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# UNFRIENDLY SHORES: AN EXAMINATION OF AUSTRALIA'S “PACIFIC SOLUTION” UNDER INTERNATIONAL LAW

## INTRODUCTION

In August 2001, the *M/V Tampa* (“*Tampa*”), a Norwegian freighter ship, responded to the distress signal of a sinking vessel in the waters of the South Pacific.<sup>1</sup> The *Tampa* pulled more than 430 South Asian refugees from the waters and sailed for Christmas Island, a remote Australian territory in the Indian Ocean.<sup>2</sup> In an internationally criticized decision, the Australian government refused the *Tampa* permission to dock in its territory, which led to a standoff culminating in an Australian military unit boarding the *Tampa* and taking custody of its human cargo.<sup>3</sup> In a domestically popular decision, Australian Prime Minister John Howard declared that the asylum seekers rounded up during the “*Tampa* Affair” would not enter Australia, despite their pleas for relief.<sup>4</sup>

The Australian government’s actions during the *Tampa* Affair marked a new, hardline stance<sup>5</sup> in that country’s policy toward “boat people”—international refugees who sail to Australia in search of asylum.<sup>6</sup> In response to the *Tampa* Affair and a contin-

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1. *Australia Turns Away Ship Carrying Migrants*, WASH. POST, Aug. 28, 2001, at A11.

2. Richard C. Paddock, *Australia Ships Boat People to Distant Refuge*, L.A. TIMES, Sept. 4, 2001, <http://articles.latimes.com/2001/sep/04/news/mn-41825>.

3. *See id.*; *See also Norway Reports Refugee Boat Crisis to International Bodies*, TELEGRAPH, Aug. 29, 2001.

4. Some *Tampa* refugees threatened to riot or throw themselves overboard if they were not granted entry to Australia. Despite their pleas, radio and TV stations were flooded with comments expressing support for Howard’s decision. *See* Rosemary Schultz, *The Agenda Setting Function of Mass Media, Tampa, John Howard, Print Media and Public Opinion: How It All Came Together in Melbourne*, INDEP. STUDY PROJECT COLLECTION PAPER 482, 4–7 (2005).

5. The *Tampa* Affair prompted new laws and made immigration a central issue in national elections. *See* Katharine Gentry, *How Tampa Became a Turning Point*, AMNESTY INT’L AUSTRALIA (June 14, 2007), [www.amnesty.org.au/refugees/comments/how\\_tampa\\_became\\_a\\_turning\\_point](http://www.amnesty.org.au/refugees/comments/how_tampa_became_a_turning_point).

6. The term “boat people” became common in the 1970s when refugees fled the Vietnam War. *See* JANET PHILLIPS AND HARRIET SPINKS, PARLIAMENT OF

ued influx of migrants seeking asylum, the Australian government reformed several aspects of its immigration system and began a controversial policy commonly referred to as the “Pacific Solution.”<sup>7</sup> The Pacific Solution is a third country immigration processing scheme, wherein asylum seekers<sup>8</sup> who arrive in Australian territory by boat are detained by Australian authorities and shipped to other Pacific nations to have their refugee claims processed and reviewed under the receiving nations’ laws.<sup>9</sup> This “offshore processing” mechanism is attacked by human rights activists as flawed and incompatible with Australia’s obligations under international law, who argue that the policy poses a serious threat to the rights of foreign migrants seeking asylum.<sup>10</sup>

This Note argues Australia’s method of offshore processing using third party countries, and its increasingly forceful stance against waterborne arrivals seeking asylum,<sup>11</sup> is an unsettling

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AUST. DEP’T OF PARLIAMENTARY SERV., BOAT ARRIVALS IN AUSTRALIA SINCE 1976, 1 (July 23, 2013).

7. *Migration: Timeline of Australian asylum-seeker debate*, INTEGRATED REG’L INFO. NETWORKS (Sept. 20, 2011), [www.irinnews.org/report/93760/migration-timeline-of-australian-asylum-seeker-debate](http://www.irinnews.org/report/93760/migration-timeline-of-australian-asylum-seeker-debate).

8. This Note adopts the U.N. High Commissioner for Refugees’ definition of an asylum seeker, which refers to “persons applying for refugee status pursuant to the definition of a ‘refugee’ in the 1951 Convention and 1967 Protocol relating to the Status of Refugees.” See U.N. High Comm’r for Refugees, *Detention Guidelines* 10 (2012) [hereinafter *Detention Guidelines*].

