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Abstract

In a 2011 decision, the High Court of Australia effectively incorporated an international treaty into a domestic statute. The case involved a refugee swap deal, called the “Malaysia Solution,” between Australia and Malaysia, which the Australian government hoped would deter asylum seekers from making the dangerous overseas voyage to Australia. However, some of these asylum seekers argued that the Malaysia Solution violated the Migration Act, an Australian immigration statute. The plaintiffs proposed an interpretation of the immigration statute that incorporated elements of the Convention Relating to the Status of Refugees, most notably the principle of “non-refoulement.” A majority of the High Court of Australia agreed, and the future of the Malaysia Solution is now in doubt. This Comment argues that the Malaysia Solution does not necessarily violate the plain text of the Migration Act. By referencing unincorporated international law, the High Court of Australia decided the degree to which international norms affect domestic policymaking. Particularly in the refugee context, this judicial practice raises concerns about political accountability and democratic legitimacy. But there is a ready answer to these concerns: the Australian Parliament could revise the relevant provisions of the Migration Act to directly incorporate the Refugee Convention’s precepts. More broadly, judges faced with conflicting domestic and international regimes should defer to the laws of the domestic polity and leave the work of incorporating international refugee norms to the democratically accountable branch of government—the legislature.

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I. INTRODUCTION

On December 15, 2010, residents of Australia's Christmas Island awoke to screams and pleas for help.\(^1\) A rickety boat carrying foreign asylum seekers had crashed along the island's shore.\(^2\) With rescue made difficult by rocky topography, the incident eventually claimed as many as fifty lives, including some children.\(^3\) The story was shocking and widely publicized, all the more because the carnage was captured on video for the whole country to watch.\(^4\) The Christmas Island shipwreck instantly became a political fulcrum in Australia, which for decades had wrestled with immigration policy.\(^5\) Prime Minister Julia


\(^2\) Id.


\(^4\) See Christmas Island Shipwreck Kills Asylum Seekers (cited in note 1).

\(^5\) For a historically expansive view of immigration in Australia, see generally Gianni Zappala and Stephen Castles, Citizenship and Immigration in Australia, 13 Georgetown Immig L J 273 (1999). For
Gillard set about to “smash” the “people smugglers’ business model.” Although the legislation was intended to prevent another Christmas Island shipwreck, Gillard’s disdain for a “big Australia” filled with unwelcome immigrants helped fuel the rush to reform.\footnote{See Catherine Skulan, Australia’s Mandatory Detention of “Unauthorized” Asylum Seekers: History, Politics and Analysis under International Law, 21 Georgetown Immig L.J 61, 65–93 (2006).}


In the recent case *Plaintiff M70/2011 v Minister for Immigration and Citizenship (M70)*,\footnote{[2011] HCA 32 (Austl).} the High Court of Australia obstructed the plan, concluding that the Gillard government exceeded its power under the Migration Act.\footnote{Id at ¶ 148. Or, to use a somewhat coarse reference to the Christmas Island incident, the Malaysia Solution is now shipwrecked. See Michael Gordon, *The Malaysia Solution is Shipwrecked* (The Age Sept 1, 2011), online at \url{http://www.theage.com.au/national/the-malaysia-solution-is-shipwrecked-20110831-1jfmf.html} (visited Apr 20, 2012).} On a superficial level, the High Court of Australia held that Malaysia was improperly designated a “safe” country, as the Migration Act defines the concept.\footnote{M70, [2011] HCA at ¶¶ 135–36.} But the M70 decision was not merely an exercise in statutory interpretation. In the majority opinion, the justices seemingly read the requirements of the Convention Relating to the Status of Refugees (Refugee Convention)\footnote{Convention Relating to the Status of Refugees (1951), 189 UN Treaty Ser 150 (1954) (Refugee Convention). Australia is a signatory to the Refugee Convention. UNHCR, *States Parties to the 1951 Convention Relating to the Status of Refugees and the 1967 Protocol* (2011), online at \url{http://www.unhcr.org/3b73b0d63.html} (visited Apr 20, 2012).} into the relevant provisions of the Migration Act.\footnote{See M70, [2011] HCA at ¶¶ 90–119.} This unexpected interpretive move—the judicial incorporation of international law into domestic refugee law—forms the focus of this Comment.\footnote{From a survey of media reports, it appears that the High Court decision was unexpected by government officials. See *High Court Decision Unexpected: Swan* (Australian News Sept 1, 2011), online at \url{http://www.australianews.com.au/story?cityid=d1de82e1-fce9-4f45-9541-79d83e888155&storyid}
Usually, the legislature is tasked with incorporating treaties into domestic statutes.23 Yet here the relevant provisions of the Migration Act make no mention of the Refugee Convention.24 Implicitly, therefore, the Australian Parliament delegated to the judiciary the necessary work of incorporating this treaty. As the $M70$ decision illustrates, however, this delegation creates interpretive problems unique to judges. When international norms are at issue, concerns about political accountability and democratic legitimacy collide with concerns about transnational comity. How does a judge reconcile these conflicting concerns? In $M70$, the High Court justices relied upon rigid interpretive frameworks. A majority of justices believed that Australia’s compliance with international refugee norms was imperative.25 For that reason, the majority understood the domestic Migration Act as a “reflex” of the international Refugee Convention.26 On the other hand, a dissenting justice believed that the majority’s reading did violence to the domestic statute and that the domestic statute is the only law of the land.27 According to this view, the Refugee Convention is only marginally relevant because international norms have less legitimacy than domestic statutes.28 What is best for Australia takes a back seat in this battle between interpretive ideologies. Australians should find this troubling, as should advocates for refugee rights.

In Section II, this Comment surveys Australia’s recent attempts to control the influx of boat people. In Section III, this Comment demonstrates that the recent decision, $M70$, went beyond the Migration Act’s text to incorporate the Refugee Convention’s requirements into the domestic legal regime. In Section IV, this Comment analyzes the unique interpretive problems that arise when legislatures delegate the incorporation decision to the judiciary, using the $M70$ decision as a case study. Finally, in Section V, this Comment suggests that, both in Australia and elsewhere, the judiciary should not be the branch of government reconciling international norms and domestic refugee statutes. Instead,
incorporation of international obligations is best left to the democratically accountable branch of government—the legislature.

II. A BRIEF HISTORY OF BOAT PEOPLE IN AUSTRALIA

Australia has a long history of struggling with boat people, and the Malaysia Solution is simply one recent chapter in a lengthy saga. The struggle began with former Prime Minister John Howard’s “Pacific Solution.” The genesis of Howard’s plan is reminiscent of the Christmas Island shipwreck. In 2001, a boat containing more than four hundred Afghan nationals foundered off the coast of Indonesia. A Norwegian vessel, the MV Tampa, rescued the boat people. The captain of the Tampa sailed for Christmas Island, which touched off an embarrassing international tiff between Australia and Norway. No one wanted the refugees, least of all the Australian government. After a successful appeal through the Australian court system, government officials arranged for the migrants to be processed on Nauru, a small island in Micronesia, and the Howard government set about to legitimize its actions through legislation.

Howard’s plan involved designating certain Australian island territories as outside the “migration zone,” thereby restricting boat people’s rights to claim refugee status and make use of the appeals process. Then, all migrants were diverted to these islands—or third countries like Nauru—and detained while

31 See Willheim, 15 Intl J Refugee L at 159–63 (cited in note 30).
32 See id at 161–63.
33 Id.
34 The rapid court proceedings reveal the Australian government’s sense of emergency as it attempted to relocate the boat people. See *Australia Appeals Against Ship Racing* (BBC Sept 12, 2001), online at http://news.bbc.co.uk/2/hi/asia-pacific/1536719.stm (visited Apr 20, 2012). At first, Judge North obstructed the government’s plan to remove the boat people from Australian territorial waters. See *Victorian Council for Civil Liberties Inc v Minister for Immigration & Multicultural Affairs*, 110 FCR 452 (2001) (Austl). However, on September 11, 2001, the Full Court set aside Judge North’s orders, clearing the way for the government to relocate the migrants. See *Ruddock v Vadarlis*, 110 FCR 491 (2001) (Austl).
35 See Willheim, 15 Intl J Refugee L at 162 (cited in note 30).
their refugee status was determined. This policy became unpopular, and rioting broke out in the detention centers, where migrants could be held indefinitely. The Pacific Solution was altering and finally scrapped in 2007. But remnants of the Pacific Solution have influenced current policies. The Malaysia Solution, then, is merely an evolved method of tackling an old problem in Australia.

