

THE REVIVAL OF THE PACIFIC SOLUTION: AN ANALYSIS OF THE LEGAL PARAMETERS OF OFFSHORE PROCESSING IN AUSTRALIA

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I INTRODUCTION

According to recent statistics released by the United Nations High Commissioner for Refugees (UNHCR), more people are seeking asylum and becoming refugees than at any time since 2000.¹ Coinciding with this trend, an increasing number of States appear reluctant to offer protections guaranteed to asylum seekers under the Refugee Convention,² resorting to measures which seek to deflect State responsibility and deter persons from seeking asylum in their countries. Among the most controversial of these has been the adoption of “offshore processing” policies, the aim of which is to transfer asylum seekers from a “receiving” State to a third country (often one to which they have never been) where their claims for asylum can be processed under the Convention.³ The ideology underpinning this concept is one of ‘burden sharing’; that is, where one State bears a disproportionate responsibility, or “burden”, of providing for the protection needs of refugees or asylum seekers, it retains the assistance of a third country to

¹ UNHCR, Global Trends Report 2011, 18/06/2012, <http://www.unhcr.org/4fd6f87f9.html>

² Convention relating to the Status of Refugees (adopted 28/07/1951, entered into force 22/04/1954) and Protocol relating to the Status of Refugees (adopted 31/01/1967, entered into force 4/10 1967) (“**Refugee Convention**”)

³ Offshore processing is a variation of traditional “protection elsewhere” regimes, which typically involve a State acting on the basis that the protection needs of an asylum seeker should be considered or addressed somewhere other than in the territory of the state where the person seeks protection. Other contexts in which protection elsewhere practices arise are “country of first arrival” (i.e. where person is denied access to asylum on the basis that he / she has found protection in another country) or “safe third country” situations which presume that an applicant could or should have requested asylum if he/she passed through a safe country en route to the country where asylum is requested: see Michelle Foster, *Responsibility Sharing or Shifting? “Safe” Third Countries and International Law*, (2008) 25 *Refugee* 64 for a detailed discussion on the various types of “protection elsewhere” practices.

address those protection needs within its territory.⁴ While this model has the appearance of being fair and equitable, in practice, it has been increasingly exploited by States as a means of shifting responsibility rather than equitably sharing it.⁵ This could not be more evident than in Australia which, although having ratified the Refugee Convention, has in the last decade overseen the adoption of several legislative reforms purposively aimed at discouraging the arrival of asylum seekers on its shores.

The most contentious of these reforms has been the adoption of the "offshore processing" mechanism in 2001 under the now repealed section 198A of the Migration Act,⁶ pursuant to which the former Coalition Government led by former Prime Minister, John Howard, facilitated the transfer of "offshore entry persons" to Nauru and Papua New Guinea (PNG) for processing under its controversial "Pacific Solution".⁷ Offshore processing under the Pacific Solution ended briefly in 2008 after the new Labor Government took steps to close offshore processing centres on Nauru and PNG citing it as "a cynical, costly and ultimately unsuccessful exercise".⁸ However, that same Government has now sought to resurrect aspects of the Pacific Solution by re-establishing offshore processing in

⁴ Foster (2008) above n 3, 64-65, notes that while different names are ascribed to variations of "protection elsewhere" regimes, "the core legal question remains the same, *viz*, whether a state may deflect its responsibility under international law by transferring a refugee to another state".

⁵ *Ibid.*

⁶ Section 198A of the Migration Act 1958 (Cth) (**Migration Act**) was repealed by the Migration Amendment (Offshore and Regional Processing) Act 2012 (Cth) (**Amendment Act**) and since been replaced by section 198AB.

⁷ The Pacific Solution included a series of amendments to the Migration Act, including the excision of certain territories from the Australian migration zone in order to prevent asylum seekers arriving by boat in Australian territories from making valid visa applications. The amendments also created a new category of unauthorised arrival – an 'offshore entry person' – a person who arrives unlawfully at one of the offshore areas. Such persons are prohibited from applying for a protection visa unless the Minister for Immigration and Citizenship (**Minister**) considers that it is in the public interest to do so: see section 46 of the Migration Act. For further analysis see Michelle Foster and Jason Pobjoy, 'A failed case of Legal Exceptionalism? Refugee Status Determination in Australia's "Excised Territory"' (2011) 23 *IJRL* 583.

⁸ 'Flight from Nauru ends Pacific Solution', *Sydney Morning Herald* (8/02/2008), <http://news.smh.com.au/national/flight-from-nauru-ends-pacific-solution-20080208-1qww.html>

Nauru and Manus Island under what is being described as the “Pacific Solution Mark II”.⁹ This policy reversal has come after the Government publicly endorsed¹⁰ the suite of recommendations published by the Houston Expert Panel¹¹ in August 2012, which call for a return to regional processing of asylum seekers in Nauru and PNG under the “no advantage principle”; that is, the adoption of deterrence measures to actively discourage asylum seekers from embarking on maritime voyages to Australia by ensuring that such persons will not be advantaged by engaging people smugglers to attempt entry into Australia.¹²

Whilst a return to offshore processing in the Pacific has been pitched by the Government as a “regional solution” to decrease boat arrivals and “save lives at sea”,¹³ it has been criticised as unworkable for several reasons. The key contention is that the return to offshore processing in Nauru or PNG is unlawful as it places Australia in breach of its international and domestic law obligations.¹⁴ Given that refugee status determination (RSD)

⁹ Referred to as the ‘**New Strategy**’ in this paper.

¹⁰ Phillip Coorey, Judith Ireland and Jessica Wright, ‘*Gillard Backs Experts Asylum Seeker Report*’, *Sydney Morning Herald* (13/08/2012), <http://www.smh.com.au/opinion/political-news/gillard-backs-experts-asylum-seeker-report-20120813-24417.html>.

¹¹ Angus Houston AC, Prof Michael L’Estrange AO and Paris Aristotle AM (**Expert Panel**), ‘*Report of the Expert Panel on Asylum Seekers*’ (**Expert Report**) (August 2012), <http://expertpanelonasylumseekers.dpmc.gov.au/report>

¹² The Expert Report includes a suite of recommendations to reduce irregular migration in Australia. While some have led to positive outcomes (e.g. the Government has agreed to increase Australia’s annual resettlement intake to 20,000 per year and has committed to increase funding for capacity-building initiatives in the region), Some commentators argue that they do not outweigh the return to offshore processing in the Pacific: see Graham Thom, ‘*Houston report a major setback for refugee rights*’, *ABC News* (13/08/2012), <http://www.abc.net.au/unleashed/4195746.html>; Savitri Taylor, ‘*Wicked Problems and Good Intentions*’ *Inside Story* (20/08/2012) <http://inside.org.au/wicked-problems-and-good-intentions/>

¹³ Transcript, Chris Bowen Interview with Fran Kelly, ABC Radio National Breakfast (14/08/2012), <http://www.minister.immi.gov.au/media/cb/2012/cb189217.htm>

¹⁴ Crock, Ghezelbash & McAdam, ‘*Pacific Solution 2 sparks humanitarian concerns*’, *Crikey* (14/08/12) http://www.crikey.com.au/2012/08/14/pacific-solution-2-sparks-humanitarian-concerns/?wpmp_tp=1; Guy Goodwin-Gill ‘*Offshore processing won’t let Australia off the hook*’, *Sydney Morning Herald* (24/08/2012), <http://www.smh.com.au/opinion/politics/offshore-processing-wont-let-australia-off-the-hook-20120823-24ob4.html>

procedures and economic resources available in Nauru and PNG are qualitatively inferior to those in Australia,¹⁵ it is argued there is a *real* risk that asylum seekers will be denied “effective protection” if processed there.¹⁶ This concern has been heightened by the Government’s endorsement of the Panel’s ‘no advantage’ principle which sets out to deter refugees from seeking asylum in Australia by not only transferring them offshore but by ensuring that they will not be resettled more quickly than if they had pursued “regular migration pathways”.¹⁷ Moreover, it is argued that by focusing exclusively on Australia’s “problem”, the New Strategy, like its predecessor fails to provide a “regional solution” to irregular migration and does nothing to alleviate refugee situations within the Asia-Pacific region¹⁸. In particular, commentators argue that the implementation of such policy fails to recognise the underlying human rights issues which prompt asylum seekers to embark on dangerous voyages in the first place¹⁹ and will either do nothing to stop the flow of asylum seekers reaching

¹⁵ Crock, Saul & Dayastri *Future Seekers II: Refugees and Irregular Migration in Australia* (Federation Press, 2006) Annandale, 129.

¹⁶ ‘Not for Profits Slam Expert Panel on Asylum Seekers’, *Probono Australia* (14/08/2012) <http://www.probonoaustralia.com.au/news/2012/08/not-profits-slam-expert-panel-asylum-seekers#>

¹⁷ Chris Uhlmann, Interview transcript with Chris Bowen, *ABC News* (13/08/2012) <http://www.abc.net.au/7.30/content/2012/s3566923.htm>; Savitri Taylor ‘*The Devil’s in the Detail*’, *Inside Story* (5/09/2012) <http://inside.org.au/the-devil-is-in-the-detail/>; Chris Bowen Interview with Lyndal Curtis, (15/08/2012) <http://www.minister.immi.gov.au/media/cb/2012/cb189319.htm>

¹⁸ Refugee Council, ‘*Nauru No Solution*’ (22 December 2012) <https://www.refugeecouncil.org.au/n/mr/111222-Nauru.pdf>. See comments made in relation to the Pacific Solution by Susan Kneebone, ‘*The Legal and Ethical Implications of Extra-Territorial Processing of Asylum Seekers: Europe Follows Australia*’, 53 in *Seeking Asylum in Australia: 1995–2005 Experiences and Policies*, Institute for Public History and the Australian Centre for the Study of Jewish Civilisation, Monash University, http://www.safecom.org.au/monashconf05-kneebone.htm&ei=GbaVUPxu7ZWJB8iegGA&usg=AFQjCNGLzt_PXEYTuK-wOT50Egwsprysig,

¹⁹ See Savitri Taylor, ‘*What Has the Bali Process Got to Do with It?*’, *Inside Story* (2/07/2012) <http://inside.org.au/what-has-the-bali-process-got-to-do-with-it/>; Submission by Jane McAdam et al to Expert Panel on Asylum Seekers dated 11/12/2012 (**Law Academic Submission**)

Australia,²⁰ or simply divert the flow of asylum seekers onto equally risky journeys to other countries.²¹ The problem which this poses for the Government is twofold; any failure by Australia to act in accordance with its international obligations, in particular Article 33 of the Refugee Convention, will not only further international criticism of its treatment of refugees, but more relevantly in line with recent High Court decisions,²² it will open the door for further domestic legal challenges to its policies.²³

While Australia has a sovereign right to determine who enters its territory, such right is confined to operate within the parameters of legal obligations it has *voluntarily* accepted by ratifying various international treaties.²⁴ Therefore, if the Government is to engage in offshore processing as part of its long-term asylum seeker policy, it must comply with Australia's obligations under international law. The practical questions which then arise are these: under what conditions can Australia lawfully conduct offshore processing (if at all); and to what extent does the New Strategy accord with them? This paper seeks to answer these questions by examining the nature and scope of Australia's international and domestic law obligations with a view to outlining a set of minimum conditions it would need to satisfy in order for offshore processing to be lawful. The underlying objective of this paper is to identify a practical legal framework within which Australia's need to "protect its borders" can be balanced with its legal obligation to provide effective protection to asylum seekers.

