the international legal norm governing the right to seek asylum influenced Australia’s asylum and border control policy transformation. Following the boatpeople arrivals of 1999 to 2001, the Howard government engaged in entrepreneurialism drawing the public’s and the normative community’s attention to problems: secondary movement, people smuggling, and the high costs of onshore processing in comparison to what refugees were receiving abroad. Australia proposed that the normative community reorganize itself around a more collective system of protection and called for enhanced border control and entry restrictions. The arrival of the *Tampa* in late August of that year revealed severe uncertainty for the Howard government. From Australia’s perspective, there were no collectively acceptable practices available to use in resolving the problems it identified. This uncertainty created the opportunity for the Howard government to exert its version of national sovereignty through the Pacific Solution strategy. While the Howard government was unable to publicly disparage multiculturalism or attack the rate of Asian immigration, calling boatpeople queue jumpers and illegal immigrants allowed it to channel its populist energies in a more legitimate direction. The Howard government’s criticism of the UNHCR and the United Nations fit the populist narrative about anti-democratic and unfair rules being imposed by elites.128

Following the implementation of the Pacific Solution and just prior to the November 2001 election, Howard gave a speech in which he said:

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128The Howard government criticized the UN human rights monitoring committees for exceeding their mandates in their commentary about Australia’s international obligations. They tended to give too much weigh to NGOs, they had a biased approach to Australia, and they criticized countries with good human rights records but not those with poor records sufficiently (Zifcak 2003: 38).
It is also about having an uncompromising view about the fundamental right of this country to protect its borders, it’s about this nation saying to the world we are a generous open hearted people taking more refugees on a per capita basis than any nation except Canada, we have a proud record of welcoming people from 140 different nations. But we will decide who comes to this country and the circumstances in which they come (Howard 2001).

Most observers point to this statement as the iconic voice of Australian populism and national sovereignty. It clearly reflects a tough stance towards border control using historical cultural themes and represents a turn in direction from past governments and even Howard’s earlier statements.

This explanation should not be interpreted as an apology for a very controversial policy. For most people, including myself, something was clearly wrong. The Howard government’s actions closed off its onshore protection system to boatpeople and, as we will see in the next chapter, led to the harsh treatment of boatpeople and harmed Australia’s reputation in the region and with the UN. Australia was turning back boatpeople to Indonesia and it sent others to remote locations for temporary accommodation and processing. Surely, this outcome was not what the framers of the 1951 Convention had in mind. If all states party to the 1951 Convention were permitted to implement this practice, the protection space for refugees would become smaller and smaller over time. How could international law permit this? Our inability to hold the Howard government to account using formal provisions of the 1951 Convention was almost as unsettling as the effects of the policy. A constructivist approach takes a step in the right direction by focusing in on the importance of the intersubjective basis of international law contained in shared understandings and practices developed by a normative community.

How does the preceding analysis compare to explanations that use more cynical accounts of international law? Critical theory, decisionist, and rational choice treatments of international law speak directly to the motivations of states that use international law. Though this constructivist
theory of legal norm contestation does not clearly challenge or endorse any of these accounts, it treats legal discourse more seriously. Legal discourse is neither just strategic window dressing for self-interest nor a veneer to conceal power. Legal discourse is shaped by and shapes the intersubjective content of legal norms: shared understandings and practices. Actors interact to create meaning for material reality and they negotiate and renegotiate rules regarding how to behave. The Howard government observed the traditional interpretation of the right to seek asylum from 1996 to 1999 but then decided to contest this by pointing out problems. Contestation involved costly entrepreneurialism and a particular pattern of delegitimization and relegitimization. As boat arrivals increased and became more public, this uncertainty grew more pronounced. It is within this normative context that the Howard government was enabled to diverge from the shared understandings and practices of the legal norm and introduce the Pacific Solution strategy. But how effective was this entrepreneurialism? Did the normative community accept these arguments? The next chapter provides further clarity around these issues and the motivations of the Howard government.
CHAPTER 5: THE LABOR GOVERNMENT AND REGIONAL COOPERATION AMIDST A NEW LEGAL NORMATIVE CONTEXT (2002-2013)

5.1. Introduction

In the previous chapter, I discussed how Australia contested the traditional interpretation of the legal norm governing the right to seek asylum. Eventually uncertainty became too great, leading the Howard government to invoke the Pacific Solution strategy. In this chapter, I examine the last two phases of legal norm contestation. First, I describe how Australia’s entrepreneurialism appeared to influence the normative community. From 2002 to 2007, key actors including the United Kingdom (UK) and the United Nations High Commissioner for Refugees (UNHCR) even became entrepreneurial themselves echoing many of Australia’s points. Second, the final phase of legal norm contestation required that Australia actually implement the new ideas developed by the normative community domestically. The Howard government did not actually appear interested in engaging with the tough legal questions this process would have raised. Ultimately, the Australian Labor Party (ALP) would take up the task of promoting new asylum and border controls in the context of the Bali Process.

This chapter’s focus on the final two phases of the legal norm contestation framework complicates traditional explanations of Australia’s behavior that are based on domestic politics and cynical theories about international law. First, the Howard government and the ALP clearly played a central role in the variation of Australia’s asylum and border control policies, highlighting the importance of domestic politics. But first the LNC and then eventually the ALP rejected an onshore asylum system in no small part as a result of the severe uncertainty they detected in the
legal norm governing the right to seek asylum. In the previous chapter I described how the Immigration Department, in its experiences with boatpeople arrivals from 1999 to 2001, noted problems with the prevailing interpretation of the legal norm governing the right to seek asylum. First, it pointed to ambiguities in the rules and practices around onward secondary movement and gaps relating to absence of practices to respond to migrant smuggling. More generally, the Immigration Department argued that continued adherence to the traditional interpretation of in-country screening followed by the offer of permanent residence revealed contradictions in that it created pull factors for economic migration. Without acknowledging the uncertainty within the legal norm at this time, arguments based on domestic politics alone are incomplete. Secondly, most theories that use international law to explain Australia’s responses to boat arrivals and especially its shift from an onshore to an offshore approach claim that Australia’s engagement with international law was disingenuous. My constructivist theory of legal norm contestation reveals that this characterization is too sweeping. While there were points at which Australia appeared to use law disingenuously, on other occasions Australia appeared to be acting in good faith.

5.2. The Australian Influence and an Emerging Normative Context Governing the Right to Seek Asylum

A constructivist theory of legal norm contestation examines how uncertainty arises, creating opportunities for interpretive variation and contestation among actors. The framework also encourages scholars to assess whether other members of the normative community accept an entrepreneur’s persuasive efforts. How does the normative community receive and adjudicate the entrepreneur’s arguments? Are they accepted or rejected? If they are accepted, the next analytical step is to evaluate how legal norm contestation feeds back to reconstitute or reshape the norm of interest. For Reus-Smit, resolving legal norm contestation involves quieting the major actors and
relevant audience by negotiating away the underlying sources of contention (2007: 168-171). In the words of Sandholtz and Stiles (2008: 6-7), this process is about dispute resolution.

Australia’s arguments and justifications helped to influence the normative community’s shared understandings and practices. From 2001 to 2007, key actors within the normative community such as the UK and the UNHCR proposed new thinking about responding to asylum and migration movement that effectively accepted the validity of Australia’s arguments and proposals. The quality of Australia’s legal arguments and justifications was a central feature of this shift.

We have to be careful not to overstate the influence of Australia on the normative community. Australia did not simply teach new ideas to uninformed or passive actors. The members of the normative community engaged in their own deliberations and they already had an intersubjective foundation from which to draw on to make these decisions. Indeed, the normative community critically evaluated Australia’s arguments because of its adjudicatory role. Nevertheless, Australia was a particularly important actor in facilitating a shift in the normative context from one defined exclusively by shared understandings and practices to one in which out-of-country asylum and border control was a possibility. Australia had a reputation among liberal democracies as a source of expertise; it was the most entrepreneurial member of the normative community and collaborated closely with other actors. In this section, I describe the emergence of a new normative context (defined by new shared understandings and practices), highlight evidence revealing Australia’s influence on the development of this new normative context, and compare my account of this development to competing explanations.
Let us first turn to the UK’s proposal for the reform of the legal norm governing the right to seek asylum. The UK faced the typical political and legal pressures of a liberal democracy in responding to rising numbers of asylum seekers throughout the 1980s and 1990s. In 1998, the UK Labour Government’s White Paper on asylum and immigration restated a familiar objective “the Government’s aim is to create an efficient asylum system that helps genuine asylum seekers and deters abusive claimants” (Home Office 1998 in Hassan 2000: 186). The UK experimented with the familiar enforcement practices like the detention of asylum seekers, safe third country legislation and agreements, and expedited status determination. Throughout the 1990s, the UK remained committed to an in-country asylum system for those able to access its territory. Without the desired level of success in responding to the issue domestically, the UK sought to push the matter into the EU governance context. Tony Blair took the issue of asylum and migration unusually seriously for a sitting Prime Minister and requested regular briefings from Immigration Department officials (Van Kessel 2013). In 2003, Blair wrote to the EU Presidency requesting that the topic of “better management of the asylum process globally” be on the agenda of the 2003 European Council in Brussels (UK Government 2003: 1).

The UK called its proposal “A New Vision for Refugees.” UK officials noted that the current system was failing because too much money was being spent on too few refugees in the Global North and not enough was being provided to the vast majority of refugees in the Global South. The proposal continued: most refugees reaching the West were required to use the services of people smugglers; half to three-quarters claiming asylum did not meet the criteria of a 1951 Convention refugee; removals were extremely difficult, time consuming and costly; and rapidly fluctuating numbers of refugees and asylum seekers now made individual responses difficult (UK Government 2003: 1-2). The UK argued that all of these issues undermined the public’s confidence
in executing immigration policy (1). The UK highlighted the problem of “individuated policies”; most countries focused on their own asylum systems, rather than a multilateral system of responsibility sharing (2). The paper expressed greater interest in military interventions that would enable refugees to return home and maintained that resettlement should become a more strategic tool for resolving protracted displacement (Noll 2003: 318). Most notably, the proposal involved the creation of Regional Protection Areas (RPAs) for effective protection outside the EU for those deemed secondary movers. Any asylum seeker who reached a participant state would be returned to an RPA for screening rather than receiving screening in the country of arrival and thereby gaining access to multiple layers of judicial review. Though the proposal did not include calls for interception or interdiction, presumably because transfer to an RPA would eventually achieve the deterrence objective, the “New Vision” document contained beliefs about the existing system and proposals that echoed much of what Australia had previously recommended.

The UK observed Australia’s policies and practices and there is evidence that the UK learned from Australia. The UK was a member of the Intergovernmental Consultations (IGC) on Refugees, Asylum, and Migration and was privy to Australia’s entrepreneurialism as Chair during 2000 and 2001 when Australia put its plan to the group. Following Australia’s turn as Chair, the UK took over the Chair’s position in 2002 and picked up where the Australians left off. The UK also consulted closely with senior Australian Immigration Department officials about their approach to asylum and the offshore processing on Nauru and Manus Island (Bedlington 2016). Bilateral consultations also extended to the political level. In December 2001, Minister Ruddock was invited to give a public address titled “Are Australia’s Immigration Policies a Viable Model for the United Kingdom?” to the Foreign Policy Centre in London Ruddock discussed the government’s immigration system and refugee resettlement program and also attempted to defend
the actions it took toward the *Tampa* earlier that year (Ruddock 2001c). Then, in August 2002, Ruddock gave another public speech at Australia House in London entitled “Managed Migration — Who does the managing?” The speech addressed a similar subject but stressed the importance of retaining control over complex flows of migrants, asylum seekers, and refugees to retain the public’s confidence in the immigration system (2002b). That year, Ruddock even proclaimed that Australia’s experience in dealing with boat arrivals “helped to shape the UK’s policy”. Throughout 2002, Ruddock held regular discussions with Foreign Secretary Jack Straw and other British ministers about migration matters (Taylor and Fray 2002).

It does not seem surprising that the UK was receptive to Australia’s entrepreneurialism or that it simply came to similar conclusions about the prevailing system to deal with asylum seekers. The UK experienced similar asylum and migration pressures. How would a more critical actor, like the UNHCR, respond to the challenges raised by Australia? On the surface, the UNHCR publicly denounced Australia’s Pacific Solution strategy. In November 2001, High Commissioner Ruud Lubbers accused Australia of breaching international law and following a “law of the jungle” because of its actions towards the *Tampa* (BBC News 2001). In 2002, the UNHCR awarded the *MV Tampa*’s captain, Arne Rinnan, with the Nansen Medal for “courage and a unique degree of commitment to refugee protection” (UNHCR 2002b). In 2003, the UNHCR’s Director of International Protection, Erika Feller, testified to a UK parliamentary committee working on asylum and border control policy. When asked about the UNHCR’s early position on the Pacific Solution, Feller stated, “there are no lessons to be learnt from this [the Pacific Solution] and no precedents that have been set by this as far as we are concerned” (Feller in Taylor 2005: 11). This criticism was consistent with the agency’s positions during the 1980s and 1990s. The UNHCR challenged liberal democracies for their attempts to control access to their in-country asylum
It was also reluctant to participate in what the agency saw as a migration issue because of its exclusive mandate for refugees. Australian Immigration officials recalled that the UNHCR only used a protection lens to respond to asylum and migration, but that Australia had to use both immigration and protection lenses (Bedlington 2015; Hughes 2016).

In 2000, Director of International Protection, Erika Feller, helped initiate the Global Consultations on International Protection. The Global Consultations were an ambitious effort to reinvigorate the 1951 Convention in light of the instrument’s upcoming 50th anniversary. The Consultations received the support of the UNGA, EXCOM, and the Secretary General and lasted for over one year. Roundtables and workshops were held with government officials, international organizations, academics, and NGOs to discuss, among other things, protracted refugee situations, the high costs of asylum systems in industrialized countries, burdens on developing countries of hosting refugees, and the real or perceived abuse of asylum systems (UNHCR 2001b). The Global Consultations concluded in December 2001 when member states endorsed its outcome document, the Agenda for Protection. Liberal democracies are among the top donors to the work of the UNHCR. It was therefore likely that Feller initiated the Global Consultations to keep those countries from backing away from the regime. But my argument is that legal argumentation and persuasion also played a part in shifting the UNHCR’s views.

The UNHCR used its experiences and the insights from the Agenda for Protection to develop a concrete proposal called the Convention Plus Initiative (CPI). While acknowledging the “continuing centrality and validity of the 1951 Refugee Convention,” High Commissioner, Ruud Lubbers noted it had “become clear that the Convention alone [would] not suffice” (Redmond 2002). The CPI was an attempt “to build an effective system of international burden sharing that would also enable refugees to find adequate protection or assistance as close to home as possible”
In his public statements, Lubbers marketed the CPI by speaking to destination states’ concerns. For instance, in 2002 Lubbers said:

To be effective, we need strict and workable policies to help sort the economic migrants from those people who are in need of international protection. One measure sought by EU countries is better policing, especially on their periphery. I see no objection to strengthening Europe’s outer borders, provided that arriving refugees still have access to a fair and fast asylum procedure (Lubbers 2002).

The High Commissioner also highlighted other elements needed to make the system work more effectively, such as more opportunities for migration, better harmonization of national asylum systems, and increased resettlement. Lubbers even recommended that developed states aim to set a resettlement quota of 0.1 percent of their country’s population annually (Mares 2002: 243). The CPI constituted three programs: the Strategic Use of Resettlement; Irregular Secondary Movements; and Targeted Development Assistance to improve access to durable solutions and protection capacities in regions of origin (UNHCR 2005). IGC coordinator Gerry Van Kessel recalled the former Dutch Prime Minister as a pragmatic High Commissioner “prepared to work closely with destination and donor countries” (2015).

The UK attempted to coordinate its “New Vision” proposal with the UNHCR’s CPI. The UK was aware that its “New Vision” proposal might not attract the support of all European states. The paper stated that “the asylum and immigration debate is relatively advanced in the UK compared to most of our European neighbours and we may not find enthusiasm for this vision throughout the whole of Europe” (UK Government 2003: 27). So the UK attempted to draw from the CPI and stated that it would align its plan for regional protection areas with UNHCR’s

It is revealing to note the UK’s use of the word “advanced” to describe the state of discourse and legal understanding about asylum and migration at this time. Some academic observers saw the proposal and debate as actually regressive and harmful to the basic system of international protection (Anker et. al. 1998; Noll 2003). For other legal scholars like Stephen Legomsky such a proposal was the path forward for the regime: “ultimately, the solution almost certainly lies in some form of orderly out-of-country processing” (Legomsky 2006: 695).
development of the CPI which should “give us scope for moulding the organization [UNHCR] more as we wish it to be” (4). The UNHCR intended that agreements be reached through general normative frameworks and through their application to pilot Comprehensive Plans of Action (CPA), based on the precedent of the Indochinese CPA (Lubbers 2003 cited in Betts 2008: 147). Initial plans were to focus on the Somalian and Afghan caseloads (Betts 2008: 149).

The UK’s doubts about how the controversial nature of its proposal would be received were confirmed. The proposal divided European states, once again revealing the adjudicative role of the normative community. When the UK proposed its “New Vision” to an informal meeting of the EU Justice and Home Affairs Council in Veria, Greece on 28 March 2003, Italy, Denmark, and the Netherlands were particularly supportive while Finland, Spain, Ireland, Austria, and Belgium were more circumspect. Among the major challengers, however, was Germany supported by Sweden, Portugal, and European Commission members (Dombey 2003). The mainstream media reported the UNHCR’s skepticism and Lubbers said he would only support a plan if processing centres were located in the EU (Dombey 2003). The issue of where processing would occur was not something that was resolved in Veria and further discussion was put off until June 2003 during the EU’s Thessaloniki Summit.

Realizing that the idea of processing outside of the EU created resistance, the UK withdrew its proposal and only promoted “zones of protection” at the Thessaloniki Summit because it believed this would be less contentious. Lubbers proposed a version of the CPI that complemented the UK’s proposal (UNHCR 2003). However, after hearing objections from the European Commission and several EU Member states, notably Sweden and Germany, the UK withdrew its proposal entirely (Travis et. al. 2003). This situation left the UNHCR alone promoting its CPI at Thessaloniki. Perhaps because Lubbers did not distance the UNHCR enough from the UK
proposal, both Germany and Sweden blocked Lubbers’s CPI proposal from proceeding any further. Gregor Noll stated that UNHCR received significant criticism from legal observers and even stated that “the Swedish Minister for Migration expressed astonishment that ‘the High Commissioner himself supports these ideas’” (2003: 308). The UK’s proposal and UNHCR’s CPI roll out failed to receive the desired support from states. From Betts and Durieux’s point of view, the CPI outlined highly innovative conceptual and procedural practices to promote cooperation and respond to complex asylum and migration movements (Betts and Durieux 2007).

Following the failure of the CPI, the new ideas and practices stemming from its development were compiled into a punchier document called the 10-Point Plan to deal with mixed migration. Though widespread adoption of out-of-country screening failed in the EU and the Pacific Solution was sharply criticized by the UNHCR, the normative community was now more interested in cautiously proceeding with out-of-country asylum and border control practices. This larger shift was also reflected within the EXCOM and its Conclusions on International Protection during these years. Two EXCOM Conclusions in particular are informative. In 2003, the EXCOM passed a conclusion on returns and another on interception. EXCOM conclusions begin with a set of contextual observations or shared understandings about the current protection environment before moving on to highlight rules or standards. Each conclusion explicitly noted that the enforcement of asylum law was necessary for the proper functioning of the international protection

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130 Various reasons have been highlighted for the failure of the CPI. One scholar argued that it was a futile attempt at piecemeal engineering where structural adjustment was needed (Zieck 2009). One senior Australian official recalled that the CPI failed because of European states experiences during World war II, they were uncomfortable with the idea of large detention centres in Europe (Interview I 2015).

131 The 10 strategies include the following: Cooperation among key partners; data collection and analysis; protection-sensitive entry systems; reception arrangements; mechanisms for profiling and referral; differentiated processes and procedures; solutions for refugees; addressing secondary movements; return arrangements for non-refugees and alternative migration options; information strategy (UNHCR 2007).