The Malaysia Solution sparked a lively debate within Australia, and public opinion on the swap deal was mixed. However, the M70 decision was widely regarded as an embarrassment for the Gillard government, which apparently did not expect the ruling. Government officials rushed to denounce the justices. The public was disappointed to learn that Australia was still obligated to pay over large sums to Malaysia. Now, the future of the Malaysia Solution—and boat people who land on Australia's shores—is in doubt.

III. THE COMPETING LEGAL REGIMES

Although international law blocked the Malaysia Solution, the international law in question, the Refugee Convention, does not explicitly appear in the

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38 See, for example, Raymond Bonner, Pressed, Australian Leader Makes Changes in Handling of Refugees, NY Times A7 (June 20, 2005).
40 See Tim Johnston, Australia Ends Automatic Detention for Asylum Seekers, NY Times A8 (July 30, 2008).
41 See, for example, Norimitsu Onishi, Australia Puts Its Refugee Problem on a Remote Island, Behind Razor Wire, NY Times A6 (Nov 5, 2009).
44 See High Court Decision Unexpected (cited in note 22).
45 See Packham, Julia Gillard Attacks High Court's Asylum Ruling (cited in note 22).
46 See Chieh, Malaysia Willing to Swap Refugees with Any Country (cited in note 13).
47 See Packham, Julia Gillard Attacks High Court's Asylum Ruling (cited in note 22).
relevant provisions of the Migration Act. It is an "accepted general proposition" that the Refugee Convention has no effect unless incorporated into domestic Australian law. But then why is it "evident" to the M70 majority that the relevant provisions of the Migration Act, which make no mention of the Refugee Convention, are intended to conform to Refugee Convention requirements? This section will analyze the two legal regimes, the international and the domestic; demonstrate that they are in conflict; and examine some interpretive tools for reconciling the two. This analysis will lay the groundwork to answer the question posed above.

A. The International Regime: The Refugee Convention

The language of the Refugee Convention is broad and can be interpreted in many ways. Unlike a constitution, however, the Refugee Convention is not interpreted by a single, hierarchal court system. There is no one supreme court to promulgate binding precedent. Instead, there are many such courts; interpretation of the treaty is left to the individual signatories.

The Malaysia Solution indirectly implicates Article 33 of the Refugee Convention; the central tenet of Article 33 is "non-refoulement." From the French refouler, non-refoulement is "[a] refugee's right not to be expelled from one state to another." The right is not confined to the Refugee Convention; it appears in various forms in other treaties. Moreover, many commentators now argue that non-refoulement is a matter of customary international law.

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48 Migration Act § 198A.
50 M70, [2011] HCA at ¶ 98.
52 However, the Refugee Convention does allow signatories to present disputes to the International Court of Justice if other means of resolution have proven futile. See Refugee Convention, Art 38 (cited in note 20).
54 Refugee Convention, Art 33 (cited in note 20).
56 See, for example, International Covenant on Civil and Political Rights, Art 7, 999 UN Treaty Ser 171 (1966). See also Foster and Pobjoy, 23 Intl J Refugee L at 600–01 (cited in note 29).
57 See, for example, UNHCR, Note on International Protection, UN Doc A/AC.96/951 at ¶ 16 (2001). See also Vijay M. Padmanabhan, To Transfer or Not to Transfer: Identifying and Protecting Relevant Human Rights Interests in Non-Refoulement, 80 Fordham L Rev 73, 84–85 (2011).
Interpretation of the principle has become a cottage industry within legal academia, and, understandably, there is some divergence of opinion on its proper interpretation. Yet, this broad language must mean something. What do the text and the purpose of the Refugee Convention have to say about the scope of the right to non-refoulement?

In relevant part, Article 33 of the Refugee Convention reads: “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.” By its plain text, Article 33 does not require signatories to accept refugees who arrive on their shores or borders; signatories are only required to abstain from refoulement. Even commentators who argue for a radical rethinking of the Refugee Convention concede that it contains no such amnesty provision. This means that Article 33’s plain text, narrowly construed, has nothing to say about the Malaysia Solution, as long as the migrants that Australia sends to Malaysia are not Malaysian refugees.

Therefore, the plain text leaves two important questions unanswered. First, may signatories turn refugees over to non-signatories? If so, Article 33 risks becoming irrelevant. Wily countries could create a proxy refoulement scheme whereby a signatory palms off its refugees on a non-signatory, which then sends the refugees back to their countries of origin. This is simply refoulement with an intermediary. Resolving this issue is of particular significance to the Malaysia Solution, since Australia is a Refugee Convention signatory and Malaysia is not.

The text of Article 33 does not seem to contemplate the possibility of proxy refoulement, but this kind of scheme nevertheless seems antithetical to the Refugee Convention.

Second, may a signatory send a migrant back to his home country before determining whether he is a refugee or send a migrant to a country that has a narrower understanding of the term “refugee”? This question is relevant to the

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58 Refugee Convention, Art 33.1 (cited in note 20).

59 Lori A. Nessel, Externalized Borders and the Invisible Refugee, 40 Colum Hum Rts L Rev 625, 636 (2009) (“The Refugee Convention does not expressly provide for a right to enter a country in order to seek refugee status.”).

60 See UNHCR, States Parties to the 1951 Convention at *1, 3 (cited in note 20).

61 Two examples may illuminate this problem. Italy and Libya entered into an agreement whereby the latter, a non-signatory, agreed to tighten its borders to prevent potential refugees from setting sail for Italy; the agreement also facilitated repatriation of Libyan migrants who arrived on Italian shores. William Wheeler and Ayman Oghanna, After liberation, Nowhere to Run, NY Times SR1 (Oct 30, 2011). In Sale v Haitian Centers Council, Inc, the US Supreme Court held that a domestic statute whose language mirrored Article 33 did not prohibit interdiction of migrants on the high seas. 509 US 155, 182 (1993). Repatriation and border tightening both seem to make a mockery of
Malaysia Solution because the migrants that Australia intended to send to Malaysia were unprocessed; their refugee status was yet to be determined. The obvious concern is that Malaysia will either send the migrants to another state without determining their refugee status or will rarely, if ever, permit the UNHCR to designate deserving migrants as refugees. Even if Malaysia determines that a particular migrant is worthy of protection, it is unclear whether that protection will be sufficient. The text of the Refugee Convention is silent on all of these issues.

Professor Michelle Foster proposes an interpretive framework that adheres closely to the Refugee Convention’s text, while employing a purposive reading to fill in the treaty’s textual gaps. Her framework, which builds on the Fourth Colloquium on Challenges in International Refugee Law, provides a sensible reading of the requirements of Article 33 and the Refugee Convention. Foster first tackles the issue of proxy refoulement. She agrees that “the [text of the] 1951 Convention neither expressly authorizes nor prohibits reliance on protection elsewhere policies.” To fill in this textual gap, Foster looks to a relevant authority on the purpose of the Refugee Convention—the UNHCR. The UNHCR interprets the Refugee Convention to require receiving countries, like Malaysia, to establish refugee protections “akin” to those enumerated in the treaty. The receiving country need not sign the Refugee Convention so long as it generally follows its precepts. This interpretation means that the Malaysia Solution is not automatically in contravention of the treaty because Malaysia is a

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62 See Section I.
64 See Frelick and Adams, Letter to UNHCR (cited in note 63).
65 See id.
69 Id at 239–40.
70 Id.
71 Id.
non-signatory. However, when considered in light of its purpose, the Refugee Convention does not permit any kind of proxy refoulement scheme, and it must be determined that Malaysia's refugee protections are sufficiently similar to those enumerated in the treaty.  