²⁰ George Roberts, 'Indonesia says asylum policies won't stop boats', *ABC News* (2/11/2012) <http://www.abc.net.au/news/2012-11-02/indonesia-says-australias-asylum-policies-wont-stop-boats/4348816>

²¹ Taylor, above n 19

²² See *Plaintiff M61/2010E v The Commonwealth* [2010] HCA 41(M61) and *Plaintiff M70 /2011 v Minister for Immigration and Citizenship & Anor, Plaintiff M106 of 2011 by his Litigation Guardian*, [2011] HCA 32 (19/08/2011) (M70).

²³ Lanai Vasek, 'Kevin Rudd predicts asylum seeker challenge', *The Australian* (9/11/2012) <http://www.theaustralian.com.au/national-affairs/rudd-predicts-asylum-seeker-challenge/story-fn59niix-1226513537634>.

²⁴ Jane McAdam (22/05/2006), Submission to Senate Committee on Migration Amendment (Designated Unauthorised Arrivals) Bill 2006; see also M61, above n 22, [139]

II BACKGROUND TO THE NEW STRATEGY: PLAINTIFF M70 DECISION

On 31 August 2012, the Australian High Court handed down its landmark decision in *M70* which considered the validity of the Gillard Government's first attempt at offshore processing under arrangements for the transfer of 800 asylum seekers to Malaysia for processing of their refugee claims status (**Malaysia Solution**).²⁵ The policy objective of the Malaysia Solution was one of deterrence, premised on Malaysia being perceived as an inhospitable host country for asylum seekers.²⁶ By a 6:1 majority, the High Court ruled that the declaration of the Minister under (now repealed) section 198A, naming Malaysia a "declared country" to which asylum seekers could be taken for processing, was invalid. In reaching its decision, it held that section 198A did not allow the Minister to declare a country to which asylum seekers should be taken for processing *unless* that country was legally bound by international or its domestic law to: provide access for asylum seekers to effective procedures for assessing their need for protection; provide protection for asylum seekers pending determination of their refugee status; and provide protection for persons given refugee status pending their voluntary return to their country or resettlement in another country²⁷. In the case of Malaysia, the facts necessary to satisfy the Minister that Malaysia met the relevant protection and human rights criteria could not be established and, as such, his declaration was invalid.

While the decision in *M70* was welcomed by refugee advocates and lawyers, it struck a major political blow for the Government. Its implications cast doubt on the Government's declaratory power to implement offshore processing as a deterrence measure at all. The Solicitor General himself advised the Government that he was no longer confident valid declarations could be made under section 198A to allow a return to offshore processing on Nauru or PNG.²⁸ In order to overcome the legal hurdle posed by *M70*, the Government sought to broaden its powers by

²⁵ For an analysis of the Malaysia Solution and *M70* see Jane McAdam & Tamara Wood, 'Australian Asylum Seeker Policy All at Sea: An analysis of Plaintiff *M70/2011 v Minister for Immigration and Citizenship and the Australia-Malaysia Agreement*', (2012) 61(1) ICLQ 274 – 300.

²⁶ *Ibid*, 274.

²⁷ *M70* n 22, at [119],[124]-[126] per Gummow J, Hayne J, Crennan J and Bell J

²⁸ Opinion, SG No 21 of 2011, *Solicitor-General of Australia* (2 September 2011) http://www.minister.immi.gov.au/media/media-releases/_pdf/SG21-implications-of-migration-decision.pdf

introducing amendments to the Migration Act which would result in the protections set out in section 198A (3), upon which *M70* was largely based,²⁹ being stripped from the Migration Act. At first, the Government was unable to obtain the political support needed to pass the amendments in parliament. The release of the Panel's recommendation in August 2012, however, cleared the way (politically) for the Government to pass the Amendment Act,³⁰ which repealed and replaced section 198A with a revised offshore processing mechanism under section 198AB. This new offshore provision attempts to leave the Ministers' declaratory power to designate a country as a "regional processing country" virtually unconstrained, placing only one statutory condition on it – that the Minister thinks that it is in the "national interest" to designate a country to be a "regional processing country". The legality of this provision is discussed in further detail below.

Shortly after the passing of the Amendment Act, the Government signed a legally non-binding Memoranda of Understanding (**MOU**) with Nauru³¹ and PNG³² to facilitate the transfer and assessment of asylum seekers intercepted by Australia to either state.³³ Although international co-operation between States is clearly recognised in the Refugee Convention,³⁴ what is less certain is the extent to which so called 'responsibility sharing arrangements', such as those which Australia has recently entered into with PNG and Nauru, are lawful. The starting point of such an assessment necessarily begins with a closer examination of the concept of offshore processing and its lawfulness under international law.

²⁹ See repealed section 198A(3)(a)(i)-(iv)

³⁰ Taylor above n 17 and Amendment Act above n 6

³¹ MOU between Australia and Nauru executed on 29/08/2012, accessed http://www.minister.immi.gov.au/media/media-releases/_pdf/australia-nauru-mou-regional-processing.pdf

³² MOU between Australia and Papua New Guinea executed on 8/09/2012, accessed http://www.minister.immi.gov.au/media/media-releases/_pdf/mou-between-png-australia-regional-processing.pdf

³³ The key difference between these MOU and those entered into under the Pacific Solution is the incorporation of the "no advantage" principle advocated by the Expert Panel.

³⁴ The preamble of the Refugee Convention notes that "the grant of asylum may place unduly heavy burdens on certain countries, and that a satisfactory solution of a problem of which the United Nations has recognised the international scope and nature cannot therefore be achieved without international co-operation": Refugee Convention, above n 2.

III LAWFULNESS OF OFFSHORE PROCESSING

Unlike typical “protection elsewhere” arrangements which involve a State transferring an asylum seeker to a third state which he or she has transited through or has had some prior connection³⁵, offshore processing involves transferring an asylum seeker to a third state to which the asylum seeker has never been. This encompasses the implementation of one of two models: the first is the interception and transfer of asylum seekers to a third country in circumstances where the sending State retains a significant degree of control and responsibility over RSD and protection needs³⁶; and the second involves the complete transfer of responsibilities by the sending State of all determination processes and protection needs of such persons to a safe third country.³⁷ Properly construed, Australia's engagement in such practices should be viewed in light of its international law obligations, which arise principally under treaties to which Australia is a party³⁸. To this end, although the Refugee Convention is silent as to whether a Contracting State, such as Australia, may engage in offshore processing arrangements with other States,³⁹ the adoption of policies which oversee the removal of asylum seekers to third countries prepared to offer protection are so entrenched in state practice that it is widely accepted that they form part of international customary law under which Australia is bound.⁴⁰ It is assumed, in this regard, that the legality of such transfers is

³⁵ Foster (2008) above n 3, 64.

³⁶ Angus Francis, *'Bringing Protection Home: Healing the Schism between International Obligations and National Safeguards created by Extraterritorial Processing'* (2008) 20 IJRL 253, 278.

³⁷ UNHCR (November 2010) Protection Policy Paper: Maritime interception operations and the processing of international protection claims: legal standards and policy considerations with respect to extraterritorial processing (**UNHCR Protection Policy**), 10 <http://www.unhcr.org/refworld/pdfid/4cd12d3a2.pdf>

³⁸ These include the Convention, the International Covenant on Civil and Political Rights 999 UNTS 171 (entered into force 23/01/1976) (**ICCPR**), Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (adopted 10/12/1984, entered into force 26/06/1987) (**CAT**), Convention on the Rights of the Child (entered into force 2/09/ 1990) (**CROC**) & International Convention on the Elimination of All Forms of Racial Discrimination (**ICERD**).

³⁹ Law Academic Submission, above n 19.

⁴⁰ Foster (2008) above n 3, 65; Stephen Legomsky, *'Secondary Refugee Movements and the Return of Asylum Seekers to Third Countries: The Meaning of Effective Protection'* (2003) 15 IJRL 567, 572

found in a deliberate omission in the text of the Refugee Convention, namely, the lack of a right to be granted asylum⁴¹.

Whilst the UNHCR has indicated that it "does not object in principle to the notion of designating countries as safe third countries", it has qualified this by advising that such practices should only be undertaken as a *significant* exception to the general principle that claims for international protection made by asylum seekers should be processed within the territory of the receiving State.⁴² Moreover, it stipulates that offshore processing should only be pursued "as part of a burden-sharing arrangement to more fairly distribute responsibilities and enhance the available protection space", and should contain, in both the formal arrangement and its practical implementation, fundamental human rights and protection safeguards that are owed by Convention States.⁴³ The concept of "burden sharing" with respect to refugees can be found in paragraph 4 of the Preamble of the Refugee Convention, which expressly acknowledges that "the grant of asylum may place unduly heavy burdens on certain countries, and that a satisfactory solution of a problem of which the United Nations has recognized the international scope and nature cannot therefore be achieved without international cooperation." Since that time, the international community has repeatedly stressed upon the importance of States to engage in burden sharing⁴⁴.

⁴¹ Foster (2008), above n 3, 65.

⁴² UNHCR, Note on Key Issues of Concern to UNHCR on the Draft Asylum Procedures Directive, March 2004

⁴³ UNHCR, above n 37; See also, UNHCR, Advice to the Australian Minister for Immigration and Citizenship regarding Nauru (5/09/2012) <http://unhcr.org.au/unhcr/images/120905%20response%20to%20minister%20bowen.pdf> (**UNHCR Advice on Nauru**) and UNHCR, Advice to the Australian Minister for Immigration and Citizenship regarding PNG (9/10/2012) <http://unhcr.org.au/unhcr/images/121009%20response%20to%20minister%20on%20png.pdf> (**UNHCR Advice on PNG**); UNHCR, Briefing Notes UNHCR reviewing Australian changes on offshore processing, at <http://www.unhcr.org/502e226e9.html>

⁴⁴ The Executive Committee of the UNHCR Programme (ExCom) has elaborated several Conclusions, which either focus on, or draw attention to, the issue of burden-sharing. See for example, ExCom Conclusion 22 (XXXII) of 1981 relating to the Protection of Asylum Seekers in Situations of Large-Scale Influx, accessed at <http://www.unhcr.org/refworld/pdfid/4b28bf1f2.pdf>; See also UNHCR Submission (2000) 'Burden-Sharing - Discussion Paper Submitted By

Contracting parties to the Refugee Convention are also under a legal obligation to implement their treaty obligations in good faith.⁴⁵ This duty would be breached if a combination of acts or omissions were to have the overall effect of undermining the purpose or object of that treaty⁴⁶. For instance, if offshore processing were used by States as a means to divest responsibility under the Refugee Convention and unfairly shift it onto another third State⁴⁷ then such conduct would be inimical to the entire object and purpose of the Refugee Convention and therefore be unlawful under international law⁴⁸. Thus, having identified the precondition that offshore processing can only be undertaken in good faith as a legitimate exercise of 'burden sharing' (that is, not diverting responsibility but equitably sharing it) under the Refugee Convention, assuming that such precondition is satisfied, it is necessary to consider the conditions under which Australia could lawfully engage in offshore processing.

