

OFFSHORE PROCESSING OF ASYLUM SEEKERS – IS AUSTRALIA COMPLYING WITH ITS INTERNATIONAL LEGAL OBLIGATIONS?

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Australia has a number of international legal obligations in relation to asylum seekers and refugees. In the scheme of things, the number of asylum seekers and refugees who attempt to reach Australia by sea without a valid visa is relatively small. Since 2012, Australia has restored its legal framework of processing asylum seekers and refugees who arrive by sea offshore in Papua New Guinea and Nauru. There are a number of concerns with the treatment of asylum seekers and refugees at these offshore processing centres, highlighting concerns Australia is not complying with its international legal obligations. The primary justification of the current policies has been that a strong deterrent is required to deter the people-smuggling trade. However, the deterrent justification lacks evidence to support it, and is unable to justify breaches of some of the most fundamental obligations owed to refugees and asylum seekers.

I INTRODUCTION

Australia has a number of international legal obligations in relation to asylum seekers and refugees. These arise from the 1951 *Convention Relating to the Status of Refugees* and the 1967 *Protocol Relating to the Status of Refugees* (collectively, ‘the *Refugees Convention*’),¹ and other human rights treaties.² Australia also has an obligation to implement the key objects and purposes behind the *Refugees Convention* in good faith; these are the protection of refugees seeking asylum, and the assurance of fundamental rights and freedoms for refugees without discrimination or penalty.³ Australia’s current practice of processing asylum seekers offshore raises some important issues.

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¹ *Convention Relating to the Status of Refugees*, opened for signature 28 July 1951, 189 UNTS 137 (entered into force 22 April 1954) (‘*Refugees Convention*’); *Protocol Relating to the Status of Refugees*, opened for signature 31 January 1967, 606 UNTS 267 (entered into force 4 October 1967).

² *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 172 UNTS 1976 (entered into force 23 March 1976); *Convention on the Rights of the Child*, opened for signature 20 November 1989, 1577 UNTS 3 (entered into force 2 September 1990); *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, opened for signature 10 December 1984, 1465 UNTS 85 (entered into force 26 June 1987); *International Covenant on Economic, Social and Cultural Rights*, opened for signature 16 December 1966, 993 UNTS 3 (entered into force 3 January 1976).

³ *Vienna Convention on the Law of Treaties*, opened for signature 23 May 1969, 1155 UNTS 331 (entered into force 27 January 1980) arts 26, 31; *Refugees Convention*, 189 UNTS 137 Introductory Note, 4.

A large proportion of Australia's refugees are processed and resettled in Australia through the United Nations High Commissioner for Refugees' offshore humanitarian program. In 2013–2014, 11 016 visas were granted under this program.⁴ There are also a number of people who apply for asylum within Australia after they have arrived with valid visas (2752 in 2013–2014).⁵ Some asylum seekers arrive in Australia by air, but do not have required visas on arrival and then apply for asylum. However, there is a small number of people who are unable to apply for asylum through the humanitarian program, are unable to obtain a valid visa to come to Australia, are unable to reach Australia by air, and have made the choice to attempt to reach Australia by boat to claim asylum without entering with a valid visa. In 2013–2014, only 978 visa applications were lodged for 'irregular maritime arrival' applications, and 545 visas were granted.⁶

Following recommendations in 2012, Australia restored its domestic legal framework and practice of processing asylum seekers who arrived by sea offshore.⁷ The rationale underpinning this policy was to ensure the asylum seekers would not obtain faster processing as this would have a deterrent effect.⁸ Australia then designated Papua New Guinea ('PNG') and Nauru as states for processing asylum seekers offshore,⁹ raising a number of concerns as to whether Australia is now complying with its international legal obligations. As of 30 October 2014, there were a total of 1044 people on Manus Island, PNG, and 996 people in Nauru.¹⁰

Concerns about conditions in offshore processing centres increased following events on Manus Island in early 2014. Specifically, concerns heightened after the death of a 23-year-old asylum seeker, and injuries to many more people.¹¹ This prompted a PNG judicial inquiry into PNG's treatment of asylum seekers.¹² The PNG Government swiftly acted to shut down that inquiry, a move supported by the Australian Government.¹³ However, the Australian Government did request

⁴ Commonwealth, Department of Immigration and Border Protection, *Department of Immigration and Border Protection 2013–2014 Annual Report* (2014) 108.

⁵ *Ibid* 108.

⁶ *Ibid* 111.

⁷ Commonwealth, *Report of the Expert Panel on Asylum Seekers* (August 2012); *Migration Act 1958* (Cth) as amended by *Migration Amendment Regulations 2012 (No 5)* (Cth).

⁸ Commonwealth, above n 7.

⁹ *Migration Act 1958* (Cth) — *Instrument of Designation of the Independent State of Papua New Guinea as a Regional Processing Country under subsection 198AB(1) of the Migration Act 1958* (October 2012); *Migration Act 1958* (Cth) — *Instrument of Designation of the Republic of Nauru as a Regional Processing Country under subsection 198AB(1) of the Migration Act 1958* (September 2012).

¹⁰ Department of Immigration and Border Protection, 'Joint Agency Task Force Monthly Update: November 2014' (Media Release, 2 December 2012) <<http://newsroom.border.gov.au/releases/joint-agency-task-force-monthly-update-november>>.

¹¹ Rod St George, 'Manus Island, Inside the Horror', *The Age* (online), 7 March 2014 <<http://www.theage.com.au/comment/manus-island-inside-the-horror-20140306-349x8.html>>.

¹² Liam Fox, 'Manus Island Detention Centre Human Rights Inquiry Launched by PNG court', *ABC News* (online), 18 March 2014 <<http://www.abc.net.au/news/2014-03-17/png-court-launches-human-rights-inquiry-into-detention-centre/5324844>>.

¹³ Michael Gordon, 'Abbott and O'Neill Agree: No Human Rights Inquiry for Manus Island', *Sydney Morning Herald* (online), 23 March 2014 <<http://www.smh.com.au/federal-politics/political-news/abbott-and-oneill-agree-no-human-rights-inquiry-for-manus-island-20140322-35a6e.html>>.

its own independent review into the events that occurred.¹⁴ The Governor of PNG further expressed his concern for the detention centre remaining open.¹⁵ There have also been further concerning reports of two asylum seekers allegedly attempting suicide in early 2015.¹⁶ This paper will consider the reports from the United Nations High Commissioner for Refugees ('UNHCR') and the independent review to establish whether it is likely conditions on PNG are upholding Australia's standards. Similarly, it will also examine the earlier review following violent riots on Nauru in July 2013, to consider possible human rights issues there.

Comments have been made that the events on Manus Island were unsurprising given the documented issues concerning PNG's compliance with human rights standards.¹⁷ It is also perhaps not surprising given the lack of obligations PNG has agreed to in comparison to Australia, with PNG only recently withdrawing its Reservations to the *Refugees Convention* and not signing up to another key human rights treaty — the *Convention Against Cruel, Inhuman or Degrading Treatment or Punishment* ('CAT').¹⁸ Nauru does not have Reservations to the *Refugees Convention*, but has not signed up to the *International Covenant on Economic, Social and Cultural Rights* ('ICESCR').

Although there are concerns about the conditions on PNG and Nauru, there also have been a number of people who have lost their lives at sea in attempting to reach Australia (estimated at 964 deaths and missing persons between 2001 and 2012).¹⁹ This is one of Australia's primary justifications for processing and resettling people who arrive by sea on PNG and Nauru, in that it deters people from making the journey by sea, and in turn reduces the 'people-smuggling' trade. According to information from Australian Customs and Border Protection Service, there has been a significant decline in the number of people arriving by sea, with only one vessel with 157 people intercepted in June 2014.²⁰ However, it is unclear whether this is due to the deterrent effect, or whether other measures implemented by the current Government, such as 'tow-backs', are more influential.

¹⁴ Robert Cornall AO, 'Review into the Events of 16-18 February 2014 at the Manus Regional Processing Centre' (Report to the Secretary, Department of Immigration and Border Protection, 23 May 2014) <https://www.immi.gov.au/about/dept-info/_files/review-robert-cornall.pdf>.