Foster further argues that sending and receiving countries are jointly liable for violations of the Refugee Convention pursuant to their bargain. This rule partially responds to the concern that Malaysia might return a migrant to his home country before assessing his refugee status. Although Malaysia is not a Refugee Convention signatory, liability would inhere to Australia if Malaysia violates the non-refoulement rule under the Malaysia Solution.

But what if Malaysia simply has a narrower understanding of the term "refugee"? Does Australia violate Article 33 if Malaysia returns a migrant who would have been considered a refugee under Australian law? Here Foster responds in the affirmative. If a receiving country’s understanding of an Article 33 “refugee” is substantially narrower than the sending country’s understanding, then the sending country may not relocate refugees to that country. Since interpretation of the treaty is largely left to individual signatories, a country with an expansive reading of the Refugee Convention should not be able to shirk its duties by sending potential refugees to a country with a loose reading. Malaysia is not a signatory to the Refugee Convention, but Foster’s rule may still be applied in a modified form. For the Malaysia Solution to conform to Refugee Convention requirements, Malaysia must not send migrants back to their countries of origin when Australia would not understand the treaty as permitting itself to do so.

Given that interpretation of the treaty is left to the individual signatories, this delegation results in an entire constellation of potential legal rules that implement the Refugee Convention’s precepts. Analyzing the Malaysia Solution under all these rules would be impracticable, but Foster’s framework, as modified here, is the narrowest reading of the treaty’s requirements. As such, it proves useful in examining Australia’s domestic refugee statute.

73 Foster, 28 Mich J Intl L at 262 (cited in note 66) (“[W]here two or more states enter into an agreement to participate jointly in the processing of refugee claims, they are each responsible for violations of Article 33 carried out pursuant to that agreement.”).
74 Id at 248.
75 See id at 226.
76 See UNHCR, States Parties to the 1951 Convention at *3 (cited in note 20).
77 See UNHCR, Refugee Protection at *6 (cited in note 53).
B. The Domestic Regime: The Migration Act

Australia’s Migration Act formed the legal bedrock of the refugee swap deal. The statute is byzantine and further complicated by amendments, but the following overview provides a rough outline of the provisions relevant to the Malaysia Solution. First, Section 36 of the Migration Act authorizes the issuance of “protection visas” to any “non-citizen in Australia to whom the Minister is satisfied Australia has protection obligations under the Refugees Convention.” Section 91R, recently enacted, provides some conditions on the otherwise unqualified term “refugee.” These conditions ensure that the harm from which a putative refugee is fleeing is substantial enough to warrant Australia’s protection. Read together, these two provisions clearly attempt to satisfy Australia’s Article 33 non-refoulement obligations.

However, these provisions were unavailable to the plaintiffs in the M70 decision. Christmas Island, the Australian territory where the plaintiffs first landed from abroad, finds itself on nebulous legal ground. Section 5 designates Christmas Island as an “excised offshore place,” and Section 46A(1) designates any illegal entrant as an “offshore entry person.” Together, these sections essentially vitiate a migrant’s attempt to file for a protection visa if that migrant lands in one of these excised offshore places. Geography explains this “excision”: Christmas Island is located in the Indian Ocean, near Southeast Asia. It is a natural port of call for boat people. Shutting off the conveyor belt from Indonesia to Christmas Island is a natural first step in deterring unwanted immigration. The excision also means that the protections afforded potential refugees—those found in Section 36—are not applicable to the majority of boat people. Since boat people who land in excised offshore places are not automatically able to apply for a visa, they are deemed “unlawful non-citizens.”

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78 For a breakdown of the Migration Act, see generally Andreas Schloenhardt, To Deter, Detain and Deny: Protection of Onshore Asylum Seekers in Australia, 14 Intl J Refugee L 302 (2002).
79 Migration Act §§ 36(1)-(2).
80 Id at § 91R.
81 See id at § 91R(2)(b).
82 Id at §§ 5(1), 46A(1). Other “excised offshore place[s]” include the Ashmore and Cartier Islands and the Cocos (Keeling) Islands. Id at § 5(1).
84 Migration Act § 14(1).
It is then within the discretion of the Australian Minister for Immigration (minister) to allow an individual migrant to seek a visa on a case-by-case basis.\textsuperscript{85}

What happens to these unlawful non-citizens who find themselves in excised offshore places? The Migration Act is not an exemplar of clarity on that point. Section 189 gives an officer the right to detain unlawful non-citizens in excised offshore places.\textsuperscript{86} Section 198 commands that "[a]n officer must remove as soon as reasonably practicable an unlawful non-citizen" who, in essence, has not made a successful immigration application.\textsuperscript{87} Presumably the two sections proceed in sequence.

Difficulties are compounded by Section 198A, which contains several provisions relevant to the Malaysia Solution:

The Minister may:

(a) declare in writing that a specified country:

(i) provides access, for persons seeking asylum, to effective procedures for assessing their need for protection; and

(ii) provides protection for persons seeking asylum, pending determination of their refugee status; and

(iii) provides protection to persons who are given refugee status, pending their voluntary repatriation to their country of origin or resettlement in another country; and

(iv) meets relevant human rights standards in providing that protection; and

(b) in writing, revoke a declaration made under paragraph (a).\textsuperscript{88}

This section seems to conflict directly with Section 198, which simply commands the removal of unlawful non-citizens (presumably to their countries of origin). The text also does not explicitly require that the minister’s declaration be made in good faith or with reference to particularized facts that support it. With a declaration in force, an officer is then permitted under Section 198A(1) to remove an unlawful non-citizen to the declared country.\textsuperscript{89}

To add a final layer of complexity, Section 198A(4) counsels that "[a]n offshore entry person who is being dealt with under this section [198A] is taken not to be in immigration detention."\textsuperscript{90} This last ambiguity can be resolved with

\textsuperscript{85} Id at § 46A(2) ("If the Minister thinks that it is in the public interest to do so, the Minister may, by written notice given to an offshore entry person, determine that subsection (1) does not apply to an application by the person for a visa of a class specified in the determination.").

\textsuperscript{86} Id at § 189(3).

\textsuperscript{87} Id at § 198(2).

\textsuperscript{88} Migration Act § 198A(3).

\textsuperscript{89} Id at § 198A(1) ("An officer may take an offshore entry person from Australia to a country in respect of which a declaration is in force under subsection (3).") (emphasis added).

\textsuperscript{90} Id at § 198A(4) (emphasis omitted).
careful statutory interpretation. Recall that Section 198 mandates the removal of unlawful non-citizens immediately and that this seems to conflict with Section 198A. Section 198 applies automatically if the non-citizen is a “detainee,” which elsewhere is defined as someone in immigration detention. Therefore, Section 198A(4) is a formalistic attempt to distinguish Section 198A from Section 198. Those who fall within Section 198A are not “detainees” and, therefore, do not simultaneously fall within the Section 198 framework.

The legislative history of Section 198A helps explain this structure. Section 198A was added as an amendment to the Migration Act in 2001, during Howard’s Pacific Solution era. Instead of the old system for deportation, which relied on individualized assessment, the 198A framework allowed for mass deportations after a country had been designated “safe.” As applied to the Malaysia Solution, once Malaysia was designated safe by issuance of a Section 198A(3) declaration, essentially all unlawful non-citizens could be removed to Malaysia rapidly and with little individual assessment.

Section 198A lacks any reference to the Refugee Convention. Elsewhere in the Migration Act, specifically in Section 36, the Refugee Convention is incorporated into the statute by reference. Protection visas are issued to migrants deserving of refugee status as defined by the Refugee Convention. However, this explicit mention of the Refugee Convention in one provision highlights its absence in Section 198A. The significance of this point cannot be understated, and it calls into doubt whether Section 198A conforms to Refugee Convention requirements at all.

C. Interpretive Methods for Reconciling the Regimes

With two legal regimes, one vague and expansive and the other precise and interstitial, how are judges to decide cases? Answering this question requires developing an interpretive approach to deal with conflicts between the two regimes.\(^{91}\)

\(^{91}\) Id at § 5(1).