9. The Pacific Solution is a comprehensive immigration policy enabled by domestic Australian law and international agreements with other Pacific countries. See AUSTRALIAN HUMAN RIGHTS COMM’N, HUMAN RIGHTS ISSUES RAISED BY THE THIRD COUNTRY PROCESSING REGIME 3-5 (Mar. 2013).

10. See, e.g., *id.* at 7–11; *Amnesty International: Expert Panel Recommendations a Major Setback for Refugee Policy*, AMNESTY INT’L (Aug. 13, 2012), [www.amnesty.org.au/news/comments/29465/](http://www.amnesty.org.au/news/comments/29465/).

11. In September, 2013, Australians voted into power the Liberal-National Coalition with Tony Abbott as Prime Minister. Abbott and his party pledged a hard line immigration stance. See Alison Rourke, *Tony Abbott, the Man Who Promised to ‘Stop the Boats’, Sails to Victory*, GUARDIAN, Sept. 7, 2013, [www.theguardian.com/world/2013/sep/07/australia-election-tony-abbott-liberal-victory](http://www.theguardian.com/world/2013/sep/07/australia-election-tony-abbott-liberal-victory). After taking office, Abbott’s government launched “Operation Sovereign Borders,” a military border security operation designed to intercept and refuse entry to Australian waters boats carrying refugees. See Scott Morrison, Austl. Minister for Immigration and Border Protection, Press Conference on Operation Sovereign Borders (Sept. 26, 2013) (transcript available at [www.customs.gov.au/site/130923transcript\\_operation-sovereign-borders.asp](http://www.customs.gov.au/site/130923transcript_operation-sovereign-borders.asp)).

development for an otherwise refugee friendly nation,<sup>12</sup> and its current policy should be abandoned in favor of an approach that comports with its legal obligations. Part I of this Note examines Australia's unique immigration policy by examining Australia's legal obligations under international treaties and laws, and then traces the development of the Pacific Solution from the *Tampa* Affair to the present. Part II analyzes how the Pacific Solution fails to uphold these obligations and violates the rights of vulnerable individuals. Part III proposes how Australia can reform its immigration procedures to align with its international obligations, while simultaneously discouraging future unauthorized immigration.

## I. HOW WE GOT HERE: AUSTRALIA'S TREATY COMMITMENTS AND THE RISE OF THE "PACIFIC SOLUTION"

### A. Australia's International Legal Obligations

Australia is a signatory to multiple international treaties and agreements that address the rights of asylum seekers. This treaty list includes: the Universal Declaration of Human Rights ("UDHR"), the 1951 Convention Relating to the Status of Refugees ("Convention"), the 1967 Protocol Relating to the Status of Refugees ("Protocol"), the International Covenant on Civil and Political Rights ("ICCPR"), the U.N. Convention Against Torture ("CAT") and the International Convention on the Elimination of All Forms of Racial Discrimination ("ICERD").<sup>13</sup> As an independent sovereign state, Australia's signature to these instruments

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12. While the Australian government claims the nation accepts an unusually high number of refugees on a per capita basis, an analysis of global refugee statistics for 2012 by the Refugee Council of Australia shows the nation ranked twenty-second in accepting refugees that year. See REFUGEE COUNCIL OF AUSTRALIA, AUSTRALIA'S REFUGEE RESPONSE NOT THE MOST GENEROUS BUT IN TOP 25 (July 19, 2013), available at [www.refugeecouncil.org.au/n/mr/130719\\_GlobalStats.pdf](http://www.refugeecouncil.org.au/n/mr/130719_GlobalStats.pdf).

13. For Australia's commitment to the Convention, Protocol, ICCPR, and CAT, see Gillian Triggs, *Australia, Human Rights, Refugees and Asylum Seekers*, INT'L ADVOCATE, Aug. 1, 2013 at 3-4, available at <https://www.human-rights.gov.au/news/opinions/australia-human-rights-refugees-and-asylum-seekers>; For Australia's adoption of the UDHR, see 1948-1949 U.N.Y.B. 535, U.N. Sales No. 1950.I.II; For ratifying ICERD, *Racial Discrimination Act 1975* (Cth) (Austl.).

indicates its voluntary assumption to uphold human rights principles and to operate its immigration system within internationally acceptable parameters.<sup>14</sup>