IV THE SCOPE OF AUSTRALIA'S INTERNATIONAL OBLIGATIONS

The overriding consideration which now dominates legal debate over the permissibility of offshore processing is whether the third State will, *in fact*, provide "effective protection" to asylum seekers transferred there.⁴⁹ Whilst there are now several multilateral and bilateral schemes in operation in

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http://www.iom.int/jahia/webdav/site/myjahiasite/shared/shared/mainsite/policy_and_research/rcp/APC/2000-Discussion-Paper-UNHCR-submission-5th-plenary.pdf

⁴⁵ Vienna Convention on the Law of Treaties (adopted 23/05/1969, entered into force 27/01/ 1980) 1155 UNTS 331 arts 26, 31

⁴⁶ McAdam (2006) above n 24, 4

⁴⁷ UNHCR Protection Policy above n 37, 13

⁴⁸ See generally, UNHCR's submissions in *R v Immigration Officer at Prague Airport, ex parte European Roma Rights Centre* [2004] UKHL 55, [2005] 2 AC 1, available as UNHCR, "Written Case" (2005) 17 International Journal of Refugee Law 427, para 32 cited in submissions by Bassina Farbenblum and Jane McAdam to the Senate Legal and Constitutional Affairs' inquiry on the Anti-People Smuggling and Other Measures Bill 2010 (submission no. 23), 16.

⁴⁹ See Legomsky above n 40, 570; Michelle Foster, 'Protection Elsewhere: the legal implications of requiring refugees to seek protection in another state', (2006-7) 288 MJIL 223; Susan Kneebone, 'The Pacific Plan': the Provision of Effective Protection' (2006) 18 IJRL 696

other regions – such as the *Dublin Regime*⁵⁰ and the *US-Canada Safe Third Country Agreement*⁵¹ – there have been few opportunities for domestic courts to examine the legality of such schemes in light of states parties' obligations under the Refugee Convention.⁵² It clear, however, that the High Court's decision in *M70* has, in this regard, made a valuable contribution to international jurisprudence by confirming that the concept of "effective protection" does *in fact* extend beyond *non-refoulement* to include the protection of other fundamental human rights in accordance with international norms and treaties⁵³. The relevant question for States wishing to implement offshore processing is, however, where does one draw the line in determining whether "effective protection" will be provided in a third country?

A Protection Framework

The starting point for determining whether a third country will provide *effective protection* involves a consideration of what legal obligations it has to ensure the protection of rights under the Refugee Convention. It is now a widely accepted principle in international law that because the Refugee Convention "does not contemplate the devolution of protection responsibilities to a non-state entity, any sharing-out of protection

⁵⁰ Council Regulation (EC) No 343/2003 of 18/02/2003, '*Establishing the criteria and Mechanisms for Determining the Member State Responsible for Examining an Asylum Application Lodged in One of the Member States by a third country national*' [2003] OJ L 50/1 at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2003:050:0001:0010:EN:PDF>

⁵¹ Agreement between Canada and the USA for Co-operation in the Examination of Refugee Status Claims from Nationals of third countries, 5/12/2002,[2004] CTS 2 (29 December 2004)

⁵² See Michelle Foster, '*The implications of the failed Malaysia Solution*' (2012) 13 MJIL 396, 400, in which Foster observes that most courts that have considered the validity of such schemes have done so in relation to regional human rights treaties such as the European Convention on Human Rights (eg, *R (Yogathas) v Secretary of State for the Home Department* [2003] 1 AC 920 ("**Yogathas**")), or have been restricted by relevant domestic legislation to assess the relevant scheme only in relation to art 33 of the Refugee Convention.

⁵³ See Lisbon Expert Roundtable, '*Summary Conclusions on the Concept of "Effective Protection" in the Context of Secondary Movements of Refugees and Asylum Seekers*' (9-10 December 2002) ("**Lisbon Conclusions**"), para 15(b) <http://www.unhcr.org/3e5f323d7.html>; See also Legomsky above n 40, 60.

responsibility must take place between and among states".⁵⁴ In this regard, accession to the Refugee Convention is understood to be a minimum requirement for any third country to which asylum seekers are sent *unless* that country has already adopted protections akin to those contained in the Refugee Convention.⁵⁵ Whilst the conduct of Contracting States demonstrates that the ratification of treaties does not necessarily equate to compliance with them, "if a third State is not even obligated as a matter of international law to implement rights to which a refugee is already entitled in the sending state, then it is open to question whether the transfer will result in the protection of refugee rights".⁵⁶ Moreover, failure to ratify the Refugee Convention carries with it a lack of accountability which Contracting Parties otherwise bear. Conversely, accession to or ratification of the Refugee Convention gives the UNHCR "a degree of leverage that it might not otherwise have" to supervise the practices of a State and inform its policies.⁵⁷ It is for this reason that the High Court has confirmed that whilst it is not strictly necessary that a receiving country be a party to the Refugee Convention, its domestic laws would be considered more likely to provide relevant protections if it were a Contracting State.⁵⁸ However, the High Court noted that it would be insufficient for a third country to give a commitment to respect, for instance, the principle of *non-refoulement*, if it had no legally binding arrangement to do so and was not bound under international or domestic law to provide the types of protections afforded by Australia to asylum seekers in its territory.⁵⁹ The Court's analysis here confirms international principles that the rights and protections afforded to refugees under the Refugee Convention can only be meaningfully

⁵⁴ Fourth Colloquium on Challenges in International Refugee Law, held at the University of Michigan Law School, Ann Arbor, Michigan, USA, on 10-12 Nov. 2006, 'The Michigan Guidelines on Protection Elsewhere', adopted 3/01/2007 at 211 (**Michigan Guidelines**)

http://refugeecaselaw.org/documents/Protection_Elsewhere.pdf ; as regards state responsibility generally, see Guy Goodwin-Gill, 'The Extraterritorial Processing of Claims to Asylum or Protection: The Legal Responsibilities of States and International Organisations' (2008) 9 UTS Law Review.

⁵⁵ Lisbon Conclusions, above n 53 para 15(e); Foster (2006-7) above n 49 at 240.

⁵⁶ Foster (2006-7) above n 49 at 240.

⁵⁷ Legomsky above n 40, 660; Foster(2006-7) above n 49, 240, also notes that accession includes the compulsory obligation for States to submit to the jurisdiction of the International Court of Justice in relation to any dispute.

⁵⁸ M70 above n 22 at [244] per Kiefel J.

⁵⁹ Ibid.

guaranteed if a legal framework is in place to provide them in the third State.⁶⁰ Thus, in order to lawfully implement offshore processing, the third State must have ratified the Refugee Convention *unless* it can demonstrate that it has adopted protections akin to those in the Convention. This would presumably require domestic legislation which entrenches similar, if not identical, obligations to those guaranteed under the Refugee Convention.⁶¹ Moreover, even if the third State is a party to the Refugee Convention and has entered into a binding agreement to respect Convention rights, a sending State must still satisfy itself that the third country has a legal framework which supports those obligations being met in practice.⁶²

B *Non-refoulement* – Article 33 Obligations

The most fundamental constraint on the legality of offshore processing is the duty of *non-refoulement* as set out by Article 33 of the Refugee Convention.⁶³ This key obligation is also reflected in other human rights treaties, including the ICCPR which, through its prohibition on torture and cruel, inhuman and degrading treatment or punishment,⁶⁴ has been interpreted by the Human Rights Committee to prohibit the *refoulement* of persons who face a real risk of ill treatment if removed.⁶⁵ This obligation now forms part of domestic law in Australia under the ‘complementary protection’⁶⁶ regime (**Complementary Protection Regime**) incorporated

⁶⁰ See *MSS v Belgium* (ECtHR, Grand Chamber, Application No 30696/09, 21 January 2011) (**MSS Case**), which held, at [353], that ‘the existence of domestic laws and accession to international treaties guaranteeing respect for fundamental rights in principle are not in themselves sufficient to ensure adequate protection against the risk of ill-treatment where, as in the present case, reliable sources have reported practices resorted to or tolerated by the authorities which are manifestly contrary to the principles of the Refugee Convention.’: accessed http://www.proasyl.de/fileadmin/fm-dam/NEWS/2011/Urteil_EGMR_MSS_gegen_Belgien_und_Griechenland.pdf

⁶¹ Foster (2012) above n 52, 408.

⁶² See *M70* above n 22,[245] per Kiefel J; *MSS Case* above n 60.

⁶³ Foster (2006-7) above n 49, 251 notes that ‘Article 33 is not conditioned on a refugee being within the territory of state parties’ and that the duty not to return a refugee to the countries where his life or freedom may be threatened extends to ‘any manner whatsoever’.

⁶⁴ ICCPR, article 7.

⁶⁵ HRC, General Comment No. 31: *The Nature of the Obligation imposed on State Parties to the Covenant*, (2004) UN Doc CCPR/C/21/Rev.1/Add.

⁶⁶ “Complementary protection” is a the term used to describe a category of protection against *refoulement* (removal), which is additional to that

into the Migration Act pursuant to the *Migration Amendment (Complementary Protection) Act 2011* (Cth).⁶⁷ It is an accepted principle of international law that States must respect the principle of *non-refoulement* with respect to asylum seekers in search of protection, as well as to recognized refugees and beneficiaries of complementary protection.⁶⁸ The principle precludes States from returning people to *any* territories in which they are at risk of persecution or other serious harm.⁶⁹ Under international law the obligation applies to *direct* as well as *indirect refoulement*. In other words, a receiving State cannot return or transfer a refugee to a third state where it is foreseeable that the third state will transfer the refugee back to a country of persecution.⁷⁰ In practice, this requires transferring States to ensure that the third State guarantees to respect the principle of *non-refoulement* and other convention rights, but that it also provides those transferred with “fair and efficient procedures” for RSD under the Refugee

provided by the Refugee Convention, in particular, the obligation not to return people who face torture and other serious forms of harm pursuant to CAT, ICCPR and CROC: see Jane McAdam, ‘*Australian Complementary Protection: A Step-By-Step Approach*’ (2011) 33(4) *SydLawRev* Vol, 688.