\(^{93}\) See id.

\(^{94}\) Migration Act § 36(2)(a).

\(^{95}\) The MOU between Australia and Malaysia attempts, and fails, to span the domestic and international divide. See generally *Arrangement between the Government of Australia and the Government of Malaysia* (cited in note 8). Although the MOU references non-refoulement and explains processing protocol for migrants, ambiguous references to “dignity” and “human rights standards” are little more than aspirational. More fundamentally, the MOU “is not legally binding on the Participants” and therefore does little to advance our understanding of the legality of the Malaysia Solution. Id.
Broadly, there are two schools of thought on judicial reconciliation of domestic and international regimes: monism and dualism. Monism, insofar as it concerns competing legal rules, holds that an international legal rule should not be subordinate to a domestic one. Both are coequal or on the same plane. Legal norms culled from customary international law, for example, may supply rules of decision in domestic constitutional cases. Unincorporated international treaties are not to be treated with suspicion and disdain. Dualism, by contrast, subordinates unincorporated international rules to domestic statutes and common law. International and foreign rules may be persuasive evidence, but domestic statutes and common law always control. In dualist thinking, common law should be developed domestically, with little or no reference to international practices or customs.

Dyson Heydon, a justice of the High Court of Australia, may reasonably be described as a dualist. In a law review article, he describes some modern judicial trends to which he takes umbrage:

Judgments tend to cite all the efforts of their author, of their author's colleagues, of... English courts and American courts and Canadian courts and anything else that comes to hand. Often no cases are followed, though all are referred to. There is much talk of policy and interests and values.

A pessimistic take on modern judicial tendencies, Justice Heydon's description does capture the dualist's understanding of the monistic approach: anything goes. If foreign judgments and unincorporated treaties may supply rules of decision, what is not fair game?

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97 Id at 641. In its most basic formulation, monism is simply "a theory or doctrine of a single force, source, or system from which all particular instances devolve." Oxford English Dictionary 1001 (Clarendon 2d ed 1989). In an abstracted form, monism can mean the subjugation of "all 'rights' and 'goods' to a single determinative measure, conceived as a 'super' or prime value." Leon Trakman, Pluralism in Contract Law, 58 Buff L Rev 1031, 1032 (2010).

98 For a discussion of dualism, see Reuven (Ruvi) Ziegler, Legal Outlier, Again? U.S. Felon Suffrage: Comparative and International Human Rights Perspectives, 29 BU Intl L J 197, 242-43 (2011) ("In 'dualist' systems, treaties are not directly applicable in domestic law.").

99 For an example of dualist thought in the American legislative branch, consider the Constitution Restoration Act of 2005, HR 1070, 109th Cong, 1st Sess (Mar 3, 2005), in 151 Cong Rec H 980 (Mar 3, 2005):

In interpreting and applying the Constitution of the United States, a court of the United States may not rely upon any constitution, law, administrative rule, Executive order, directive, policy, judicial decision, or any other action of any foreign state or international organization or agency, other than English constitutional and common law up to the time of the adoption of the Constitution of the United States.

A monist would respond that this critique is inaccurate. Michael Kirby, a former justice of the High Court of Australia, describes the way he employed international law in his opinions:

[C]ases arose for decision by me for which there was no constitutional rule.... In such cases I began to reach for, and to find useful, the developments of international law concerning human rights. . . . They sometimes afforded practical help in resolving the controversy before me in a normative way.101

For dualists, “normative” is a red flag, and dualists are not mollified by Justice Kirby’s promises of judicial restraint. Professor Melissa Waters offers a narrower monist approach to the use of international legal rules in domestic decisions, an approach that assesses international treaties on a case-by-case basis and incorporates them into domestic law only after considering to “what extent . . . the treaty [is] an authoritative expression of the views of the domestic polity.”102

Judicial dualism has a longer history than monism, and dualism is deeply rooted in the Anglo-American common law tradition where monism is a relative novelty.103 However, the two schools of thought are not diametrically opposed. Monism simply expands the universe of legal material that may supply rules of decision. Whereas dualism narrows that universe to domestic statutes and common law, monism takes a broader view. However, monism still utilizes all the tools of the dualist—domestic common law, domestic statutes, and domestic scholarship. For that reason, a monist will seldom find distasteful a dualist interpretation of the law, although the opposite is not necessarily true.104

Therefore, to begin reconciling the Migration Act with the Refugee Convention, Section III.D takes up the dualist mantle. Instead of incorporating the treaty into Section 198A of the Migration Act, the following section will ask

102 Waters, 107 Colum L Rev at 701 (cited in note 96). There is the even narrower view, endorsed recently by Elena Kagan in her confirmation hearing, that international law is merely a font of “good ideas.” See Nomination of Elena Kagan to be an Associate Justice of the Supreme Court of the United States, Hearing before the Committee on the Judiciary, S Hrg No 111-1044, 111th Cong, 2d Sess, 126-27 (2010).
104 Compare Michael Kirby, *Constitutional Law and International Law: National Exceptionalism and the Democratic Deficit*, 98 Georgetown L J 433, 435 (2010) (“[I]n most countries, there is no particular problem where a local statute expressly [or implicitly] imports into municipal law obligations assumed by the nation-state under a treaty.”) with *Sosa v Alvarez-Machain*, 542 US 692, 750 (2004) (Scalia dissenting) (“For over two decades now, unelected federal judges have been usurping this lawmaking power by converting what they regard as norms of international law into American law.”).
if Section 198A, standing alone, is compatible with the treaty. If the answer is yes, then monists and dualists should agree with one another.

D. Is Section 198A Compatible with the Refugee Convention?

Analysis of Section 198A begins with the “declaration requirement,” the minister’s obligation to make a formal announcement that the receiving country is safe. The first question is whether the receiving country must in fact be safe or whether the minister simply must make a declaration to that effect. The plain text provides no help. A declaration is “[a] formal statement, proclamation, or announcement, esp[ecially] one embodied in an instrument.” Without making any reference to the Refugee Convention, it is at least plausible that a declaration could satisfy the statute when the contents of the declaration are untrue.

Therefore, a dualist would not rule out any of the following assertions about the “declaration” requirement: first, that the declaration need not be made in good faith; second, that the statute does not require the underlying facts of the declaration to be true; and third, that the declaration is only reviewable on the “fact” that the declaration was made. The text of Section 198A does not foreclose any of these possibilities. The Refugee Convention forecloses at least the first two possibilities, since non-refoulement is an absolute right. However, the dualist is indifferent to the treaty’s commands.

Ambiguity, however, does not end the analysis. A purposive dualist would note that Section 198A was enacted to facilitate refugee relocations to Nauru during the Pacific Solution years. A textualist dualist would note that the provision does not explicitly require good faith or factual validity. But a dualist can only find the textual gap here and fill it in using some (domestic) interpretive tool. Any dualist reading of the “declaration requirement,” therefore, does not tell us whether the Migration Act conforms to Article 33 of the Refugee Convention; it only shows that it is plausible to read Section 198A as either conforming to or not conforming to the treaty.

Unfortunately, when a dualist examines the factual criteria underlying the declaration, Section 198A comes up wanting. Section 198A(3)(a)(i) requires a receiving country provide “effective procedures for assessing their need for

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105 Migration Act § 198A(3)(a).
107 Generally, it is understood that this rule excepts aliens designated unsafe. See Padmanabhan, 80 Fordham L Rev at 84–85 (2011) (cited in note 57). See also Refugee Convention, Art 32.1 (cited in note 20) (“The Contracting States shall not expel a refugee lawfully in their territory save on grounds of national security or public order.”).
In addition, Foster's narrow reading of the Refugee Convention requires that the adjudicatory process in the receiving country reach substantially the same results as if the process took place in the sending country. Nothing about the word "effective" indicates that the procedures in the receiving country must result in the same outcomes. The term "effective" implies no concrete level of stringency, and it does not imply that receiving countries must have procedures commensurate with those of Australia. Here, there is simply no way to bridge the divide between the domestic and international regimes, unless one reads the international into the domestic, which a dualist will not do.