¹⁵ Liam Cochrane, 'Papua New Guinea Governor Slams Asylum Seeker Policy', *ABC News* (online), 6 May 2014 <<https://au.news.yahoo.com/a/23227369/papua-new-guinea-governor-slams-asylum-seeker-policy/>>.

¹⁶ Liam Cochrane, 'Manus Island: Two Asylum Seekers Try to Kill Themselves at Detention Centre', *ABC News* (online) 22 January 2015 <<http://www.abc.net.au/news/2015-01-21/manus-island-two-men-try-to-hang-themselves/6032608>>.

¹⁷ Graeme McGregor, 'Manus Island Violence: Shocking but Not Surprising', *ABC News* (online), 21 February 2014 <<http://www.abc.net.au/news/2014-02-21/mcgregor-manus-violence-is-shocking-but-not-surprising/5274518>>.

¹⁸ *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, opened for signature 10 December 1984, 1465 UNTS 85 (entered into force 26 June 1987).

¹⁹ Commonwealth, above n 7, 75.

²⁰ Department of Immigration and Border Protection, *Illegal Entry Vessel Arrivals — 18 September to 17 October 2014*, (2014) <<http://www.border.gov.au/OperationSovereignBorders/Documents/illegalentryvesselarrivals-18september2013to17october2014.pdf#search=Illegal%20Entry%20Vessel%20Arrivals%20-%2018%20September%20to%2017%20October%202014>>.

This paper will explore the international legal obligations Australia has in relation to refugees and asylum seekers, and the difficulties that can arise by having a regional processing system, particularly given Australia should be responsible for any breaches of its international obligations that occur in PNG and Nauru. It will then look at what changes would need to be made to the current system in PNG and Nauru, such as signing up to all relevant treaties, implementing treaty obligations into domestic law, setting up clear policy as to how refugees' civil, social and political rights will be upheld, clarifying the bilateral agreements regarding the joint responsibility of the states, and including some enforcement mechanisms if a state was non-compliant.

However, as the current legal and operational framework stands between Australia, PNG and Nauru, it is unlikely these issues could be addressed expeditiously. Although there are other issues as to whether Australia does comply with its international obligations when processing and resettling asylum seekers onshore, Australia should consider whether the only way to actually be in control of its compliance at this stage may be to cease the practice of transferring asylum seekers to PNG and Nauru. In September 2014, Australia and Cambodia also signed a Memorandum of Understanding relating to resettling refugees in Cambodia, indicating the practice of moving and keeping asylum seekers or refugees offshore is going to expand, rather than retract.²¹

II AUSTRALIA'S INTERNATIONAL LEGAL OBLIGATIONS IN RELATION TO ASYLUM SEEKERS AND REFUGEES

Australia is a party to the *Refugees Convention*,²² which gives particular rights to people seeking asylum and people found to be refugees. The *Refugees Convention* is grounded in Article 14 of the *Universal Declaration of Human Rights*, which declares the right for a person to seek asylum from persecution in other countries.²³ Further, Australia has signed up to a number of other human rights treaties, including the *International Covenant on Civil and Political Rights* ('ICCPR'), the *Convention on the Rights of the Child* ('CRC'), the *CAT* and the *ICESCR*, which impose on Australia further obligations in relation to treatment of people seeking asylum in Australia.²⁴

Under the *Refugees Convention*, a person should be considered to be a refugee if, essentially, they have a well-founded fear of persecution due to their race, religion, nationality, political opinion or membership of a particular social group, they are outside their country of nationality, and they are

²¹ *Memorandum of Understanding between the Government of the Kingdom of Cambodia and the Australian Government Relating to the Settlement of Refugees from Nauru in Cambodia*, Commonwealth of Australia — Cambodia, signed 26 September 2014.

²² *Refugees Convention*, 189 UNTS 137; *Protocol Relating to the Status of Refugees*, opened for signature 31 January 1967, 606 UNTS 267 (entered into force 4 October 1967).

²³ *Universal Declaration of Human Rights*, GA Res 217A (III), UN GAOR, 3rd sess, 183rd plen mtg, UN Doc A/810 (10 December 1948) art 14.

²⁴ *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 172 UNTS 1976 (entered into force 23 March 1976); *Convention on the Rights of the Child*, opened for signature 20 November 1989, 1577 UNTS 3 (entered into force 2 September 1990); *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, opened for signature 10 December 1984, 1465 UNTS 85 (entered into force 26 June 1987); *International Covenant on Economic, Social and Cultural Rights*, opened for signature 16 December 1966, 993 UNTS 3, (entered into force 3 January 1976).

unable or unwilling to return to that country because of that fear.²⁵ The purpose of this paper is not to look at the rules that surround whether or not a person is a genuine refugee, as it is acknowledged that the majority of people who have arrived by boat have in fact been found to be genuine refugees.²⁶ Though, it should be noted, that given the complicated process of determining whether or not a person is a refugee, discrepancies in applying the various rules might occur when different institutions are making this status determination.

The *Refugees Convention* also contains a number of procedural safeguards, such as the right for asylum seekers to have access to courts.²⁷ It provides economic and social rights for refugees such as rights regarding employment and welfare.²⁸ The *Refugees Convention* is aimed at ensuring that people who seek asylum in other countries are not penalised in doing so.²⁹ Accordingly, and importantly, it contains a provision under Article 31 of the *Refugees Convention* that contracting states will not impose penalties on refugees or asylum seekers who enter into a state without authorisation.³⁰ This is in line with the introductory note to the *Refugees Convention*, which states Article 31 is to recognise the fact that the ‘seeking of asylum can require refugees to breach immigration rules’.³¹

Further, the *Refugees Convention* also articulates the customary international legal principle of *non-refoulement* in Article 33, which provides:

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 principle of *non-refoulement* essentially ensures that people are not forced to go back to their country of origin or to any other place where they would face threats to their life or liberty.

The *ICCPR* also contains some important rights relevant to people arriving in Australia to seek asylum, including the right to not be subject to arbitrary arrest or detention,³² and if they are deprived of liberty, to be treated with humanity and respect for the inherent dignity of the human person.³³ It also articulates the principle of *non-refoulement*.³⁴

Asylum seekers who have arrived by sea have included children, and accordingly, the rights under the *CRC* need to be considered. The overarching right under the *CRC* is that organisations should be treating the best interests of the child as the paramount consideration when making any

²⁵ *Refugees Convention*, 189 UNTS 137 art 1A.

²⁶ Janet Phillips, ‘Asylum Seekers and Refugees: What are the Facts’ (Background Note, Parliamentary Library, Parliament of Australia, 2013) 9–10.

²⁷ *Refugees Convention*, 189 UNTS 137 art 16.

²⁸ *Ibid* arts 17–19, 20–24.

²⁹ *Ibid* Introductory Note, 3.

³⁰ *Ibid* art 31.

³¹ *Ibid* Introductory Note, 3.

³² *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 172 UNTS 1976 (entered into force 23 March 1976) art 9.

³³ *Ibid* art 10(1).

³⁴ *Ibid* arts 6–7.

decisions about them.³⁵ There is also the right that children should not be separated from their parents unless it is in their best interest.³⁶ The importance of the family and the right to family reunification is recognised under the *CRC*, as well as under the *Universal Declaration of Human Rights* and the *ICCPR*.³⁷

Article 37 of the *CRC* contains some important obligations for Australia to ensure that:

- no child is subject to cruel, inhuman or degrading treatment;
- there is no arbitrary deprivation of liberty, and if there is deprivation of liberty, it is only ever as a last resort and the child will have the right to legal and other assistance; and
- every child is treated with humanity.³⁸

It again articulates the principle of *non-refoulement*.³⁹ Lastly, there is the right that a child who comes to a country as a refugee should have the same rights as the children who are born in that country.⁴⁰

The *CAT* again articulates the principle of *non-refoulement*.⁴¹ The main provision in this convention imposes obligations on states to prevent any act of torture in any territory under its jurisdiction.⁴² Although there are some important rights that are contained in the *ICESCR*, these are also dealt with in detail in the *Refugees Convention* in relation to economic and welfare rights.⁴³

It is true Australia has not fully implemented all of its convention obligations into Australian domestic law, and even without reference to offshore processing, it would be a far stretch to say Australia is fully complying with its international obligations to onshore asylum seekers and refugees. However, the purpose of this paper is to look at whether Australia is able to, in consideration of the practice of processing refugee claims offshore, comply with its international obligations. The majority of the international obligations outlined above are based from a human rights perspective. Although international human rights can be different to other areas of international law, the mutual promises states make to each other — that they will uphold human rights — are fundamentally the same as other international treaties and, therefore, impose a moral obligation on the states to comply with their promises.⁴⁴ It is clear, in any event, these international

³⁵ *Convention on the Rights of the Child*, opened for signature 20 November 1989, 1577 UNTS 3 (entered into force 2 September 1990) art 3.