⁶⁷ Ibid. The Complementary Protection Act amended the Migration Act by creating a new group of people to whom a protection visa may be granted. Section 36(2) provides that a protection visa is to be granted not only to non-citizens to whom Australia has protection obligations under the Refugee Convention, but also to non-citizens with respect to whom: “*the Minister is satisfied Australia has protection obligations because the Minister has substantial grounds for believing that, as a necessary and foreseeable consequence of the non-citizen being removed from Australia to a receiving country, there is a real risk that the non-citizen will suffer significant harm.*” This reflects comparable statutory regimes implemented in the European Union, Canada, the United States and New Zealand: see McAdam (2011) above n 66 for further discussion on other statutory regimes.

⁶⁸ See Guy Goodwin-Gill & Jane McAdam, *The Refugee in International Law* (Oxford University Press, 2007) 206-207; See also *John Doe v Canada* (Inter-American Commission on Human Rights, Report No 78/11, Case 12.586, 21 July 2011) [103]–[106], where the IACHR noted the overwhelming international authority for this position: cited in Foster (2012) above n 52, 412.

⁶⁹ Elihu Lauterpacht and Daniel Bethlehem, ‘*The scope and content of the principle of non-refoulement: Opinion*’ in Erika Feller, Volker Turk and Frances Nicholson (eds), *Refugee protection in International Law* (2003) 87, 122; Foster (2008) above n 3, 69.

⁷⁰ See MSS Case above n 60; *TI v The United Kingdom*, 2000-III Eur.Ct. H.R. 435, 456-57; and *Thiagarajah Gnanapiragasam v MIMA* (1998) FCA 1145

Convention⁷¹ so as to avoid them being removed, directly or indirectly, to their country of origin.⁷²

C Fair and Effective Procedures

Although the Refugee Convention does not contain any set provisions for RSD procedures, the principle of good faith (discussed above) in fulfilling treaty obligations requires Contracting Parties to implement procedures which allow for the RSD of those entitled to the guarantees of that treaty.⁷³ Indeed, it was confirmed in *M70* that for the exercise of power to transfer asylum seekers to be lawful, the destination state must be legally bound by international law or domestic law to: provide access for persons seeking asylum to effective procedures for assessing their need for protection; provide protection for asylum seekers pending determination of their refugee status; and provide protection for persons given refugee status pending return to their country of origin or settlement in another country.⁷⁴ According to the UNHCR, this should entail “respect for the principle of *non-refoulement*, clear allocation of authority for considering and determining claims, the provision of necessary guidance and facilities to applicants to make claims, the opportunity for administrative or judicial review in cases of rejection, and permission to remain in the country pending the final outcome of their application”.⁷⁵

⁷¹ Law Academic Submission above n 19 at 20; Michigan Guidelines above n 54

⁷² See also MSS Case above n 60, [342].

⁷³ "As a general rule, in order to give effect to their obligations under the 1951 Convention and/or 1967 Protocol, States will be required to grant individuals seeking international protection access to the territory and to fair and efficient asylum procedures.": UNHCR Advisory Note on the Extraterritorial Application of Non-Refoulement Obligations under the 1951 Convention Relating to the Status of Refugees and its 1967 Protocol, at 7 (Jan. 26, 2007), available at <http://www.unhcr.org/home/RSDLEGAI.45fi7ala4.pdf> cited in Foster (2006-7) above n 49, 249

⁷⁴ *M70* above n 22, [119],[124]-[126] per Gummow J, Hayne J, Crennan J and Bell J

⁷⁵ UNHCR Executive Committee ' Conclusion No. 8: Determination of Refugee Status' (<http://www.unhcr.org/refworld/docid/3ae68c6e4.html>) cited in McAdam & Wood above n 25, 294; Erika Feller (Director, Department of International Protection, UNHCR) presentation at the IARLJ World Conference, Judicial or Administrative Protection: Legal Asylum Processes. Stockholm, 21/04/2005) at

Whilst the existence of legal protection frameworks is a necessary condition which must be satisfied in determining whether or not a third country is 'safe' for the purposes of offshore processing, it is even more significant to consider what a third State does in practice.⁷⁶ This position is confirmed by the Michigan Guidelines which relevantly note that "formal agreements and assurances are relevant to this inquiry, but do not amount to a sufficient basis for a lawful transfer...[A] sending state must rather inform itself of all facts and decisions relevant to the availability of protection in the receiving state".⁷⁷ Therefore, for Australia to lawfully engage in offshore processing it would need to be satisfied that there are not only RSD procedures in place to identify and safeguard those requiring protection, but that those procedures are effective in substance, not just in form. This requires both pre-transfer investigations and post-transfer monitoring to ensure obligations guaranteed by the third country are met in practice.⁷⁸

In the circumstances, given that a State cannot rely on 'blanket' determinations that a third state is safe and will respect Convention rights, at a minimum, it *must* conduct an individual assessment as to whether a person transferred will be provided with effective protection.⁷⁹ As observed

<http://www.unhcr.org/refworld/category,POLICY,UNHCR,SPEECH,,42a404cf2,0.html>

⁷⁶ See McAdam (2006) above n 24, 8; *M70* above n 22, [112] per Gummow, Hayne, Crennan and Bell JJ. See also *MSS Case* n 60 in which the European High Court held that Greece was not a safe country for asylum seekers notwithstanding that it is a party to the Refugee Convention and other international treaties.

⁷⁷ Michigan Guidelines above n 54, para 3.

⁷⁸ See *Regina (ex parte Yogathas) v Secretary of State for the Home Department* [2003] 1 AC 920 (**Yogathas**) cited in Foster (2008) above n 3, 72, where Lord Hope [48] noted that central to the Court's decision to allow a return to Germany was the fact that the Secretary of State was "able to show that he based his decision on a state of knowledge resulting from his own inquiries as to the practice in Germany and from his experience of constantly monitoring the performance by member states of their obligations in similar cases". Also available at: <http://www.bailii.org/uk/cases/UKHL/2002/36.html>.

⁷⁹ The assessment of whether or not an asylum seeker will receive 'effective protection' in a third state differs from refugee status determination which involves the examination process by a country's authority or UNHCR of whether an individual who has submitted an asylum claim is indeed a refugee. The former however, concerns whether the asylum seekers will

by Foster⁸⁰, there is now considerable litigation emerging from European Union member states, many concerning transfers to Greece, that attest to the importance of individual assessment. In this regard, superior appellate courts in Austria, France, Hungary, Italy and Romania have ruled against proposed *Dublin* transfers to Greece in individual cases where effective protection has been found lacking.⁸¹ In the United Kingdom, the House of Lords has also stressed that whilst an ‘accelerated procedure’ to determine legality of offshore transfers is acceptable, efficiency cannot absolve the need for a court to subject the decision to transfer an individual asylum seeker to a ‘rigorous examination’.⁸² In Australia, it is relevant to note that the Minister in *M70* conceded that his power to conduct transfers under (repealed) section 198A(1) must be exercised by reference to the circumstances of an individual, and that it is mandatory to consider whether the applicant would face persecution in the country to which he or she would be transferred.⁸³

D Protection of Other Convention Rights

The concept of effective protection which has developed under domestic and international jurisprudence is not limited to respecting the principle of *non-refoulement* under Article 33 but extends to other rights set out in the Refugee Convention and human rights treaties.⁸⁴ The rationale behind this principle is that once an asylum seeker is within the territory of a State party⁸⁵ (regardless of whether or not he or she has been recognised as a

receive protections guaranteed under the Refugee Convention whilst its refugee status is being determined and after it has been determined.

⁸⁰ Foster (2012) above n 52, 419-420.

⁸¹ For analysis of cases see UNHCR Information Note on ‘*National Practice in the Application of Article 3(2) of the Dublin II Regulation in Particular in the context of Intended Transfers to Greece*’ (16 June 2010) 4 -6, <http://www.unhcr.org/refworld/docid/4c18e6f92.html>. See also Rosemary Byrne and Andrew Shacknove, ‘*The Safe Third Country Notion in European Asylum Law*’ (1996) 9 Harvard Human Rights Journal 185, 200 for analysis of European Asylum Law.

⁸² Yogathas above n 78, 74.

⁸³ See Transcript of Proceedings, *M70* [2011] HCATrans 224 (23/08/2011) and section 198AB(3)(a)(i), Migration Act.

⁸⁴ Lisbon Conclusions above n 53, para 15(b); Legomsky above n 40, 60; Foster (2008) above n 3, 67; and Law Academic Submission above n 19, 22.

⁸⁵ “the consistent view under human rights law is that a state exercises jurisdiction when it wields “effective control” over territory or persons”:

refugee) he or she acquires a range of rights under the Refugee Convention and human rights law.⁸⁶ Once those rights are acquired, the sending State must ensure that those same rights are respected in the third State.⁸⁷ This principle has also been affirmed by the High Court in *M70*,⁸⁸ which held that the obligations of Australia to provide effective protection to refugees, once engaged, was not limited to *non-refoulement* but extended to provisions of all of the kinds to which parties to the Refugee Convention are bound to provide such persons. This according to the Court extended beyond Article 33 (*non-refoulement*) and Article 31 (non-penalisation for illegal entry or presence) to include non-discrimination⁸⁹, freedom to practice their religion⁹⁰, access to courts of law⁹¹, elementary education⁹², the right to choose their place of residence and to move freely within its territory⁹³. Implicit in the Court's ruling is the principle that a sending state cannot avoid obligations it has incurred under international law simply by transferring refugees to another state.

The High Court considered it unnecessary, however, to decide which of the rights in the Refugee Convention applied to asylum seekers, instead choosing to focus its attention on those rights acquired by persons *found* to be refugees.⁹⁴ It is, however, argued by scholars such as Foster⁹⁵ that, due to the declaratory nature of refugee status (i.e. a person becomes a refugee when they satisfy the definition, not when they are formally recognised as one),⁹⁶ a State should not deprive an asylum seeker of rights under the Convention simply on the basis that his or her refugee status has not been

Foster, (2006-7) above n 49, 258; Lauterpacht and Bethlehem, above n 69, 111.

⁸⁶ Foster (2008) above n 3, 67.

⁸⁷ See Michigan Guidelines above n 54, para 8.

⁸⁸ *M70* above n 22, [117] - [120] per Gummow J, Hayne J, Crennan J and Bell J and *NAGV and NAGW of 2002 v Minister for Immigration and Multicultural and Indigenous Affairs* (2005) 222 CLR 161, [31].

⁸⁹ Refugee Convention, above n 2, article 3.

⁹⁰ *Ibid*, article 4.

⁹¹ *Ibid*, article 16(1).