Might the minister's declaration that the receiving country "meets relevant human rights standards" obviate the abovementioned concerns? After all, the Refugee Convention is perhaps a relevant human rights standard in the refugee removal context, and Article 33 of the Convention, although not mentioned in Section 198A, is in fact referenced elsewhere in the Migration Act. At first, this approach seems like it could placate dualists and monists alike. A monist might see this as carte blanche to incorporate the Refugee Convention, and a dualist might begrudgingly agree, since the treaty has become part of the domestic legislative history. But this approach may fail for two reasons. First, a dualist might not require the Section 198A declaration to have any basis in fact. Although the minister might declare Malaysia safe, for example, that need not be true, or at least not according to the plain text of the statute. That would leave the Migration Act wanting.

Second, the requirement that a country "meet[] relevant human rights standards" only applies to "protections" for refugees and hopeful refugees. For reasons that are unclear, the Australian legislature chose to cabin the restrictive "relevant human rights standards" requirement to "protection." The requirement that a country provide adequate protections commensurate with human rights standards is only activated after a migrant has sought asylum, and the human rights standards do not apply to the asylum-seeking process. Access to this "process" need only be "effective." "Relevant human rights standards," in other words, provide no assistance to hopeful migrants who are proceeding through the adjudicatory process toward a refugee status determination. Therefore, a dualist will not be able to slip the Refugee Convention in through

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109 Migration Act § 198A(3)(a)(i).
111 See id at §§ 36(1)-(2). See also Section III.B.
112 The Migration Act requires a declaration stating that a country "meets relevant human rights standards in providing that protection." Migration Act § 198A(3)(a)(iv) (emphasis added).
the backdoor, and as a result, Section 198A falls short of the Refugee Convention's requirements.

Thus, even assuming away the potential problem with the declaration requirement, the substantive criteria in Section 198A do not bring the Migration Act within the penumbra of the Refugee Convention. This failure is not unexpected, since the provision nowhere references Article 33. Dualist judges, forced to consider the Migration Act and the Refugee Convention, will simply say they are irreconcilable and hew to the domestic statute over the international regime. With this interpretive groundwork laid, this Comment now turns to an analysis of the recent M70 decision, where the conflict between dualism and monism actually plays out between the justices.

IV. THE HIGH COURT'S DECISION

The M70 decision is factually sparse. Two unnamed plaintiffs, designated M70 and M106, each arrived on Christmas Island in August 2011 after traveling from Afghanistan. M106 was a minor at the time of the judgment. The record essentially leaves out all other facts, but in an interview, David Manne of the Refugee and Immigration Legal Centre said this about the plaintiffs:

[T]here's a very moving human story here and that is people who have fled from very traumatic circumstances and have come here seeking our help in a desperate bid for safety, are currently being incarcerated on Christmas Island, wanting the Australian Government to look at why they're here and to assess whether they're refugees.

Upon reaching Christmas Island, both plaintiffs were deemed "unlawful non-citizens," denied the right to apply for a protection visa, and prepared for removal to Malaysia. After Manne's organization was contacted, a team of seven pro bono lawyers was assembled to litigate the case. The legal team quickly sought an injunction to delay the migrants' expulsion, which was granted.

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114 M70, [2011] HCA at ¶ 3-5.
115 Id at ¶ 5-8.
117 M70, [20111] HCA at ¶ 5-8.
118 See Jones, Manne Discusses Ruling (cited in note 116).

The \textit{M70} decision contains four separate opinions. The joint judgment is the precendent opinion, and Justices Gummow, Hayne, Crennan, and Bell join it. On the High Court of Australia, four justices constitute a majority. Chief Justice French and Justice Kiefel filed separate concurrences, the latter justice essentially agreeing with the joint judgment in every material way. Justice Heydon supplied the lone dissent.

Each of the court’s opinions addresses the same two issues relevant to this discussion. First, concerning the Section 198A “declaration requirement,” what standard of judicial scrutiny is to be applied to the declaration in assessing that declaration’s validity? Second, applying that standard of judicial scrutiny, was the minister’s declaration effective? This Section will examine the justices’ attempt—or lack thereof—to bring the statute’s requirements within the penumbra of the Refugee Convention.

\textbf{A. The Dualist: Justice Heydon}

Justice Heydon is the lone dualist thinker on the High Court of Australia; he is also the lone dissenter in the \textit{M70} case. In his opening paragraph, Heydon makes clear the Refugee Convention should not supply the rule of decision: “Whatever obligation Art[icle] 33 imposes on Australia, it is an obligation which stems from a treaty. The treaty has no force in Australian law until it or any part of it is enacted.”\footnote{Id at \P 150.} Only summarily does Heydon genuflect to that treaty: “It is true that legislation is to be construed so as to avoid, if possible, a breach of Australia’s international obligations.”\footnote{Id at \P 153.} But Heydon’s “convention avoidance doctrine,” if it exists in practice, does not determine the outcome of Heydon’s opinion.\footnote{See Heydon, 10 Otago L Rev 493 (cited in note 100).}

Next, Heydon considers the Section 198A declaration requirement, which he construes narrowly.\footnote{See \textit{M70}, [2011] HCA at \P\P 155–59.} The plaintiffs contend that the conditions that make up the declaration must be factually true.\footnote{Id at \P 155.} According to this argument, Malaysia
must be legally obligated to, for example, provide adequate adjudicatory procedures. The courts, then, are to scrutinize the declaration for the existence or nonexistence of these factual conditions, including adequate access to courts codified by state law and fair judicial treatment without preference given to citizens.

The minister, according to Justice Heydon, must ask a narrow set of questions to satisfy judicial scrutiny.\textsuperscript{127} The minister must properly construe the conditions of Section 198A(3), make an inquiry with reference to these conditions, and then make a declaration accordingly.\textsuperscript{128} Heydon would reserve the issue as to whether good faith or some limited basis in fact is required by the statute.\textsuperscript{129} Heydon does not believe the statute requires the searching inquiry advanced by the plaintiffs.\textsuperscript{130}

Analysis of two of the plaintiffs' contentions affords Heydon an opportunity to spell out several rationales for judicial dualism. First, the plaintiffs argue that the intent of the legislature was to operationalize the Refugee Convention through Section 198A of the Migration Act.\textsuperscript{131} Heydon responds with an originalist argument. Section 198A was enacted to facilitate refugee swaps with Nauru during Howard's Pacific Solution.\textsuperscript{132} Nauru was not a Refugee Convention signatory and did not have many of the domestic law protections that the plaintiffs claim are required by the statute.\textsuperscript{133} Therefore, it is unlikely the legislature intended to silently incorporate the Refugee Convention into Section 198A. Heydon grapples with the plaintiffs' first argument on its own terms, as one might expect from a dualist confronted with a question of legislative purpose.

Justice Heydon reserves his ire for the plaintiffs' second argument; their brief argues that the term "protection" in the Migration Act should be interpreted to accord with the definition of the term in the Refugee Convention.\textsuperscript{134} To do so would be to import a wide range of humanitarian

\textsuperscript{127} Id at ¶ 159.
\textsuperscript{128} Id at ¶ 161.
\textsuperscript{129} M70, [2011] HCA at ¶ 159.
\textsuperscript{130} Id at ¶¶ 159-61.
\textsuperscript{131} Id at ¶ 166.
\textsuperscript{132} Id at ¶ 169.
\textsuperscript{133} See UNHCR, States Parties to the 1951 Convention at *3 (cited in note 20). See also M70, [2011] HCA at ¶ 169.
\textsuperscript{134} Debbie Mortimer, et al, Plaintiffs' Outline of Submissions: Between Plaintiff M106 of 2011 and Minister for Immigration and Citizenship *8 (Aug 17, 2011), online at http://www.hcourt.gov.au/assets/cases/m70-2011/M70-2011_Plf.pdf (visited Apr 20, 2012) ("Thus, the 'protection' of which subsection 198A(3) speaks should be construed as the protection that the Refugees Convention requires signatories to afford: namely, non-refoulement and the matters set out above.").
protections from the treaty, and these protections are clearly not spelled out in Section 198A. Justice Heydon strongly disagrees with this and explains his unwillingness to use a treaty to supply meaning to ambiguous terms.\textsuperscript{135} First, although conceding some ambiguity in the language, Justice Heydon believes he can resolve that ambiguity without turning to the Refugee Convention.\textsuperscript{136} Second, Section 198A mandates a ministerial decision and, as such, affords the minister wide berth without much judicial second-guessing.\textsuperscript{137} Third, the executive, of which the minister is a part, is a politically accountable branch of government.\textsuperscript{138} The executive may be publically scrutinized or, if his decision is particularly egregious, voted out of office. The judiciary is not politically accountable in this way.