The framework of Australia's modern international refugee law originated in the aftermath of the Second World War, when the United Nations addressed the issue of persons displaced by conflict.<sup>15</sup> In 1948, Australia voted in favor of a U.N. motion to adopt the UDHR, a comprehensive list of civil, political and human rights to which all people are entitled.<sup>16</sup> Though not legally binding, the UDHR serves as a common, internationally recognized standard of universal human rights and has significantly influenced the development of international law.<sup>17</sup> Additionally, the UDHR is a means to guide and support the interpretation of other binding international treaties.<sup>18</sup> In 1950, the U.N. established the office of U.N. High Commissioner for Refugees ("UNHCR"), which develops and implements solutions to refugee issues.<sup>19</sup> Soon after the UNHCR's founding, Australia adopted the 1951 Convention, a legally binding treaty of forty-six Articles designed to guide the refugee policy of signatory nations.<sup>20</sup> The Convention covers three main subjects, including

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14. See, e.g., Riona Moodley, *The Revival of the Pacific Solution: An Analysis of the Legal Parameters of Offshore Processing in Australia* 5 (UNSW Student Legal Research Series Research Paper No. 13-03 Mar. 2013), available at [www.papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2236529](http://www.papers.ssrn.com/sol3/papers.cfm?abstract_id=2236529); See also ANNE F. BAYEFSKY, THE UN HUMAN RIGHTS TREATY SYSTEM: UNIVERSALITY AT THE CROSSROADS 4-5 (2001).

15. Guy S. Goodwin-Gill, Introductory Note on the Convention Relating to the Status of Refugees and Protocol Related to the Status of Refugees 1 (2008), <http://legal.un.org/avl/ha/prsr/prsr.html>.

16. For Australia's vote in favor of the UDHR, 1948-1949 U.N.Y.B. 535, U.N. Sales No. 1950.I.II. For the text of the UDHR, Universal Declaration of Human Rights, G.A. Res. 217 (III) A, U.N. Doc. A/RES/217(III) (Dec. 10 1948) [hereinafter Universal Declaration of Human Rights].

17. *What is the Universal Declaration on Human Rights?*, AUSTRALIAN HUMAN RIGHTS COMM'N, [www.humanrights.gov.au/publications/what-universal-declaration-human-rights](http://www.humanrights.gov.au/publications/what-universal-declaration-human-rights) (last visited Jan. 14, 2014).

18. See U.N. High Comm'r for Refugees, *Human Rights and Refugee Protection (RLD 5)* 5, 11 (Oct. 1995), available at [www.unhcr.org/3ae6bd900.pdf](http://www.unhcr.org/3ae6bd900.pdf).

19. Goodwin-Gill, *supra* note 15, at 1-2.

20. The High Commissioner for Refugees describes how the Convention "lays down basic minimum standards" for signatories. See U.N. High Comm'r for Refugees, Introductory Note from the U.N. High Commissioner for Refugees 3, [www.unhcr.org/3b66c2aa10.html](http://www.unhcr.org/3b66c2aa10.html); Australia adopted the Convention on January 22, 1954. Convention Relating to the Status of Refugees, Apr. 22, 1954, 189 U.N.T.S. 137.

the definition of “refugee,” the rights and legal status of refugees in the country of asylum, and the obligations of signatory states, which include cooperating with the UNHCR and applying the Convention’s protections.<sup>21</sup>

Several years after Australia adopted the Convention, international legal scholars convened to discuss unresolved refugee issues and suggested certain updates of the Convention to the UNHCR.<sup>22</sup> Otherwise known as the 1967 Protocol, Australia assented to the suggested updates in 1973.<sup>23</sup> Although Australia did not adopt the Convention and Protocol’s protections through domestic legislation, the High Court of Australia has ruled the Convention’s provisions should be applied as if they had been enacted via domestic law.<sup>24</sup> In addition to the Convention and the Protocol, Australia further committed to international obligations by signing the ICCPR in 1980.<sup>25</sup> The ICCPR is a compilation of basic human rights, and it acts as a “yardstick” for drafting laws concerning individual rights.<sup>26</sup> Because the ICCPR is not legally binding without corresponding domestic legislation, it obliges signatories to assume its provisions through such domestic legislation.<sup>27</sup> Though Australia has not passed a domestic law enshrining the ICCPR’s protections, it has created the Australian Human Rights Commission, an independent

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21. Kate Jastram and Marilyn Achiron, U.N. COMM’R FOR REFUGEES, *Refugee Protection: A Guide to International Refugee Law* 10 (2001), available at [www.ipu.org/pdf/publications/refugee\\_en.pdf](http://www.ipu.org/pdf/publications/refugee_en.pdf).

22. Goodwin-Gill, *supra* note 15, at 7.

23. Though the 1967 Protocol is an independent instrument, it is colloquially referred to and functions as an amendment to and revision of the 1951 Convention. *See id.* For Australia’s ratification, see Protocol Relating to the Status of Refugees, Participants, Oct. 4, 1967, 606 U.N.T.S. 267, available at [https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg\\_no=V-5&chapter=5&lang=en](https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=V-5&chapter=5&lang=en).