⁹² *Ibid*, article 22(1).

⁹³ *Ibid*, article 26.

⁹⁴ See *M70* above n 22, [117] per Gummow, Hayne, Crennan and Bell JJ.

⁹⁵ See Foster (2012) above n 52, 416.

⁹⁶ As noted by Goodwin-Gill and McAdam, above n 68 at 240 "a person becomes a refugee at the moment when he or she satisfies the definition, so that determination of status is declaratory, rather than constitutive".

determined.⁹⁷ Although many States do suspend delivery of Convention rights pending formal determination of refugee status, “the better analysis is that the transferring state must at least consider those rights acquired by the refugee (whether or not status has yet been determined) by virtue of mere physical presence” in the country.⁹⁸ Thus, if Australia is lawfully to engage in offshore processing, the transfer of any asylum seeker should “be preceded by a good faith empirical assessment that *each* person will in practice enjoy the rights set by Articles 2-24 of the Refugee Convention in the receiving State”.⁹⁹

E Protection of Other Human Rights

Refugees transferred to a third State come under the jurisdiction of a State party first and hence acquire a number of core rights under the Refugee Convention, as well as other treaties. Accordingly, under international law a transferring State is therefore also required to ensure the satisfaction of its obligations under *other* rights instruments in the destination state¹⁰⁰. Australia, for instance, is prohibited under treaties which it has ratified, such as ICCPR and CAT, from removing a person where there is a real risk that the right to life, or right not to be subjected to torture, or cruel, inhuman or degrading treatment or punishment, will be violated.¹⁰¹ Thus, even if it were assumed that Article 33 of the Refugee Convention was the only relevant constraint on the transfer of a refugee to a third state, violations of such rights in the third State could still be relevant to an Article 33 analysis¹⁰². Thus, if Australia were to send asylum seekers to a third State in those circumstances it may be constructively held to have

⁹⁷ See also *M70 above* n 22, [79]–[80] (Kiefel J), UNHCR, *Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967, UN Doc HCR/IP/4/Eng/REV.2* (1992) [28].

⁹⁸ See Foster (2012) *above* n 52, 417. This is also the position adopted by the UNHCR (see UNHCR, *Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol Referring to the Status of Refugees, UN Doc HCR/IP/4/Eng/REV.2* (1992) [28].

⁹⁹ Foster (2006-7) *above* n 49, 274; Michigan Guidelines *above* n 54 at para 8 and 9.

¹⁰⁰ Michigan Guidelines *above* n 54 at para 11.

¹⁰¹ Foster, (2006-7) *above* n 49, 257-259; See Articles 6 and 7, ICCPR and Article 3, CAT.

¹⁰² Foster (2008) *above* n 3; The ECtHR has considered rights other than those in the Convention in matters concerning the lawfulness of offshore processing: see *MSS Case above* n 60.

violated those covenants under international law. Legomsky refers to this as the 'complicity principle'; that is, "where a state delivers a refugee to another state that in turn violates his or her rights under international law, and the first state does so with knowledge of the circumstances of the intentionally wrongful act, then the assumption here is that the first state thereby aids or assist in the commission of that wrongful act".¹⁰³ Moreover, having regard to the Complementary Protection Regime enacted in Australia, the Government may also be acting in breach of the *non-refoulement* obligations arising under section 36(2)(aa) of the Migration Act if, as a necessary and foreseeable consequence of a person being removed from transferred to a third State, there is a real risk that the person will suffer significant harm.¹⁰⁴ This reinforces the need for a sending State, such as Australia, to undertake an individual empirical assessment of human rights conditions in the third State before transferring any persons.¹⁰⁵

F Durable Solution

It has been emphasised by the UNHCR that the notion of *effective protection* at international law entails refugees being provided durable solutions; that is, solutions which will last for at least as long as the refugees need international protection.¹⁰⁶ This gives effect to the ultimate goal of refugee protection under the Refugee Convention, which is to find secure and lasting situations in which refugees can live in safety and rebuild their lives.¹⁰⁷ Accordingly, the efficacy of the Refugee Convention rests upon the understanding that Contracting Parties will protect asylum seekers and refugees within their territories, or co-operate with other States to find durable solutions – namely, voluntary repatriation, local integration or

¹⁰³ Legomsky above n 40, 695.

¹⁰⁴ "Significant harm" includes arbitrary deprivation of life; the death penalty; torture; cruel or inhuman treatment or punishment; and degrading treatment or punishment: see section 36(2A), Migration Act (above n 6); See also McAdam (2011) above n 66, 715 for a detailed discussion on the standard of proof required for section 36(2)(aa) and the complementary protection regime in Australia generally.

¹⁰⁵ Lisbon Conclusions, above n 53 para 15(b).

¹⁰⁶ UNHCR, Executive Committee Conclusion 58 (XL), Problem of Refugees and Asylum-Seekers Who Move in an Irregular Manner from a Country in Which They Had Already Found Protection (1989), paras. (a) and (d) cited in Legomsky above n 40, 627.

¹⁰⁷ Lisbon Conclusions above n 53 para 15(i); Refugee Council of Australia, 'Durable Solutions' (Last updated May 2012) at <http://www.refugeecouncil.org.au/f/int-ds.php>.

resettlement in contracting state.¹⁰⁸ The importance of States co-operating to find durable solutions has also been emphasised in other regional intergovernmental frameworks dealing with irregular migration, such as the Bali Process, which notes that refugees “should be provided with a durable solution, including voluntary repatriation, resettlement within and outside the region and, where appropriate, possible ‘in country’ solutions”.¹⁰⁹ Given that Australia has ratified the Refugee Convention, and is also an active participant in the Bali Process, it has a legal obligation to ensure that refugees under its control are offered durable solutions within reasonable timeframes in order to give effect to the object and purpose of the Convention.¹¹⁰ It follows, then, that for a transfer to be lawful, the third State must also be “willing and able to provide effective protection for as long as the person remains a refugee or until another source of durable effective protection is found” before a transfer is lawfully effected.¹¹¹

G Domestic Framework

While the above considerations are by no means exhaustive, by reference to international and domestic law they authoritatively set out what *minimum* conditions the Government would need to satisfy to conduct offshore processing lawfully. The High Court has made it clear that the ambit of any statutory power to remove unlawful non-citizens from Australia, whether under s 198A or 198AB, must be understood in a context provided by two considerations: firstly, that the Migration Act read as a whole “contains an elaborated and interconnected set of statutory provisions directed to the purpose of responding to the international obligations which Australia has undertaken in the Refugees Convention and the Refugees Protocol”,¹¹²; and secondly, that the “the ambit and operation of a statutory power to remove an unlawful non-citizen from Australia must be understood in the context of relevant principles of international law concerning the movement of

¹⁰⁸ See UN High Commissioner for Refugees, ‘*Framework for Durable Solutions for Refugees and Persons of Concern*’, (May 2003) <http://www.unhcr.org/refworld/docid/4124b6a04.html>.

¹⁰⁹ ‘Co Chairs’ Statement of the Fourth Bali Regional Ministerial Conference on People Smuggling, Trafficking in Persons and Related Transnational Crime’ (Bali, 29-30 March 2011).

¹¹⁰ See McAdam (2006) above n 24, 6.

¹¹¹ Legomsky above n 40, 624.

¹¹² See *M70* above n 22, [90] per Gummow, Hayne, Crennan and Bell JJ citing *M61*.

persons from state to state".¹¹³ In the circumstances, although it was intended that the Amendment Act would overcome the outcome in *M70*, the underlying legal principles which govern that decision and the judicial review of Ministerial declarations to remove asylum seekers remain unaffected.

Thus, notwithstanding the introduction of section 198AB,¹¹⁴ the Government cannot, save for withdrawing from the Refugee Convention and key human rights treaties, absolve itself from international law principles which have been incorporated into domestic law. Indeed, even if the only relevant consideration under section 198AB is the "national interest", any declaration made under that power will be subject to judicial review and must be construed by reference to Australia's international obligations.¹¹⁵ Applying the principles espoused in *M70*, the exercise of such power by the Minister requires him to form, in good faith, an evaluative judgment of whether such designation is in Australia's "national interest"¹¹⁶. Thus, properly construed, for the Minister's opinion or belief that a particular designation is in the "national interest" to have been made in *good faith*, he must take into account the relevant international law obligations which constrain Australia's power conduct to conduct offshore processing¹¹⁷. If the Minister were to proceed to make a declaration on the basis of a misconstrued criterion in assessing the "national interest" (such as by failing to take into account such obligations), he would be making a declaration not authorised by the Parliament and as such, his declaration would be *ultra vires*¹¹⁸. Accordingly, for Australia to engage in offshore processing lawfully, and avoid suffering another embarrassing legal challenge to its policies, it *must* act in good faith and ensure that the above conditions are satisfied *before* transferring asylum seekers offshore for processing.

¹¹³ Ibid, [91].

¹¹⁴ In particular, its removal of protections previously framed in s198A.

¹¹⁵ *Minister for Immigration and Ethnic Affairs v Teoh* (1995) 183 CLR 273, also cited in *M70* above n 22, 246–47. See also *Polites v Commonwealth* (1945) 70 CLR 60.

¹¹⁶ *M70* above n 22, [59].

¹¹⁷ Ibid; While 198AB(3) outlines matters which the Minister must have regard to when considering the 'national interest', these should not be considered exhaustive given that 198AB(3)(b) allows the Minister to take into account other considerations which in his opinion are relevant to the national interest.

¹¹⁸ *M70* above n 22, [59].

V THE NEW 'PACIFIC STRATEGY'

The question which must now be asked is this: to what extent is the Government's reintroduction of offshore processing on Nauru and Papua New Guinea consistent with the above legal framework? Given the significant human rights concerns¹¹⁹ raised during the operation of Pacific Solution, there are renewed concerns about the lawfulness of efforts to resume offshore processing in the Pacific.¹²⁰ By reference to the above framework, the logical starting point to an assessment of the New Strategy is determining whether such arrangements have been pursued in *good faith* by the Government as part of a legitimate "burden-sharing arrangement to more fairly distribute responsibilities and enhance available protection space".¹²¹

A Burden Sharing?

As noted earlier, measures taken to 'burden share' arise where a country bears a disproportionate responsibility in providing for the protection needs of refugees or asylum seekers.¹²² It is therefore permissible for a State to retain the assistance of another "safe" third country to address those protection needs within its territory so long as responsibilities are more evenly distributed.¹²³ Globally, the Asia Pacific region is home to some of the world's largest refugee situation, hosting 30 per cent of the global population of concern to UNHCR, or some 9.5 million people.¹²⁴ Within the Asia Pacific region, Australia remains a minor destination country for asylum seekers having received only 2.5 per cent of global asylum claims in 2011 (including air and maritime arrivals).¹²⁵ In the circumstances, whilst

¹¹⁹ See Oxfam, Community Aid Abroad, *'Still Drifting: Australia's Pacific Solution Becomes 'A Pacific Nightmare''* (August 2002); Mary Crock, *'In The Wake Of The Tampa: Conflicting Visions Of International Refugee Law in the Management of Refugee Flows'* (2003) 2 Pacific Rim Journal of Law and Policy 49; Savitri Taylor, *'The Pacific Solution or A Pacific Nightmare: The Difference between Burden Shifting and Responsibility Sharing'* (2005) 6 Asian-Pacific Law and Policy Journal 1.