³⁶ *Ibid* art 9.

³⁷ *Ibid* art 10. *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 172 UNTS 1976 (entered into force 23 March 1976) art 23(1); *Universal Declaration of Human Rights*, GA Res 217A (III), UN GAOR, 3rd sess, 183rd plen mtg, UN Doc A/810 (10 December 1948) art 16(3).

³⁸ *Convention on the Rights of the Child*, opened for signature 20 November 1989, 1577 UNTS 3 (entered into force 2 September 1990) art 37.

³⁹ *Ibid* art 6–37.

⁴⁰ *Ibid* art 22.

⁴¹ *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, opened for signature 10 December 1984, 1465 UNTS 85 (entered into force 26 June 1987) art 3.

⁴² *Ibid* art 2.

⁴³ *Refugees Convention*, 189 UNTS 137 ch 3–4.

⁴⁴ HLA Hart, 'Are There Any Natural Rights?' (1955) 64 *The Philosophical Review* 175, 185.

obligations are at least framing the political debate in Australia, and have been influential on interpretation of domestic migration legislation.⁴⁵

The *Vienna Convention on the Law of Treaties* states ‘[u]nless a different intention appears from the treaty or is otherwise established, a treaty is binding upon each party in respect of its entire territory’.⁴⁶ However, it also states ‘every treaty in force is binding upon the parties to it and must be performed in good faith’.⁴⁷

This supports the position that in some circumstances, a state could be responsible for extra-territorial events, where to deny responsibility may be seen as not performing its own obligations in ‘good faith’.

This has been the view taken by the European Court of Human Rights,⁴⁸ and the opinion of the UN is that if moving someone to another territory is ‘a link in the causal chain that would make possible violations in another jurisdiction’, this can give rise to responsibility for extra-territorial violations of human rights obligations.⁴⁹

Therefore, it is argued, from an international law perspective at least, Australia’s international obligations extend extra-territorially in some circumstances.⁵⁰

III AUSTRALIA’S HISTORICAL AND CURRENT PRACTICES

Over the past two decades, Australia’s practice in relation to asylum seekers and refugees has been in a state of flux. In 2001, following the MV Tampa incident, which resulted in deaths of multiple people, Australia implemented the ‘Pacific Solution’, and this continued until 2008.⁵¹ The Australian Government decided to transfer the refugees on the MV Tampa to Nauru for processing, and retrospectively enacted legislation to legitimise this process.⁵² Following changes to the *Migration Act 1958* (Cth) (*Migration Act*) to allow for regional processing,⁵³ PNG and Nauru

⁴⁵ Anthony Pastore, ‘Why Judges Should Not Make Refugee Law: Australia’s Malaysia Solution and the Refugee Convention’ (2013) 13(2) *Chicago Journal of International Law* 615, 622; *Plaintiff M70/2011 v Minister for Immigration and Citizenship*; *Plaintiff M106 of 2011 v Minister for Immigration and Citizenship* [2011] HCA 32.

⁴⁶ *Vienna Convention on the Law of Treaties*, opened for signature 23 May 1969, 1155 UNTS 331 (entered into force 27 January 1980) art 29.

⁴⁷ *Ibid* art 26.

⁴⁸ *Banković and others v Belgium and others* [2001] 52207/99 ECHR 890, [54].

⁴⁹ Human Rights Committee, *Recommendation: Communication No. 1539/2006*, 96th sess, UN Doc CCPR/C/96/D/1539/2006 (July 2009) (*Munaf v Romania*) 14.2; See also Human Rights Committee, *Views: Communication No. 829/1998*, 78th sess, UN Doc CCPR/C/78/D/829/1998 (2003), (*Judge v Canada*) 10.6

⁵⁰ Michelle Foster, ‘Protection Elsewhere: The Legal Implications of Requiring Refugees to Seek Protection in Another State’ (2007) 28 *Michigan Journal of International Law* 223, 261–262.

⁵¹ See generally Jaffa McKenzie and Reza Hasmath, ‘Deterring the “Boat People”: Explaining the Australian Government’s People Swap Response to Asylum Seekers’ (2013) 48(4) *Australian Journal of Political Science* 417, 418.

⁵² *Border Protection (Validation and Enforcement Powers) Act 2001* (Cth) ss 5, 6.

⁵³ *Migration Amendment (Excision from Migration Zone) (Consequential Provisions) Act 2001* (Cth) s 4, inserting *Migration Act 1958* (Cth) s 198A.

were then designated regional processing facilities. At this time, PNG was a signatory to the *Refugee Convention* (but with significant Reservations), but Nauru was not.⁵⁴

The initial ‘Pacific Solution’ broadly provided an ‘offshore entry person’ (being essentially someone who had arrived by boat) could not apply for any visa while in Australia.⁵⁵ An immigration officer could then use reasonable force to take an offshore entry person from Australia to a regional processing centre.⁵⁶ After seven years of this practice, the Australian Government ended the ‘Pacific Solution’ in 2008, proclaiming to take a more humane approach to asylum seekers.⁵⁷ Maritime asylum seekers were then able to be processed and apply for visas from within Australia.

However, in 2010, the Government then tried to reinstate the practice of offshore processing of asylum seekers by designating Malaysia as a regional processing centre. This was successfully challenged in the High Court, on the basis that the then section 198A of the *Migration Act* did not give the Government the power to designate Malaysia as a regional processing centre. That section of the *Migration Act* was to be read that a state could only be designated as a regional processing centre if it provided the protections Australia was bound to provide to asylum seekers and refugees under the *Refugee Convention* and other human rights treaties.⁵⁸

Although this decision meant Malaysia could not be designated as a regional processing centre under the then *Migration Act*, it was open to the Government to change the *Migration Act* in order to allow for Malaysia to go ahead. In 2012, the Expert Panel on Asylum Seekers delivered its report which included some recommendations, amongst others, that:

- legislation to support the transfer of people to regional processing arrangements be introduced into the Australian Parliament as a matter of urgency;⁵⁹
- Nauru and PNG were established as regional processing centres;⁶⁰ and
- the agreement with Malaysia was disregarded.⁶¹

In 2012, the *Migration Act* was amended to remove section 198A, and replace it with section 198AA of the current *Migration Act*.⁶² This section clearly states the purpose of this amendment:

This Subdivision is enacted because the Parliament considers that:

⁵⁴ Papua New Guinea became a signatory to the *Refugees Convention* in 1986, and Nauru became a signatory in 2011.

⁵⁵ *Migration Amendment (Excision from Migration Zone) Act 2001* (Cth) s 4, amending *Migration Act 1958* (Cth) s 46A.

⁵⁶ *Migration Amendment (Excision from Migration Zone) (Consequential Provisions) Act 2001* (Cth) s 4, inserting *Migration Act 1958* (Cth) s 198A.

⁵⁷ McKenzie and Hasmath, above n 51.

⁵⁸ *Plaintiff M70/2011 v Minister for Immigration and Citizenship; Plaintiff M106 of 2011 v Minister for Immigration and Citizenship* (2011) 244 CLR 144, 184–205 (Gummow, Hayne, Crennan and Bell JJ).

⁵⁹ Commonwealth, above n 7, [3.54], [3.57].

⁶⁰ *Ibid* [3.44]–[3.57].

⁶¹ *Ibid* [3.58]–[3.70].

⁶² *Migration Act 1958* (Cth), as amended by *Migration Amendment Regulations 2012 (No 5)* (Cth).