But all these rationales reduce to the simple fact that, for a dualist, international obligations in unincorporated treaties are given the least weight. Even vague concerns regarding agency discretion and political accountability are enough, in Justice Heydon’s view, to outweigh the countervailing concerns regarding compliance with a major humanitarian instrument. Judicial restraint in the area of foreign relations is something a dualist thinker can wrap his head around. Compliance with an unincorporated international treaty is “talk of policy and interests and values,”\textsuperscript{139} so much so that Heydon grows suspicious of the plaintiffs’ entire theory of the case when he senses an attempt to conflate international and domestic law.\textsuperscript{140}

B. The Fence Sitter: Justice French

Justice French’s opinion is a compromise of the monist and dualist views. On the declaration required by Section 198A, French takes a moderate position. In making the declaration, French contends, the minister must satisfy two conditions. The minister must “properly construe” the 198A criteria and then, in good faith, assure himself that those criteria have been met.\textsuperscript{141} This is not as nebulous as Justice Heydon’s approach to the 198A declaration,\textsuperscript{142} and it is not as onerous as the joint judgment’s “jurisdictional fact” requirement.\textsuperscript{143} However,

\textsuperscript{135} M70, [2011] HCA at ¶ 167.
\textsuperscript{136} Id at ¶ 162.
\textsuperscript{137} Id at ¶ 161.
\textsuperscript{138} Id at ¶ 163.
\textsuperscript{139} See Heydon, 10 Otago L Rev at 501 (cited in note 100).
\textsuperscript{140} M70, [2011] HCA at ¶ 167.
\textsuperscript{141} Id at ¶ 59.
\textsuperscript{142} See Section IV.A.
\textsuperscript{143} See Section IV.C.
the standard is stringent enough that French believes the minister overstepped his bounds. Accordingly, he concurs with the orders proposed by the joint judgment, albeit for reasons that are meaningfully different. The most significant difference between French's opinion and that of the joint judgment is in the former's ambivalent—and ambiguous—treatment of international law. Here, French is properly characterized as a fence sitter in the debate between monism and dualism.

According to Justice French, for the minister to "properly construe" the 198A criteria and form a good-faith evaluative judgment, he must consider a large amount of information about the receiving country. Some of this information is expressly mentioned in the Section 198A criteria, some of this information has no basis in the text or legislative history, and some of this information concerns non-statutory international legal principles. French states: "An affirmative answer to the questions posed by the criteria in section 198A(3)(a), reached by reference only to the specified country's laws and international obligations, is not the end of the necessary ministerial inquiry." The receiving country's history of adherence to these laws and obligations across an indefinite swath of time also must inform the minister's decision. In sum, then, he requires: (a) refugee protections codified in the receiving country's domestic law, (b) refugee protections that comply with relevant international obligations, and (c) a history of practical compliance with these laws and international obligations.

This multi-factor inquiry opens a window through which the Refugee Convention may enter the domestic legal regime without legislative implementation. For Justice French, the non-refoulement obligation in Article 33 is "relevant," if not dispositive, to this case. The Section 198A(3) criteria are "statutory criteria," he concedes, "albeit informed by the core obligation of non-refoulement which is a key protection assumed by Australia under the Refugee Convention."

Justice French only requires proper construction of the 198A(3) criteria and a good faith evaluative judgment. He does not believe the High Court of Australia should scrutinize the underlying factual validity of the minister's declaration. His insistence, then, that the Refugee Convention is "relevant" is really a wink and a nod to the minister. French would like to see the treaty play

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144 M70, [2011] HCA at ¶ 69.
145 Id at ¶ 58.
146 Id at ¶ 67.
147 Id at ¶ 66.
an important role in treatment of refugees, but he sees no way of shoehorning the Refugee Convention's requirements—and strong judicial oversight—into the 198A(3) language. Instead, French leaves room for ministerial discretion and urges the minister to use that discretion to incorporate Refugee Convention precepts in his decisionmaking.

C. The Monists: The Joint Judgment

The majority opinion, or "joint judgment" in Australian parlance, is by far the most monist of the opinions. After a recital of the relevant statutory provisions, the joint judgment states the proposition that guides its hand:

The references in section 198A(3)(a)(i) to (iii) to a country that provides access to certain procedures and provides protections of certain kinds must be understood as referring to access and protections of the kinds that Australia undertook to provide by signing the Refugees Convention and the Refugees Protocol. In that sense the criteria stated in section 198A(3)(a)(i) to (iii) are to be understood as a reflex of Australia's obligations.150

There is an ideological gap between this statement and Justice Heydon's opinion. Here, a treaty unincorporated into the 198A statutory framework is being employed to interpret that framework. The reason is unclear, but the statute apparently "must" be understood that way. To a dualist like Justice Heydon, this is ipse dixit plain and simple.

Monism explains the joint judgment's construction of the Section 198A criteria. First, according to the joint judgment, compliance with these criteria in the receiving country must not merely be observed in practice but "must be provided as a matter of [that country's] legal obligation."151 For example, access to Malaysian courts must be more than practicable for migrants; it must be guaranteed by Malaysian law. To reach this conclusion, the joint judgment looks to Section 198A(3)(a)(iii): the receiving country must "provide[] protection to persons who are given refugee status."152 What are these protections? Employing the "relevant human rights standards" language, the monist joint judgment fills in this textual gap with the protections provided in the Refugee Convention.153

These treaty protections include freedom from invidious discrimination, freedom of religion, access to courts, freedom to work, access to education, and freedom of movement.154 Since these treaty protections are best characterized as legal rights, the reference to "protection" in 198A(3)(a)(iii) must also refer to

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150 Id at ¶ 118.
151 Id at ¶ 116.
152 Migration Act § 198A(3)(a)(iii).
153 See M70, [2011] HCA at ¶ 118.
154 Id at ¶ 117, citing Refugee Convention, Arts 3, 4, 16.1, 17.1, 22.1, 26 (cited in note 20).
legal rights. And since Section 198A(3)(a)(iii) must therefore refer to legal rights, the other two Section 198A criteria must refer to legal rights as well. This line of reasoning proceeds uninterrupted from a domestic statute to an unincorporated international treaty and back again. The majority draws tenuous inferences from the international treaty and applies them to interpret the domestic statute.

Second, monism explains the joint judgment's theory about the "access" to "effective procedures" criteria. According to the majority, a receiving country like Malaysia may satisfy the "access" to "effective procedures" requirement if it codifies UNHCR oversight into domestic law. As noted in Section III.D, nothing in the text of Section 198A suggests that the receiving country's adjudicatory procedures must comply with the Refugee Convention, but the monist joint judgment seizes upon the ambiguity inherent in the word "effective" to incorporate international law precepts.

Judicial monism further explains a paragraph in the joint judgment opinion that a dualist would find bewildering. The government argued that Section 198A was enacted in 2001 to facilitate refugee transfers to Nauru during the Pacific Solution and that Nauru was not a treaty signatory. Presumably, this argument attempts to decouple the Migration Act from the Refugee Convention, and Justice Heydon agreed with the government. However, the joint judgment does not accept this: "[T]hose hopes or intentions do not bear upon the curial determination of the question of construction of the legislative text." The rejoinder to this claim is that hopes and intentions were what seemingly permitted the majority to read the Refugee Convention into Section 198A in the first place. The opinion hides behind textualism. In reality, however, this interpretive move cannot be explained by any traditional canon of statutory construction. Rather, the majority is making a monist argument in the joint judgment while attempting to wrap the result in the text of the statute: the original intention animating the statute—or the statute’s plain meaning—is less compelling to the majority than the statute's compliance with the Refugee Convention.