¹²⁰ See Law Academic Submission above n 19, 2.

¹²¹ UNHCR Protection Policy above n 37.

¹²² See Foster (2008) above n 3, UNHCR Protection Policy above n 37.

¹²³ Foster (2008) above n 3, 64.

¹²⁴ UNHCR, *'2013 UNHCR country operations profile - Asia and the Pacific'* accessed at <http://www.unhcr.org/pages/4a02d8ec6.html>.

¹²⁵ See *'Fewer Asylum Claims in Australia'*, UNHCR, (18 October 2011) http://unhcr.org.au/unhcr/index.php?option=com_content&view=article&id

the number of asylum seekers arriving by boat to Australia has increased over the last year,¹²⁶ when one considers Australia's refugee population in context with the rest of the Asia Pacific Region, such an increase does not represent a disproportionate burden in providing for protection needs.¹²⁷ Moreover, given that Australia possesses a far more robust legal system and financial capacity to provide effective protection to asylum seekers than most neighbouring States,¹²⁸ one would expect that any truly regional approach to "burden" sharing undertaken in good faith would involve Australia assuming a greater responsibility for the protection needs of refugees and asylum seekers in the region.

The Government claims that the New Strategy represents a truly "regional approach" to combat people smuggling and irregular migration. However, notwithstanding references in the MOU to a "Regional Cooperation Framework" to combat irregular migration in the Asia-Pacific region,¹²⁹ the substantive terms and practical effect of the arrangements with PNG and Nauru do not in fact address any "regional" problems affecting Australia's neighbours, nor do they address issues affecting the countries to which asylum seekers are to be sent¹³⁰. PNG, for example, has "long been host to thousands of asylum seekers crossing the border from the Indonesian province of Papua",¹³¹ and yet such concerns have been entirely ignored under the New Strategy. Instead, it deals only with reducing the number of

=227:fewer-asylum-claims-in-australia&catid=35:news-a-media&Itemid=63 (cited in Expert Panel Report n 11, para 1.16) which notes that the number of asylum-seekers coming to Australia in the first six months of 2011 (4,930) was 19 per cent lower than in the same period of 2010 (5,867).

¹²⁶ The number of IMAs who have arrived in Australia in the first seven months of 2012 (7,120) has exceeded the number who arrived in total in 2011 (4,733) and 2010 (6,850): See Expert Panel Report, above n 11, para 1.14. However, the numbers of IMAs who claim asylum in Australia remain considerably lower than air arrivals: Expert Panel Report, above n 11 para 1.15.

¹²⁷ For example, compared to Malaysia which had approximately 216,000 people of concern to the UNHCR in 2012, Australia has had only 28,000: '2012 UNHCR Country Profiles – Malaysia', accessed at <http://www.unhcr.org/pages/49e4884c6.html> and '2012 UNHCR Country Profiles – Australia' accessed at <http://www.unhcr.org/pages/49e487af6.html>.

¹²⁸ Crook, Saul & Dayastri, above n 15

¹²⁹ Taylor, above n 17

¹³⁰ Taylor, above n 119, 31

¹³¹ Ibid.

asylum seekers destined for Australia. Moreover, in formulating the New Strategy, the Government has failed to meaningfully engage with any regional Governments, the UNHCR or human rights organisations to develop an effective “regional” strategy to address irregular migration and improve upon protections given to refugees.¹³² The UNHCR has itself expressed several concerns about the return to offshore processing in the Pacific and has indicated that it will not be involved in the implementation of offshore arrangements in Nauru or Papua New Guinea, when such efforts seek to “resolve a domestic issue by transferring people to another jurisdiction or jurisdictions in the region”.¹³³

At the time the Pacific Solution was first introduced, various bodies characterised offshore processing on Nauru and PNG “as an attempt by Australia to use its economic power to dump its problem on its extremely poor, politically unstable and socially vulnerable neighbours, without any thought for the damage it may cause”.¹³⁴ The same is now being said of the New Strategy.¹³⁵ Indeed, there are concerns that the New Strategy is likely to result in the same destabilising political and social impact in Nauru and PNG as that which occurred under the Pacific Solution when Australia’s asylum seekers were swapped for aid.¹³⁶ Properly construed by reference to its terms and impact, the New Strategy fails to address any regional issues of people smuggling and irregular migration beyond Australia’s own “minor” one. Instead, all that can be seen is Australia denying and deflecting its obligations to impoverished countries with limited means to provide effective protection. In the circumstances, the New Strategy cannot

¹³² This is notwithstanding the Expert Panel recommendation that the involvement of UNHCR and IOM, inter alia, would be highly desirable and should be actively pursued: Expert Panel Report, n 11 at para 3.52.

¹³³ ‘UNHCR tells Govt won’t be involved in Pacific Solution Mark 2’ ABC News (24/08/2012) <http://www.abc.net.au/pm/content/2012/s3575458.htm>; UNHCR, UNHCR reviewing Australian changes on offshore processing, Briefing notes, 17 August 2012, <http://www.unhcr.org/502e226e9.htm>

¹³⁴ Taylor, above n 119, 32

¹³⁵ See Law Academics Submission, above n 19, 3; ‘Refugee group demands access to Nauru returning sri-lankan asylum seeker’ Refugee Action Coalition Sydney (25/09/2012), accessed <http://refugeeaction.org.au/2012/09/25/refugee-group-demands-access-to-nauru-returning-sri-lankan-asylum-seeker/>; ‘Australia Pacific Solution – Redux’ Human Rights Watch (17/08/2012) <http://www.hrw.org/news/2012/08/17/australia-pacific-solution-redux>

¹³⁶ See Taylor, above n 119, 25-32 on the social and political impact of the Pacific Solution.

be characterised as a “regional co-operation” arrangement undertaken in good faith as is contemplated by the Convention.

B Effective Protection

Turning now to an assessment under the framework of *effective protection*, for the New Strategy to be construed as lawful, it *must*, in both the formal arrangement and in its practical implementation, afford asylum seekers and refugees “effective protection”¹³⁷. This necessitates that Nauru and PNG have not only have legal obligations to ensure the protection of Convention rights, but that such obligations are met in practice¹³⁸. Firstly, while the formal terms of the Nauru and PNG MOU indicate a common intention that, *inter alia*, “all persons entering...will depart within as short a time as is reasonably necessary”, that transferees “will be treated with dignity and respect and that relevant human rights standards are met”, and that there will be “oversight of practical arrangements required to implement this MOU”, it should be noted that such terms are non-legally binding¹³⁹. In other words, whilst the MOU are relevant in outlining the States’ respective commitments to one another, they carry no legal obligation or remedy should either State breach their “commitments”. Secondly, while it is acknowledged that Nauru and PNG are now signatories to the Convention¹⁴⁰ and have international obligations¹⁴¹ to provide effective protection to refugees, neither country has in place a satisfactory domestic legal or regulatory framework for RSD under the Convention, nor do they possess any framework to provide refugees with effective protection under the Convention.¹⁴² Although Nauru’s Immigration Regulations 2000 (**Nauru Regulations**)¹⁴³ was recently

¹³⁷ See UNHCR Protection Policy above n 37.

¹³⁸ See *M70* n 22 at [244] per Kiefel J.

¹³⁹ Nauru and PNG MOU, above n 31 and n 32 respectively.

¹⁴⁰ PNG’s accession to the Refugee Convention in 1986 contained significant reservations that refugees would ordinarily be entitled to under the Refugee Convention, including Articles 17(1), 21, 22(1), 26, 31, 32 and 34. While it is a signatory to ICERD, ICESCR and ICCPR, it has not ratified CAT.

¹⁴¹ Nauru is also signatory to ICERD, ICCPR and CAT, but not other key treaties such as ICESCR.

¹⁴² UNHCR advice on Nauru and PNG, above n 43.

¹⁴³ See *Immigration Regulations 2000* (Nauru), as amended and in force from 14 September 2012, accessed at http://ronlaw.gov.nr/nauru_lpms/files/subordinate_legislation/6d46685d732f19d733f9526cbd4212e2.pdf.

amended to facilitate a RSD process¹⁴⁴, commentators argue that such changes will be insufficient to address current deficiencies.¹⁴⁵ Indeed, the amendments do not provide any guidance on the rights to be provided to an asylum seeker once he or she is granted an “Australian Regional Processing Visa” for RSD purposes, let alone once he or she is granted refugee status.¹⁴⁶ Similarly, whilst PNG is empowered under section 15A of the Migration Act 1978 to determine non-citizens are refugees, the Act “does not presently contain any indication of the process that will be undertaken to provide refugee status determinations, nor does it contain any reference to the country’s international obligations”¹⁴⁷ or guidance on the rights and obligations provided to a person once he or she is even granted refugee status in PNG.¹⁴⁸

In its recent advice to the Government, the UNHCR has confirmed that there are significant gaps to be filled in Nauru’s and PNG’s legal and administrative capacities before they can successfully implement protection obligations owed under the Convention.¹⁴⁹ Given the absence of any national capacity to implement a protection framework in PNG and Nauru, UNHCR has been obliged to exercise its own mandate to determine asylum seekers’ need for protection in PNG and find solutions through resettlement.¹⁵⁰ Nauru, on the other hand, with a gross domestic product reported to be in the region of \$28 million, cannot provide basic legal protections to its own citizens let alone the needs of asylum seekers.¹⁵¹ It is clear, therefore, that commitments made by Nauru and PNG to provide RSD processes, as well as guarantee human rights standards, cannot be

¹⁴⁴ See section 9A of the Nauru Regulations.

¹⁴⁵ ‘*Asylum seekers will have appeals heard in Nauru*’ ABC News (8/10/2012) <http://www.abc.net.au/news/2012-10-08/an-asylum-seekers-will-have-appeals-heard-in-nauru/4300298>; see also UNHCR Legal Advice on Nauru, above n 43; Legal Opinion by S.P Estcourt QC to the Edmund Rice Centre dated 3/09/2011 (**Estcourt Opinion**)

¹⁴⁶ See generally section 9A of the Nauru Regulations.

¹⁴⁷ See Migration Act 1978 (PNG) accessed at http://www.paclii.org/pg/legis/consol_act/ma1978118/; Estcourt Opinion, above n 145, 5.