132 EXCOM Conclusion No. 96—Conclusion on the return of persons found not to be in need of international protection (2003); EXCOM Conclusion No. 97—Conclusion on Protection Safeguards in Interception Measures (2003).
system, but then went beyond this by acknowledging the rising prominence of mixed migration, the high costs of hosting and processing asylum seekers, the rise of smuggling and trafficking, and the need to exclude those not entitled to protection, among other matters. Both conclusions identified appropriate standards to be met in carrying out returns and interceptions, and of course, the requirement that neither practice undermine an individual’s right to seek asylum and other aspects of international law.

Now that the normative community appeared more interested in pursuing out-of-country asylum and border controls, it shifted its attention to the thorny issue of effective protection. Prior to this point, deliberations about secondary movement and the conditions under which returns could be carried out occurred under the label “safe third country standards”. Just to recall, if an asylum seeker or refugee had come to a country indirectly or from a third country (not a refugee producing country), they were often deemed secondary movers. But what constituted a safe third country? EXCOM Conclusion No. 58 (1989) provided some general guidance about what “safe third country standards” might entail. There had to be protection against refoulement and treatment in accordance with “basic human standards”. Under these conditions, a state could return an asylum seeker or refugee to a safe third country. Safe third country agreements and legislation were typically implemented on a case-by-case ad hoc basis in consultation with the UNHCR. Australia experimented with safe third country legislation during the 1990s; the details of the legislation were drawn from Conclusion No. 58.

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133 Of particular interest is Paragraph F (i-ii) of EXCOM Conclusion No. 58: “Where refugees and asylum seekers nevertheless move in an irregular manner from a country where they have already found protection, they may be returned to that country if i) they are protected there against refoulement and ii) they are permitted to remain there and to be treated in accordance with recognized basic human standards until a durable solution is found for them.

134 The 1995 Australian legislative amendment to the Migration Act stated in section 91D (3) that a safe third country was “the compliance by the country, or each of the countries, with relevant international law concerning the protection of persons seeking asylum; and b) the meeting by the country, or each of the countries, of relevant human rights standards for the persons in relation to whom the country is prescribed as a safe third country; and c) the willingness of the country, or each of the countries, to allow any person
The challenge at this time was the ambiguity that surrounded safe-third country standards. While *non-refoulement* had to be closely observed and was very clear, what did the term “basic human standards” mean? What rights should an asylum seeker or refugee have access to beyond *non-refoulement*? Despite deliberations during the 1990s, these shared understandings and rules continued to be ambiguous at both the international and the domestic levels. The ambiguity gave the Howard government an opening to maintain the dubious position that the guarantee of *non-refoulement* (Article 33) was all that was necessary to ensure Australia upheld its obligations to the refugee regime. According to a 2002 Amnesty international report examining the Pacific Solution strategy, Australia took a minimalist interpretation of refugee law. According to one official interviewed:

> We looked at our [Refugee] Convention obligations. We wanted to be generous, but since we provided more than what’s required by the Convention, we asked, what is the minimum that’s required? (2002: 24)

Despite the questionable intentions of this objective, legal scholars had trouble condemning Australia’s Pacific Solution strategy as a clear breach of the 1951 Convention.

Even though the Howard government observed Australia’s *non-refoulement* obligation, legal scholars and UNHCR officials did not approve of the offshore processing centres in Nauru and Manus Island. Instead, the label “burden shifting” (not “burden sharing”) was used to characterize Australia’s cooperation with these countries (Crisp 2004; Taylor 2005). Amnesty International argued that if this approach was left unchallenged “it would allow wealthy countries like Australia to shift responsibility, an option which is not available to developing nations

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in relation to whom the country is prescribed as a safe third country: i) to go to the country; and ii) to remain in the country during the period in which any claim by the person for asylum is determined; and iii) if the person is determined to be a refugee while in the country— to remain in the country until a durable solution relating to the permanent settlement of the person is found”. For commentary see Taylor 1995.
receiving far larger numbers of refugees and struggling to support them” (2002: 24). If Australia (or any other country) wanted to transfer boatpeople to third countries for the processing of claims, legal observers, the UNHCR, and even IGC states argued that a country would have to ensure access to a wider range of rights to those transferred than just non-refoulement.

Within this space, various actors promoted their own proposals for effective protection. Feller was UNHCR’s lead on articulating the meaning of effective protection during the October 2004 EXCOM meeting and stated that protection could be regarded as sufficient if:

[T]here is no likelihood of persecution, refoulement, or torture; there is no other real risk to life; there is a genuine prospect of accessing durable solutions in or from the asylum country, within a reasonable timeframe; stay is permitted under conditions which protect against arbitrary expulsion and deprivation of liberty and which provide for adequate and dignified means of subsistence; the unity and integrity of the family is ensured; and specific protection needs of the affected persons, including those deriving from age and gender, are able to be identified and respected (Feller 2004).

Feller worked to clarify these conditions in a 2006 article published in the International Journal of Refugee Law. Feller stated the 1951 Convention’s purpose was to ensure protection was provided to certain standards to those who fall within its ambit, rather than to ensure that protection in a particular country. Asylum seekers may therefore be returned to another country whether they have already found international protection, without their claim necessarily being adjudicated in substance in the country where they have subsequently applied for asylum, providing an adequate regulatory framework to do so exists and is implemented in practice (2006: 528-529).

Of critical importance, Feller emphasized that “quality protection” involved certain rights related to the legal process, identity documents, non-discriminatory access to education, labour market rights and other social rights (529). Eventually these deliberations subsided. According to Danielle

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135IGC states discussed something called ‘adequate protection’ during 2004 to 2005, as a way to outline ‘minimum standards’ needed to begin considering investment and provision of support to host countries and returns (Interview E 2015). James Hathaway and his colleagues also developed a comprehensive list of standards for effective protection known as the “Michigan Guidelines on Protection Elsewhere”. (Colloquium on Challenges in International Refugee Law 2007).
Phuong, many academics and NGOs resisted contributing to these debates for fear of legitimizing a dilution of the 1951 Convention (Phuong 2005: 13). Some legal advocates stated that transfers should not occur unless the state receiving an asylum seeker was able to provide every single right contained in the 1951 Convention (Francis 2008: 279-280) and not just those listed by Feller.

Negotiations around effective protection were arcane. But if liberal democracies intended to respond to the arrival of secondary movers and deal with people smugglers through out of country asylum and border controls, the ambiguities around “basic human standards” would have to be resolved. Various other practices, such distinguishing secondary movement from refugee movement, conducting of returns or removals, identifying appropriate hosting countries, and determining which countries should receive financial support for hosting refugees, hinged on a general acceptance of these standards.

Although the idea for out-of-country processing had been around for many years, something changed beginning in 1999 making members of the normative community willing to proceed in this direction. First Australia, then the UK, and the UNHCR devised major revisions to the traditional approach to asylum and refugee protection. The UK presented its plan for out-of-country screening to the IGC Full Round meeting in April 2003 in Belgium. During that IGC meeting, serious consideration was given to the UK strategy in a joint paper by Danish, Dutch, EU, UNHCR, and IGC officials. Gregor Noll points out that this paper did not seriously reflect on the discussion paper of 1995 when out-of-country processing was considered in detail but rejected for moral, legal, and political reasons (2003: 313-314). Officials participating in the meeting stated that while similar ideas had been presented in the past, the challenges Western states faced in recent years were increasingly acute (Van Kessel 2015). According to Van Kessel, liberal
democracies were now prepared to consider transferring asylum seekers to a country and screening people in regions of origin (2015).

Australia’s entrepreneurialism was influential in this shift. Based on my interviews, Australia made major contributions to shaping the asylum and migration debate at this time. One senior Australian official stated that:

> We did a lot of policy work on the asylum migration nexus, more so than any of the other resettlement and western countries. Our counterparts recognized that we were leading the pack on thinking about these issues (Interview E 2015).

Australia perceived that other members of the normative community were not addressing these issues in the way Australia thought was necessary. Bedlington recalled, with frustration, that even some states within the IGC, “had their heads buried in the sand” not wanting to acknowledge that there were significant problems (2015) with their interpretation of the legal norm. Gerry Van Kessel, the Canadian delegation’s lead at the IGC from 1996 to 2001 and coordinator of the IGC from 2001 to 2005, attested to Australia’s special expertise and knowledge of the “asylum migration nexus”:

> As coordinator of the IGC, I had on going dealings with immigration officials from all sixteen member countries. In my opinion, the Australians were by far the most versed, most sophisticated, had the deepest knowledge of the issues that lay at the back of migration and asylum. Whether they were the most senior officials or subject matter experts who had come to our working groups in Geneva, I found them to be simply the most knowledgeable by a considerable margin. I would include our own country here as well. We’re not bad (Canada), but the Australians were just head and shoulders above everyone (Van Kessel 2015).

Van Kessel also recalled that after UNHCR’s Lubbers accused Australia of violating the 1951 Convention with its response to the *Tampa* and Pacific Solution strategy, he had to apologize to Australia because of how carefully it observed *non-refoulement* (2015). With this intellectual capital and reputation, Australia had a foundation to persuade other actors. The UK’s collaboration with Australia in developing its “New Vision” proposal also provides support for this point. Of the
other liberal democracies making up the normative community, Australia had a disproportionate influence on the shaping of shared understandings at this time.

It is certainly possible to overemphasize the Australian influence and the reality was that deliberations within the normative community were also crucial. One Australian senior official recalled their influence:

You provide the thought-provoking questions and then let it percolate through and keep talking about it and presto UNHCR started owning the asylum migration nexus as if it was something they had always done. This was UNHCR’s attempt to get the dialogue on the ‘asylum migration nexus’, which was being increasingly mixed up with terrorism and broader transnational crime back to have it become a protection issue… all of the destination states and donor countries had started to look very broadly at these issues; once you do that there was no way they were going back (Interview C 2016).

While acknowledging the importance of the Australian contribution, Van Kessel also emphasized that the normative community was central to this shift as well:

The Australians were always in front on things. When we [IGC states] did things that matched with the Australians it was less from just looking at the Australians. It was more about coming from the same intellectual space that everyone was at and deciding whether or not that would work… So I don’t think there was any conscious effort to mimic what the Australians were doing (2015).

It is impossible to rewind history to see what would have happened had Australia not been entrepreneurial or involved in these discussions. I believe a safe conclusion would be to say that Australia helped initiate and hasten this shift rather than “cause” it.

In the end, the UK’s proposal was rejected, but something had changed between 1995 (when the Netherlands proposed regional screening) and 2003 to make serious consideration now possible. Neither rising numbers of arrivals nor domestic politics, on their own, can explain this turn. While there was an increase in mixed migration during this period (1998-2003), arrivals to the West were actually higher following the end of the Cold War (1989-1993) (Graph 1). Western states were concerned with upholding their national sovereignty and rising populism was also a
consideration. Some domestic political leaders identified asylum seekers as taking jobs from national citizens or highlighted a clash of civilizations, but these were longstanding anxieties that existed long before the creation of a legal norm governing the right to seek asylum. The legal norm contestation argument proposed here is more convincing because of how entrepreneurial and specialized the interactions and debates were from 1999 to 2007. Senior bureaucrats with the expertise and legal knowledge helped inform state leaders. The UNHCR officials drew on a highly legalistic discourse and proposed solutions to work within the basic contours of the legal norm. The capacity to engage in these esoteric debates and deliberations could not be achieved by domestic political actors alone. In identifying a significant starting point in this shift, Australia stands out as the first major actor to articulate a highly legalistic rationale for abandoning the traditional interpretation of the legal norm concerning the right to seek asylum (defined exclusively by in-country asylum processing followed by the local integration of refugees) and for providing a viable alternative way forward.

Graph 1

Compare the argument I make here with a recent contribution by Daniel Ghezelbash from his 2018 book, *Refuge Lost: Asylum Law in an Interdependent World*. Ghezelbash argues that the shift towards interdiction and offshore processing actually began with the United States’ response to Haitian boat arrivals during the 1980s. Ghezelbash provides evidence to show how Australia borrowed these practices from the U.S. The Howard government consulted closely with the Americans in the roll out of the Pacific Solution strategy. Though compelling at a technical level, there are two key differences in our explanations. First, the Australians borrowed these practices from the Americans but applied them differently. The Australians were not intercepting people as they left a first asylum country the way the U.S. did with the Haitians. Australia responded to secondary movement of refugees and asylum seekers from the Middle East. If Australia intercepted boatpeople refugees coming directly from Indonesia or Southeast Asia, we could more easily group the American and Australian approaches together. Second, the U.S. was not entrepreneurial like Australia. The Americans did not attempt to promote its interpretation of the 1951 Convention globally. Because contestation involves entrepreneurialism, it is difficult to say the Americans actually contested anything. The U.S. policy was inconsistent as well. It did not seek to dissolve its in-country asylum system and continued to allow most other non-Haitians to file asylum claims on U.S. territory. While Ghezelbash is interested in how practices like interdiction/interception and offshore processing diffuse, I am interested in examining how an intersubjective legal norm made up of both shared understandings and practices regarding refugee and migration movement shifted and evolved making way for greater acceptance of particular practices.
To conclude this section, a legal norm contestation framework directs attention to how entrepreneurial actors’ can influence other actors within the normative community and how the legal norm is instantiated. More than just the introduction of new practices, the developments of 2001 to 2007 created the foundations of a new normative context. Key actors now accepted that in-country screening would no longer be the exclusive way in which states could uphold their obligations to the legal norm governing the right to seek asylum. From 1999 to 2007, key actors like Australia, then the UK, and even the UNHCR, identified problems with the traditional interpretation of the legal norm. New shared understandings emerged about migrant smuggling, secondary movement, and the ineffectiveness of existing practices to respond. Australia and the UK proposed out-of-country asylum and border control practices, with the support of some Western European states. And without explicitly supporting the UK proposal or Australia’s, the UNHCR signaled that it was prepared to engage in new practices and articulated effective protection standards to help identify secondary movement and where responsibility for processing of asylum claims lay. This intersubjective shift is what defines this period from previous attempts to promote out-of-country screening and from the more incremental reforms of the adaptation process described earlier. Most of the participants I spoke to during my interviews identified this period as a turning point of sorts and that “there was no going back” to the traditional state of affairs (Interview P 2017; Bedlington 2016).

Australia was an important and influential actor in this shift. However, it was not as if Australia proposed new ideas and the normative community accepted them automatically. Members of the normative community used their discretion, based on legal expertise and shared understandings, and critically adjudicated the arguments made by entrepreneurs. Indeed, the normative community continued see the Pacific Solution and the American response towards the
Haitians as unacceptable, outlier policies. Other liberal democracies did not attempt to dissolve their in-country screening systems in favor of an out-of-country system and UNHCR took strong positions against both country’s practices. However, Australia was influential with respect to the timing of its entrepreneurialism, which occurred prior to the UK and the UNHCR’s proposals. Evidence also indicates that Britain consulted closely with Australia before releasing its “New Vision” document. Finally, Australia’s reputation for “advanced” knowledge of the asylum migration nexus gave that country more influence over the normative community than other liberal democracies. The arguments raised by Australia, but also the UK and the UNHCR initiated a shift in the normative community and the legal norm governing the right to seek asylum. This development reaffirms constructivism’s basic premise about the ongoing co-constitution of structure and agency: legal norms influence the policy practices, arguments, and justifications of actors and these in turn reconstitute legal norms.

5.3. Legal Norm Contestation and Second Image Reversed: Australian Domestic Politics and National Identity

As this new emerging normative context developed, uncertainty continued to affect Australian domestic politics. The negotiations in the normative community occurred among a highly specialized group of state bureaucrats, international civil servants, civil society groups, and academics. In Australia, the major actors responsible for designing policy were elected officials who had limited knowledge of this subject area. As described earlier, uncertainty within a legal norm creates opportunities for domestic actors to pursue competing policies. Because liberal democratic states are defined by party competition and regular national elections, an actor’s “internal conversation” involves different political actors proposing their own interpretations about how to resolve uncertainty. This is a competitive process. Policies that once received bipartisan
political consensus become the source of domestic political contestation. A second-image reversed phenomenon occurs in which the detection of uncertainty can exacerbate domestic political cleavages among political parties. Gourevitch (1978) and Rogowski’s (1987) influential articles evaluated the effect of international wars and exposure to international trade on domestic politics. Building on these insights, I argue that rising uncertainty regarding how to respond to a contested international legal norm can shape domestic political debates and outcomes.

From 1999 to 2001, the Howard-led Liberal National Coalition (LNC) won this domestic competition based on its tough border control and asylum policies and vision of Australian national identity. But from 2001 to 2007, the Australian Labor Party (ALP) re-emerged to defeat the LNC government. The ALP, under Kevin Rudd, proposed and then implemented a more humane interpretation of the right to seek asylum. Scholars normally conceive of domestic political jockeying as derived from a straightforward competition to achieve political office. The advantage of using a legal norm contestation framework is that it adds nuance to this account. Rising uncertainty within the legal norm can contribute to, and even exacerbate, domestic political cleavages effectively becoming an enabler of party competition and tension. Prior to 2001, both the ALP and the LNC maintained a tacit agreement not to politicize the issue of asylum and border control. But following the Howard government’s actions towards the *Tampa*, this bipartisanship broke down and both the ALP and the LNC pursued competing approaches. Australian historian Robert Manne noted that he could not, “remember a single issue, which more transformed politics, than the decision taken by the Howard government to repel all boat arrivals of asylum seekers” (Manne 2011).

In this section, I describe how from 2001 to 2007, a softening of the national mood occurred enabling the ALP to re-emerge and position itself as the humane alternative to the LNC. During
these years, Australians accumulated a list of grievances with the Howard government on various policy issues: economic; health care; education; the environment; and aboriginal issues. More importantly for this project, Howard’s tough border control practices, dismissive attitude towards human rights, and the sharp decline in the number of boat arrivals significantly contributed to a shift in the national mood. These developments gave the ALP an opportunity to paint the Howard government as out of touch with Australian values and sensibilities.

As scholars identified, legal norm contestation and uncertainty draw our attention to domestic level dynamics such as rationalist arguments and more ideational arguments. In the first case, domestic competition between the LNC and the ALP was naturally informed by rational incentives around gaining political office. But each party possessed a different interpretation of national identity and sovereignty that informed their respective positions. As I described in the previous chapter, the Howard government’s Pacific Solution was grounded in a populist conception of national identity that rejected “elite impositions” of rules or international responsibilities. From 2006 to 2007, Kevin Rudd and the ALP developed a different conception of Australian national identity informed by a more cosmopolitan position. The ALP pledged to restore compassion to Australian politics, which meant, among other things, resetting Australia’s asylum and border control strategy, dismantling the Pacific Solution, and re-engaging with the United Nations.

Because of the success of the Pacific Solution strategy in stopping boatpeople, the issue drifted out of the public’s consciousness and the popular appeal of the strategy gradually diminished. Instead, the media’s attention shifted away from stories about breaches in border security to the human impact of the government’s restrictive policies, particularly around Australia’s detention system. The number of detainees rose from 1863 in 1997-1998 to 9321 in
2001-2002 (Phillips and Spinks 2013: 40). From January 2002 through to June 2002, the Woomera detention centre in the remote South Australian outback was the site of suicide attempts, mass hunger strikes, public protests, and high-profile escapes (Farouque and Kremmer 2002). A series of critical reports from international and domestic rights groups were also published. In May 2002, the UN Working Group on Arbitrary Detention toured Australian detention facilities and condemned the government’s policy as a violation of the ICCPR (arbitrary detention and access to legal review) and the UN Convention on Rights of the Child (prohibiting detention of children except as a last resort) (Millett 2002; Bhagwati 2002). The UN Human Rights Committee issued similar statements on other occasions.136

Instead of apologizing or planning to reform the detention system, the Howard government continued its populist critique of the UN. Immigration Minister Ruddock, Foreign Minister Downer, and Attorney General Williams dismissed a 2002 UN report on detention as “fundamentally flawed”, incorrect about key facts, and lacking objectivity. It was understood as yet another example of UN interference: “This brings the credibility of the entire report and its conclusions into question. It again demonstrates the fundamental flaws in the UN human rights committee system” (DFAT 2002). In 2004, the Australian Human Rights and Economic Opportunity Commission issued a report indicating that Australia’s mandatory detention policy was “fundamentally inconsistent with the Convention on the Rights of the Child” and constituted conditions that could violate the Convention Against Torture (HREOC 2004: 6).137 In response, Immigration Minister Amanda Vanstone asserted that “releasing children from detention would

136The Human Rights Committee issued a number of critical opinions in A v Australia (1997); C v Australia (2002); in Baban v Australia (2003); and Bakhtiyari v Australia (2003). All judgments indicated that prolonged detention was illegal without periodic reviews and case-by-case justifications (Stubbs 2006: 297).
137It was found that children were at risk of psychological harm in prolonged detention and the failure to remove children from detention with their parents constituted cruel, inhumane and degrading punishment forbidden by the CAT.
send the message to people smugglers that carrying children on dangerous boats would be a way to avoid detention” (Vanstone 2004). The UNHRC and advocates saw the government’s reluctance to address criticism as a denial of Australia’s international obligations (Charlesworth et. al. 2006: 85).