- (a) people smuggling, and its undesirable consequences including the resulting loss of life at sea, are major regional problems that need to be addressed; and
- (b) unauthorised maritime arrivals, including unauthorised maritime arrivals in respect of whom Australia has or may have protection obligations under the Refugees Convention as amended by the Refugees Protocol, should be able to be taken to any country designated to be a regional processing country; and
- (c) it is a matter for the Minister and Parliament to decide which countries should be designated as regional processing countries; and
- (d) the designation of a country to be a regional processing country need not be determined by reference to the international obligations or domestic law of that country.⁶³

The Government was attempting to make it clear the international obligations and domestic law of any offshore processing country would not need to be considered as part of the process of designating a state for regional processing centre. Australia then designated PNG and Nauru as states for processing asylum seekers offshore.⁶⁴ Initially, PNG was to just be a processing centre, with the resettlement of refugees to occur in Australia.⁶⁵ However, changes to policy meant all refugees transferred to PNG after 19 July 2013 were to be resettled in PNG,⁶⁶ and by 31 July 2013, all women and children were removed from the Manus Island centre, leaving only single males at the centre.⁶⁷ In May 2014, the first refugees had been settled in Nauru.⁶⁸ As of late 2014, there were still approximately 1 000 people on each of Manus Island and Nauru.⁶⁹

Further, under the *Migration and Maritime Powers Legislation Amendment (Resolving the Asylum Legacy Caseload) Act 2014* (Cth), many sections of the *Migration Act* have been further amended. Notably, a new section 197C has been inserted, which essentially states the obligation of *non-refoulement* is irrelevant in relation to the removal power, and removal may occur even if an assessment of risks in relation to *non-refoulement* has not occurred.

⁶³ *Migration Act 1958* (Cth) s 198AA.

⁶⁴ *Migration Act 1958 (Cth) — Instrument of Designation of the Independent State of Papua New Guinea as a Regional Processing Country under subsection 198AB(1) of the Migration Act 1958* (October 2012); *Migration Act 1958 (Cth) — Instrument of Designation of the Republic of Nauru as a Regional Processing Country under subsection 198AB(1) of the Migration Act 1958* (September 2012).

⁶⁵ *Memorandum of Understanding between the Government of the Independent State of Papua New Guinea and the Government of Australia, Relating to the Transfer to and Assessment of Persons in Papua New Guinea, and Related Issues*, Commonwealth of Australia - Papua New Guinea, signed 8 September 2012.

⁶⁶ *Regional Resettlement Arrangement between Australia and Papua New Guinea on Further Bilateral Cooperation to Combat People Smuggling*, Commonwealth of Australia–Papua New Guinea, signed 19 July 2013; *Memorandum of Understanding between the Government of the Independent State of Papua New Guinea and the Government of Australia, Relating to the Transfer to, and Assessment and Settlement in, Papua New Guinea of Certain Persons, and Related Issues*, Commonwealth of Australia–Papua New Guinea, signed 6 August 2013.

⁶⁷ Cornall, above n 14, 22.

⁶⁸ Department of Immigration and Border Protection, 'First Refugees Settled in Nauru' (Media Release, 22 May 2014) <<http://www.minister.immi.gov.au/media/sm/2014/sm214755.htm>>.

⁶⁹ Department of Immigration and Border Protection, above n 10.

IV AUSTRALIA'S RESPONSIBILITY FOR ACTIONS AND EVENTS IN DESIGNATED STATES

Australia has made it clear that it will not consider its international obligations or the international obligations of the designated states in making a declaration. Indeed, in relation to designating Nauru as a regional processing centre, the Hon Chris Bowen MP, made the following statement:

On the basis of the material set out in the submission from the Department, I think that it is not inconsistent with Australia's international obligations (including but not limited to Australia's obligations under the Refugees Convention) to designate Nauru as a regional processing country ... However, even if the designation of Nauru to be a regional processing country is inconsistent with Australia's international obligations, I nevertheless think that it is in the national interest to designate Nauru to be a regional processing country.⁷⁰

Through its legislative amendments in 2012, the Australian Government has essentially closed the door for a domestic challenge to any declaration of a state as a regional processing centre, regardless of that state's international obligations or practice in relation to refugees and asylum seekers.⁷¹ Despite this limitation of domestic challenge, at an international level, it is still argued both Australia and the state designated as the processing centre would be jointly responsible for any violations of the *Refugees Convention*.⁷² As stated in Part II above, the UN is of the view that responsibility for extra-territorial violations of human rights obligations can arise in certain situations.⁷³

If Australia still has 'effective' control, then it must continue to ensure asylum seekers are treated in a manner consistent with the human rights Australia has agreed to be bound by, regardless of the obligations the designated states have agreed to be bound by.⁷⁴

From an international legal perspective, it is likely that breaches of obligations owed by Australia to refugees and asylum seekers in the states that have been designated as regional processing centres would be treated as breaches of Australia's international obligations if the breach can be attributed to Australia.⁷⁵ Although Australia has not expressly denied its international obligations in relation to transferees arriving in excised places, an approach was taken to explain to transferees that only the PNG Government is responsible for transferees' health and human rights.⁷⁶ However, the correct international position is likely to be that Australia would be responsible for any

⁷⁰ Chris Bowen, Minister for Immigration and Citizenship, *Statement of Reasons for Thinking that it is in the National Interest to Designate Nauru to be a Regional Processing Country*, September 2012, as quoted in Australian Human Rights Commission, *Human Rights Issues Raised by the Transfer of Asylum Seekers to Third Countries* (Discussion Paper, 15 November 2012) 7.

⁷¹ *Plaintiff S156/2013 v Minister for Immigration and Border Protection* (2014) 309 ALR 29.

⁷² Foster, above n 50, 261–262.

⁷³ Human Rights Committee, *Recommendation: Communication No. 1539/2006*, 96th sess, UN Doc CCPR/C/96/D/1539/2006 (July 2009) ('*Munaf v Romania*') 14.2; Human Rights Committee, *Views: Communication No. 829/1998*, 78th sess, UN Doc CCPR/C/78/D/829/1998 (2003), ('*Judge v Canada*') 10.6.

⁷⁴ *Ibid*; *Banković and others v Belgium and others* [2001] 52207/99 ECHR 890 [54].

⁷⁵ International Law Commission, *Responsibility of States for Internationally Wrongful Acts*, adopted in General Assembly Resolution 56/83 (2001) arts 4, 5, 7, 8, 16.

⁷⁶ Cornall, above n 14, 38–39.

breaches of its obligations that occurred in PNG or Nauru, regardless of whether or not it was done by an Australian official.

Given PNG and Nauru have different international obligations from Australia, and a different capacity to Australia to effectively implement obligations, there is great potential for breaches of obligations Australia owes to refugees and asylum seekers that are being processed or resettled in PNG or Nauru. Offshore processing has unquestionably withheld at least certain procedural protections.⁷⁷ Offshore resettlement will also subject refugees to a lesser standard of human rights protections than what they could expect if they were to be resettled in Australia, particularly in relation to employment and welfare.

V THE DIFFERENCES IN INTERNATIONAL OBLIGATIONS BETWEEN AUSTRALIA, PNG AND NAURU AND THEIR CAPACITY TO UPHOLD THOSE OBLIGATIONS

The latest Memoranda of Understanding were signed between Australia and Nauru on 3 August 2013 and with PNG on 6 August 2013.⁷⁸ Neither agreement attempts to deal with who has responsibility for processing the claims of asylum seekers.⁷⁹ They do contain a commitment to ‘treat transferred asylum-seekers in accordance with relevant human rights standards’;⁸⁰ however, it is unclear whether those standards are Australia’s obligations, PNG’s obligations or Nauru’s obligations.

A *Refugees Convention*

Australia does not have any Reservations to the *Refugees Convention*. However, in relation to the *Refugees Protocol*, it has declared that ‘[t]he Government of Australia will not extend the provision of the Protocol to Papua New Guinea’.⁸¹ Nauru became a party to the *Refugees Convention* in 2011, and did not make any Reservations or Declarations.

⁷⁷ Jane McAdam and Kate Purcell, ‘Refugee Protection in the Howard Years: Obstructing the Right to Seek Asylum’ (2008) 27 *Australian Year Book of International Law* 87, 101.