¹⁴⁸ Estcourt Opinion, above n 145, 5

¹⁴⁹ See UNHCR Legal Advice on Nauru and PNG, above n 43.

¹⁵⁰ See UNHCR Legal Advice on PNG, above n 43, 2.

¹⁵¹ See Estcourt Legal Opinion, above n 145, 4; ‘*Manus Island as inhuman as Nauru*’ *Sydney Morning Herald* (20/08/2012) <http://www.smh.com.au/national/manus-island-as-inhumane-as-nauru-amnesty-20110820-1j3cf.html>

meaningfully guaranteed in the absence of a protection framework.¹⁵² It is for this reason that the Government's indication that those transferred under the Strategy will only have appeal rights under Nauruan law¹⁵³ and not in Australia, has provided no comfort. Instead, it has only intensified concerns that asylum seekers transferred to Nauru will be denied effective protection if processed there¹⁵⁴.

The Government's continuing lack of transparency over transfer and processing arrangements on Nauru¹⁵⁵ is reminiscent of the Pacific Solution¹⁵⁶. Certainly, the haste with which asylum seekers have been transferred under the New Strategy has raised concerns that the Government is breaching its legal obligations by making 'blanket' determinations to transfer asylum seekers to Nauru without regard to Australia's legal obligations. Also concerning is the Government's deliberate delay in processing the asylum claims of those transferred¹⁵⁷. Current housing and living conditions for asylum seekers on Nauru have also raised human rights concerns, with many likening current arrangements on Nauru to refugee camps in Africa¹⁵⁸. Nauru also suffers from significant water, food and power shortages across the island, which presents an ongoing concern for the provision of basic living conditions to

¹⁵² See Nauru and PNG MOU, above n 31 and n 32 respectively.

¹⁵³ See Chris Bowen Media Release (8/10/2012)

<http://www.minister.immi.gov.au/media/cb/2012/cb190572.htm>;

¹⁵⁴ M61, above n 22 at [9], where the applicants successfully sought judicial review of their RSD determinations on Christmas Island, suggests that those transferred could challenge any pre-removal assessment to transfer them to Nauru on grounds of denial of procedural fairness and effective protection.

¹⁵⁵ 'Sending Asylum seekers to Nauru: Many questions few answers,' *Amnesty International* (26/09/2012) www.amnesty.org.au/refugees/comments/29843/; Chris Uhlman, 'Asylum seekers face uncertain Nauru legal status', *ABC News* (25/09/2012) <http://www.abc.net.au/7.30/content/2012/s3597808.htm>.

¹⁵⁶ K Bem et al, 'A price too high: the cost of Australia's approach to asylum seekers', *A Just Australia and Oxfam Australia* (August 2007) (**Oxfam Report**), <http://www.ajustaustralia.com/resource.php?act=attache&id=213>.

¹⁵⁷ Interview with UNHCR representative 'Delays to processing asylum seekers causing trauma' *ABC Radio Australia* (9/11/2012), <http://www.radioaustralia.net.au/international/radio/program/pacific-beat/delays-to-processing-asylum-seekers-causing-trauma-unhcr/1043580>.

¹⁵⁸ Dylan Welch, 'Nauru awaits first pacific solution intake' *Sydney Morning Herald* (28/08/2012). <http://www.smh.com.au/national/nauru-awaits-first-pacific-solution-intake-20120828-24z5p.html>

those transferred¹⁵⁹. Indeed, recent reports that pregnant women and children will also be transferred to Nauru have heightened concerns that the New Strategy will, in failing to provide proper housing and subsistence for the vulnerable, contravene Australia's protection obligations under the Convention as well other treaties such as CAT and the ICCPR¹⁶⁰. In its recent report on Nauru, Amnesty International argues that the destitute conditions and mental health impact of arbitrary detention on Nauru constitutes cruel, inhuman or degrading treatment¹⁶¹. Certainly, if, as a necessary and foreseeable consequence of asylum seekers being removed from Australia to Nauru, it can be established that there is a real risk that such persons will suffer "significant harm",¹⁶² it seems likely that Australia will also be in breach of its protection obligations under section 36(2)(aa) of the Migration Act by facilitating such transfers¹⁶³. Moreover, the possible transfer of children to Nauru is also likely to contravene provisions under CROC, which imposes an obligation on Australia to make the 'best interests of the child'¹⁶⁴ a primary consideration in all actions involving them¹⁶⁵. Similarly, with respect to PNG, UNHCR has expressed concern over the living conditions of those proposed to be shortly transferred there, noting that "the level of human insecurity and extremely high cost of living

¹⁵⁹ Ibid.

¹⁶⁰ 'Children, Pregnant Women may go to Nauru', *SBS News* (11/09/2012), <http://www.sbs.com.au/news/article/1691563/Children-pregnant-women-may-go-to-Nauru>

¹⁶¹ Amnesty International, 'Media Release and Nauru Brief' dated 23 November 2013, <http://www.amnesty.org.au/images/uploads/news/NauruOffshoreProcessingFacilityReview2012.pdf>; See also Article 7, ICCPR and the UN Human Rights Committee (HRC), CCPR General Comment No. 20: Article 7 (Prohibition of Torture, or Other Cruel, Inhuman or Degrading Treatment or Punishment), 10 March 1992, <http://www.unhcr.org/refworld/docid/453883fb0.html>; Jane McAdam's submissions on Refugees and Asylum Seekers to the National Human Rights Consultation Secretariat dated 10 June 2009, http://www.gtcentre.unsw.edu.au/sites/gtcentre.unsw.edu.au/files/mdocs/Final_Submission_11June09.pdf.

¹⁶² As defined in section 36(2A), Migration Act.

¹⁶³ See McAdam, above n 66 for further discussion the legal tests which need to be satisfied in order for a non-citizen to receive protection under section 36(2)(aa) of the Migration Act.

¹⁶⁴ Article 3, CROC.

¹⁶⁵ Article 22, CROC; Law Academic Submission, above n 19, 16.

[in PNG]...make life very difficult for asylum seekers and refugees and render local integration almost impossible"¹⁶⁶.

Given the incapacity of Nauru and PNG to provide fair and effective refugee determination procedures, or basic living conditions, there is a real risk¹⁶⁷ that asylum seekers transferred to Nauru and PNG will be subject to *refoulement*, as well as the contravention of other basic human rights owed by Australia. Since rights acquired by asylum seekers whilst under the jurisdiction of Australia¹⁶⁸ cannot be 'contract out' to third countries or the care of third parties,¹⁶⁹ if such violations occur on Nauru or PNG, Australia will be constructively held to have violated those covenants under international law.¹⁷⁰ Based on the above analysis and past experiences under the Pacific Solution, transfers to Nauru or PNG are presently inconsistent with the concept of "effective protection" as is contemplated by the Refugee Convention and the legal framework outlined above. As such, the Minister's current designation under section 198AB cannot be characterised as lawful either under international or domestic law.

C "No Advantage"

Central to the Government's New Strategy is its incorporation of the "no advantage" principle. In this regard, the Government has been unapologetic in its resolve to deter asylum seekers arriving "irregularly" by boat by not only denying them access to onshore RSD processes but also ensuring that "no benefit is gained by refugees circumventing regular

¹⁶⁶ See UNHCR Legal Advice PNG, above n 43, 3.

¹⁶⁷ In the context of discussion regarding the definition of 'real risk' in section 36(2) (aa) of the Migration Act, McAdam (above n 66, 719) considers that it should equate to the meaning of 'real chance'.

¹⁶⁸ Once asylum seekers who arrive in or are intercepted by Australia fall within its legal jurisdiction and as such acquire a range rights under the Convention and other human rights treaties to which Australia is a party: *M70* above n 22 at [117] - [120].

¹⁶⁹ A "country cannot provide access to effective measures, if having no obligation to provide the procedures, all that is seen is that it has permitted a body such as UNHCR to undertake that body's own procedures in assessing the protection needs of persons seeking asylum": *Ibid*, [125]; see also discussion on state responsibility in Guy Goodwin-Gill, 'The Extraterritorial Processing of Claims to Asylum or Protection: The Legal Responsibilities of States and International Organisations' (2008) 9 UTS Law Review

¹⁷⁰ Legomsky, above n 40, 695.

migration arrangements".¹⁷¹ Unlike the Pacific Solution which was premised on Australia's sovereign right to "decide who comes to this country and the circumstances in which they come"¹⁷², the New Strategy purports to 'save lives' by actively discouraging asylum seekers from risking their lives on dangerous maritime journeys.¹⁷³ Thus, in addition to processing claims offshore, the 'no advantage' policy provides that if asylum seekers taken to Nauru or PNG are found to be refugees, they should be denied rights to family reunion¹⁷⁴ and should not be resettled more quickly than they would have been had they pursued "regular migration pathways". As regards the latter, the Government proposes that such time frame should be assessed against a period the refugee might face had he or she been assessed by UNHCR under its "regional resettlement" programs¹⁷⁵. In response, UNHCR¹⁷⁶ has noted that the time it takes for UNHCR to process resettlement referrals are "not suitable comparators for the period that a Convention State, whose protection obligations have been engaged, would need to resettle genuine refugees"¹⁷⁷. Moreover, it has indicated that "regional arrangements" are at their early stages of conceptualisation and should therefore not be used as a measure for appropriate resettlement times¹⁷⁸. This is particularly so, given that there are in fact no queues or "average" times for resettlement, and when UNHCR's practice is to resettle refugees "on the basis of need and specific categories of vulnerability" and not a "time spent" basis¹⁷⁹. Given that the total number of Convention refugees in need of resettlement by UNHCR

¹⁷¹ Coorey et al, above n 10.

¹⁷² Sarah Clarke, Transcript: Late Line, *ABC News* (21/11/2001), <http://www.abc.net.au/lateline/content/2001/s422692.htm&ei=Pz6eUO-KBYaRiQe26IE4&usg=AFQjCNEL6qgkZ0kElxJlcO4Zsz1uGPJr3A>

¹⁷³ Expert Panel Report, above n 11, 8.

¹⁷⁴ *Ibid*, para 3.15 -3.16.

¹⁷⁵ See Michael Gordon, 'The trouble with Labor's New Look Nauru solution', *The Age* (14/09/2012) <http://www.theage.com.au/opinion/politics/the-trouble-with-labors-newlook-nauru-solution-20120914-25xvi.html>

¹⁷⁶ See UNHCR Nauru and PNG Advice, above n 43.

¹⁷⁷ Although UNHCR is responsible for RSD in 70 countries, its procedures have been criticised for lack of procedural fairness including failure to issue reasons for decisions, limited or no access to independent legal counsel, and inadequate independent appeal mechanisms: Michael Kagan, 'The Beleaguered Gatekeeper: Protection Challenges Posed by UNHCR Refugee Status Determination' (2006)18 *IJRL* 1, cited in Foster (2012), above n 52, 413.