Following these reports came a number of unsettling realizations in the form of High Court of Australia (HCA) rulings that upheld Australia’s right to detain unauthorized arrivals in an indiscriminate way. In a 6-1 decision in Behrooz v Secretary of the Department of Immigration the HCA ruled the legal right to detain was impervious to the statutory conditions in which detainees were held. In two more controversial rulings, Al Kateb v Godwin and Minister for Immigration v Al Khafaji, the HCA ruled 4-3 in both cases that the government could use the “aliens” power of the Constitution to impose detention for as long as the government deemed it necessary. In a show of frustration, Al-Kateb’s lawyer stated that, “The effect of this decision is that [Al-Kateb] will be locked up until a state of Palestine is created or some other Middle Eastern state is willing to have him. It’s taken 51 years so far. I’m not holding my breath” (ABC 2004). The HCA outcomes created deep discomfort for Australian legal advocates and scholars argued that parliamentary support for rights was limited because of party responsible government

138 Mr. Behrooz had been one of a number of detainees to escape Woomera detention centre but was eventually apprehended and charged under the Migration Act under section 197A. Behrooz justified his escape on the basis that conditions were so harsh that they were punitive and not administrative, making his detention unlawful. That being said, the majority softened its position indicating that detention officers would be liable to prosecution if they assaulted detainees or failed to comply with their duty of care. The implication was that to protect non-citizens held in detention, legal action would have to be taken on their behalf against Australians who might be behaving in contravention of regulations and policy (Thwaites 2014: 92-93).

139 Mr. Al Kateb arrived to Australia by boat in December 2000 and applied for a protection visa for which he was rejected. When Al Kateb expressed his wish to return to either Kuwait or Gaza, Australia was unable to remove Al Kateb because he had no citizenship in either place and was effectively stateless. The Court’s decision, in a 4-3 ruling allowed unlawful non- citizens to be detained until they are removed from Australia even when there is no prospect of their removal in the reasonably foreseeable future. Moreover, in a 2-1 decision, the judges also maintained that provisions of the Migration Act should not be interpreted by reference to international law.

140 Mr. Al Khafaji was a recognized Iraqi refugee fleeing persecution in Iraq but was refused a protection visa on the ground that he had a right to reside in Syria, where he once lived. However, Syria’s refusal to admit him left him in legal limbo.
resulting in the dominance of the parliament by the executive (Chappell, et. al. 2009: 43). So not only could the government mandatorily detain unauthorized arrivals, as was found in 1993; the HCA also found the government could do so indefinitely.

Other problems also came to light around immigration and border control policy. First, in 2005, the Immigration Department was linked to its a scandal concerning the mistreatment of two individuals, Cornelia Rau141 and Vivian Alvarez.142 In two separate government reports released that year, the Immigration Department came under fire for various systemic problems.143 The Palmer report144 was critical of the department for ethical and cultural problems:

There is a serious cultural problem within DIMIA’s [Department of Immigration and Multicultural and Indigenous Affairs] immigration compliance and detention areas: urgent reform is necessary. The combination of pressure in these areas and the framework within which DIMIA has been required to operate has given rise to a culture that is overly self-protective and defensive, a culture largely unwilling to challenge organizational norms or to engage in genuine self-criticism or analysis (Palmer 2005: ix).

The Comrie Report came out in October 2005 and found similar problems. Second, the civil society group Oxfam pointed to the high costs of the Pacific Solution and found that:

In the six years since the Tampa crisis in August 2001, Australian taxpayers have spent more than $1 billion to process less than 1700 asylum seekers in offshore locations—or more than half a million

141Ms. Rau was a German citizen and Australian permanent resident who was unlawfully detained for 10 months in 2004 and 2005 under the mandatory detention policy. Rau had psychiatric problems and had been detained after being classified as an illegal immigrant by the Immigration Department. Because of confusion about her identity, Rau’s family was only able to locate her when a newspaper published a story entitled “Mystery woman at Baxter may be ill” (Jackson 2005).

142Ms. Alvarez was an Australian citizen who was unlawfully removed to the Philippines by the Department of Immigration in July 2001 as an illegal immigrant. Alvarez came to Australia 1984 and changed her name when she married an Australian. She divorced in 1993 and she changed her name back. From 1995 to 2000, Alvarez developed a minor criminal record and was taken into protective custody where she underwent psychiatric treatment. The mistaken deportation was discovered when Queensland police contacted the Department of Immigration in 2003, but the Department did nothing. However, a Catholic priest in the Philippines who knew Alvarez saw a report on ABC Asia Pacific and identified her as someone he knew.

143Though these reports dealt only with two individual cases, they reported against a background of 200 possible cases of wrongful detention and settlement payments to at least eleven of these on condition of remaining silent (see quote in Jupp 2007: 194).

144Palmer was appointed by Immigration Minister Vanstone so there was criticism that he was not sufficiently at arm’s length from the government to thoroughly and effectively investigate the department.
dollars per person. Most, if not all, of these asylum seekers have paid a substantial personal toll through poor mental and physical health and wellbeing. There have also been detrimental impacts on Australia’s democratic and legal system, Australia’s regional relationships and the international system of protection of refugees and asylum seekers (Bem et. al. 2007: 3).

The report also attempted to link the conditions of detention to numerous instances of self-harm of detainees and psychological distress (16-20).

The Howard government’s tough stance towards unauthorized arrivals, human rights, and the UN was attractive for many Australians in 2001. This approach did not have the same effect a few years later and boatpeople were not debated during the 2004 federal elections. Some began pointing to a softening of attitudes towards asylum seekers as early as August 2004 when a *Newspoll* survey found that sympathy towards boat people had risen since 2001. The poll revealed that 61 percent of voters said some or all asylum seekers should be allowed to land in Australia. The same poll conducted in October 2001 found that 56 percent of voters wanted all boats stopped. According to polls cited by George Megalogenis, in 2004 only 35 percent agreed with the actions taken against the *Tampa* and 43 percent did not (2008: 263). The Pacific Solution was popular when there was a sense that the government had lost control over boat arrivals, but this support subsided and even reversed with some segments of the population once the issue was controlled and accusations of questionable conduct came to light.

This subtle shift in attitudes did not translate into mass public protests and outrage. Rather, the findings created an atmosphere within which Labor could reposition itself in the lead-up to the 2007 Federal Election. By 2006, the leadership of the Labor party noted a “shift in national mood” and replaced Beazley with the fresh faces of Kevin Rudd, Foreign Affairs Shadow Minister and Julia Gillard, Labor’s Health spokesperson in late 2006. According to one observer, this election was different than others in that it was a “presidential” race where the personal traits, integrity, and future visions of the major party leaders came under unprecedented scrutiny (Williams 2008: 222).
Rudd and Gillard attempted to paint the Howard government as excessively harsh on many policy issues and not in line with Australian values like “a fair go”, “mateship”, and the needs of Australia’s “battlers”. Much like Howard’s critiques during the 1990s and 2001, the ALP made the 2007 federal election a contest over Australian national identity. But unlike Howard’s populist version of national identity, the ALP would promote a form of cosmopolitan Australian national identity and sovereignty.

The ALP targeted Howard’s WorkChoices legislation as harming Australia’s blue-collar workers because it undermined unions and workplace tribunals to the benefit of employers (Williams 2008: 105-106). This move allowed the ALP to reincorporate so-called “Howard Battlers” (Kelly 2009). There were also concerns about declining support for the government health care, education, the environment, and aboriginal issues, and its response to terrorism. Rudd also pledged to initiate a process towards a Bill of Human Rights to align Australia with other liberal democracies. In the HCA decision of Al Kateb v Godwin regarding detention, Justice McHugh sided with the majority in upholding the legality of indefinite detention. But he said the outcome was “tragic” and called for a Bill of Rights, “which substantially adopts the rules found in the most important of the international human rights instruments” (Prince 2004: 2; Thwaites 2014: 87). The Howard government rejected such a Bill, claiming that Australia’s democratic institutions did enough to protect the rights of Australians (Prince 2004: 13) and that the Bill would create unintended consequences (Howard 2006).

For further analysis of how this issue was successfully framed by the Labor Party and the unions see Goot and Watson (2012).

The “stolen generation” issue saw large numbers of half-caste children removed from their communities between 1910 and 1970. For more information, see Robbins (2007).

In 2007, Mohamed Haneef was falsely accused of aiding terrorists and detained without charge in July 2007. The incident led to a judicial inquiry and report in 2008 which was critical of government actions (Chappell et. al. 2009: 232-234).
Once Rudd gained the leadership position in December 2006, he looked to tap into Australian values. He declared that the country had reached a fork in the road with respect to a range of policy issues. Rudd also pointed to another fork in the road involving national identity:

One [fork in the road] not often talked about in this country, but I think it’s critical—and that’s the actual fabric of our federation…This fork in the road has emerged because John Howard has taken a bridge too far. A bridge too far on industrial relations, a bridge too far when it comes to Iraq, and a bridge too far on climate change by not going far enough (Rudd 2006).

Gillard supported Rudd’s comments with her own statement emphasizing the ALP’s professed egalitarianism and her immigrant background:

Australians are looking for a new style of leadership and they’re looking to protect fairness at work and fairness beyond work. They’re looking to protect that traditional Australian fair go. My family aren’t long-time Australians; they came here as immigrants because Australia offered them a fair go—a precious thing about our culture, and something that we’ve got to make sure is protected and enhanced, and I agree with Kevin that the election we will have next year is a fork in the road (Gillard 2006).

During the 1996 and the 2001 federal elections, Howard used traditional cultural themes such as “mateship”, “a fair go”, and “battlers” to criticize what he saw as the Keating ALP government’s elitism. Howard looked to connect with Australians on a fundamental level. During 2006 and 2007, Rudd and Gillard made a similar bid, arguing that these themes were actually more appropriately aligned with the ALP’s conception of national identity. For most Australians, national identity is grounded in the spirit of the Australia New Zealand Army Corps. This spirit included such qualities as “courage, mateship, sacrifice, generosity, freedom, and a fair go for all”. Australia has often been called “the land of a fair go” where mates looked after each other, and egalitarianism, rather than class, shaped national character. For the Australian historian Russell

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148For the Australian historian Frank Bongiorno, “[t]he Gallipoli campaign was the beginning of true Australian nationhood. When Australia went to war in 1914, many white Australians believed that their Commonwealth had no history, that it was not yet a true nation, that its most glorious days still lay ahead of it. In this sense the Gallipoli campaign was a defining moment for Australia as a new nation” (Australian Government 2015). During the 1915 campaign, war correspondents reported on many of the qualities they observed in the ANZAC soldiers.
Ward “mateship”, collectivist ideas, capacity for improvisation, and an anti-intellectual, materialist outlook was born among the convicts and grew up among the bush workers of the Australian pastoral industry during the nineteenth century (1966: v). Alongside this narrative, Australia became known for its progressive policies. It was one of the first countries to grant women the right to vote and stand for seats in parliament. Australia was also known for establishing the eight-hour workday.

Rudd claimed that these themes were actually ideas developed by the ALP. In his first speech to Parliament in 2006, Rudd stated the following:

Labor’s message then is this: we believe in a strong economy; we believe in a fair go for all, not just for some. That is Labor’s message in a nutshell. When it comes to fairness, a fair go, some people think that this just mysteriously grew out of the soil one day in Australia. Do you know that it did not? Our movement etched it into the Australian soul through the 19th century and 20th century. If you read the history of 19th century Australia, you will not see much about a fair go; there is nothing about fairness. With our industrial movement—which has been so criticized by those opposite today—and with our political movement from the 1890s on, we took fairness and a sense of the fair go, we won political office, we obtained concessions in the workplace and we entrenched fairness in the statutes of the nation. We etched the fair go also into Australia’s consciousness, our political consciousness. It is our legacy to the nation—legacy that the current government seeks to peel apart bit by bit (Rudd 2006b).

Rudd made the case that when it came to the question of “a fair-go”, Labor had a historic claim to this Australian value.

Rudd also aimed to connect with urban elites arguing that Australians had lost the value of compassion. Rudd declared in his first speech to parliament:

[I]t is time to rehabilitate the word “compassion” into our national vocabulary. Compassion is not a dirty word. Compassion is not a sign of weakness. In my view, compassion in politics and in public policy is in fact a hallmark of great strength (2006b).

Rudd then published two articles in the glossy intellectual magazine *The Monthly*. In the first article, “Faith in Politics”, Rudd responded to the dominant representation of Christianity in politics as defined by right wing evangelicals. Instead, Rudd argued that progressive Christianity
had a vital political role in Australia, “giving voice to the voiceless and speaking truth to power” (Rudd 2006c). On refugees and asylum, Rudd invoked the “parable of the Good Samaritan” for insight into how Australians should respond to vulnerable strangers in their midst. Depicting the Howard government as excessively harsh in many policy areas, not least of which was asylum and border control, was a simpler task considering that boat arrivals were no longer in the news. The following month, Rudd continued his critique of the Howard government’s economic and social policies in a lengthy and philosophical article entitled “Brutopia”. Rudd drew on philosophers from Oakeshott to Smith to argue that Howard’s economic policies had actually detached themselves from the Australian community’s cultural foundation, and it was time to restore the balance (Rudd 2006d).

When Labor released its 320-page platform in April 2007, it mentioned the words “fair”, “fairness”, and “unfair”, in excess of 200 times (ALP 2007). In particular, Labor devoted a chapter to human rights entitled, “Respecting Human Rights and a Fair Go for All”. The document stated that if elected, it would “initiate a public inquiry about how best to recognize and protect the human rights and freedoms enjoyed by all Australians”. Most interpreted this as a pledge to initiate a process towards a national bill of rights. The ALP also announced its intention to re-establish a more generous and humane asylum and border control policy. In 2002, MP Julia Gillard declared “Labor will end the Pacific Solution, the processing and detaining of asylum seekers on Pacific Islands, because it is costly, unsustainable and wrong as a matter of principle” (Mercer 2012). Instead, the ALP intended to provide more support to refugees in general, overhaul Australia’s detention system, and lead a world debate on new understandings about international protection (ALP 2007: 222). The party pledged to reform administrative detention so that asylum seekers would only be held for purpose of medical, identity, and security screening; children and family
groups would be placed under supervision within the community, and protection would be permanent and not temporary.

In November 2007, Australians went to the polls and elected Kevin Rudd by a majority 83 seats to 65 seats. Howard lost his own seat of Bennelong. Just as Howard used themes like “a fair go”, “mateship”, and “battlers” to connect with deep-seated popular sentiment to win the 1996 and 2001 federal elections, Rudd used those same themes to paint Howard’s policies as morally problematic and connected with Australians’ disenchantment. These themes were rooted in a sense of egalitarianism that constituted a strand of Australian national identity. The LNC did not speak to the issue of border control during the 2007 campaign. According to reports, this was because party members said the national mood had changed and the party did not want to re-open the conversation for fear of reviving memories of the ‘children overboard’, stirring further dissent among Liberal Party backbenchers who had spoken out against Howard, and recent criticism about Howard’s tough approach to anti-terrorism (Browne 2010).

Sworn in on December 3rd, 2007, Prime Minister Rudd began delivering on election commitments by ratifying the Kyoto Protocol, replacing Workchoices with the Fair Work Act, and formally apologizing to Indigenous Australians. LNC leader Brendan Nelson warned that the apology would fuel a “culture of guilt” in middle Australia (Schubert 2008). The ALP’s pledge to human rights and a better relationship with the UN led to new actions. The Rudd Government described itself as “coming in from the cold” (Attorney General 2008) and “re-engaging with UN processes, too long neglected by the previous government” (Smith and McClelland in DFAT 2008). In 2008, Rudd signed on to the optional protocol to the Convention Against Torture and the optional protocol to the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW), providing for individual complaints to the CEDAW committee. He ratified
the new Convention on the Rights of Persons with Disabilities in July. In late 2008, Rudd announced funding of $2.8 million for a national consultation on a Bill of Rights Act and appointed Frank Brennan, a Jesuit Priest and human rights activist, as chair. The Brennan Committee received 8671 submissions and the Committee’s Report summarized the evidence and in particular noted that

there have been serious breaches of human rights during the past decade…the lengthy, and potentially indefinite, mandatory detention of asylum seekers; and the increase in law enforcement agencies’ powers as a result of the new national security laws. There was a sense that the power of the executive arm of government needs to be checked (National Human Rights Consultation Committee 2009: 15).

During his first two years in office, Rudd attained exceptionally high approval ratings and there was a widespread sense of optimism about the direction of the country.149

Of importance here, the Rudd transition and its vision of national identity also meant that the Howard era asylum and border policies were to be dismantled. According to a senior immigration department official working at the time, urban elites held “an absolute and unshakable expectation” that the Labor Party would correct Howard’s policies in this area. Chris Evans, the new Immigration Minister, came to office with “a very firm moral and personal commitment to reform many of these policies, a process that was marked by a lot of emotion… a lot of emotion” (Interview I 2015). Evans began his reforms in February 2008 when it closed the offshore processing centres and brought the few remaining refugees to Australia. Evans stated that Australia should have been shouldering the burden of protecting refugees instead of outsourcing Australia’s protection obligations to less developed countries (Evans 2008). The new government stopped

149Kevin Rudd’s approval rating was said to be 74 percent by Nielson polling and equaled the all-time poll popularity record of 75 percent set in November 1984 by Bob Hawke (Coorey 2009).
issuing Temporary Protection Visas (TPVs) to boatpeople found to be refugees. Evans described TPVs as,

one of the worst aspects of the Howard government’s punitive treatment of refugees, many of whom had suffered enormously before fleeing to Australia. There is clear evidence that the TPV arrangements did nothing to prevent unauthorized boat arrivals and, in fact, arrival numbers increased not long after the regime was introduced (Evans 2008).

UNHCR applauded the actions as the end to “one of the most controversial chapters in Australia’s treatment of asylum seekers and refugees” (UNHCR in Rummery 2008).

Evans sought to bring cultural change to the Immigration Department. According to a senior official in the Immigration Department, Evans aimed to make the department a more compassionate organization in the way it implemented policy “from the very moment he walked in the door” (Interview I 2015). In a speech at the Australian National University in July 2008, Evans condemned the previous approach to detention:

Labor rejects the notion that dehumanizing and punishing unauthorized arrivals with longterm detention is an effective or civilized response. Desperate people are not deterred by the threat of harsh detention— they are often fleeing much worse circumstances… [T]he legacy of the Howard government’s punitive detention regime is still being felt in the ongoing mental health problems of former detainees, including children, and the mounting compensation claims against the Commonwealth (2008a: 2).