⁷⁸ *Memorandum of Understanding between the Republic of Nauru and the Commonwealth of Australia, Relating to the Transfer to and Assessment of Persons in Nauru, and Related Issues*, Commonwealth of Australia — Nauru, signed 3 August 2013; *Memorandum of Understanding between the Government of the Independent State of Papua New Guinea and the Government of Australia, Relating to the Transfer to, and Assessment and Settlement in, Papua New Guinea of Certain Persons, and Related Issues*, Commonwealth Australia — Papua New Guinea, signed 6 August 2013.

⁷⁹ Australian Human Rights Commission, above n 70, 6.

⁸⁰ *Memorandum of Understanding between the Republic of Nauru and the Commonwealth of Australia, Relating to the Transfer to and Assessment of Persons in Nauru, and Related Issues*, Commonwealth of Australia — Nauru, signed 3 August 2013, cl 17; *Memorandum of Understanding between the Government of the Independent State of Papua New Guinea and the Government of Australia, Relating to the Transfer to, and Assessment and Settlement in, Papua New Guinea of Certain Persons, and Related Issues*, Commonwealth Australia - Papua New Guinea, signed 6 August 2013, cl 17.

⁸¹ *Protocol Relating to the Status of Refugees*, opened for signature 31 January 1967, 606 UNTS 267 (entered into force 4 October 1967) note 3.

Historically, PNG had several Reservations with respect to articles 17(1), 21, 22(1), 26, 31, 32 and 34 and did not accept the obligations in those articles.⁸² Broadly:

- article 17(1) relates to the right to engage in employment;
- article 21 provides refugees should enjoy the same conditions at least as other aliens;
- article 22(1) provides refugees should receive the same elementary education as other nationals;
- article 26 provides refugees should have freedom of movement;
- article 31 relates to states not imposing any penalties on account of people entering into a country without authorisation;
- article 32 prohibits a state from expelling a refugee, save in some circumstances; and
- article 34 contains an obligation for states to facilitate the ‘assimilation and naturalisation of refugees’.

On 20 August 2013, following the 2013 Memorandum of Understanding with Australia, PNG noted its decision to partially withdraw its Reservations, but only in relation to refugees transferred by the Government of Australia.⁸³ Although PNG has partially withdrawn its Reservations, there is particular concern from the UNHCR that PNG does not have the legal and regulatory framework for adequately determining the status of refugees.⁸⁴ In the independent review last year into the events of 16–18 February 2014 at the Manus Regional Processing Centre, it was commented that ‘when the Prime Ministers announced the new processing and resettlement arrangement and its immediate implementation, PNG did not have the necessary policies, procedures and regulations in place to implement it’.⁸⁵ Although it is a welcome step that PNG has withdrawn its Reservations, it appears it still does not have the domestic legal structure to implement the obligations it has agreed to.

B *Other Human Rights Conventions*

PNG is not a party to the *CAT*, or the 1954 *Convention Relating to the Status of Stateless Persons* or the 1961 *Convention on the Reduction of Statelessness*.⁸⁶ Nauru has become a signatory to the *CAT*, but is not a party to the *ICESCR*. Australia, PNG and Nauru are all signatories to the *CRC*.

Accordingly, there are a number of international obligations Australia has in relation to treatment of asylum seekers and refugees under the *Refugees Convention* and other human rights treaties PNG and Nauru have either not signed or only just recently signed. Although they have agreed to some of these obligations, the ability of these states to effectively uphold these obligations in their

⁸² Reservations and Declarations in relation to the *Refugees Convention*, 189 UNTS 137.

⁸³ Ibid note 30.

⁸⁴ UNHCR Regional Representation, ‘Monitoring Visit to Manus Island, Papua New Guinea 23 to 25 October 2013’ (Report, UNHCR, 26 November 2013) 7.

⁸⁵ Cornall, above n 14, 84.

⁸⁶ *Convention Relating to the Status of Stateless Persons*, opened for signature 28 September 1954, 260 UNTS 117 (entered into force 6 June 1960); *Convention on the Reduction of Statelessness*, opened for signature 30 August 1961, 989 UNTS 175 (entered into force 13 December 1975).

domestic system has been questioned.⁸⁷ This is especially important when refugees are resettled in PNG and Nauru, as they are exposed to a potential lifetime in a country that cannot provide the human rights standards they could have expected if they were resettled in Australia.

VI HUMAN RIGHTS CONCERNS IN PNG AND NAURU

A PNG

A 2013 UNHCR submission assessed PNG's compliance with human rights standards, while also investigating whether PNG had followed through with the earlier recommendations made by the UNHCR in 2010.⁸⁸ Some of the main concerns that were highlighted in the June 2013 UNHCR report included that, despite the Memorandum of Understanding between Australia and PNG, PNG had still not codified procedural guidance as to how a refugee status determination should be made and there was only one experienced official responsible for refugee status determinations.⁸⁹ There was also a particular concern for 'refugees who may be lesbian, gay, bisexual, transgender or intersex individuals', as PNG criminalises homosexuality, with potential penalties between three and 14 years imprisonment.⁹⁰

In relation to the rights of children, and of family reunification, the UNHCR was of the view that children should not be transferred to PNG given the inadequate protections for children, and protections for ensuring people will be reunited with their families if they are found to be refugees.⁹¹ Although the Government's policy is now to not send children to PNG, perhaps to avoid any issues with non-compliance with the *CRC*, this does not alleviate the issues with family reunification. As discussed above, the importance of the family and the right to family reunification is recognised under the *Universal Declaration of Human Rights*, the *ICCPR* and the *CRC*.⁹² However, if transferees on Manus Island are assessed as refugees and resettled in PNG, and there is no established facility designated to process and resettle women and children in PNG, potentially refugees will be resettled in PNG and not be able to be reunited with their families.

The UNHCR was also concerned there was a culture of encouraging asylum seekers to return to their country of origin if they were not satisfied with the conditions in the centre. In the UNHCR's

⁸⁷ UNHCR Regional Representation, above n 84, 7–8; Correspondence from António Guterres, United Nations High Commissioner for Refugees, to Chris Bowen, Minister for Immigration and Citizenship of Australia, 5 September 2012 <http://unhcr.org.au/unhcr/index.php?option=com_content&view=article&id=277&catid=35&Itemid=63>.

⁸⁸ Human Rights Liaison Unit, United Nations High Commissioner for Refugees, 'Submission by the United Nations High Commissioner for Refugees for the Office of the High Commissioner for Human Rights' Compilation Report — Universal Periodic Review: Papua New Guinea' Submission to the Office of the High Commissioner for Human Rights, November 2010; UNHCR Regional Representation, above n 84.

⁸⁹ UNHCR Regional Representation, above n 84, 7–8.

⁹⁰ UNHCR Regional Representation, above n 84, 123; *Criminal Code Act 1974* (Papua New Guinea) ss 210, 212.

⁹¹ UNHCR Regional Representation, above n 84, 19, 26.