Monist thinking also explains how the joint judgment decides the appropriate level of judicial scrutiny to apply to the minister's declaration. According to the justices of the joint judgment, the minister's good faith is necessary but not sufficient to uphold the declaration; the declaration must also

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155 M70, [2011] HCA at ¶ 125.
156 Id at ¶ 127.
157 Id at ¶ 128.
158 See id at ¶ 118.
be supported by “jurisdictional”—that is, objective—facts. To require only good faith “would pay insufficient regard to [the statute’s] text, context and evident purpose. Text, context and purpose point to the need to identify the relevant criteria with particularity.”

The text is inherently ambiguous, so the “context and purpose” of the declaration requirement must be informing the joint judgment’s holding. Although it is not stated expressly, one gathers that the “context and purpose” of the declaration requirement, as the joint judgment understands it, is the Refugee Convention.

The joint judgment, unwilling to distinguish the domestic and international regimes, must logically find the minister’s declaration invalid. Because there is inadequate refugee protection codified into domestic Malaysian law, Malaysia is not a signatory to the Refugee Convention, and there is no binding agreement between the two countries, the jurisdictional facts requisite for the minister to make an adequate declaration did not, and cannot, exist.

For a dualist, the premise upon which the joint judgment relies to reach its holding is both tenuous and impermissible. The monist premise is that international obligations, whether or not incorporated by the legislature, are legitimate sources of authority, useful for interpreting domestic law. Disagreement over this premise explains the divergent results that the monist joint judgment and the dualist dissent reach on an otherwise simple matter of statutory interpretation. The opposition of the joint judgment’s and Justice Heydon’s results, at its core, is a disagreement over something more abstract than what the Migration Act requires; it is a disagreement over the reach of international law.

V. WHAT THE M70 DECISION SAYS ABOUT INCORPORATION OF INTERNATIONAL LAW

If there is a continuum spanning from monism, on one end, to dualism, on the other, the joint judgment resides close to one end and Justice Heydon finds himself close to the other. Justice French is somewhere in between. Monism and dualism are not absolutes but rather matters of degree, and there is a great heterogeneity of thought regarding the proper role of international law in domestic contexts. For the Australian public, it matters greatly which judicial interpretive framework holds sway on the High Court of Australia. Australian
Why Judges Should Not Make Refugee Law

law—particularly, ambiguous law like Section 198A—is interpreted through the justices’ interpretive frameworks. The majority’s framework, whether monist or dualist, will necessarily influence the outcome of cases, as it did in M70. For example, if the High Court of Australia were comprised of a few more dualists, the Refugee Convention would likely be little more than a footnote in the majority opinion with Plaintiff M70 and Plaintiff M106 on their way to Malaysia.

Legislatures, in theory, incorporate international agreements into domestic law for the benefit of their constituencies. Even a humanitarian agreement like the Refugee Convention represents the public’s political aspirations and values. Incorporating the treaty into domestic statutory law formalizes these aspirations and values. Judges, however, traditionally have a different role in common law jurisdictions. Neither policymakers nor representatives, judges interpret the law as it is written. Therefore, if legislatures delegate to the judiciary the task of incorporating international law, the public good loses primacy. Instead, resolution of cases like M70 depends upon an abstract debate about judicial interpretation.

There is nothing assiduous about the judiciary’s different role in the legislative process, just as there is nothing assiduous about the debate about proper judicial interpretation. But these different roles suggest that a different branch of government—the legislature—is best suited to make the appropriate call on the incorporation decision because the legislature is best able to weigh the public interest on international matters like the one presented in M70. This section suggests how the legislature might make the incorporation decision, both in the case of the Migration Act and in the case of international refugee treaties more generally.

A. Revising the Migration Act

What would Section 198A look like if the legislature made the incorporation decision? The best place to begin this inquiry is with a different provision in the Migration Act. In Section 36 of the Migration Act, the Australian legislature decided that the issuance of “protection visas” to “non-citizen[s] in Australia” would hinge upon whether “the Minister is satisfied

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164 Id.

165 See Section IV.

166 Interestingly, monists might respond with a somewhat extreme argument that the legislature’s claim to democratic primacy is an illusion. See Kirby, 98 Georgetown L J at 457 (cited in note 104) (“Yet once one gets away from the activities of local government, the notion of popular participation in the content of law is at best theoretical and at worst romantic.”).
Australia has protection obligations [to a migrant] under the Refugees Convention. This reference provides a template for incorporation.

For Section 198A, the first step along the road to clarity might be an explicit mention of the Refugee Convention. Instead of requiring that the receiving country “meet[] relevant human rights standards in providing . . . protection,” the statute could require the country “meet relevant human rights standards under the Refugee Convention.” To avoid foreclosing deals like the Malaysia Solution, the legislature could specify that the receiving country need not be a Refugee Convention signatory to meet such standards. On the other hand, if the legislature did disapprove of the Malaysia Solution, it could require the receiving country to sign the treaty. To match the level of clarity achieved in Sections 36 and 31R, the legislature could enumerate the considerations to be taken into account when deciding whether a country is “Convention safe.” The most specific of all statutes might reference Foster’s rule; namely, a receiving country must reach substantially the same determinations on a migrant’s refugee status as would be reached in Australia.

With these additional points of clarification, the differences between judicial interpretive frameworks would be immaterial. The legislature would have made the decision, and the judges would merely enforce the domestic regime, as legislatively conflated with the international regime. Such a revision would ensure that the Gillard government could expect no further surprises regarding the legality of their future swap deals.

B. Revising Our Understanding of Incorporation

On matters of refugee law, the debate between monist and dualist judges is not cabined to the Australian continent. In Baker v Canada, the Supreme Court of Canada decided a case factually similar to the M70 decision. Considering the applicability of the unincorporated Convention on the Rights of the Child, the majority stated that “the values reflected in international human rights law may help inform the contextual approach to statutory interpretation and judicial

167 Migration Act § 36(2)(a). See also Section III.B. This concise, albeit important, reference to the Refugee Convention is all that is necessary to smooth out most ambiguities. A dualist judge will no longer perceive any problem applying international law, precisely because that law is no longer international. And here the Australian legislature was especially astute. Perhaps aware that interpretation of the Refugee Convention has been left to individual signatories, the legislature elaborates upon its understanding of Australia’s international obligations. See Migration Act § 31R. All of these details constrain judicial discretion, leaving the incorporation decision in the hands of the legislature.

168 See Section III.A.


review." The dualist concurrence objected to the majority's permissive use of international law:

I do not agree with the approach adopted by my colleague, wherein reference is made to the underlying values of an unimplemented international treaty in the course of the contextual approach to statutory interpretation and administrative law, because such an approach is not in accordance with the Court's jurisprudence concerning the status of international law within the domestic legal system.

The Canadian legislature, like the Australian legislature, could smooth out the ambiguities in its statutory scheme by updating domestic law. US decisions similarly have referenced unincorporated treaties and international norms in the immigration context, despite the US judiciary's definitive dualist stance.

The per curium opinion and corresponding dissent in *Haitian Refugee Center, Inc v Baker* provides an interesting microcosm of the debate in US courts. The case concerns interdiction of large numbers of Haitian refugees, who, after President Jean-Bertrand Aristide was overthrown by military leaders, set sail for the Southeastern US. The Coast Guard interdicted those boats and forcibly returned the passengers to Haiti. The plaintiff in the case was the Haitian Refugee Center, which sought injunctive relief barring the Coast Guard from continued repatriation. The plaintiff argued that the Coast Guard had run afoul of its Article 33 obligations by not assessing the refugee status of Haitian boat people before repatriating them. In the abbreviated per curium opinion, the majority argues that Article 33 is "not self-executing and thus provides no enforceable rights to the Haitian plaintiffs in this case." This treatment roughly conforms to judicial practice in the US.