Evans argued that enormous damage was done to Australia’s international reputation and cited 14 occasions over the last decade in which the United Nations Human Rights Committee made adverse rulings against detention cases in Australia (Evans 2008a: 6). Evans announced his vision for “restoring integrity” to the system, claiming that the Department would operate under a “new set of values— values that seek to emphasize a risk-based approach to detention and prompt resolution of cases rather than punishment”, adding that “the best deterrent is to ensure that people who have no right to remain in Australia are removed expeditiously” (Evans 2008a). This risk-based approach consisted of initial health, identity, and security screening, but following that, the
government would allow most asylum seekers to remain in the community while their claim was resolved. Evans introduced seven guiding values for detention.\textsuperscript{150}

The government abolished TPVs and returned to offering permanent residency to those found to be refugees. It pledged to return to administrative detention and establish an effective returns policy for those deemed not in need of international protection. During these early years, numerous pieces of legislation were passed and proposed\textsuperscript{151} and there was a general sense within the Labor Party taking the moral high ground. Australia’s relationship between UNHCR improved immediately. In November 2008, Minister Evans stated that:

\begin{quote}
With the worst excesses of Howard era refugee policy behind us, Australia has been able to return as a credible international actor in the field of refugee protection. Australia was this year elected Vice- Chair of the UNHCR Executive Committee -- recognition that we’re seen as good international citizens, and engaged (2008).
\end{quote}

\textsuperscript{150} These values consisted of 1) mandatory detention as an essential component of strong border control; 2) to support the integrity of Australia’s immigration program, three groups will be subject to mandatory detention a) all unauthorized arrivals for health, identity, and security risks to the community b) unlawful non- citizens who present unacceptable risks to the community c) unlawful non- citizens who have repeatedly refused to comply with their visa conditions; 3) children, and, where possible, their families, will not be detained in an immigration detention centre; 4) indefinite detention is unacceptable and are subject to regular review 5) detention is to be a last resort and for the shortest practicable time; 6) people in detention will be treated fairly and reasonably within the law; 7) conditions of detention will ensure the inherent dignity of human person.

\textsuperscript{151} During the early years of Labor’s administration (2008-2009), the government passed nine pieces of legislation and proposed two more before Parliament was prorogued in July 2010. Migration Legislation Amendment Act (No. 1) 2008 (an omnibus Bill to clarify and improve the effectiveness of migration and citizenship legislation relating to judicial and merits review, border protection, visa integrity, citizenship, and other miscellaneous matters); Migration Amendment Regulations 2008 (No. 5) (to abolish TPVs and secondary movement visas, and to remove the “7 day rule”); Migration Amendment (Notification Review) Act 2008 (reform measures to improve consistency in notifying visa applicants of outcomes; prior to legislation this system lacked consistency and in some cases undermined the applicant’s ability to seek review); Migration Legislation Amendment Act (No. 1) 2009 (introducing more effective time limits for appealing a migration/refugee outcome); Migration Amendment (Abolishing Detention Debt) Act 2009 (removed the requirement that certain person held in immigration detention in Australia be liable for the costs of their detention which was thought to be a penalty under the Refugee Convention of 1951); Migration Amendment (Protection of Identifying Information) Act 2009 (provided greater measures to protect the identification of asylum and migration applicants and raises distinctive protection concerns); Australia Citizenship Amendment (Citizenship Test Review and Other Measures) Act 2009 (inter alia the legislation made it easier for a person with a physical/mental incapacity as a result of suffering torture or trauma before coming to Australia to apply for citizenship); Migration Amendment Regulations 2009 (No. 6) (enhances the possibility of certain visa applicants to work in Australia). Proposed Legislation (The Bills lapsed when the House was prorogued in July 2010 for the federal election): Migration Amendment (Immigration Detention Reform) Bill 2009 (the Bill sought to enshrine the government’s Detention policy outlined by Evans in July 2008); Migration Amendment (Complementary Protection) Bill 2009 (the Bill sought to enshrine Australia’s non-refoulement obligation under other international human rights treaties beyond the 1951 Convention).
Evans went on to describe the government’s new approach to the UNHCR:

As we seek to remove the stain from Australia’s international reputation and re-engage with the United Nations, including UNHCR, we need to do everything we can to maximize the impact of our contribution to the international system of refugee protection... The objective of the Rudd Labor Government’s refugee policies will continue to be to bring humanity, fairness, integrity, and public confidence to an area of public policy in which they were sadly lacking under the previous government. Having restored our international credibility, we will play a constructive and active role in addressing international protection needs (Evans 2008).

At the 2008 EXCOM meeting, Evans stated that the UN High Commissioner for Refugees Antonio Guterres described Australia as a “model asylum country” (Evans 2008). In 2008 and 2009, the UN High Commissioner invited Rudd to give a keynote address to the annual EXCOM meetings. In February 2009, Guterres visited Australia and praised the government’s contribution to the refugee regime, identifying it as having one of the best refugee resettlement programs in the world and encouraged the government to continue promoting this globally. Guterres acknowledged the government’s contribution to the global debate on international protection and the positive changes it had recently made to its asylum and detention policies (DIAC 2008-09: 91).

In the remaining portion of this section, I attempt to distinguish my legal norm contestation account from competitor theories. Most scholars evaluating this period look at the issue of motivations, both on the part of the Howard government and the ALP. The Howard government’s Pacific Solution was very popular and effective. In September 2001, a poll conducted by A.C. Nielson and cited in both The Age and The Economist revealed that 77 percent of Australians supported the handling of the Tampa and 68 percent specifically supported boat turn backs (Betts 2001: 42-43). Observers saw the Pacific Solution as a calculated move to “wedge” the ALP’s main constituencies, pushing blue collar voters to the tough measures of the LNC and the urban elites to the more ideological guided Greens (McAllister 2003: 450). As a result, the ALP dropped to its
lowest seat count in six decades and the LNC maintained power despite trailing in the opinion polls for much of the year (Scott 2004: 8).

Because the Howard government was so successful in the 2001 federal election, most Australians believed that it intentionally exerted national sovereignty over a complex issue to gain political advantage. Indeed, two points of evidence support this view. Following the Howard government’s order to turnback boatpeople to Indonesia, the Navy sought to turn back a boat on October 6th when its passengers began jumping overboard. Word reached the Howard government that asylum seekers were throwing their children overboard. The Howard government publicly condemned the incident:

there is something incompatible about a person who claims to be a refugee and someone who would throw their children into the sea. It offends the natural instinct of protection and delivering safety and security to your children (Howard in Chapman 2011).

The characterization helped to justify the Pacific Solution and was a message that held sway with the public shortly after the 9/11 attacks on Washington, DC and New York City. In early November, The Australian released a story citing a number of disgruntled sailors who said that the “overboard incident” never happened (O’Brien 2001). Opposition Senators created the Senate Select Committee to investigate the incident. The committee released its report in late 2002. The report lent credence to suspicions that senior figures in the Howard government were aware by October 10th, 2001 that there were severe doubts over the claims that boatpeople had thrown their children overboard (SSCICMI 2002: xxiii). It went on to state that once the government knew of its mistake the public record remained uncorrected because of either “deliberate deceit” or simply “an unwitting perpetuation of a falsehood because of inadequate advice” (xxxvi). If Howard and his cabinet claimed children were thrown overboard, publicly announced this, and then realized no children were thrown overboard, its failure to inform the public of this fact could be viewed as
a political scandal. The lengthy investigation kept the issue in the media for most of 2002 and “succeeded in locating children overboard firmly in the public memory” (Brett 2007: 34). The “Children Overboard” incident has been described as “one of the greatest political scandals in modern Australian history” (Herd 2006) and for the ALP it was clear evidence that they were double-crossed.

The second piece of evidence is that the Howard government did not appear particularly interested in the new ideas emerging within the normative community. Australia helped create the Bali Process in 2002 to promote a regional response to irregular migration and people smuggling. Following the UNHCR’s development of the CPI, High Commissioner Lubbers attended the 2003 Bali Process Ministerial meeting and proposed the plan:

[T]o be effective in fighting crime, it is not sufficient to increase border control and attack criminal networks. You have been engaged in this for many years, but the problem is still with us. One needs to limit “the oxygen” of this crime to reduce the number of victims available to be exploited by criminal networks. You must not only live up to the spirit of the 1951 Convention, but also engage in comprehensive solutions… Solutions for refugees and burden sharing is not only a humanitarian and political challenge. It is about fighting crime (UNHCR 2003: 10).

A year later, the UNHCR co-hosted a Bali Process workshop with Fiji in April 2004 that further sought to appeal to state interests and was entitled: “Reconciling Legitimate State Interest to Control Immigration with Refugee Protection”. The titles of the various workshop sessions reveal the lengths to which the UNHCR was prepared to go to persuade states’ that refugee protection was consistent with their efforts to tackle smuggling and irregular migration.\footnote{Day 1, panel 1: “Right to limit access to the territory and right to seek and enjoy asylum: how to reconcile both principles, their points of intersection, and their implication on immigration/asylum management”; panel 2: “Establishing fair, quick, and effective mechanisms to identify those in need of international protection and screen them from economic migrants”; Day 2, panel 1: “Excluding from refugee protection those who have committed serious crimes”; panel 2: “Improving exchange of information, including country of origin information, between UNHCR and governments”; Day 3, panel 1: “Developing coordination/strategies among states to ensure removal of those who have been rejected after a fair and effective refugee status determination procedure”; panel 2: “Working on durable solutions for refugees (including the promotion of effective protection in countries of first asylum” (Bali Process 2004).}
Despite the UNHCR’s efforts to promote its CPI, the Bali Process did not pursue this path. One might argue that because the Bali Process was made up of largely non-members to the refugee regime, this resistance was not surprising. But evidence points out that Australia may have been a key actor resisting the UNHCR’s proposals. One of the UNHCR’s representatives who attended a number of Bali Process meetings during these years stated that the agency tried to promote refugee issues, particularly around encouraging participants to look at countries of origin, but this was not well received by the four countries on the steering committee: Australia, Indonesia, New Zealand, and Thailand (Interview B 2014). In one of my interviews with a senior Immigration Department official working on the Bali Process at this time, I was told the Howard government was closed minded: “the Howard government believed that they had fixed the problem [boat arrivals]” and that no further action was required (Interview I 2015). One might expect that if the Howard government was concerned about reconfiguring the legal norm it would have taken UNHCR’s plan more seriously.

At this point, the reader will be tempted to point out that these pieces of evidence challenge my argument: if Howard was interested in international law, it was only for its strategic benefit. Based on this assessment, any attempts to contest the legal norm using arguments and persuasion were simply to conceal self-interest. And Howard was only really concerned with winning the 2001 federal election. This is the dominant view among observers and scholars and there is certainly evidence to support it. However, a legal norm contestation framework complicates this explanation in two respects. First, rising uncertainty from the late 1990s to 2001 gradually brought this issue into the public and political spotlight. The Immigration Department and civil servants, who were trying to resolve a complex legal challenge and not win political office, provided the majority of the intellectual input and policy content during these late 1990s to 2001. They
perceived the boatpeople arrivals of 1999 to 2001 as a fundamental challenge and argued in favor of shifting the legal norm. But with the exception of TPVs, they continued to insist that all boatpeople would be allowed onshore and screened there.

The increasing number of boatpeople arrivals in August 2001 and the public standoff with the *Tampa* changed all of that. As described in the previous chapter, these latter developments revealed severe uncertainty within the legal norm governing the right to seek asylum but also other areas of international law like criminal and maritime law. The incident also brought Howard, who had been on the periphery previously, directly into the fray. He responded by deviating from past practice to setup the toughest border control strategy available. The point I am making is that the restraint Australia exercised prior to the Pacific Solution and its entrepreneurialism from the late 1990s to 2001 were informed by the legal norm and they had an effect on the normative community. However, once the issue became so problematic that Howard entered the picture, the tense situation allowed him to express his vision of national identity and sovereignty more fully than he had been able to before that. Howard’s primary interest was domestic politics and in exerting his interpretation of the right to seek asylum. Once the Pacific Solution was up and running, he showed little interest in using any of the UNHCR’s new ideas.

From 2001 to 2007, domestic polarization occurred around Australia’s asylum and border control policy. Howard and the LNC had their interpretation of the right to seek asylum derived from its populist inspired vision of Australian national identity. This approach appealed to a particular constituency of voters in Australia. On the other hand, the ALP re-emerged to win the 2007 federal election by appealing to Australians’ moral conscience and urban intellectuals using a more progressive or enlightened conception of national sovereignty. Intent on correcting Howard’s policies, the ALP government dismantled the Pacific Solution and sought to re-establish
a more traditional asylum and border control policy. Clearly domestic politics played an enhanced role during this period. Indeed, neither the Howard government nor the new ALP drew from the new shared understandings and practices of the normative community. However, domestic politics and the polarization between the LNC and the ALP over asylum policy was triggered by the detection of uncertainty within the international legal norm during the 1999 to 2001. Uncertainty, therefore, had a second image reversed effect of exacerbating domestic political cleavage formations.

The incoming ALP government did not appear to have learned about the lessons of the previous Howard government regarding the problems with a traditional interpretation of the right to seek asylum. It did not see secondary movement, people smuggling, and the potential pull-factors of an onshore asylum system as influencing boatpeople arrivals. According to one senior Immigration Department official, the ALP made an “implicit gamble” that the surge in Afghan and Iraqi boatpeople in 1999-2001 had come to an end (Interview I 2015). It was thought that the two military interventions in Afghanistan and Iraq in 2001 and 2003 created the prospect of mass repatriation and that the refugee flows from those countries might stop. Indeed, the UNHCR devised repatriation and reintegration plans for Afghanistan in 2001 and Iraq in 2003. From 2002 to 2008, 5.6 million Afghans returned to their home country according to UNHCR (Guterres 2008). UNHCR served as a broker for a Joint Programme between Iran, Afghanistan, and UNHCR for voluntary repatriation of Afghan Refugees and Displaced Persons (UNHCR 2001c). Some pointed to the overall decline in asylum seekers arriving in OECD countries which had dropped from a high of 600,000 in 2001 to below 300,000 in 2006 (Menadue 2013). From this perspective,

\[\text{UNHCR maintained staff throughout Iraq to accompany returning refugees back to their homes and provide information to hundreds of thousands of Iraqis still waiting in countries throughout the region (News Story 2004).}\]
the ALP perceived that boat arrivals were largely caused by push factors and that pull factors were not significant.

There was one important adjustment that was made to the ALP’s asylum and border control policy that revealed the relationship between the Immigration Department and the executive. According to a senior official in the Immigration Department, the bureaucracy convinced the ALP to use the Christmas Island detention facility which was upgraded at a cost of $318 million if boats did return (Narushima 2008; Interview I 2015). If boatpeople arrivals resumed, asylum claims would be processed there using a non-statutory screening and appeals system. Under the new detention values policy, however, asylum seekers would receive publicly-funded advice and assistance, access to independent review of unfavourable decisions (but not the Refugee Review Tribunal or Administrative Appeals Tribunal), and external scrutiny by the Immigration Ombudsman (Evans 2008). The rationale was that those not in need of Australia’s protection would be promptly screened out and returned rather than getting caught up in the traditional onshore asylum system which officials noted typically required five years to proceed through (Interview I 2015; Interview F 2015). The new shared understandings and practices within the normative community about out-of-country screening, interception, and effective protection, were not proposed by the ALP at this time. The decision to dismantle the Pacific Solution strategy and restore a more traditional asylum system appeared to have strong domestic motivations.

From 2001 to 2008, Australia’s asylum and border control policies experienced a dramatic reversal, going from the Pacific Solution strategy under the Howard government to a more traditional asylum and border control policy under the ALP. Some points are worth highlighting to conclude this section. First, the Howard government’s tough border control and asylum policies contributed to a softening of the national mood in Australia that enabled the ALP to re-emerge and
win the 2007 federal election. Second, the ALP promoted a contrary vision of national identity to Australians and this was reflected in the dismantling of the Pacific Solution and the adoption of a more traditional asylum and border control policy. Third, I argued that severe uncertainty within the legal norm governing the right to seek asylum enabled and exacerbated this domestic political competition and polarization regarding an appropriate policy.

5.4. Labor’s Response to “Irregular Maritime Arrivals”: Regional Cooperation and Implementing New Shared Understandings and Practices

The final phase of the legal norm contestation process occurs when an actor works to implement the new shared understandings and practices negotiated by the normative community. If law is to remain relevant, actors must actually use these new shared understandings and practices to respond to their concerns. The legal scholar Harold Koh described this phase through his transnational legal process model as the point at which actors “bring international law home”. Legal norms enter the domestic context through “key agents” like norm entrepreneurs, governmental norm sponsors, transnational issue networks, and interpretive communities who incorporate them into a state’s value system through social, political, bureaucratic, and legislative pathways (1998: 626-628). This phase of legal norm contestation also involves entrepreneurialism. But instead of these efforts being directed at the normative community, entrepreneurialism focuses on shifting the beliefs and activities of local and regional actors. In this section, I describe how the ALP government attempted to achieve this final stage in the legal norm contestation process. The Howard government appeared uninterested in entertaining the new ideas and practices promoted by the UNHCR from 2001 to 2007. But the ALP government engaged in entrepreneurialism from 2009 to 2012 at home and in its region in an attempt to “bring international law home”.
Not long after the ALP all but restored an early 1990s style asylum and border control policy, boatpeople returned to Australia from 2009 to 2013 (Table 1). At first, the ALP government used the Christmas Island facility to receive boatpeople and process their claims. But it realized that its newly implemented policy was unsustainable. Rather than reverting to Howard’s Pacific Solution strategy which it had campaigned against, the ALP “rediscovered” (in the words of one senior official) the Bali Process (Interview J 2014). During the Bali Process meetings from 2009 to 2012, member states accepted that protection should be part of a response to irregular migration. They negotiated and agreed to a non-binding declaration called the Regional Cooperation Framework (RCF) in 2011 that drew from the UNHCR’s CPI and its 10 Point Plan (the new shared understandings and practices highlighted in the first section of this chapter). The ALP government, especially under Julia Gillard, attempted to shift shared understandings in Australia and pursue new practices. In particular, the Malaysia arrangement stands out as the clearest attempt to achieve this goal. Unfortunately for the ALP, the LNC continued to see the issue as politically valuable for them and obstructed the ALP’s efforts. In the end, and amidst unprecedented numbers of boatpeople arrivals, the ALP under Kevin Rudd returned to the policies of John Howard in the lead up to the 2013 federal election.

**Table 1** Boat Arrivals to Australia (2002-2013)

<table>
<thead>
<tr>
<th>Year</th>
<th>2002-2007</th>
<th>2008</th>
<th>2009</th>
<th>2010</th>
<th>2011</th>
<th>2012</th>
<th>2013</th>
</tr>
</thead>
<tbody>
<tr>
<td>Boats</td>
<td>18</td>
<td>7</td>
<td>60</td>
<td>134</td>
<td>69</td>
<td>278</td>
<td>300</td>
</tr>
<tr>
<td>People</td>
<td>575</td>
<td>161</td>
<td>2726</td>
<td>6555</td>
<td>4565</td>
<td>17204</td>
<td>20587</td>
</tr>
</tbody>
</table>

Sources: Phillips and Spinks 2013: 22

After several years of very low numbers (2001 to 2008), boatpeople returned to Australia in 2009 (Table 1). During 2008, Labor’s first full year in office, Australia only received 161
boatpeople on 7 boats, likely because of the residual deterrent effects of the Pacific Solution strategy. The issue of boat arrivals re-emerged in the public conversation following a dramatic standoff in which the Australian government intercepted a boat and held it for 12 hours hoping it would return to Indonesia. Australian officials then boarded the vessel, at which time the people smugglers sabotaged the boat leading to an explosion that killed five asylum seekers. The disturbing incident was broadcast on Australian news channels (Coorey 2009). Amidst a surge in arrivals from September 29 to October 18, 2009, in which 1,900 people were intercepted by the Australian Coast Guard, 78 Sri Lankan boatpeople prompted a rescue situation by sabotaging their boat. The Australian customs vessel *Oceanic Viking* picked up the Sri Lankans in international waters and sought to disembark them in Indonesia believing they would have access to the rca mechanism of asylum screening, care, and eventual resettlement set up there in 2000. However, the Sri Lankans demanded to be taken to Australia where they could access Australia’s asylum system. Eventually, Indonesian President Yudhoyono allowed the *Oceanic Viking* to dock, and the asylum seekers were given expedited resettlement.\(^{154}\) Recalling the Howard government’s efforts to deal with the *Tampa*, the media dubbed Rudd’s response to the *Oceanic Viking* as the “Indonesian Solution” (Bolt 2009). With the exception of higher numbers of Sri Lankans, most of the arrivals were once again Iraqis and Afghans who travelled from the Middle East through Indonesia with the help of people smugglers. The return of boatpeople recaptured the nation’s attention and placed pressure on the Rudd government.