⁹² *Convention on the Rights of the Child*, opened for signature 20 November 1989, 1577 UNTS 3 (entered into force 2 September 1990) art 10; *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 172 UNTS 1976 (entered into force 23 March 1976) art 23(1); *Universal Declaration of Human Rights*, GA Res 217A (III), UN GAOR, 3rd sess, 183rd plen mtg, UN Doc A/810 (10 December 1948) art 16(3); UNHCR Regional Representation, above n 84, 26.

view, by creating poor detention conditions, as well as pressure from authorities encouraging asylum seekers return to their country of origin, if an asylum seeker did choose to return to their country of origin, the question must be asked whether that could in fact be a voluntary return. In the recent review into events on Manus Island, it came to light that Jeffrey Kianguli, the Centre Operational Manager stated to transferees ‘[y]ou are free to leave PNG and return to your country or another country where you have a right of long term residence at any time’.⁹³ This was in response to legitimate questions from transferees regarding the length of the process, indicating a culture of pressuring asylum seekers to return to their country of origin. If it is not truly a voluntary return, then the UNHCR argues it could be considered ‘constructive *refoulement*’, and accordingly in breach of Article 33 of the *Refugees Convention* (which Australia and PNG have both agreed to).⁹⁴

In February 2014, after transferees were effectively told Australia was not responsible for upholding their human rights on Manus Island, that they should expect little information and a lengthy refugee status determination process, it is perhaps understandable that tensions rose in the Manus Island detention centre.⁹⁵ The statements made to transferees on Manus Island clearly indicated that they would be exposed to extensive detention, calling into question whether that detention was in fact arbitrary, in contravention with Article 9 of the *ICCPR*.⁹⁶ Over the days of 16–18 February 2014, there were violent confrontations resulting in the death of a 23-year-old asylum seeker, and serious injuries to many more.⁹⁷ However, this was perhaps not an unexpected event, according to stories from people who had been working on Manus Island.⁹⁸

The review stated the main causes for the violence were likely the policy change in 2013 to resettle transferees in Australia, the lack of information given to transferees concerning their status, the delays in refugee status determinations, and the physical environment on Manus Island.⁹⁹ It is also clear from the earlier report from the UN in June 2013 that there were some unaddressed concerns about the treatment of asylum seekers in the Manus Island centre.¹⁰⁰ There has even been a call from the Governor of PNG, in his letter to PNG’s Foreign Minister Rimbink Pato, to close the Manus Island centre and for PNG to ‘adopt a more human and morally superior approach than adopting Australian policy and culture or be blinded by our people’s fears and prejudice’.¹⁰¹ It is clear the Manus Island detention centre falls short of many human rights obligations Australia has agreed to abide by, such as arbitrary detention and *non-refoulement*. As stated above, the fact that

⁹³ Cornall, above n 14, 37–38.

⁹⁴ UNHCR Regional Representation, above n 84, 24–25; *Refugees Convention*, 189 UNTS 137 art 33; Morrison, above n 15 (stating) that 251 people have now voluntarily left Australian offshore processing centres since Operation Sovereign Borders commenced on the 18 September 2013.

⁹⁵ Cornall, above n 14, 37–39, 69–70; Australian Human Rights Commission, above n 70, 21.

⁹⁶ *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 172 UNTS 1976 (entered into force 23 March 1976) art 9.

⁹⁷ Geoff Thompson and Karen Michelmore, ‘The Manus Solution’, *ABC Four Corners* (online) 28 April 2014 <<http://www.abc.net.au/4corners/stories/2014/04/28/3991401.htm>>; Cornall, above n 14.

⁹⁸ St George, above n 11; Thompson and Michelmore, above n 97.

⁹⁹ Cornall, above n 14, 69–70.

¹⁰⁰ UNHCR Regional Representation, above n 84.

¹⁰¹ Cochrane, above n 15.

the processing or resettlement of refugees occurs within PNG rather than Australia's territory does not mean that Australia does not have responsibility for any events and actions that occur there.

B *Nauru*

In July 2013, there were violent riots in the Nauru facility.¹⁰² The causes of these riots are believed to be a delay in the refugee status determinations, lack of information provided to asylum seekers, a failure to have adequate administrative structures in place, and a lack of security at the facility.¹⁰³ This is unsurprising given the concern that, although Nauru has signed the *Refugees Convention* and its protocol, 'there is no domestic legal framework, nor is there any experience or expertise to undertake the tasks of processing and protecting refugees on the scale and complexity of the arrangements under consideration in Nauru'.¹⁰⁴

Recommendations from the 2013 review into the riots included, amongst others, changes to the physical centre, strengthening of administrative arrangements, appropriate communication of information to transferees, and a plan be developed to facilitate an understanding of 'duty of care' in the detention centre.¹⁰⁵ It is welcomed that progress appears to have been made in Nauru, especially in relation to getting children into educational facilities and upgrading health services. However, the commitment in April 2014 to only make 60 refugee status determinations per month, given that at the time there were over 1000 detainees on Nauru, indicates that there is still likely to be lengthy delays.¹⁰⁶ It is also concerning that people who have been resettled have only received temporary protection visas, and there is uncertainty as to whether Nauru will be able to provide refugees with the required social and economic rights as required under the *Refugees Convention*.

Clearly, there are some issues with the capability of Australia to comply with its international obligations, such as prohibiting arbitrary detention and providing the required economic and social rights, by transferring refugees who arrive by boat to PNG and Nauru. The practice has also been criticised by the Australian Human Rights Commission as a direct contravention of Article 31 of the *Refugees Convention*; sending them to a place where conditions would be less favourable than if they were to remain in Australia is essentially a penalty on those asylum seekers arriving without authorisation.¹⁰⁷ However, a contravention of Article 31 can be excused if there is a legitimate reason.

¹⁰² Keith Hamburger, 'Executive Report of the Review into the 19 July Incident at Nauru RPC' (Report to the Department of Immigration and Citizenship, 8 November 2013) 4–5.

¹⁰³ Ibid 5–6.

¹⁰⁴ Correspondence from António Guterres, United Nations High Commissioner for Refugees, to Chris Bowen, Minister for Immigration and Citizenship of Australia, 5 September 2012
<http://unhcr.org.au/unhcr/index.php?option=com_content&view=article&id=277&catid=35&Itemid=63>.

¹⁰⁵ Hamburger, above n 102, 12–13.

¹⁰⁶ Scott Morrison, Minister for Immigration and Border Protection and David Adeang, Nauru Minister for Justice, 'Australia and Republic of Nauru Joint Ministerial Forum to Oversee Implementation of Regional Partnership between Australia and Nauru' (Joint Statement, 11 April 2014)
<<http://www.minister.immi.gov.au/media/sm/2014/sm213447.htm>>.

¹⁰⁷ Australian Human Rights Commission, above n 70, 12.

VII ARE THERE ANY LEGITIMATE REASONS FOR NON-COMPLIANCE?

The main thrust of the 2012 *Report from the Expert Panel on Asylum Seekers* ('*Expert Report*') was prevention of loss of life of people choosing to travel to Australia by sea required urgent action by the Australian Government.¹⁰⁸ Over the period 2001 to June 2013, there were 964 asylum seekers and crew lost at sea, and since October 2009, 604 people lost their lives.¹⁰⁹ The *Expert Report* states the purpose in discouraging maritime voyages was not to 'punish' asylum seekers, but was to ensure that people arriving by boat do not gain an 'advantage' over people seeking asylum through regular migration pathways, thereby creating a disincentive for coming by boat.¹¹⁰

The amendments to the *Migration Act* implemented after the *Expert Report* were aimed at directly addressing the issues of people smuggling and the loss of life at sea.¹¹¹ On the face of it, the deterrence argument is directly at odds with the obligation to not place punitive measures on asylum seekers who enter into the country unauthorised. However, this obligation can be excused if there is an appropriate justification for doing so.¹¹² The *Expert Report* acknowledges there are a number of 'push' and 'pull' factors that impact on the decision of people to leave their current situation.¹¹³ The *Expert Report* goes on to say '[p]ush factors that drive individuals out of countries of origin are usually associated with instability or violence (either generalised or specifically targeting an individual), lack of opportunity or disaster'.¹¹⁴ However, the *Expert Report* also states there is no precise data as to the importance of 'pull' factors on asylum seekers choosing to travel by sea, but seems confident to conclude, regardless, that national policy can effectively deter people choosing to travel to Australia by boats.¹¹⁵ The *Expert Report* broadly states 'pull' factors for regular migrants include things such as stability, empowerment, economic prospect, education and existing diasporas, but acknowledges there is little data as to why asylum seekers or refugees choose the country of destination.¹¹⁶

The issue is that while reducing people travelling by boat is a positive outcome, there appears to be no evidence to support the fact that establishing offshore processing on PNG and Nauru actually achieves as much.¹¹⁷ A joint submission from community members and organisations working within the asylum seeker and refugee sector are of the opinion that reopening the detention centres on Manus Island or Nauru will not deter people from attempting to travel to Australia by boat.¹¹⁸

¹⁰⁸ Commonwealth, above n 7, 19 citing Australian Customs and Border Protection Service, 'Number of Deaths and Missing Persons at Sea from October 2001 to June 2012' (2012).

¹⁰⁹ Ibid.

¹¹⁰ Commonwealth, above n 7, 47 [3.41].