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171 *Baker*, 2 SCR at 861.
172 Id at 865 (Locabucci concurring).
174 Kirby, 98 Georgetown L J at 436, 442–45 (cited in note 104). See also Section III.C.
175 949 F2d 1109 (11th Cir 1991).
176 The facts of this case are detailed in the district court opinion. See *Haitian Refugee Center, Inc v Baker*, 789 F Supp 1552, 1555–57 (SD Fla 1991).
177 Id.
178 Id at 1554.
179 *Haitian Refugee Center*, 949 F2d at 1110.
180 Dualism has a venerable history in America. See generally *Whitney v Robertson*, 124 US 190 (1888). America is not a signatory to the Refugee Convention; however, it is a signatory to the Refugee Protocol, which expands and incorporates the Refugee Convention's non-refoulement provision. See UNHCR, *States Parties to the 1951 Convention* at *4* (cited in note 20).
The impassioned dissent argues for judicial incorporation of the Article 33 requirements: "Having promised the international community of nations that it would not turn back refugees at the border, the government yet contends that it may . . . actively prevent Haitian refugees from reaching the border. Such a contention makes a sham of our international treaty obligations." 181 Although conceding that Article 33 was not given effect by congressional legislation, the dissent argues "the subject matter, legislative history, and subsequent construction of the Protocol support the proposition that the Protocol is self-executing and binding upon the United States." 182 In essence, then, the dissent argues that, despite no law enacting Article 33, the non-refoulement principle should be applied to this case. This argument is just shy of monist thinking.

The Haitian Refugee Center and Baker cases demonstrate why an international audience should understand the debate between monism and dualism in the context of domestic immigration and refugee statutes. As this section argues, incorporation of international treaties into these statutes is structurally better left to the legislature than to the judiciary.

1. Political accountability and democratic legitimacy.

Where refugee statutes are at issue, legislative incorporation of international law promotes political accountability and democratic legitimacy. Professor Waters's moderate view of judicial monism 183 relies on a belief that the trend toward judicial monism is "inevitable," but Waters admonishes judges and scholars to address "with great care and sensitivity . . . democratic legitimacy concerns." 184 This statement implies that legislative lawmaking is superior to judicial lawmaking from the perspective of legitimacy. Waters contends that judicial incorporation is desirable when the treaty in question expresses the views "of the domestic polity." 185 But public opinion concerning the Malaysia Solution was mixed. 186 Support for tough immigration policies has ebbed and flowed, as highlighted by the history of such policies in Australia. Moreover, who becomes a member of the Australian polity is an extremely weighty decision. The matter should be decided by a deliberative body that can better debate the matter on

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181 Haitian Refugee Center, 949 F2d at 1112 (Hatchett dissenting).
182 Id at 1115.
184 Id at 705.
185 Id at 701.
186 See note 42.
behalf of the public; the government should not leave to the judiciary a question so central to sovereignty as who may become a citizen. 187

2. Legislative clarity and agency costs.

Section 198A of the Migration Act is not an exemplar of clarity. What constitutes “relevant human rights standards” is left unspecified. 188 What constitutes “effective” adjudicatory procedures also is left unspecified. 189 These are important criteria, and there is no reason for the statute to be clear if the legislature can count on the judiciary to fill in the gaps. Unclear statutes implicitly delegate rulemaking authority to the judiciary, but the effects of unintended delegation are especially undesirable in the refugee context. Treaties like the Refugee Convention involve important substantive rights for individuals in an especially vulnerable position. These treaties also affect the rights of current citizens, who are being asked to welcome new citizens into the domestic fold. Signing such treaties should be a weighty decision, just as incorporating those treaties into domestic law should be a weighty decision. Yet, those important rights risk abridgement, and the incorporation decision becomes unnecessary if the job is passed off to the judiciary. If undisciplined by the judiciary, a legislature is free to make a hash of refugee law without making tough decisions on behalf of its constituents.

3. Transparency and predictability.

Apparently, the decision in M70 was a surprise to the Gillard government. 190 That surprise demonstrates that Section 198A left open a wide range of reasonable interpretations, widened further by the existence of the Refugee Convention. This wide range afforded the justices the ability to decide for themselves the extent to which treaties should be incorporated into refugee laws. The decisionmaking took place outside of the public eye, in the opaque confines of the High Court chambers. Generally, discretion increases unpredictability, as the Gillard government’s reaction demonstrates. Vague

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187 In unfortunately populist terms, some American legislators have acknowledged the democratic superiority of legislative incorporation. Consider this statement by Alabama Senator Jeff Sessions at Elena Kagan’s confirmation hearing:

I do not see how anyone can justify a citation to actions outside the country as any authority whatsoever to define what Americans have done. Americans believe that you only govern with the consent of the governed, and we have not consented to be governed by Europe or any other advanced nation.

Nomination of Elena Kagan at 302 (cited in note 102).

188 Migration Act § 198A(3)(a)(iv).

189 Id at § 198A(3)(a)(i).

190 See note 22.
statutes hurt vulnerable migrants who may not have access to sophisticated legal counsel. Therefore, the greater the detail with which a statute incorporates or rejects the Refugee Convention's requirements, the less discretion is given to the judiciary and the more predictable and legitimate the judicial results will necessarily be. The range of interpretive tools available to a judge is vast when applying monist thinking to a domestic immigration problem. In order to limit this otherwise broad discretion to a democratically agreed-upon legislative solution, a legislature should incorporate international law—with care and specificity—into the domestic statutory regime. In that way, the legislature can reduce the unpredictability that necessarily results from punting the issue to the judiciary.

VI. CONCLUSION

The nexus between the domestic and international regimes is riven by judicial strife. Between monists and dualists, an interesting debate is unfolding in decisions and scholarship concerning the proper role of international law in domestic statutory interpretation and common law development. This debate is an academic one, but for a polity's laws and norms—particularly its refugee laws—it is a potentially dangerous one. Justice Scalia famously quipped about judicial activists that "[f]or over two decades now, unelected federal judges have been usurping lawmaking power by converting what they regard as norms of international law into American law." This Comment has had little to say about judicial activism, for in the refugee law context, the problem is not that judges are incorporating norms of international law into their immigration decisions but that legislatures give judges the unfettered discretion to choose whether and how much they incorporate.

Why legislators choose to delegate implicitly these weighty decisions is a topic for other articles. Legislators frequently write unspecific statutes, and scholars frequently speculate why. This Comment does not add to that body of scholarship. Nor is this Comment a paean to judicial isolationism or a plea against judicial usurpation. Rather, this Comment suggests that, in the context of refugee law, there is increasingly a suboptimal relationship between two branches of government. One branch, the legislature, charged with deciding who gets the benefits of refugee protection guaranteed by international law, fails to write specific legislation making those difficult decisions. The other branch, the judiciary, latches upon that ambiguity to do work the legislature failed to do.

191 Sosa, 542 US at 750 (Scalia dissenting).
192 See generally Richard A. Posner, Statutory Interpretation—In the Classroom and in the Courtroom, 50 U Chi L Rev 800 (1983).
Why Judges Should Not Make Refugee Law

Pastore

With substantive rights as important as non-refoulement at issue, this situation is problematic.

Australia’s Malaysia Solution—and the litigation that surrounded it—provides an interesting case study in the problem. Here, the opinions in the M70 decision fall neatly along a continuum, from monist to dualist, demonstrating the heterogeneity of thought on the issue of judicial incorporation. The fact that this debate holds the domestic law captive should strike Australians as undesirable. For the Australian Parliament and the Gillard government, however, there should be nothing surprising about the outcome of the case. Judges necessarily decide cases through the lens of an interpretive framework, and different judges will necessarily have different judicial frameworks. However, quibbles about proper interpretive methods should not be dispositive when deciding issues as weighty as those presented in this case. Instead, the democratically elected organ of government should make the call and leave the academic debate to the judges.