Domestic uncertainty about how to respond to irregular migration re-emerged. Immigration Minister Evans assumed the Labor government’s public position: the arrivals were a result of push

\(^{154}\)The US agreed to take 28, Canada 13, and Norway 3 while Australia took the remainder. Four of the Australian refugees were sent to Christmas Island by the Australian Security Intelligence Organization (ASIO) because of adverse security assessments (Taylor and Rafferty Brown 2010: 572).
factors. He stated that “Countries like the U.S., UK, Canada, and Italy are all facing increased numbers of asylum seekers, much more in the order of tens of thousands than those we are seeing” (Evans 2009, Senate Hansard September 14). Australian Foreign Minister Stephen Smith stated that the people onboard the Oceanic Viking did not have the right to come to Australia:

Let me make this point, it is not a matter for the Sri Lankans on board to choose where they make their application for refugee status. We absolutely defend their right to make that application but they were picked up on the high seas, they were rescued on the high seas. It is not their choice (Kirk 2009).

Legal advocates argued that it would be more practical and humane for the Hazara, Tamils, and Iraqis to be brought to Australian cities like Darwin and Melbourne where there were large ethnic communities who could provide assistance and distribute some of the care burden (Marr 2009). The LNC opposition leader, Malcolm Turnbull, and Shadow Minister for Immigration Stone criticized the Rudd government for dismantling the “Pacific Solution” and creating pull factors by giving “the people smugglers a powerful marketing tool where they can offer the near certainty of permanent residence in one of the richest societies in the world to those who have the cash and contacts to buy a seat on a boat” (November 13 2009).

The ALP government increased its cooperation and financial support with Indonesia, but Australia had been pursuing broader regional cooperation since early 2009. The venue Australia sought to work through was the Bali Process. While the Howard government created the Bali Process to deal with the criminal aspects of irregular migration, the ALP government (with the support of the UNHCR) focused on bringing protection into the Bali Process. The selection of

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155Prime Minister Rudd travelled to Indonesia and offered a funding package said to be worth $50 million for interception, accommodation, and processing in Indonesia (Kamenev 2009; Fitzpatrick 2009). The new government also provided about $30 million for the IOM in Indonesia to refurbish and renovate detention centres, provide medical facilities, and training programs (Fitzpatrick 2009). With the collaboration of Australia and the IOM, Indonesia also ratified the Palermo Protocols on Migrant Smuggling and Human Trafficking in 2009 and passed migrant smuggling legislation into its Immigration Law of 2011. The law establishes penalties of 5 to 15 years for the smugglers, up to 7 years for corrupt immigration officials, and sets out procedures for detention of irregular migrants (Brown 2011; Nethery et. al. 2013: 97).
the Bali Process rather than the Asia Pacific Consultations on Refugees, Displaced Persons, and Migrants reflected Australia’s entrepreneurialism. In 2009, Australia decided that the Bali Process’s Ministerial level engagement allowed for more practical action compared to the bureaucratically-driven APC. The APC included “refugees” and “asylum”, terminology that historically created discomfort for Asian states. Australia saw the Bali Process, with its focus on people smuggling, trafficking, and crime, as more palatable place to pursue its plan (Interview J 2014). The challenge for the Australian ALP government and the UNHCR was in persuading Asian states, particularly those in Southeast Asia, to accept the idea that a criminalized approach to the issue of irregular migration and smuggling was not sufficient and that protection was needed.

With the UNHCR’s new doctrinal innovations stemming from the CPI and 10 Point Plan and the ALP government’s commitment to protection, there was potential to achieve something more. According to a senior Australian official,

We encouraged UNHCR in this direction (improved regional protection). Most of these governments were not signatories to the Convention and they were not going to be any time soon. So what do you do in an environment in which the countries are not parties to the Refugee Convention yet they have hundreds of thousands of refugees on their territory and thousands of asylum seekers transiting their territory? The answer that we encouraged them to adopt and they adopted anyway, was that you look at practices not the theory of it. Here are the kinds of behaviors that we’d like to see in the region, because ultimately it is the behaviors that count. There are plenty of countries in the world that are signatories to the Refugee Convention but they have no intention of implementing it and no infrastructure in place. For Southeast Asia, we wanted to say to them these are the practices we’d like implemented (Interview J 2014). 156

Regional meetings began in February 2009 with a Senior Officials Meeting in Brisbane, Australia followed by a Ministerial meeting two months later in Bali, Indonesia. In its February 2009 statement, UNHCR outlined its protection agenda:

While there is a long—standing humanitarian tradition of hosting refugees in the region, toleration alone is not enough to provide them with the protection that meets international standards. What is

156 What this official was acknowledging was the insufficiency of understandings of international law that prioritize formal treaties and ratifications.
often lacking is a legal framework to protect them. Some countries legally label refugees and asylum seekers as ‘illegal migrants’ and they are subject to arrest, detention, and even deportation.

The protection space for refugees and other persons of concern needs to be broadened through pragmatic arrangements, especially in countries that are not party to the international refugee and/or statelessness instruments… improving the standard of treatment for asylum seekers and refugees, particularly in terms of access to health care, education, and employment, would be in the economic, security, and humanitarian interest of host countries (UNHCR 2009: 2-3).

At both the Senior Officials and Ministerial meetings, the UNHCR framed its protection agenda for Bali Process members and observers by speaking to their concerns about crime. It stated that policing action alone was not enough to respond to irregular migration because,

[p]eople will go where ever they are best protected. And if there’s only one state protecting you then they are going to want to go to that state. But the idea is to discourage people from hopping from country to country. So, if all countries treat people the same way, then there isn’t going to be that irregular movement. If you ensure that level of protection and everyone agrees to that level it will discourage onward movement (Interview K 2014).

At the Ministerial level meeting in April 2009, the outcome document promulgated by the Co-Chairs indicated participants’ interest in bringing protection into the Bali Process:

Ministers, while acknowledging that this Conference had not been convened to deal directly with the issue, noted that they would use their best endeavors to deal with the issues of refugees, particularly those based on humanitarian grounds… Ministers recognized that improving the availability of comprehensive and sustainable solutions for refugees might reduce the pressure for onward secondary movement and thereby complement the international community’s efforts comprehensively to combat people smuggling, trafficking in persons, and transnational crime (Co-Chairs 2009).

In 2010, the UNHCR proposed a workshop on “Protection, Resettlement, and Repatriation,” and Indonesia offered to host the meeting in June 2010 in Bali. In the outcome document, it was stated that workshop participants discussed refugee issues in the region and agreed on the desirability of developing and applying consistent standards for protection, resettlement, and repatriation, at the regional and at the national level. Disparity between countries’ approaches contributes to irregular movement, and uniformity throughout the region would be a strong and effective disincentive to potential irregular migrants (AHG 2010).
Following this workshop, a Senior Officials Meeting was held the next day, and a Co-Chairs’ statement issued following the meeting. The document referred to traditional and general concerns related to smuggling and trafficking, but also included an important acknowledgment about Common but Differentiated Responsibilities (CBDR):

Participants recognized that addressing irregular migration is a shared responsibility. In that context, be they source, transit, or destination countries, each could make a substantive contribution to minimizing the irregular movement of people through our region. Destination countries could play a part through appropriate border and visa controls, allowing protection space, providing options for resettlement for those irregular migrants in the region who warranted international protection and returning those who did not warrant protection to their country of origin. Transit countries could contribute through effective border management and visa controls, interceptions, allowing protection space and facilitating, with the support of international organizations, the return of those people who did not warrant international protection. Source countries could play an important role in accepting and facilitating returns of their nationals who do not warrant international protection (SOM 2010: 2-3).

This statement signaled that the Bali Process was now more than just a law enforcement forum concerned with criminalization of irregular migration. Governments recognized that source, transit, and destination countries should adopt differentiated policies that were connected to a larger framework involving protection.

Back in Australia, Rudd was losing popularity and his own party described his leadership style as “chaotic” on many issues, especially the pressing matter of boatpeople. Rudd was seen as unable to communicate with Australians about a longer-term strategy to deal with boatpeople. By 2010, Immigration Minister Evans admitted that the issue was “killing the government” (Grattan and Allard 2010). In June 2010, the ALP decided to replace Rudd with his Deputy, Julia Gillard.157 Gillard had a reputation as one of Labor’s best performers in parliament with her ability to sell

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157A Nielsen poll in June found that the Labor Party would lose a federal election if one was held then and Rudd was the leader. Part of the reason for this decline in popularity was his decision to ditch the emissions trading scheme and challenge the mining sector. But the boat arrivals issue was also very prominent. Rudd received the nickname “Captain Chaos” for his reputation for micro-managing and indecision (Wanna 2010: 24).
policies and deflect political attacks. She took steps to entrepreneurially promote the RCF and Australia’s asylum and border control strategy to the public and Parliament.

Shortly after taking office, Gillard announced the government’s approach to people smuggling and boat arrivals in a speech to the Lowy Institute in June 2010. She pointed to the polarized Australian public debate on boat arrivals that undermined an effective response:

> If you are hard-headed you’re dismissed as hard-hearted. If you are open-hearted you are marginalized as supporting open borders. I say to those engaged in this type of rhetoric. Stop selling our national character short. We are better than this (2010).

Gillard identified the truths and falsehoods on both sides of the debate. From the left she argued that the human rights advocate Julian Burnside was right in pointing out that the numbers of arrivals were miniscule by global standards, but she challenged the assertion that those calling for tough border controls were racist simply because they desired a clear and firm belief about how to deal with a difficult problem. On the other hand, Gillard stated that Opposition leader Abbott’s plan to turn back boats as the Howard government had done was inhumane and dangerous (2010: 3-4). Gillard made a proposal for a regional response:

> To stop the boats not at our shoreline but before they even leave those far away ports; to ensure people smugglers have nothing to sell and so ending the long and dangerous voyages… That means building a regional approach to the processing of asylum seekers, with the involvement of the UNHCR, which effectively eliminates the onshore processing of unauthorized arrivals and ensures that anyone seeking asylum is subject to a consistent process of assessment in the same place (Gillard 2010: 7).

Gillard argued that the strategy reconciled the basic polarities of the debate:

> there is nothing humane about a voyage across dangerous seas with the ever present risk of death in leaky boats captained by people smugglers. That Australia’s basic decency does not accept the idea of punishing women and children by locking them up behind razor wire or ignoring people who are

158UN Human Rights Commissioner, Navi Pillay, described Australia’s asylum policies as driven by racism in 2011 (Sydney Morning Herald 2011).
fleeing genocide, torture, and persecution, nor does it allow us to stand back and watch fellow human beings drowned in the water, but equally that there is nothing inconsistent between these decencies and our commitment to secure borders and fair, orderly migration. The rule of law in a just society is part of what attracts so many people to Australia. It must be applied properly to those who seek asylum, just as it must be applied to all of us. There is nothing inconsistent between these decencies and our commitment to secure borders and fair, orderly migration…No one should have an unfair advantage and be able to subvert orderly migration programs (6).

Gillard went on to characterize this approach as a ‘sustainable regional protection framework’ but warned that it was not about ‘quick fixes’ would take time. Gillard attempted to deconstruct the domestic political context by proposing a bold plan in the form of the Bali Process.

By establishing a regional protection framework, Australia hoped to restrict access to its onshore asylum system but do so while not reducing the protection space in the region and even increasing it. The first such initiative was Gillard’s announcement of a Regional Assessment Centre with East Timor. The Centre was thought to promote consistent assessment of asylum seekers so as to undermine the ability of people smugglers to market and sell arrival in destination countries and thereby deter people from undertaking treacherous maritime voyages. Gillard stated that, “the purpose would be to ensure that people smugglers have no product to sell. Arriving by boat would just be a ticket back to the regional processing centre” (2010: 7). Despite a strong push from the Australian government and a close bilateral relationship,159 East Timor eventually rejected the proposal. While the deterrent aspects of the proposed processing centre in East Timor were clear, as articulated by Gillard, a confidential concept note on the proposed processing centre leaked to the press revealed only modest protection benefits for the region and the East

159 A processing centre in East Timor also had practical challenges related to logistics such as a clear and potential location for such a facility, and the possible tensions it might create with Indonesia that surfaced during the negotiations (Interview M 2016). Australia was East Timor largest donor of Official Development Assistance (ODA). In 2010- 2011, Australia contributed $103 million to East Timor down from $117 million in 2009-2010 (DFAT 2011). Though the costs of constructing the centre, assessing the asylum seekers, and repatriating non-refugees would not be classified as ODA according to OECD regulations, provision of food, shelter, and medical attention could be (DFAT 2011).
According to one senior Immigration Department official, the very ambitious plan was part of an election pledge and none of the necessary diplomatic groundwork had been built-up to give the arrangement a chance of success (Interview J 2014). The establishment of a regional declaration in the Bali Process, involving shared understandings and new practices, could assist in creating setting up these practical arrangements.

Meanwhile, with a general interest in protection now evident within the Bali Process, the UNHCR began work on a “roadmap” and what would become the RCF. Unlike the 1990s, the agency now had a repertoire of doctrinal innovations at its disposal in the CPI and 10 Point Plan. Australia and the UNHCR hoped to implement and develop these general ideas in a more regional direction. According to an Australian senior Immigration Department official,

UNHCR is an international organization, but in many respects they were behaving like a series of independent offices in countries in the region, but not acting regionally. If everyone works within their own jurisdiction, they leave the free market open for irregular migration, smuggling, and trafficking. At the time, the Immigration Department was saying that we were pursuing regional cooperative solutions. And we were also saying to UNHCR we’d like to see you act regionally, as opposed to an organization in Geneva with a number of offices in various states with their position being in relation to the national situation of that country. We need a regional focus and need to see you take a position on what should happen in the region as opposed to the ten individual countries you’re represented in (Interview J 2014).

Reflecting on the UNHCR’s RCF proposal, a UNHCR official described the evolution in the agency’s thinking towards a more regional perspective:

The 10-point plan was at the core of the regional cooperation framework but it [the RCF] went further because it looked at the dynamics of the situation in our region in particular. For instance, one of the scenarios we had developed in the regional cooperation framework was maritime movements and how to address those movements in a regional comprehensive approach (Interview K 2014).

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160 The Australian government argued that in hosting the facility, East Timor could act as a regional leader in the field of human rights, but also that it would create opportunities for local employment, a chance to improve the skills of the Timorese labor force, and improve “community infrastructure”. The development of “community infrastructure” such as water, electricity, roads, medical and education facilities will also provide benefits for East Timor and to assist the Timorese Government to achieve some of its key milestones outlined in its National Strategic Development Plan (NSPD) (Australian Government 2010).
The regional framework, therefore, combined the UNHCR’s new thinking that occurred from 2001 to 2007 with a regional focus.

The UNHCR hosted a Bali Process workshop in November 2010 in Manila, Philippines and presented participants with a discussion paper, “Regional Cooperative Approach to address Refugees, Asylum Seekers and Irregular Movements”. According to participants, the paper was put together and reviewed by UNHCR’s most senior legal practitioners. In that document, the agency proposed the RCF, which was a statement of shared understandings regarding the problem of mixed and irregular migration and what practices were needed to respond. In the beginning, Australia wanted to call the framework the Regional Protection Framework, but it was UNHCR that decided on the RCF label. The agency believed the term protection might not be appropriate for this region given the low number of signatory states (Interview J 2014).

The RCF was designed to be a regulatory framework and to reconcile control over secondary movement and anti-smuggling with refugee protection. It used the CPI and the 10 Point Plan and highlighted a number of ways Australia could uphold its national sovereignty to control borders while still upholding its legal obligations to the right to seek asylum. Doing so involved enabling Australia to control access to its in-country asylum system and this necessarily involved helping regional states improve protection in their countries. The RCF developed standards in three specific areas: 1) Developing practical cooperation among partners; 2) protection sensitive migration management practices; and 3) developing realistic solutions and stabilizing populations (UNHCR 2010: 3-4).

In this regard, the agency pledged to support the Bali Process’s efforts to provide a number of “regional support” functions. These were previously controversial practices, but the UNHCR

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161 Volker Turk (then Director of International Protection), Erika Feller (then Assistant High Commissioner), and Janet Lim (then Director of the Asia Pacific Bureau).
now endorsed them revealing the new contours of an emerging normative context. First, if the Bali Process members could lift the protection standard in the region, it would make it easier to determine where responsibility was for processing asylum applications. In this case, the UNHCR said, readmission or transfers from the territory of one participating state to another could occur effectively supporting out-of-country processing (2010: 5). Second, the agency also pointed to the possibility of establishing a “processing centre for a limited number of refugees e.g. on an emergency basis for those who are unable to stay in the host country while their resettlement claim is processed” (13). Third, the UNHCR highlighted that maritime rescue but also interception would play a role in the RCF and that UNHCR would support this practice by ensuring interception respected the principle of non-refoulement (11). Finally, the RCF focused on ‘developing realistic solutions and stabilizing populations’:

It is also important to avoid creating conditions in countries of asylum that attract people who otherwise would remain at home to leave their country. The prospect of resettlement to a third State can be one such factor. Used in a strategic, targeted way for well-defined groups resettlement can, however, be an important protection tool.

The strategic use of resettlement was an idea developed within the context of the Global Consultations, the CPI proposal, and the 10-point plan. Each of these elements involved an acknowledgement that protection and refugee screening should occur, but they also translated into deterrent messages regarding secondary movement.

The RCF involved more than just deterrence measures and so went beyond the Pacific Solution strategy. It provided a clear vision for how Australia could and was expected to improve the protection space in the Asia Pacific region. The RCF naturally involved central governments,

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162 For a review of the “strategic use of resettlement” in the context of the UNHCR’s Global Consultations and the CPI see Van Selm (2004).
but it also foresaw participation from civil society groups and their regional counterparts who could assist in the processing of claims, resettlement, and the return of those without protection needs. The RCF also highlighted the possibility for “in-country” solutions in Asia, potentially breaking the traditional roles of Southeast Asian states serving as reluctant providers of temporary asylum in exchange for the prompt delivery of resettlement places and returns. In this respect, the RCF discussed the possible role of labor migration schemes, family reunion, and other local opportunities (employment, citizenship) (UNHCR 2010: 6; Interview J 2014). If Australia was to engage in practices like interception, regional processing, and transfers, they would also have to contribute to building protection space in Asia.

Following the Manila workshop, the Bali Process held a Ministerial meeting in March during which the RCF was “welcomed” by Bali Process members. The outcome document from the March 2011 Ministerial meeting recognized that

> while border control and law enforcement initiatives are important and effective measures to combat people smuggling and trafficking in persons, these measures alone are not sufficient and that practical cooperative solutions that also address humanitarian and protection needs are required (Co-Chairs Statement 2011).

Australia had had no difficulty in promoting border control and law enforcement in the Asia Pacific, but the RCF was unchartered territory considering Asian states’ historic resistance to human rights, particularly refugee law. The RCF also represented the first instance in which states had agreed on a practical formulation of some of the more abstract ideas developed within the normative community from 2001 to 2007. The new Australian Immigration Minister, Chris Bowen, praised the creation of the RCF as innovative:

> If we agree on this regional cooperation framework we’ll be the first region in the world to do so… such a regional cooperation document for the first time would give us a framework within which individual countries can agree to new anti-people smuggling arrangements between them, including the possibility of a regional centre or regional centres to deal with the problem (Bowen 2011).
The IOM’s Director General, William Lacy Swing, congratulated the Bali Process on the discussions held and for becoming “a model regional consultative process” (2011). Assistant High Commissioner, Erika Feller, appreciated the development of protection within the Bali Process:

> It is fair to say that asylum-related issues, until quite recently, have been somewhat on the periphery of the discussions. There is now an evolution of thinking in this regard, as is clear from the results of the Senior Officials meeting (Feller 2011).