¹¹¹ *Migration Act 1958* (Cth) s 198AA.

¹¹² *Refugees Convention*, 189 UNTS 137 art 31.

¹¹³ Commonwealth, above n 7, 59.

¹¹⁴ Ibid 60.

¹¹⁵ Ibid 31 [2.5].

¹¹⁶ Ibid 60.

¹¹⁷ John Menadue, Arja Keski-Nummi and Kate Gauthier 'A New Approach. Breaking the Stalemate on Refugees and Asylum Seekers' (2011) *Centre for Policy Development* 24 <<http://cpd.org.au/2011/08/a-new-approach-breaking-australia%E2%80%99s-stalemate-on-refugees-and-asylum-seekers/>> quoting Jane McAdam, 'Missing the Boat on a Regional Solution' (2011) *Human Rights Defender* 2, 4.

¹¹⁸ Human Rights Law Centre, *Submission to the Expert Panel on Asylum Seekers* (16 July 2012) 2 <<http://www.hrlc.org.au/files/Joint-Submission-to-Expert-Panel-on-Boat-Arrivals.pdf>>.

The view is that ‘people get on boats because they have no other choice’,¹¹⁹ rather than it being the most attractive choice because of other ‘pull factors’. An estimated 70 per cent (during the original Pacific Solution) to 90–95 per cent (during the period of 2007 to 2010) have been found to be genuine refugees under the *Refugees Convention*.¹²⁰ Accordingly, people choosing to make the voyage by boat have been found to genuinely have a ‘well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion’ if they return to their country of origin.¹²¹

To have a serious ‘deterrent’ to people choosing to travel by sea, it has been commented the domestic system would have to be worse than wherever they are fleeing.¹²² If deterrence worked at all, the deterrence Australia would have to provide would need to be so extreme it would be a worse option than the persecution faced in the asylum seekers’ place of origin. Therefore, it seems, following this logic, the only way to deter people from travelling by sea would in fact be to breach other international human rights obligations to the point of making it a worse option than the place that is being fled. However, even if the justification could be proved, this would only excuse the ‘penalty-like’ conduct that would amount to a breach of Article 31 of the *Refugees Convention*, and it would still not be able to justify a breach of other fundamental obligations, such as prohibitions on arbitrary detention and *non-refoulement*.

Although deterring people from travelling by sea and deterring people smugglers are worthwhile and legitimate goals, there seems to be no direct evidence to suggest these measures do actually influence asylum seekers’ decision whether to attempt the risks of travelling to Australia by boat.¹²³ The opinion of frontline workers is it is unlikely that a policy of offshore processing is a sufficient deterrent; however, there is still a lack of reliable data as to the impact of deterrent measures.¹²⁴ The most logical recommendation to follow through with, if the Government is eager to follow through with the recommendations from the *Expert Report*, would be to fund the research to attempt to obtain evidence as to whether it is actually a deterrent.¹²⁵ This may then be able to assess whether there could be a level of deterrence or penalty that would go far enough to have an impact on the choice to travel by sea, but not so far as to breach other international obligations that cannot be justified (such as *non-refoulement*).

VIII RECOMMENDATIONS

Without the evidence of the effect of processing asylum seekers offshore being a main deterrent (rather than other policies), it is difficult to conclude there are legitimate reasons that justify the breaches of complying with international obligations under the *Refugees Convention*. However, it does not necessarily mean the overall framework of processing asylum seekers and resettling offshore inherently causes a breach of international obligations. It just makes it far more difficult for Australia to comply with its obligations. What is clear is the current practice of Australia using

¹¹⁹ Ibid.

¹²⁰ Phillips, above n 26, 8–9.

¹²¹ *Refugees Convention*, 189 UNTS 137 art 1.

¹²² Menadue, Keski-Nummi and Gauthier, above n 117, 31.

¹²³ Commonwealth, above n 7, 31.

¹²⁴ Human Rights Law Centre, above n 118, 7–9.

¹²⁵ Commonwealth, above n 7, 46.

PNG and Nauru as its regional processing centres definitely falls short of what could be expected of Australia.

The first step to ensure Australia complies with its international obligations is to make it a requirement to consider the international obligations of the offshore state. Accordingly, section 198AA of the *Migration Act* should be amended to reflect this requirement. In order to designate a state as a regional processing centre, the section should provide the state must have agreed to be obliged by the *Refugees Convention* and all other relevant international human rights conventions, such as *ICCPR*, *ICESCR*, *CAT* and *CRC*. It should also require the state must have the actual capacity to uphold those obligations to a standard that is comparable to the standard Australia could provide.

Before being designated as a regional processing centre, the state should have a detailed national policy for the resettlement of refugees in that country, which addresses how the social, political and civil rights of refugees are to be upheld.¹²⁶ For example, the recent review into Manus Island suggested that ‘the current measures and any further initiatives which will expedite the finalisation of PNG refugee status determinations and resettlement and removal processes be implemented as quickly as possible with appropriate assistance’.¹²⁷ This is aimed at avoiding a breach of Article 9 of the *ICCPR* relating to arbitrary detention. Further, it was recommended that overall improvements to PNG’s security, law and order were required.¹²⁸

There should be a sufficiently enforceable and clear agreement between Australia and the offshore state as to the joint responsibility for ensuring obligations are upheld, along with an enforcement process if these obligations are not upheld. Any agreement should specify the relevant human rights standards are those that could be expected of Australia, or the highest possible standards of rights that the asylum seekers or refugees could expect from either state. Further, the states should agree to the jurisdiction of the International Court of Justice and agree to be bound by any of its recommendations.¹²⁹ While agreeing to the jurisdiction may not ultimately ensure there is sufficient enforcement for any breaches of agreements, it would be an essential part of a system that would ensure Australia could meet its obligations while processing refugees offshore.

There is also a risk that, with different domestic systems assessing claims for refugee status, there would be a discrepancy in decision-making. To address this, the regional processing system may need to have an avenue to review offshore decisions by Australian courts. However, this is obviously a difficult jurisdictional structure,¹³⁰ and may result in further undue delays and costs.

Currently, transferees are only required to undergo a short health, security and identity check in Australia.¹³¹ The UNHCR has recommended that a regional processing system would need to

¹²⁶ UNHCR Regional Representation, above n 84, 26.

¹²⁷ Cornall, above n 14, 12.

¹²⁸ UNHCR Regional Representation, above n 84, recommendations 4–5.

¹²⁹ *Charter of the United Nations* art 92; *Statute of the International Court of Justice* art 36.

¹³⁰ *Jurisdictional Immunities of the State (Germany v Italy; Greece intervening) (Judgement)* [2012] ICJ Rep 99.

¹³¹ *Memorandum of Understanding between the Government of the Independent State of Papua New Guinea and the Government of Australia, Relating to the Transfer to, and Assessment and Settlement in, Papua New Guinea of*

include an adequate pre-transfer assessment, to ensure that if any asylum seekers had a particular vulnerability that could not be adequately managed in a third country, or if the transfer would lead to separation from immediate family, then that transfer should not proceed.¹³² This would ensure Australia would not be in breach of its obligations, especially in relation to *non-refoulement* by sending a person to a regional processing centre, where because of some individual trait of that person; they would suffer threats to their life or freedom on account of one of the five Convention grounds. However, unfortunately, under the new section 197C of the *Migration Act*, it is now clear a full assessment of potential risks in relation to *non-refoulement* will not occur. This is particularly concerning in PNG where, for example, homosexual asylum seekers and refugees are exposed to an unacceptable risk in PNG society because of the criminalisation of homosexuality.¹³³

When resettlement in the designated state is inappropriate or to an inadequate standard, or the asylum seeker is not transferred to the state in the pre-transfer risk assessment, there should be appropriate domestic legislation to ensure that person is able to apply for protection in Australia.¹³⁴ Therefore, it would be appropriate to have this specifically clarified in the sections relating to unauthorised maritime arrivals. Accordingly, section 46A of the *Migration Act* should be amended to allow for asylum seekers to apply for protection visas from within Australia in these circumstances.¹³⁵

PNG and Nauru have worked towards being bound by the majority of international legal obligations Australia has, with some exceptions regarding the *CAT* and the *ICESCR*. However, the issue remains that while they have agreed to the obligations, they do not actually have the capacity to uphold them. If PNG and Nauru had the willingness, capacity and framework to uphold all of the same international obligations Australia has agreed to, essentially there could be a system where transferring refugees to PNG or Nauru would not cause potential for breaches of Australia's obligations. The practical reality of raising the standard in PNG and Nauru would likely be costly and time-consuming.