¹⁷⁸ See UNHCR Nauru and PNG Advice, above n 43.

¹⁷⁹ *Ibid*.

globally is estimated at 800,000 and resettlement places stand at 80,000 per year¹⁸⁰, it would take at least 10 years to resettle the world's current refugee population under UNHCR's resettlement program. If Australia were to adopt that time frame as a guide for resettlement of its asylum seekers, the "waiting period" for those transferred to the Pacific might well be indefinite.

The fundamental problem with the "no advantage" policy is that it is formulated on the incorrect presumption that there are in fact "regular" migration pathways to seek asylum. Indeed, the underlying rationale of the Convention is for States to provide protection to those who do *not* have access to regular migration channels due to the vulnerability of their circumstances. It is for this reason that Article 31(1) of the Refugee Convention specifically provides that Contracting States shall not impose penalties on refugees on account of their illegal entry or presence.¹⁸¹ Moreover, in seeking to deter asylum seekers from arriving by boat, the policy fails to appreciate the complex factors which cause people to flee their homes and embark on life threatening journeys in the first place.¹⁸² At its highest, all that deterrence strategies can expect to achieve "is to divert asylum seekers onto equally irregular, equally risky routes to other countries in which protection may be found".¹⁸³ The Expert Panel has itself acknowledged that no asylum seeker would risk their life at sea if a viable, orderly and speedy path to resettlement were available.¹⁸⁴ And yet, quite at odds with this acknowledgement, the Expert Panel continues to stand by its endorsement of the 'no advantage' policy. Indeed, if current figures are anything to stand by, it confirms that the policy has and will have no impact in deterring genuine refugees.¹⁸⁵

¹⁸⁰ See UNHCR Executive Committee of the High Commissioner's Programme, Standing Committee 54th Meeting, 5/06/2012, 2 <http://www.unhcr.org/5006a6aa9.html>

¹⁸¹ Goodwin-Gill, 'Article 31 of the 1951 Convention relating to the Status of Refugees: Non-penalization, Detention and Protection' (Oxford University, 2001) 2.

¹⁸² Law Academic Submission, above n 19, 26.

¹⁸³ Taylor, above n 19.

¹⁸⁴ Expert Panel Report, above n 11.

¹⁸⁵ Before the Panel released its report, 7629 asylum seekers arrived this year in 114 boats; since then, another 5717 have arrived in another 100 boats: Michael Gordon, 'Friendship hits a snag in a sea of confusion', Sydney Morning Herald (4/11/2012), <http://www.smh.com.au/opinion/politics/friendship-hits-a-snag-in-a-sea-of-confusion-over-boats-20121102->

As outlined above, Australia has a distinct obligation to ensure that refugees are provided with effective protection. This requires, *inter alia*, that they be afforded durable solutions. In the circumstances, the policy's overt denial of durable solutions by subjecting refugees to indefinite detention and artificial "waiting times" renders it inconsistent with the object and purpose of the Refugee Convention, which is to find secure and lasting situations in which refugees can live in safety and rebuild their lives.¹⁸⁶ Moreover, the impact of deliberately subjecting refugees to a protracted state of uncertainty raises serious human rights concerns. As documented in the Oxfam Report on the Pacific Solution, the mental health impact that offshore processing on Nauru and PNG has had on asylum seekers has been significant, ranging from serious psychological damage to severe instances of self-harm.¹⁸⁷ Indeed, recent incidents of self-harm including hunger strikes¹⁸⁸ as well the attempted suicide of an Iraqi asylum seeker who was told that he would have to wait years before resettlement,¹⁸⁹ only adds to the weight of concern that human rights violations are occurring on Nauru today. Indeed, Australian Human Rights Commissioner, Gillian Triggs, has herself described the situation on Nauru as "an egregious breach of international human rights law".¹⁹⁰ UNHCR has echoed such views in its recent report on Nauru, noting that "the transfer of asylum-seekers to what are currently harsh and unsatisfactory temporary facilities, within a closed detention setting, and in the absence of a fully functional

28pgu.html#ixzz2BEX6m158; Paul Maley and Peter Alford, 'Afghan's warning: Nauru no deterrent, *The Australian*' (2/10/2012)

<http://www.theaustralian.com.au/national-affairs/immigration/afghans-warning-nauru-no-deterrent/story-fn9hm1gu-1226486167266>.

¹⁸⁶ Lisbon Conclusions, above n 53 para 15(i); 'Durable Solutions' Refugee Council of Australia, <http://www.refugeecouncil.org.au/f/int-ds.php>.

¹⁸⁷ Oxfam Report, above n 156.

¹⁸⁸ Simon Cullen, 'Hunger Strike Drags on', ABC News (7/11/2012) <http://www.abc.net.au/news/2012-11-07/nauru-hunger-strike-drags-on/4358490>.

¹⁸⁹ Adam Brereton, 'Asylum Seeker Attempts Suicide on Nauru', *New Matilda* (12/10/2012) <http://newmatilda.com/2012/10/12/asylum-seeker-attempts-suicide-nauru>.

¹⁹⁰ Bianca Hall and Ben Doherty, 'Nauru a breach of rights', *Sydney Morning Herald* (7 November 2012), accessed at <http://www.smh.com.au/opinion/political-news/nauru-a-breach-of-rights-20121106-28wg8.html#ixzz2KTd130rm>.

legal framework and adequately capacitated system to assess refugee claims, do not currently meet the required protection standards.”¹⁹¹

It is also concerning that the ‘no advantage’ policy purposefully discriminates between asylum seekers based on their mode of arrival. While providing those who arrive by plane access to on shore RSD processes and protections, such as the independent assistance of a migration agent and review of decisions by tribunals and courts in Australia, the policy denies those who arrive by boat the ability to make valid visa applications in Australia by sending them offshore to Nauru and PNG – where they will not only be subject to mandatory detention and harsh living conditions, but will also be denied rights to a durable solution, access to Australian courts and the right to apply for family reunion¹⁹². This two-tiered system penalises asylum seekers on the basis of their mode of arrival in direct breach of Australia's respective obligations under Articles 3 and 31(1) of the ICCPR and Convention¹⁹³.

Having regard to the above analysis, it is clear that the ‘no advantage’ policy is incapable of falling within the ambit of the minimum protection framework outlined above. Rather than fairly distribute responsibilities and improve protection for refugees, the New Strategy sets out to deliberately deny and deflect Australia's responsibility to provide effective protection under the Refugee Convention. It is plain, therefore, that the combination of the Government's acts and omissions in implementing the Strategy does have the overall effect of undermining the object of the Refugee Convention which sets out to achieve the opposite. In so doing, the New Strategy cannot be said to have been implemented good faith in accordance with Australia's treaty obligations.

¹⁹¹ UNHCR Mission to the Republic of Nauru 3-5 December 2012 Report (14 December 2012) at http://unhcr.org.au/unhcr/images/Amended%20footnote%202012-12-14%20nauru%20monitoring%20report%20final_2.pdf.

¹⁹² Expert Panel Report n 11, 9-10; see also Australian Human Rights Commission (AHRC) Submission to Inquiry into Australia's agreement with Malaysia in relation to asylum seekers, 14/09/2011 http://humanrights.gov.au/legal/submissions/2011/20110914_asylum_seekers.html.

¹⁹³ Ibid.

VI CONCLUSION

While the numbers of asylum seekers arriving by boat have increased over the last year and do present challenges, one should not lose sight of the reality that such challenges are modest by international standards¹⁹⁴ and that Australia is more than sufficiently placed to manage such increases in accordance with legal obligations it has voluntarily assumed. Moreover, it must be recognised that rights afforded to refugees under the Refugee Convention and other key treaties are not abstract “humanitarian” concepts for Government’s to “cherry pick” at their pleasure. As recognised by the High Court in *M70*, they are tangible legal rights which *must* inform the ambit and scope of statutory powers exercised by the Government with respect to asylum seekers. Thus, if Australia is to engage in offshore processing under section 198AB of the Migration Act, it is clear that such an arrangement must accord with Australia’s international obligations. In particular, for the Minister’s declaration under section 198AB – designating Nauru and PNG as “regional processing countries” – to be valid, his belief that such designation is in the “national interest” must be made in good faith as part of a legitimate burden-sharing arrangement to more fairly distribute responsibilities rather than deflect them. Unfortunately, for all concerned, current arrangements in Nauru and those proposed for PNG fall short of the requisite minimum conditions for such declaration to be valid.

The New Strategy does not in fact provide a “solution” to irregular migration within the Asia-Pacific Region¹⁹⁵ beyond addressing Australia’s own political concerns. As recent figures strongly suggest,¹⁹⁶ deterrence policies are incapable of preventing people fleeing persecution from embarking on dangerous journeys to Australia to secure protection for themselves and their families. To suggest otherwise is to misunderstand the causes of refugee flight¹⁹⁷. At its highest, all that offshore processing is

¹⁹⁴ UNHCR Submission to Expert Panel 27/07/2012

¹⁹⁵ Given the large numbers of ‘people of concern to the UNHCR’ moving into the Asia-Pacific, “no one country can be reasonably expected to manage such population movements”: Foster (2012) n 52, 422 citing John Menadue & Ors, *A New Approach: Breaking the Stalemate on Refugees and Asylum Seekers* (Occasional Paper No 13, Centre for Policy Development, August 2011) 21.

¹⁹⁶ Gordon, above n 185.

¹⁹⁷ Jane McAdam, ‘*Explainer: The Facts about the Malaysian Solution and Australia’s International Obligations*’ *The Conversation* (16/06/2011) ‘<http://theconversation.edu.au/explainer-the-facts-about-the-malaysian-solution-and-australiasinternational-obligations-1861>

likely to achieve is a redirection of irregular migration to Australia's neighbours who bear the responsibility for a disproportionately high number of irregular migrants. While such an outcome might be welcomed by some, it is important to bear in mind that Australia does not exist within a political vacuum. Its treatment of asylum seekers and any deflection of responsibility to its neighbours will affect its international reputation and political relationships with key regional nations as it has done in the past.¹⁹⁸ Moreover, coupled with the New Strategy's overt failure to provide asylum seekers with effective protection in order to deter them arriving on our shores, its policy of 'no advantage' is incapable of satisfying the minimum legal conditions required for offshore processing to be lawful. In the circumstances, the New Strategy cannot be said to have been made in *good faith* or in Australia's "national interest". As recent trends in international and domestic jurisprudence demonstrate, if the Government does wish to lawfully engage in offshore processing, such strategy would need to be conducted in accordance with Australia's international obligations. The legal framework outlined above sets out in precise terms what would practically need to be satisfied for that to occur. Whilst these conditions may appear onerous, their satisfaction will far outweigh the legal and political ramifications which are likely to be suffered if this Government or the next fails to act in accordance with the rule of law.

¹⁹⁸ See Taylor, above n 119.