The March 2011 Ministerial Meeting also created a Regional Support Office (RSO) to carry out the “regional support functions”. For Feller, these support functions “could be catalytic in harmonizing approaches to reception, identification, registration, and determination of solutions which are key to reducing incentives to resort to secondary movements” (Feller 2011: 4). During the fifth meeting of the Ad Hoc Group Senior Officials in October 2011, participants hammered out the details of the RSO and tasked it with a series of initial projects (2011: 4). The RSO was based on a similar instrument existing in the European context to assist countries with weak or nonexistent asylum systems. According to one UNHCR official, Southeast Asian states were not particularly enthusiastic about the RSO and some source countries voiced resistance to the prospect (Interview L 2014). In the end, Thailand offered to host the office and the Bali Process Co-Chairs, Australia and Indonesia, oversaw its operation in consultation with UNHCR and IOM. Australia funded the RSO with $5.2 million over four years and $2.7 million for projects run through the office (Bowen 2012). The RSO was opened in September 2012, and UNHCR hoped

[163]The Steering Group identified a range of initial projects the RSO could focus on: a) Information sharing between states on issues related to refugee protection and international migration including irregular migration and border management; b) capacity building and exchange of best practices c) pooling of common technical resources d) logistical and operational support for joint pilot projects (Bali Process 2011: 5-8).

[164]The European Asylum Support Office was established in 2011 and its first operating plan was to support the reconstruction of the Greek asylum system, followed by Malta, and eventually Italy.
it would be the implementing arm of the RCF as opposed to the more traditional Bali Process agenda of smuggling and crime.

Most observers and participants saw the Manila discussion paper and the RCF as a breakthrough for a number of reasons. First, the paper integrated protection into a comprehensive response to irregular migration and people smuggling, something that Australia and the UNHCR had tried to achieve in the past but failed. One UNHCR official even expressed optimism that the region could become an area of the world where people could come to look for solutions to their problems (Interview L 2014). The RCF represented a step in UNHCR’s stated aim of “broadening” protection space in a region. The RCF also crystallized some of the ideas developed in the normative community to respond to secondary movement and people smuggling. States could pursue practices like interception, out-of-country screening, strategic uses of resettlement, and transfer agreements as a way to discourage onward movement and reduce incentives for people smuggling operations.

Australia’s long-standing interest in diffusing its international legal obligations among its regional neighbors now had a clear roadmap in the RCF. The RCF was a high-level political acknowledgement from the region about the desirability of “protection sensitive” migration management as a long-term plan. A crucial element of the RCF was that arrival of an asylum seeker in a particular country no longer automatically meant that the country would be responsible for processing the claim and finding a durable solution. According to a Protection Policy Paper issued by UNHCR in November 2010 (at the same time as the Manila Paper was produced),

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165 Southeast Asian states have cited a range of reasons for not signing onto the 1951 Convention or Protocol. Some argue that it will impose obligations on them to treat refugees better than its own citizens (Naidu 2012). The scholar Sara Davies makes a procedural argument stating that Southeast Asian states have not acceded to the refugee instruments because they were systematically excluded from the process of drafting and negotiation that took place after World War II and during the 1960s (Davies 2008).
the processing of international protection claims outside the intercepting State could be an alternative to standard ‘in-country’ procedures. Notably this could be the case when extraterritorial processing is used as part of a burden-sharing arrangement to more fairly distribute responsibilities and enhance available protection space (UNHCR 2010: 2).

In 2001, Australia used interception, transfers, and offshore processing in the context of the Pacific Solution and drew sharp criticism from the UNHCR. But by 2010, the UNHCR was now prepared to support these kinds of practices as long as they were part of a comprehensive regional approach that involved refugee protection.

Let us return to Australia now that it had achieved one of its goals in creating a more conducive regional environment for pursuing cooperation. Throughout 2010 and early 2011, boat arrivals to Australia continued. The Christmas Island detention centre was now pushed beyond capacity (Saulwick and Narushima 2010), and two fatal boat tragedies caught the public’s attention in late 2010.166 The ALP government re-opened onshore detention centres at Curtin Air Force base and in Darwin to deal with the excess numbers. Of crucial importance, however, was a HCA ruling on November 11, 2010, in Plaintiff M61/2010E v Commonwealth and Plaintiff M69 of 2010 v Commonwealth167 that found the Christmas Island processing regime not to be sheltered from judicial review.168 Since the primary goal of the Christmas Island processing centre was to enhance

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16697 people were thought to be lost at sea on November 14th, 2010 and 50 people were confirmed drowned on December 15th, when a boat crashed onto the rocks on Christmas Island (BCO 2016).

167 Two Sri Lankans, detained and processed on Christmas Island under the non-statutory screening system, contended that they had been denied natural justice, and that decision-makers had made an error of law by not considering themselves bound by relevant provisions in the Migration Act and associated case law. Both endured prolonged detention which gave rise to a critical tension: “how could prolonged detention under the Migration Act be lawful if what prolongs detention (inquiries into eligibility for refugee status) has no statutory footing?” (Offshore Processing Case (2010) 243 CLR 319, 348). The HCA resolved the tension by re-classifying the non-statutory determination regime as “steps taken under and for the purposes of the Migration Act”.

168 The Court agreed that the government had jurisdiction under s 75(i) of the Constitution as matters could be said to be arising under a treaty, in the form of the Refugee Convention and Protocol. But the Court avoided ruling on the question of whether primary decision makers and independent reviewers were also “officers of the Commonwealth” for purposes of s 75(v) of the Constitution. The Court avoided ruling on this second issue by linking the Christmas Island process back to the Migration Act, leaving open the question of extra-territorial processing by foreign authorities.
the efficiency of determinations and returns by preventing asylum seekers from accessing the multiple levels review available to those onshore, the HCA’s decision was seen as a major defeat for the government (Crock and Ghezlbash 2011; Stewart-Weeks 2011). The new shadow Minister for Immigration, Scott Morrison, argued that the current policy was an open invitation for people smugglers and urged the government to re-open processing on Nauru in line with the Pacific Solution strategy (AAP 2010).

Amidst rising pressure to deal with the boat arrival issue, the government announced negotiations it was having with Malaysia about a transfer arrangement. The RCF envisioned that “practical cooperation on issues such as readmission or transfer from the territory of one participating State to that of another” might be implemented (UNHCR 2010: 5). On July 25, a Memorandum of Understanding (MOU) was signed and outlined to the Australian public. Australia would transfer up to 800 irregular maritime arrival asylum seekers who entered Australian custody to Malaysia for processing by the UNHCR. In exchange, Australia would take 4,000 UNHCR-approved refugees living in Malaysia for resettlement in Australia over a period of four years. Australia would pay for the costs of the entire arrangement, roughly $292 million including transportation, welfare, health, and education (Spinks 2011). Gillard promoted the arrangement as balancing national sovereignty with a commitment to protection for refugees:

I believe that this agreement meets our nation’s needs in two ways. We want to work in our region in a cooperative way to ensure that we don’t see people get on boats and risk their lives to come to Australia. So this agreement will better secure our borders and will also mean we are sending the strongest possible message: do not risk your life at sea; do not pay a people smuggler; do not get on a boat. Ours is also a nation with a strong history of offering resettlement opportunities from refugees around the world. And a number of leading Australians got here as refugees. This agreement offers 4000 more people who are genuine refugees the opportunity to come to this country and make a new life within our nation. I’ve always said that the appropriate way to tackle people smuggling, a regional

It is also interesting to note that following the HCA decisions in 2004 concerning detention rights, advocates called for a federal Bill of Rights. However, some observers argued that this 2010 HCA decision was an indication that the country’s Constitution and its common law tradition could provide some of the same outcomes (Crock and Ghezlbash 2011: 1; Stewart-Weeks 2011).
problem, was through a regional solution. The Malaysia agreement is taking place under the framework that was agreed in Bali. It is a true burden sharing agreement in line with the principles of collective responsibility and cooperation that underpin the Regional Cooperation Framework (Gillard 2011).

The deterrence message was clear: “the persons transferred will not get preferential processing and they will take their place alongside these 90,000 asylum seekers and wait their turn” (Gillard 2011). It was thought that people smugglers would be unable to market the migration outcome:

If you take a passage to Australia via Malaysia, you will be returned to Malaysia for your future to be determined. If we did that enough times and was able to negotiate more of these transfer agreements, would most people be prepared to spend $10,000 of family money or from money lenders to move from point a to point b, to point c, only to be returned to point b? (Interview J 2014).

The government pointed to a decline in boat arrivals following the announcement of the Joint Statement in May 2011 as evidence of this deterrent (Spinks 2011; Interview J 2014). If we look at boat arrival statistics, there was a modest decline in 2011 (Table 1), but deterrence is a notoriously difficult concept to falsify. But unlike processing in Nauru and PNG, the Malaysia arrangement included more safeguards and “protection dividends” consistent with the RCF’s goal of broadening of the protection space in the region.

For example, the Malaysia arrangement translated UNHCR’s effective protection standards articulated from 2001 to 2007 into practice. The transferees would be held in a medium to low security transit accommodation centre “only for a period necessary to confirm identity or undertake security or other checks” and no more than 45-days. Following release from the transit centre, asylum seekers would be allowed to live in the community where they would be encouraged

170 As a side debate that was going on at the time, some in the LNC criticized the arrangement because they said the 800 places would be quickly used up and the flows would continue again. However, it is important to note that in the three years since the current government has been turning around boats (2013- 2016), they haven’t turned around 800 people.
171 Section 3.0 of Operational Guidelines.
to reside in private accommodations, be given access to employment opportunities, education for children, and access to health care. An oversight committee composed of Malaysian and Australian officials, with the support of UNHCR, IOM, and other representatives would monitor the arrangement. Since the arrangement only involved screening for refugee claims based on the 1951 Convention, Australia would consider the broader claims of any transferee to protection under other relevant human rights conventions and make further transfer arrangements as needed. There was a solid foundation on which Australia could claim that those transferred asylum seekers received effective protection as conceived by the UNHCR’s Feller.

The Immigration Department under the Labor government saw Malaysia as a desirable location for such an arrangement. It viewed the offshore processing centres on Nauru and Manus Island as “dead ends” because they would not have UNHCR approval and involved detention. With Malaysia, however, there was an “end game” because it was UNHCR approved, did not involve detention, and UNHCR would refer people from Malaysia for resettlement to countries like Canada, the United States, and some Europeans states (Interview M 2016). East Timor, on the other hand, was not seen to be a central hub for the UNHCR or refugees, even though it was a signatory to the Convention. In comparison to other countries in the region, Malaysia was on the higher end of the Human Development Index with a score of .789 in 2016 (high development category) compared to the Convention signatories of the Philippines with .682 (medium development category) and Cambodia .563 (medium development category) (UNDP 2016).

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172 Those unable to find employment would have access to “modest backup safety net provisions” (Section 3.0 of Operational Guidelines).
173 School age children will be permitted access to private education arrangement, including those supported by UNHCR. Where such arrangements are not available or affordable, children will have access to informal education arrangements organized by IOM (Section 3.3 of Operational Guidelines).
174 Transferees would have access to initial health assessment by IOM, basic medical care by UNHCR, and emergency medical care by IOM arrangements with private hospitals (Section 3.4 of Operational Guidelines).
175 Section 5.1 of Operational Guidelines.
176 Section 2.2.3 of Operational Guidelines.
Australia could plausibly argue that the Malaysia arrangement was not about burden shifting and was more in line with the burden sharing as conceived of through the RCF. Unlike the proposed processing centre on East Timor in which protection dividends might potentially occur at some point (but certainly not immediately), or Nauru and PNG where contributions to regional protection standards were minimal, the Malaysia arrangement could lead to some clear benefits. The most immediate “protection dividend” was that Australia would resettle 4000 additional refugees from Malaysia in return for Malaysia accepting up to 800 maritime asylum seekers. Malaysia hosted a total of 102,900 refugees and asylum seekers in December 2012, so this helped (UNHCR 2013: 212). But the secondary, and more significant benefit, was that Malaysia could recognize all the formal working rights of the other refugees and asylum seekers already there. This recognition would be a major breakthrough if it could happen.

Australian officials were optimistic about this possibility. Following negotiations in August 2011, the Immigration Minister, Chris Bowen stated,

I formed a clear belief from these discussions that the Malaysian government had made a significant conceptual shift in its thinking about how it wanted to treat refugees and asylum seekers and had begun the process of improving protections offered to such persons. It was also clear to me that the Malaysian government was enthusiastic about using the transfer of 800 persons under the proposed arrangement as a kind of “pilot” for their new approach to the treatment of asylum seekers generally (Bowen in Lowes 2012: 176).

According to one of the senior Australian officials negotiating the arrangement, there was a “high probability” that the Malaysian government was planning to allow asylum seekers and refugees already there to have access to the same labour rights that were accessible to the transferees (Interview M 2016). For the UNHCR and some NGO groups working in Malaysia, this was a very desirable outcome:

From UNHCR’s point of view, the protection benefits were that a transit country was taking some responsibility for the people transiting its territory. The Malaysian government, which tended to be
reluctant to talk openly about refugee issues and to enter into agreement with them, was sitting around
the table talking about refugees in a way that UNHCR had never managed to do and UNHCR had
input into the negotiations.

Most NGOs in Australia were sharply critical, but some of the Malaysian NGOs actually saw an
opportunity because it was the first time Malaysia had engaged in a formal way in managing the
problem. They said (NGOs), we’ve been trying to get them to engage for years, but they won’t because
their position was that we’re not a signatory to the refugee convention and asylum seekers there were
just illegals. The NGOs said this was excellent because they were actually engaging on the subject of
refugees and they were talking about doing things that were not imaginable before. And that’s why
UNHCR said that, in the non-standard way of doing things, we’re happy with this (Interview M 2016).

For reasons of political sensitivity, this potential outcome was never trumpeted to the public.

Participants foresaw the potential for other such arrangements to be struck. An outspoken
UNHCR official in Southeast Asia speculated about the potential beyond the Malaysia
arrangement:

By bringing in Malaysia, Thailand and Indonesia would've been next, they couldn't stay out. It
would've moved the agenda of the Bali Process forward immensely. As far as returns, it would have
enabled work with source countries such as Sri Lanka, Afghanistan too. You just need one or two
countries of origin to participate in repatriation and we've got something to work with. Jakarta
would've accepted other such arrangements... It would've led to so much more. The RSO would've
taken on a massive amount of work, deployments of staff, etc. (Interview L 2014).

Many in Australia raised concerns about Malaysia not being a formal signatory to the 1951
Convention or other important human rights instruments. While UNHCR was not a formal
signatory to the arrangement, the agency was closely consulted and it was generally pleased with
the arrangement. Indeed, the UNHCR representative in Australia at the time, Rick Towle, stated
the following:

Most of the world’s refugees are today living in countries that haven’t signed the Refugee Convention
so the fact that you haven’t signed the convention doesn’t mean that you’re not treated properly… I
think in that sense it has the potential to make a significant practical contribution to what we’re trying
to achieve in the region. And if it’s a good experience, other countries can look at it and say ‘yes,
that’s a positive way of managing these issues. Perhaps we want to embark on similar or other
initiatives under a regional cooperation framework’…

This is an agreement that has been negotiated within a broader regional cooperation framework with
the involvement of UNHCR and IOM and we hope the involvement of other important actors as well,
including non-governmental organizations (Towle in Donovan 2011).
Australian officials were also cautiously optimistic:

This could have certainly provided a model for other ‘benign cooperative arrangements with other countries in the region. If the Malaysian arrangement had worked this could have happened (Interview M 2016).

Despite the ALP’s efforts to sell the policy to Australians, the Malaysia arrangement faced resistance domestically and was never implemented. On the left, the Green Party spokesperson, Sarah Hanson-Young, argued that Australia should not “export” Australia’s humanity and international obligations onto other countries” (Yoon 2011). The Commonwealth Ombudsman, Rohan Anderson, criticized the Malaysian Arrangement as “aspirational” because “it talks of commitments, not binding obligations” (Anderson 2011). Further criticism was linked to the lack of appeals and legal advice for transferees, concerns about direct and indirect refoulement, and the enforceability of human rights, the conditions in Malaysia, and the welfare of unaccompanied minors.177 Surprisingly, the LNC party opposed the arrangement on human rights grounds. Shadow Immigration Minister Morrison cited reports of Malaysian police who had beaten UNHCR card-holding refugees, including children, mothers, and elderly (Morrison 2011). Most political observers believed that the LNC opposition to the Malaysia arrangement was designed not to uphold human rights but to ensure it failed.178

Then on August 31st, 2011, the High Court of Australia (HCA) ruled 6-1 that the Malaysia Arrangement was invalid under the Migration Act because Section 198A required that the Minister

177 These concerns are summarized nicely in Chapter 3 of the (SSCLCA 2011).
178 Evidence of the political nature of the Coalition’s opposition for the Malaysian Arrangement come from a range of sources: a media report indicating that after standoff, Tony Abbott “conceded that the agreement with Malaysia had its merits and deserved to be tested” (Kessler 2013); one former UNHCR regional representative also indicated that Morrison ended up agreeing with the Malaysia Arrangement (Interview L 2014); and when Abbott became Prime Minister in 2013, he apologized to the Malaysian Prime Minister Najib Tun Razak offering an “act of contrition” and admitted that in Australia “we play our politics very hard” (Kenny and Bachelard 2013).
Act in “good faith” and that the criteria specified were “jurisdictional facts” (*M70/2011 v Minister for Immigration and Citizenship*). For that reason, the majority concluded that the Immigration Minister erred in declaring Malaysia a designated country for the following reasons: it had no domestic legislation recognizing the necessary protections; it had no reception, registration, documentation, and status determination for asylum seekers and refugees; it had no formal obligations under the regime; and did not make a legally binding arrangement with Australia. By implication, the HCA’s ruling also threw into doubt offshore processing in Nauru. Nauru was not a 1951 Convention signatory state nor had domestic legislation recognizing these obligations (Pastore 2013: 639). The Immigration Minister had relied on a Federal Court decision relating to Nauru that rejected the argument that the criteria in section 198A were ‘jurisdictional facts’ (Foster 2012: 8).179

In response to the HCA decision, Labor proposed the Migration Legislation Amendment (Offshore Processing and Other Measures) Bill 2011 on September 21, 2011 to amend the Migration Act and enable the Executive to implement the transfer. However, Labor did not have a majority in either houses of Parliament at the time, and politicians on the Left and Right blocked the bill on the grounds that it violated Australia’s human rights obligations. In February 2012, a private member’s bill was introduced in Parliament to overcome the impasse. The proposed legislation would have replaced criteria in Section 198A with a provision that required a written transfer agreement (whether or not legally binding) was in place, that the partner country be “a party to the Bali Process”, and that the designation be “in the national interest” (Taylor 2012). This Bill passed through the House of Representatives but was defeated in the Senate in June 2012.

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179 For academic commentary on the Malaysian Arrangement see the following: Foster 2012; Lowes 2012; Billings et. al. 2013; Pastore 2013.
Unable to implement the Malaysian Arrangement, the Gillard government established an expert advisory panel to consider options for “the best way forward for our nation in dealing with asylum seeker issues”. The findings of the non-partisan committee could create the domestic foundation of new shared understandings to the Bali Process initiatives. The conclusions of the Houston Report gave voice to Prime Minister Gillard’s approach and represented a delicate but emerging consensus on the matter of push and pull factors associated with the onshore system:

Australian policy settings do influence the flows of irregular migration to Australia. Those settings need to address the factors ‘pushing’ as well as ‘pulling’ the trend toward greater numbers of dangerous irregular maritime ventures to Australia. Australian policy in its own right needs to pursue a dual approach. It needs to promote incentives to encourage greater use of regular migration pathways and international protection arrangements; and it also needs to implement more effective disincentives to irregular and dangerous maritime voyages to Australia for the purposes of seeking asylum (Australian Government 2012: 11).

Of its 22 recommendations, the Report recommended greater emphasis on resettlement options by increasing the number from 13,750 places to 20,000 places and that this should be progressively increased to 27,000 places within five years.