As the arrangements for offshore processing currently stand, it is difficult to see the potential for breaches of international obligations could be overcome quickly. Given these difficulties, the only appropriate recommendation in the short term would be to cease transferring asylum seekers to PNG and Nauru until such time as those states had the capacity and willingness to uphold international obligations.

IX CONCLUSION

Australia has a number of obligations in relation to the processing of asylum seeker claims and the treatment of refugees. These arise from a number of instruments; most importantly, the *Refugees Convention*. However, over recent decades, Australia has been slowly eroding its regime of

Certain Persons, and Related Issues, Commonwealth of Australia — Papua New Guinea, signed 6 August 2013, cl 10(d).

¹³² UNHCR Regional Representation, above n 84, 14.

¹³³ *Criminal Code Act 1974* (PNG) ss 210, 212.

¹³⁴ UNHCR Regional Representation, above n 84, 26.

¹³⁵ *Migration Act 1958* (Cth) s 46A.

protecting refugee rights, most notably since the 2001 amendments to the *Migration Act*.¹³⁶ This was the first trial of the ‘Pacific Solution’ of processing asylum seekers offshore in Nauru and PNG. At the time, Nauru was not a signatory to the *Refugees Convention*, and PNG still had significant Reservations to the *Refugee Convention*. After a change of Government in 2007, the ‘Pacific Solution’ was brought to an end in 2008. However, following a report in 2012, regional processing was again seen as the only solution to the ‘people smuggling’ problem and the PNG and Nauru regional processing centres were reopened.

Since 2012, asylum seekers arriving in Australia by boat have been transferred to PNG and Nauru for processing. Changes in 2013 meant refugees would then be resettled as well on PNG and Nauru, and people have now been resettled. Disturbing and violent events on Manus Island in 2014 brought into the spotlight the inadequate facilities on PNG. Further, a report into these events highlighted some concerning statements made to asylum seekers — that the Government of Australia was not responsible for their health and other human rights; that they could expect extensive arbitrary detention; and, that if they did not like these standards they could return to their country of origin. Clearly, these highlight concerns of potential breaches of asylum seekers right to not be arbitrarily detained, and not to be subject to *refoulement*. The view that Australia was not responsible for asylum seekers’ rights is clearly at odds with international principles of state responsibility. Australia cannot avoid responsibility for any breaches that occur in PNG or Nauru in relation to transferees from Australia.

In 2012, a report with the primary term of reference of ‘how to best prevent asylum seekers risking their lives by travelling to Australia by boat’ recommended a return to the deterrence policy of transferring refugees to PNG and Nauru. This was despite the fact the report acknowledged there was little significant data indicating this would in fact have a deterrent effect. One of the most sensible recommendations from the report that should perhaps have received more attention was to conduct more research into the push and pull factors for asylum seekers. However, without this evidence, it seems there is little justification for a deterrent-based system, which contravenes Article 31 of *Refugees Convention* by imposing penalties on asylum seekers who have arrived without the proper authorisation. Even if there were evidence to justify a breach of Article 31, it would not justify other breaches of other important obligations, such as prohibitions on arbitrary detention and *non-refoulement*.

However, it is possible to conceptualise a framework for regional processing that could ensure Australia complies with its international obligations. This would have to include the third party states agreeing to all of the human rights treaties Australia is bound by, and having the domestic capacity to implement a framework to ensure those rights are upheld. It would also require the state to enter into a more detailed agreement so Australia could ensure compliance if those rights were breached. Further, there should be safety provisions to ensure that asylum seekers with particular requirements would not be subject to any unnecessary threats by being transferred. It is clear the current practice of using PNG and Nauru is not up to required standards. However, by getting the regional processing framework up to a standard that would ensure Australia’s compliance with international obligations, it is likely to remove any deterrent effect it would have.

¹³⁶ Angus Francis, ‘Examining the Role of Legislators in the Protection of Refugee Rights: Toward a Better Understanding of Australia’s Interaction with International Law’ (2006) 13 *Australian International Law Journal* 147, 152.

Therefore, it seems there would be little justification for committing any resources and funding to a regional processing solution. A far more efficient solution would be to close the detention centres on PNG and Nauru and concentrate resources on onshore processing and resettlement programs.

Unfortunately, this is an area that highlights the difficulty in balancing international law, state sovereignty and domestic politics. As John Howard put it in 2001, '[w]e will decide who comes to this country, and the circumstances in which they come'.¹³⁷ The Hon Chris Bowen said even if designating a regional processing centre conflicts with Australia's international obligations, if it is in the national interest, offshore processing should go ahead.¹³⁸ This hard policy line maintains today, with the current Government's views that the refugees should not be given a ticket to a first world country.¹³⁹ Unfortunately, this policy line fails to give proper weight to the international obligations of providing protections to people seeking asylum that Australia has agreed to under the *Refugees Convention* and other treaties. The current practice of sending people to PNG and Nauru is clearly inadequate. Unfortunately though, it seems evident from the recent agreement with Cambodia there is a commitment to expanding this practice regardless of the human rights obligations of Australia or of the designated offshore states.

Author note

This article was written as of January 2015 and does not take into account any changes in law and/or policy after this date.

Notable changes to the law relevant to this paper after this date include the Australia Border Force Act 2015 (Cth), changes to the Migration Act 1958 (Cth) and in particular, one pending case before the High Court.

The Australia Border Force Act 2015 (Cth) introduced offences essentially for people working on Nauru and PNG to disclose information obtained by them in their role (with some exceptions), which has added to the concerns in relation to getting accurate information in relation to PNG and Nauru.

There were also further changes to the Migration Act 1998 (Cth) with the introduction of the Migration Amendment (Protection and Other Measures) Act 2015 (Cth) and the Migration Amendment (Regional Processing Arrangements) Act 2015 (Cth). Interestingly, the original bill for the Migration Amendment (Protection and Other Measures) Act 2015 (Cth) contained Schedule 2, which contained further proposed amendments that related to Australia's protection obligations under certain international instruments, but Schedule 2 of the bill was not ultimately passed.

¹³⁷ Prime Minister John Howard, '2001 Federal Election Campaign Launch Speech' (Speech delivered at Sydney, 28 October 2001).

¹³⁸ Australian Human Rights Commission, above n 70.

¹³⁹ 'No Ticket to First World: Morrison' *SBS News* (online), 22 May 2014 <<http://www.sbs.com.au/news/article/2014/05/22/no-refugee-ticket-first-world-morrison>>.

The Migration Amendment (Regional Processing Arrangements) Act 2015 (Cth) introduced section 198AHA to the Migration Act 1958 (Cth) which relates to powers to take action in relation to regional processing functions of a country. The validity of this section is currently being considered (amongst other things) in the case of Plaintiff M68/2015 v. Minister for Immigration and Border Protection & Ors.¹⁴⁰ In October 2015, the High Court heard this case, which relates to the detention of a woman in Nauru. Arguments for the plaintiff included that the Government effectively controlled the detention on Nauru and questions the constitutional validity of this arrangement under section 61 of the Australian Constitution. The Nauruan Government has indicated the facility would become an open facility, and committed on 5 October 2015 to processing the remaining 600 asylum seekers within a week.¹⁴¹

While this paper does not purport to go into the cause of the recent legislative changes or the current case before the High Court in any detail, it will be interesting to see the High Court's judgment and any resulting political response. Hopefully, legal and political developments will not further hinder Australia's commitment to its international human rights developments.

¹⁴⁰ [2015] HCATrans 256.

¹⁴¹ The Republic of Nauru, 'No More Detention for Nauru Asylum Seekers' (Media Release, 5 October 2015) <<http://www.naurugov.nr/government-information-office/media-release/no-more-detention-for-nauru-asylum-seekers.aspx>>.