It would give greater hope and confidence to asylum seekers in the region that regular migration pathways and international protection arrangements provide a practical, realistic, and better alternative to dangerous boat voyages to Australia (39).

The report’s contributors also converged on the importance of enhanced regional cooperation, particularly through the Bali Process and to implement the Malaysian Arrangement (Australian Government 2012: 13-18). Prime Minister Gillard government endorsed the report: “This report charts the way forward and I will compromise in order to enact the recommendations of this report” (Packham 2012). The Expert report was the first basis for more robust convergence.

In late 2012, and with the Malaysia arrangement largely ruled out, the ALP began to fall back on the Howard era policies. It re-opened the Nauru and Manus Island OPCs and began transferring irregular maritime arrivals there. The Nauru facility was re-opened in August and
Manus Island in November, but the government continued to allow for the release of some into the Australian community and access to permanent residence for determined refugees (Cullen 2012) Throughout this period, boatpeople continued to arrive in even larger numbers, reaching 17,204 for 2012 and 20,587 for the first 8 months of 2013 (Table 1). Declining public confidence in Gillard led to a leadership contest in which Kevin Rudd returned to lead the party in the federal election of September 2013. Rudd then signed an agreement with PNG in which boat people would not only be taken to Manus Island but also prevented from gaining permanent residency in Australia. The following month he signed the same agreement with Nauru. Rudd now claimed that, “any asylum seeker who arrives by boat will have no chance of being settled in Australia” (Rudd in ABC 2013). The new policies resembled the measures of the Howard government that Labor pledged to eliminate. UNHCR responded to the introduction of the PNG arrangement as raising, “serious, and so far unanswered, protection questions” and concluded there were significant shortcomings in the legal framework for receiving and processing asylum seekers from Australia, such as lack of national capacity and expertise in processing, poor physical conditions and mandatory and arbitrary detention (Redden 2013).

5.5. Conclusion

In this chapter, I highlighted the last two phases of the legal norm contestation process. Australia’s entrepreneurialism from 1999 to 2001 appeared to influence the normative community which suggests Australia’s arguments had merit and were not simply derived from self-interest. Key actors shifted their shared understandings and practices regarding the legal norm from 2001 to 2007. First Australia, then the UK and the UNHCR came to see in-country screening followed by the offer of permanent residence for determined refugees as creating unintended consequences
such as contributing to the rise of people smuggling and attracting secondary movement. Despite some resistance from Sweden and Germany, these actors received support from a number of other liberal democracies. The UK and the UNHCR proposed new out-of-country asylum and border control practices like interception, regional processing, transfer agreements, and effective protection. During 2001 to 2007, this shift in shared understandings and practices created the foundations of a new normative context with which liberal democracies could respond to the challenges of asylum and migration while continuing to uphold their obligations.

In the second section, I examined the effects of severe uncertainty within the legal norm. This uncertainty allowed John Howard to implement the Pacific Solution strategy and express his vision of Australian sovereignty. In keeping with his populist inspired conception of national identity, Howard did not appear interested in implementing or even considering the new ideas coming from the normative community in 2001 to 2007. He maintained a minimal level of adherence with international law by upholding the non-refoulement obligation, but his divergence from the normative community was plain to see. On the other hand, the ALP re-emerged to win the 2007 federal election by appealing to Australians’ moral side through a more enlightened sense of Australian national identity. Interestingly, like the Howard government, Rudd and the ALP invoked traditional cultural themes like “mateship” and “a fair-go” to communicate this message to Australians. But the ALP did not appear to accept the new shared understandings and practices within the normative community at this time. The ALP government dismantled the Pacific Solution and brought back a more traditional asylum and border control policy.

In the third section, I discussed how boatpeople arrivals resumed in 2009 to 2013 and how the ALP-led government quickly perceived that its newly restored asylum system was unsustainable. To respond, the ALP pledged to develop a regional burden sharing strategy and to
implement the new ideas within the normative context. The ALP government worked to
to entrepreneurially “bring international law home” and promoted its interpretation of the right to
seek asylum to its domestic audience. To do so, Australia reinvigorated the Bali Process and
worked with the UNHCR and regional states to articulate the RCF. The RCF packaged new control
practices like interception, asylum seeker-refugee transfers, and regional processing centres into a
regional agreement that included a long-term commitment to protection. The Malaysia
arrangement proposal was clearly focused on bringing these ideas into practice. In the end, this
approach failed and the ALP resorted to the Pacific Solution 2.0 because of domestic political
resistance. The ALP was unable to overcome the problem of uncertainty and persuade enough of
its domestic audience to implement the strategy.

Many scholars argue that Australia’s policy actions during this time were an attempt pursue
national interests and shirk legal obligations. Clearly domestic politics had an important role to
play here, but we should ask why domestic politics played such an enhanced role. Legal norm
contestation describes how uncertainty within a legal norm emerges and creates a second image
reversed dynamic. Indeed, both the LNC and the ALP proposed their own highly diverging
interpretations of the right to seek asylum and it is fair to say that polarization ensued. The Howard
government refused to alter its Pacific Solution strategy, even though the normative community
made changes to address secondary movement and people smuggling. On the other hand, Kevin
Rudd and the ALP brought back a more traditional asylum and border control policy and also
ignored the difficult lessons of the Howard government and the normative community’s new ideas.
The polarization around asylum and border control policy, I argue, can be traced to the severe
uncertainty experienced by Australia around an appropriate response to boatpeople particularly
around the 2001 federal election. For this reason, domestic arguments are insufficient on their own and should be enhanced by a two-level framework.

This chapter also reveals a further complication to existing accounts. The shift from an onshore asylum system to offshore processing and out-of-country asylum and border control policies in Australia is usually explained as a disingenuous attempt to use international law to pursue self-interest or to exert power. This explanation may be insightful, but only some of the time. A constructivist approach reveals that Australia’s entrepreneurialism and arguments from 1999 to 2001 had an impact on the normative community. The normative community accepted Australia’s arguments suggesting they had merit and were not foils to conceal self-interest. The normative community deliberated and shifted its shared understandings and practices to accommodate the concerns highlighted by Australia and other actors. The UNHCR gradually began to endorse out-of-country and extra-territorialized asylum and border control policies. And when the Labor government came to power in 2007, it responded to the increase in boatpeople arrivals by attempting to entrepreneurially implement new ideas developed earlier. This is not to say that Australia’s motivations were entirely genuine from 1999 to 2013. The LNC government and the ALP government clearly diverged from the shared understandings and practices governing the legal norm and they should be scrutinized for doing so. But we cannot write off all of Australia’s actions as disingenuous.
6.1. Introduction

My dissertation explains Australia’s response to the arrival of boatpeople and specifically on how and why the country developed an onshore asylum and border control policy and then shifted to an offshore approach. To answer these questions, I made two analytical moves to distinguish my explanation from other accounts. First, most scholars explain Australia’s policies as a result of the number of arrivals and/or domestic politics. I do not deny that these elements form part of an explanation, but I maintain that neither argument is sufficient on its own and must be integrated into a larger account that considers the role of international law, particularly the universal right of all individuals to seek asylum. My second analytical move was to adopt a constructivist theory of legal norms. I argued that a constructivist theory provides a more comprehensive and, in specific cases, accurate theoretical lens than competitor theories such as rational choice. In my conclusion, I review the key findings from my dissertation, highlight its normative implications, and provide a brief commentary about the current situation in Australia since 2013 and the European context since 2015.

6.2. Main Findings

Drawing on the insights of constructivist scholars and constructivist inspired legal scholars, my dissertation offers several findings and contributions to the literature. First, my dissertation problematizes explanations about international refugee law: powerful states created and maintain
refugee law because it is a way of reconciling their national self-interest with the inevitability of involuntary migration (Hathaway 1990; 1991: 113). While I do not fundamentally challenge this claim, my approach points out that self-interest is at least partially socially constructed. What may be identified as Australia’s self-interest during the 1951 Convention negotiations was not the same as how it saw its self-interest in the late 1970s and again in the 1990s. A rational choice framework has trouble capturing this changing normative context and the influence it had on Australia. There is also a common assumption that the creation of the 1951 Convention and the 1967 Protocol automatically created binding obligations on states’ parties. A constructivist lens enabled me to see how signing onto these formal instruments did not immediately translate into a clear understanding of specific obligations. It was not until the late 1970s and early 1980s that Australia and other liberal democracies knew and accepted what their obligations entailed. The UNHCR working with liberal democratic states including Australia, helped develop these shared understandings and practices informing states that in-country screening followed by the offer of permanent residence for determined refugees were the appropriate responses to boatpeople. By the 1990s, liberal democracies shifted their shared understandings about refugee movement and the appropriateness of their existing practices. They made a justifiable claim that to retain their in-country screening systems amidst changing migration flows, more regulatory practices would be needed to maintain their national sovereignty and effectively control migration. In addition to questioning traditional approaches based purely on power and self-interest, my dissertation also reveals why a formalistic understanding of international law grounded in treaties and conventions is limited.

In the fourth and fifth chapters, I evaluated Australia’s behavior using a legal norm contestation framework. I found this approach valuable for a number of reasons. First, most
observers saw the Pacific Solution strategy as a direct result of John Howard’s vision of national identity and a self-interested effort to be competitive in the 2001 federal election. While these arguments are not wrong, they are incomplete on their own. The legal norm contestation framework integrates arguments about domestic politics or rising numbers of boatpeople arrivals into an alternative explanation of Australia’s response to boatpeople from 1999 onwards. This approach simultaneously assesses two-levels of analysis within the same theoretical framework. We can see important subtleties in the interaction between the legal norm and Australian domestic politics.

In the fourth chapter, I described how rising uncertainty created by an identification of ambiguities, gaps, and contradictions in how the legal norm on the right to seek asylum should be interpreted produced opportunities for domestic actors to contest the traditional interpretation. The Howard led-government entered office in 1996 and accepted the interpretation of the right to seek asylum involving onshore screening of boatpeople followed by the offer of permanent residence for determined refugees. With the arrival of boatpeople from the Middle East in 1999 to 2001, Australia observed problems with this interpretation, which, in turn, created severe uncertainty with respect to its response. Australia communicated its concerns entrepreneurially to domestic groups and the normative community. These concerns included new arguments about recognizing and responding to secondary movement and people smugglers. Australia also proposed new ideas about how to overcome these problems through out-of-country screening, interception, and common but differentiated responsibilities to respond. In the end, the Howard government introduced the Pacific Solution strategy in August and September 2001 in the lead up to a tightly fought federal election. Though Australia’s detection of uncertainty within the legal norm helped
enable this controversial strategy, it would be more accurate to say that domestic politics and security concerns after 9/11 helped accelerate this shift rather having “caused” it.

A legal norm contestation framework also reveals that Australia’s efforts to contest the interpretation of the legal norm governing the right to seek asylum appeared to help initiate a shift in the normative community. In time, actors like the UK and even the UNHCR became entrepreneurial themselves and put forward proposals of their own for responding to secondary movement and people smuggling. The UNHCR went on to develop specificity around effective protection standards, a doctrine around interception, and a willingness to engage with returns of those not in need of protection. These new practices and ideas formed the basis of a new normative context. These new shared understandings and practices would enable Australia and other liberal democracies to pursue out-of-country asylum and border control practices. Even though the normative community did not alter the formal rules and treaties of refugee law, evidence indicates that key actors began to shift their interpretation of the legal norm at this time.

Chapters four and five challenge explanations that point to elections or self-interest (however defined) as the primary sources for restrictions and deterrence measures. A legal norm contestation approach highlights how uncertainty within the legal norm can arise and create opportunities for domestic actors to compete and propose policies to resolve uncertainty. Of course, self-interest is always a calculation of a political party in achieving electoral success. But self-interest is at least partly shaped and defined by each party’s understanding of national identity and how this relates to the legal norm governing the right to seek asylum. From 2001 to 2013, Australia revealed two different interpretations of the right to seek asylum exemplified by the Liberal National Coalition (LNC) and the Australian Labor Party (ALP). While both parties pursued offshore asylum and border control practices each had a different interpretation of this basic approach. The LNC took
a highly minimalist position regarding what its legal obligations were. The ALP, on the other hand, looked to develop a more comprehensive regional cooperation framework with Asia through the Bali Process. Each strategy diverged from the earlier interpretation of onshore asylum processing. But they differed with respect to each party’s conception of Australian national identity. The LNC preferred a more populist vision of national sovereignty, while the ALP opted for a more enlightened approach to national sovereignty. This two-level argument about uncertainty creating interpretive space is reminiscent of a second image reversed dynamic in which uncertainty within the international legal norm feeds back to exacerbate domestic political cleavages. The explanation also shows why domestic politics or rising numbers of boatpeople are insufficient explanations on their own.

Finally, over the last 10 years, scholars have used norm contestation in a variety of theoretical ways or simply metaphorically. Based on my empirical evaluation and research, I believe my theoretical framework provides more specificity to this literature. In distinguishing between legal norm adaptation and contestation, I described two processes behind how accepted interpretations of legal norms may change over time. During the 1980s and 1990s, I argued that the legal norm went through a process of adaptation in which liberal democracies adopted control practices but continued to maintain general access to their in-country asylum systems. From 1999 to 2001, Australia entrepreneurially contested this interpretation and attempted to reject its obligations to provide an onshore asylum system in favor of an offshore approach. While both adaptation and contestation involve change to an accepted legal norm (hence showing how dynamism between structure and agency is always present), I highlight some distinguishing characteristics that define one from the other.
6.3. Normative Implications and Limitations

My chosen theoretical framework does not take on moral assumptions about what ideas and rules are normatively good. Constructivism says as much about slavery and the Nuremberg laws as it does human rights and democratic participation even though we see these two sets of norms as diametrically opposed. The challenge I face is that my dissertation focuses on one of the most normatively charged subjects in international legal and global governance studies. It would be a disappointment if it had nothing to contribute in this respect. The vast majority of theoretically informed research into refugee law and critiques of liberal democratic states are highly skeptical (and indeed, cynical) about the role of law and intentions of actors. I cannot make such strong claims about the moral quality of state behavior, but the theoretical approach I have taken can make socially and historically contingent normative claims. If we assume that international refugee and human rights law are good things, then such contingent claims could provide helpful insights to distinguish good from bad asylum and border control practices. Below I briefly highlight a few of the normative claims that emerge from my theoretical analysis.

If we assume that the legal norm governing the right to seek asylum is a good thing (which I do), then convergence and agreement between the shared understandings and rules of the legal norm, on the one hand, and the beliefs and practices of individual states governed, on the other, is a desirable state of affairs. And if actors diverge from these shared understandings and rules, this divergence may be normatively problematic requiring close scrutiny.

With these expectations in mind, Australia’s policies and beliefs about its asylum and border control practices revealed convergence and agreement with the legal norm into the 1980s. And

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180 I accept Matthew Hoffmann’s observation, that unlike liberalism and realism which have a core set of assumptions implying an ethical stance, “constructivism provides no parallel guidance on substantive morals—what is good in world politics—even while constructivist analysis stresses the importance of such ideas in explanations of world political phenomena” (2009: 233).
while Australia did adopt more control practices to respond to boatpeople arrivals during the 1980s and 1990s, some of which were highly contentious (like mandatory detention), the country continued to allow boatpeople access to its onshore asylum system and did not diverge from prevailing interpretations of the legal norm at this time. During the late 1990s and beyond, however, Australia diverged and shifted its asylum and border control practices offshore. Australia did not violate the formal rules of the 1951 Convention, but its shift to an offshore asylum and border control system received significant criticism.

Should we normatively impugn Australia for its rejection of an onshore asylum and border control system and its adoption of an offshore approach? Even from a relatively neutral constructivist perspective, this development calls for critical attention. But we should proceed cautiously and note that divergence can occur for a variety of reasons, each of which leads to different degrees of criticism. There are a number of questions to ask, that follow from a legal norm contestation framework, to assist us in making normative assessments. First, we should examine whether an actor’s divergence is accompanied by an explanation or justification. If an actor provides no arguments about why they deviated from the standards prevailing in the normative community, criticism is warranted since they appear to be simply disregarding the legal norm. Recall the very limited justifications provided by the U.S. in adopting its Haitian interdiction model.

If arguments and justifications are forthcoming, we should move on to a second question. Do these arguments seem reasonable or are they merely “window dressing” to conceal other motivations. Reasonable arguments here might involve whether states are able to control economic migration while upholding their obligation to the right to seek asylum. This concern has always been expressed by states participating in the legal norm on the right to seek asylum. Also, does the
legal norm provide sufficient guidance to address the concerns or problems identified by the contester? If the contester has reasonable concerns and the legal norm does not provide enough guidance, then we should be less critical than if their concerns were unreasonable or the legal norm did provide effective guidance. However, constructivism is somewhat limited in this respect. On its own, a constructivist approach does not provide fine-grained criteria for assessing arguments made in good or bad faith. In recent years, legal scholars have developed constructivist inspired theories of international law that outline indicators or criteria with which to examine the quality of arguments and justifications.181

Because constructivism on its own does not provide clear criteria for evaluating the quality of arguments, a more reliable indicator is whether the arguments and justifications are accepted or rejected by the normative community. Since the normative community is composed of experts and legally informed practitioners who uphold an adjudicative role, acceptance or rejection provides more evidence on which to make a constructivist informed normative assessment. Criticism should grow if arguments are rejected. But if divergent practices are accompanied by acceptable justifications that lead to legal norm change, we should temper our criticism.

Finally, if the actor’s justifications influence the shared understandings and practices of the normative community, to what extent does that actor adopt these new practices? An actor diverging from the normative community that raises legitimate concerns and prompts a shift in the legal norm should seriously consider implementing these changes. If the actor maintains its divergent practices, then we have a firmer basis on which to criticize them. If the actor does make efforts to implement the new ideas and shared understandings, then we should temper our criticism. In short,

181Brunnée and Toope developed a sophisticated theory of legal norms by adapting Lon Fuller’s eight criteria of legality, providing for objective benchmarks regarding procedural and substantive measures of legitimacy that are used to distinguish arguments made in good and bad faith (2010).
scrutinizing deviations from the legal norm is important. But not all divergences from the legal norm are the same. Following the different phases of the legal norm contestation process provides opportunities to accumulate evidence to make these contingent normative evaluations.

Based on the above framework, evaluating Australia’s response to boatpeople from 2001 to 2013 leads to a number normative claims. First, the Howard government’s Pacific Solution strategy was undesirable because it dramatically broke from the shared understandings and practices of the legal norm on the right to seek asylum. So, we are right to be critical. But this criticism comes with caveats. First, Australia did not simply diverge from the shared understandings and practices of the legal norm. It engaged in entrepreneurialism from 1999 to 2001 going to significant lengths to provide a critique of why a legal norm organized around in-country processing alone was insufficient and proposed an alternative approach. Second, the available set of practices and shared understandings accessible to Australia at this time did not provide clear guidance about how to respond to secondary movement and people smuggling. And finally, the Howard government’s entrepreneurialism helped initiate a significant debate within the normative community during the 2001 to 2007 period. Out of these debates, the UNHCR created new practices and doctrine to respond to some of the issues Australia identified. Based on these observations we should be cautiously critical about the Howard government’s adoption of the Pacific Solution strategy.

Those hoping for a more forceful condemnation of the Howard government’s behavior will be more satisfied by the evidence arising after the implementation of the Pacific Solution strategy. First, Australia’s entrepreneurialism helped initiate a debate in the normative community and the UNHCR responded by proposing its Convention Plus Initiative in 2003 and its 10 Point Plan in 2005-2007. However, the Howard government ignored these proposals even though the agency
promoted them at the Bali Process. From a constructivist perspective, this evidence indicates a dismissive attitude and supports the argument that Howard was only using international law strategically. A more normatively appropriate development would have been that as new practices and shared understandings emerged within the normative community, the Howard government abandoned the Pacific Solution in favor of these new measures. That adjustment did not happen. The Howard government pursued an interpretation of Australian national sovereignty and identity that was hostile towards the legal norm governing the right to seek asylum.

More critical evidence arises from examining Australia’s rhetorical arguments to the UN and its proposed re-interpretation of the right to seek asylum. In Minister Ruddock’s speech to the EXCOM in 2000, Australia argued that reducing pressure on in-country screening could free up resources to more effectively distribute abroad: “savings of just 10% of asylum determination costs would release funds which, if provided to UNHCR, could amount to a doubling of UNHCR’s current budget” (Ruddock 2000). This was one of the Howard government’s major points in promoting its new interpretation of the right to seek asylum. This perspective aligned with Australia’s long-term preference for resettling refugees as opposed to providing asylum to those who arrive by boat. But with the Pacific Solution up and running by 2001, there was no evidence of any transfer of funds or support occurring.

To make this determination, I used two major indicators: Australia’s resettlement numbers and funding for the UNHCR. Following the implementation of the Pacific Solution strategy, Australia’s resettlement of refugees increased from 3,997 in 2000-01 to 6,003 in 2006-07 (Table 5). The trend might be interpreted as Australia making a larger contribution to the protection of refugees. While resettled refugees made up a larger proportion of the total humanitarian program, the increase must be seen alongside a decline in boatpeople refugees onshore. Indeed, the overall
humanitarian program remained largely the same fluctuating between 13,000 and 12,000 from 2000-01 to 2006-07. The savings from reducing the high costs of receiving and processing boatpeople refugees were not equally transferred to accepting less expensive resettled refugees. Second, Australia’s total financial contributions to the work of the UNHCR from 1999 to 2007 remained roughly the same and actually dipped immediately following the implementation of the Pacific Solution strategy (Table 6). Australia’s allocation of unrestricted funds, as part of its total contributions to the UNHCR, also declined indicating a withdrawal of support. Despite Australia dismantling its onshore asylum system for arrivals of boatpeople, there was no transfer of funding or protection contributions in either the resettlement category or the financial support for the UNHCR.

Table 5- Australia’s Humanitarian Program

<table>
<thead>
<tr>
<th>Year</th>
<th>Humanitarian Visas</th>
<th>Resettled Refugees</th>
<th>% of Humanitarian Program</th>
</tr>
</thead>
<tbody>
<tr>
<td>2000-01</td>
<td>13,733</td>
<td>3,997</td>
<td>29%</td>
</tr>
<tr>
<td>2001-02</td>
<td>12,349</td>
<td>4,160</td>
<td>34%</td>
</tr>
<tr>
<td>2002-03</td>
<td>12,119</td>
<td>4,376</td>
<td>36%</td>
</tr>
<tr>
<td>2003-04</td>
<td>13,603</td>
<td>4,134</td>
<td>30%</td>
</tr>
<tr>
<td>2004-05</td>
<td>12,988</td>
<td>5,511</td>
<td>42%</td>
</tr>
<tr>
<td>2005-06</td>
<td>13,836</td>
<td>6,022</td>
<td>44%</td>
</tr>
<tr>
<td>2006-07</td>
<td>12,902</td>
<td>6,003</td>
<td>47%</td>
</tr>
<tr>
<td>2007-08</td>
<td>12,825</td>
<td>6,004</td>
<td>47%</td>
</tr>
<tr>
<td>2008-09</td>
<td>13,414</td>
<td>6,499</td>
<td>48%</td>
</tr>
</tbody>
</table>

182 A more fine-grained analysis would assess the complicated issue of Official Development Assistance and how that policy factors into Australia’s responsibilities to the legal norm governing the right to seek asylum (Knackstredt 2015).
<table>
<thead>
<tr>
<th>Year</th>
<th>Unrestricted (USD)</th>
<th>Ear-Marked (USD)</th>
<th>Total (USD)</th>
</tr>
</thead>
<tbody>
<tr>
<td>1999</td>
<td>$8,419,333</td>
<td>$8,826,738</td>
<td>$17,246,071</td>
</tr>
<tr>
<td>2000</td>
<td>$10,398,824</td>
<td>$819,449</td>
<td>$11,218,273</td>
</tr>
<tr>
<td>2001</td>
<td>$7,526,316</td>
<td>$4,409,443</td>
<td>$11,935,759</td>
</tr>
<tr>
<td>2002</td>
<td>$7,295,918</td>
<td>$5,652,911</td>
<td>$13,763,992</td>
</tr>
<tr>
<td>2003</td>
<td>$4,101,124</td>
<td>$6,366,896</td>
<td>$10,468,020</td>
</tr>
<tr>
<td>2004</td>
<td>$5,526,332</td>
<td>$8,092,052</td>
<td>$13,618,383</td>
</tr>
<tr>
<td>2005</td>
<td>$5,654,531</td>
<td>$7,621,908</td>
<td>$13,276,439</td>
</tr>
<tr>
<td>2006</td>
<td>$5,328,467</td>
<td>$8,155,297</td>
<td>$13,483,764</td>
</tr>
<tr>
<td>2007</td>
<td>$5,826,772</td>
<td>$10,862,338</td>
<td>$16,689,110</td>
</tr>
<tr>
<td>2008</td>
<td>$7,377,772</td>
<td>$20,852,124</td>
<td>$28,229,902</td>
</tr>
<tr>
<td>2009</td>
<td>$9,761,415</td>
<td>$23,112,090</td>
<td>$32,873,505</td>
</tr>
<tr>
<td>2010</td>
<td>$12,859,712</td>
<td>$32,244,731</td>
<td>$45,104,443</td>
</tr>
<tr>
<td>2011</td>
<td>$16,227,181</td>
<td>$40,310,219</td>
<td>$56,537,400</td>
</tr>
<tr>
<td>2012</td>
<td>$18,036,072</td>
<td>$30,608,401</td>
<td>$48,644,473</td>
</tr>
<tr>
<td>2013</td>
<td>$19,628,099</td>
<td>$37,894,253</td>
<td>$57,522,352</td>
</tr>
</tbody>
</table>

Source: UNHCR Global Reports 1999-2008
The evidence supports the fears of those who criticized proposals for out-of-country screening and what some see as a radical re-interpretation of the right to seek asylum. In their critique of Hathaway and Neve’s reformulation model (of which Australia saw as inspiring) Anker, et. al. (1998) express their skeptical expectations of approaches such as Australia’s Pacific Solution:

once refugees are contained in the South, the interests of the North will not be sufficiently implicated to produce the large cash transfer payments which these proposals anticipate and which are crucial to their success in enhancing refugee protection; 3) the savings, if any, from diminished refugee status determination procedures are highly unlikely to be diverted in whole or substantial part to support refugee communities in the regions of origin (300).

As a result, they argue,

sophisticated Northern governments seeking politically palatable explanations for their violations of binding international obligations will ‘cherry pick’ among the elements of the Hathaway/Neve proposal, eagerly dismantling their asylum adjudication systems while forgetting, over time, their corresponding obligation to enhance and restructure their development assistance programs (e.g. “plausible deniability”) (304).

While the Howard government did not clearly violate its binding obligations, the evidence outlined here appears to support Anker et. al.’s admonitions.

How did the Howard government’s offshore asylum and border control policy compare to the ALP’s from 2009 to 2013? Even though both governments pursued offshore asylum and border control policies, a constructivist perspective provides more normative credibility to the ALP. By 2009 to 2013, the shared understandings and practices of the legal norm involved greater recognition of secondary movement and people smuggling and outlined acceptable new practices. These practices involved UNHCR’s endorsement of a number of out of country asylum and border control practices like interception, processing centres, and asylum seeker-refugee transfers. From 2010 to 2013, evidence supports the ALP’s attempt to entrepreneurially promote these practices to national stakeholders: Prime Minister Gillard’s speeches, the Malaysia arrangement, legislative
proposals, and the Houston Report. By 2012 and 2013 and facing unprecedented numbers of arrivals, the ALP diverged from these new practices and brought back offshore processing in Nauru and Papua New Guinea and a firm commitment not to resettle any boatpeople who arrived in Australia. Though a constructivist would be critical of these latter practices, the ALP government’s efforts from 2009 to 2012 to work through the Bali Process and the Malaysia arrangement were more in line with the shared understandings and practices of the legal norm at this time than the Howard government’s actions.

Did the ALP’s rhetoric and arguments about regional solutions translate into support for refugees and protection outside of Australia? Using the indicators of resettlement and contributions to the UNHCR, there was an increase in both categories. Resettlement intake rose marginally from 2007-08 to 2011-12. But in 2012-13 the ALP government significantly increased its resettlement intake to 12,012 and its overall humanitarian program to 20,019 based on the recommendations of the Houston Report. The upward trend is more visible in Australia’s contributions to the UNHCR. There was a doubling of Australia’s total funding to the UNHCR from 2008 to 2013 and an increase to its unrestricted contributions and the ear-marked funds as well. Admittedly, however, the trend was modest compared to the fairly grandiose rhetoric about regional solutions and the RCF. One major challenge was that at no point did the ALP government achieve the same control over its borders that the Howard government did from 2001 to 2007. The number of boatpeople arrivals rose to unprecedented numbers in 2012 and 2013. According to a 2014 National Commission of Audit report, costs for detention and asylum processing rose from $118.4 million in 2009-10 to $3.3 billion in 2013-14 (Kaldor Centre 2017). Even though the ALP made more contributions to the UNHCR and increased its resettlement numbers compared to the Howard
government, it was never able to take advantage of the funding freed up from a sharp decline in boatpeople arrivals.

Australia’s basic strategy was to reduce or eliminate the availability of its onshore asylum system to boatpeople and diffuse its responsibilities and legal obligations into the Asia Pacific region. The most common normative critique of liberal democracies is that power and self-interest drove this development. These states seek to “avoid or circumvent their protection obligations, but nonetheless still formally situate themselves as countries abiding by their international law commitments” (Gammeltoft 2014: 581). The general criticism is that any attempt to adhere to the law is purely instrumental and a way of enhancing reputation. The actions of the LNC under John Howard appear to support this claim. But the ALP’s behavior does not. The ALP went above and beyond what was minimally called for, invested significant resources into the region, and incurred high costs in doing so. In both cases, the legal norm governing the right to seek asylum influenced Australia. But each party interpreted the legal norm differently based on their sense of national identity.

A constructivist reading of this development provides some helpful insights into whether this shift was normatively acceptable or not. Constructivism’s emphasis on the ongoing process occurring between the legal norm and the members of the normative community highlight that legal norms are continuously changing and being modified to meet shifting shared understandings. While both the LNC and the ALP diverged from the traditional interpretation of the right to seek asylum, this divergence was accompanied by the evolution of the legal norm. The new shared understandings and practices emerging within the normative community during the 2000s provided support and legitimacy to engaging in offshore asylum and border control practices. This new normative context provided some support to the ALP’s offshore asylum and border control
policy but continued to challenge the LNC government’s approach. Constructivism’s normative claims must be conceived of within this ongoing process.

6.4. What is the Future of Asylum in Liberal Democracies?

In 2013, the LNC government came to power in Australia and brought back Howard’s Pacific Solution strategy. In contrast to the ALP government, the LNC did not work to implement a regional cooperation framework but rather what it called a “regional deterrence framework” (LNC 2013). In a speech to the Lowy Institute in 2012, then Shadow Minister for Immigration, Scott Morrison, argued that the ALP’s interest in the RCF and the Bali Process created a “protection magnet” for boatpeople (2012). The LNC began intercepting people at sea, turning them back to Indonesia (Bachelard 2014), and transferring others to the offshore processing centres in Nauru and Papua New Guinea. As of July 2018, 1,534 people remained in these processing centres, with many languishing for 5 years or more (RCOA 2018). Even though the LNC government claims that it is not responsible for those at its offshore processing centres, it rebuffed offers from New Zealand to resettle boat people for fear that resettlement would create a pull factor (Roy 2018). Many of these people face severe mental health issues and the policy is regularly criticized by the UN and civil society groups on basic human rights grounds. From a constructivist perspective, the current strategy is highly problematic because Australia ignores all of the new practices and shared understandings developed by the UNHCR and the normative community from 2001 onwards. As a result, Australia now exerts effective control over boat arrivals, but it does so without providing any compensatory support to refugees in the region as envisioned by the RCF.

Not long after the LNC adopted its regional deterrence framework, liberal democracies (particularly in Europe) received a surge in the number of asylum seeker arrivals. In 2014, these
countries received 866,000 asylum seekers, the highest since the end of the Cold War. In 2015, however, that number rose to 1,629,000 asylum applications and 1,538,000 in 2016 for the same countries (UNHCR 2017). About half of those arriving in Europe were either from Syria or were Syrians living in precarious situations in first asylum countries of Lebanon, Jordan, and Turkey. The remaining arrivals came from various countries, including 200,000 Afghans and tens of thousands from Africa and Southwest Asia. For Alexander Betts and Paul Collier, Europe’s inability to exercise control over its borders and Germany’s policy of accepting asylum seekers (rather than returning them to Hungary or Greece through the Dublin Convention) created a massive pull factor (2017: 86-87). For hundreds of thousands of asylum seekers who made it to Europe, there were immediate and positive outcomes. Germany took in more than 1.4 million asylum seekers (Vonberg 2018). Sweden was proclaimed the most refugee friendly country in Europe when it took in over 160,000 asylum seekers in 2015 which would have been the equivalent of 7 million for a country like the United States. (Watson and Jones 2017). Sweden and Germany’s receptiveness towards these arrivals was admirable. But their difficulty in carrying out returns for those found not to be refugees raised questions about their ability to control regular migration and uphold their national sovereignty. These questions have been skillfully exploited by extreme right-wing populist parties such as the Alternative for Germany (AfD).

In September 2015, Europe as a whole pledged to relocate 160,000 refugees from Italy and Greece within two years. But the actual number of those relocated by September 2017 was closer to 40,000 (Dearden 2017). Other countries were more restrictive. Hungary adopted tough unilateral border controls like building razor wire fences that cover over a quarter of its land border (Kisbenedek 2017). The EU and Italy enlisted the support of the Libyan military and even local

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183 The statistics include all 38 European states and 6 non-European states (USA, Canada, Australia, New Zealand, Japan, and Rep. of Korea).
militias to operate detention centres to stop boatpeople from departing. According to the former UN human rights commissioner, Zeid Ra’ad al-Hussein, there is evidence of widespread torture, rape, and forced labor in Libya and some will recall news reports of slave auctions in Tripoli (Elbagir et. al. 2017). Betts and Collier described Europe’s pendulum like asylum and border control policy as the “headless heart” (generous but impractical) and the “heartless head” (practical but inhumane) (2017: 83-94), both are undesirable. These restrictive measures threaten the right to seek asylum because they are designed to deflect and block asylum seekers from accessing liberal democracies.

Asylum and border control policy is one of the most controversial topics in liberal democracies and the Australian experience is a testament to that. Some say that at the heart of this tension is the “liberal paradox of asylum” referring to the perception of an immutable tension between national sovereignty and human rights. This tension is thought to lead to the simultaneous development of restrictive border controls within the context of inclusive human rights norms. It is tempting to see these two principles as in natural conflict. For example, Matthew Gibney states “the consequences of applying the criterion of impartiality [freedom of movement] to entry policy for Western states, as relatively attractive places of residence in a world marked by dramatic inequalities, seem enormous” (2003: 60). He goes on to cite Michael Walzer: “affluent and free countries are, like elite universities, besieged by applicants” (1983: 32 in Gibney 2003: 60). Hollifield once argued that this paradox creates a gap between the intent of restrictive policies and the reality of inclusionary forces (Hollifield 1992: 570). But since then, liberal states have developed tougher and more restrictive controls like carrier sanctions, visas, and interdiction and now appear very capable of restricting access.
Some observe this development and argue that the right to seek asylum in liberal democracies (or territorial asylum) is a relic of the post Second World War (Hansen 2017). Indeed, there are unique pressures facing liberal democracies that make in-country asylum systems unsustainable on their own – a point I have underlined in my dissertation. Instead, some scholars and policymakers appear to accept that liberal democracies will continue to tighten controls over entry. Instead, they encourage liberal states to focus on contributing financial aid, development assistance, and resettlement places to support refugee populations abroad. While such arrangements are cost efficient and least likely to contribute to unintended consequences like secondary movement and people smuggling, they do not bode well for the universal right to seek asylum. From my perspective, there are problems that make this path undesirable. First, a system of tough border controls and restrictions complemented by more financial support for host countries and resettlement does not exist at the level of legal obligation or legality. These are entirely voluntary contributions at the moment and dependent on the generosity of states. Such a global system, if it is to exist at all, would require a new set of rules around responsibility sharing and asylum seeking, not to mention far more centralization of global authority to set quotas and supervise the system. In short, these changes would require more comprehensive transfers of national sovereignty to a global authority. In the meantime, the system of restrictions and increases in aid and resettlement contributions is likely to suffer from the problems articulated by Anker et. al. (1998). At a basic level, allowing territorial access to asylum is the most intuitive understanding of how to support people fleeing persecution.

How can we retain the robust legal doctrine around the universal right to seek asylum while also ensuring that liberal democracies are able to demonstrate effective control over migration? How can we design better governance in a world where in-country asylum systems are no longer
sustainable on their own but the ideal global system of responsibility sharing is out of reach? I believe we should not wipe the slate clean and start from square one. I accept that the 1951 Convention and the principle of *non-refoulement* are of continuing relevance in liberal democracies’ responses to complex asylum and migration flows. The *non-refoulement* obligation, freedom of movement, non-rejection at the frontier, and territorial asylum are all compatible with a closely regulated and enforced asylum and migration management system. Liberal states should not abandon their in-country asylum systems. These systems have produced major breakthroughs particularly around the evolution of the definition of a refugee and it would be a set back to abandon them. But liberal states should engage in regional cooperation and out-of-country processing to regulate access to these costly and sophisticated asylum systems.

I believe the Australian case offers insightful lessons for other liberal democracies and in resolving the liberal asylum paradox. Controlling regular migration and reducing the opportunities for onward movement and people smuggling strengthens national sovereignty. But the challenge has always been that strengthening national sovereignty comes at the expense of reducing access to protection and undermining the right to seek asylum. Indeed, the disturbing trend of building walls, turning back boats at sea, and visa controls and carrier sanctions is evidence of this zero-sum relationship. On the other hand, the UNHCR’s 10 Point Plan and the Bali Process’s RCF included new practices like asylum seeker refugee transfers, regional processing, and interception. The Malaysian arrangement was designed with a clear deterrent in mind, but it would have done so by enhancing protection in Malaysia and continuing to allow boatpeople access to Australia. In early 2016, Europe negotiate something similar in the EU-Turkey arrangement. Anyone coming from Turkey to Greece would be returned to Turkey. In exchange Europe offered to resettle 72,000
Syrians from Turkey and provide 6 billion euros to enhance Turkey’s protection capacity. Both the Malaysian and the EU-Turkey arrangement would enhance national sovereignty and border control. But unlike the unilateral construction of walls and other traditional border controls, these practices would not have a deleterious effect on the protection space and the right to seek asylum.

If liberal democracies commit to building regional cooperation, they can transcend the liberal paradox. Regionalism strikes the middle ground in at least two respects. It can help liberal states control their sovereign immigration systems and manage asylum while simultaneously remaining accessible to refugee movement. Scholars specializing in regions also note that “globalization has fundamentally changed the regional agenda so that the real issues that are not local are mostly global, but the tools to best manage these issues tend to be at the level we still tend to see as regional” (Foque and Steenbergen 2005: 65). Regional cooperation is, therefore, the middle ground between the unsustainability of individual asylum systems and the ideal of a global responsibility sharing regime. Thinking in these terms questions the traditional notion of national sovereignty. That a country would be compelled to engage in cooperation to control its borders to begin with implies that the traditional Westphalian notion of territorial sovereignty has already given way to new interpretations. It is time to accept that for liberal democracies, the meaning of national sovereignty has evolved. Politicians need to acknowledge and develop effective means of promoting this more realistic understanding of sovereignty rather than continuing to invoke what is by now a moribund version from more than a century ago.

184 The money was to be distributed to Turkey through various third parties: UN World Food Program, Emergency Social Safety Net, Turkish Red Crescent, and the Turkish government directly (Antypas and Yildiz 2018).
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