24. *Minister for Immigration and Multicultural and Indigenous Affairs v. QAAH of 2004* (2006) HCA 54, ¶134 (Austl.); *See also* THE 1951 CONVENTION RELATED TO THE STATUS OF REFUGEES: A COMMENTARY 81 (Andreas Zimmerman ed., 2011).

25. For Australia’s ratification, see International Covenant on Civil and Political Rights, [1980] ATS No. 23 (Austl.) [hereinafter International Covenant on Civil and Political Rights].

26. *See* Christian Tomuschat, *International Covenant on Civil and Political Rights* 1, UN AUDIOVISUAL LIBRARY OF INT’L LAW (2008).

27. KATHARINE GELBER, BACKGROUND PAPER ON AUSTRALIA’S RESPONSE TO ARTICLES 19 AND 20 OF THE ICCPR 2 (2011), available at [www.ohchr.org/Documents/Issues/Expression/ICCPR/Bangkok/KathGelber.pdf](http://www.ohchr.org/Documents/Issues/Expression/ICCPR/Bangkok/KathGelber.pdf).

body of experts that develops policy and legislation to uphold the ICCPR's principles.<sup>28</sup>

While the Convention and Protocol guide worldwide refugee policy,<sup>29</sup> Australia is a party to two other significant treaties—the CAT and ICERD.<sup>30</sup> Given effect through domestic legislation, the CAT is legally binding on Australia and prohibits Australian public officials from taking actions that violate its provisions.<sup>31</sup> Furthermore, the CAT, like the ICCPR, applies to all persons and does not qualify its protections to only refugees.<sup>32</sup> Australia likewise ratified ICERD, with its compliance judged by an international CERD Committee of legal experts.<sup>33</sup>

The term “refugee” is defined in Article 1 of the 1951 Convention<sup>34</sup> as follows:

As a result of events occurring before 1 January 1951 and owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence

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28. See *Human Rights Commission Act 1981* (Cth) SS 6, 9 (Austl.).

29. For the importance and relevance of the treaties, see U.N. High Comm'r for Refugees, *The 1951 Convention Relating to the Status of Refugees and its 1967 Protocol*, 8–9 (Sept. 2011), available at [www.unhcr.org/4ec262df9.html](http://www.unhcr.org/4ec262df9.html).

30. For Australia's ratification of CAT, see *Crimes (Torture) Act 1988* (Cth); For ICERD, see International Convention on the Elimination of All Forms of Racial Discrimination, Mar. 7, 1966, 660 U.N.T.S. 195.

31. See *Crimes (Torture) Act 1988* S 6, *supra* note 30.

32. Both the ICCPR and CAT consistently refer to “all peoples,” “all persons,” etc. The term refugee does not appear in either document. See generally International Covenant on Civil and Political Rights, *supra* note 25; For CAT, see generally Convention Against Torture, and Other Cruel, Inhuman, or Degrading Treatment or Punishment, Dec. 10, 1984, 1465 U.N.T.S. 85 [hereinafter Convention Against Torture].

33. *The International Convention on the Elimination of All Forms of Racial Discrimination (CERD)*, AUSTL. HUMAN RIGHTS COMM'N, [www.human-rights.gov.au/international-convention-elimination-all-forms-racial-discrimination-icerd](http://www.human-rights.gov.au/international-convention-elimination-all-forms-racial-discrimination-icerd) (last viewed Jan 14, 2014).

34. Convention Relating to the Status of Refugees art. 1, July 28, 1951, 189 U.N.T.S. 150 [hereinafter 1951 Convention Relating to the Status of Refugees].

as a result of such events, is unable or, owing to such fear, is unwilling to return to it.<sup>35</sup>

Thus, a person who fled their home country, and fears persecution if forced to return, is a refugee under international law.<sup>36</sup> Although the Convention does not define “persecution,” most signatory states do not limit the term to government actions but rather extend protections against persecution to non-state actors.<sup>37</sup> Economic migrants, those who leave their home country to seek improved economic or working conditions, do not fit generally the definition of refugee.<sup>38</sup> A former U.N. High Commissioner for Refugees characterizes the difference thus: “Economic migrants . . . choose to move in order to improve the future prospects of themselves and their families. Refugees have to move if they are to save their lives or preserve their freedom.”<sup>39</sup> An individual’s motivation is notable because many nations confuse economic migrants and refugees, and may indiscriminately increase barriers to entry without considering the consequences of shutting out legitimate refugees in an attempt stop economic migrants.<sup>40</sup>

To protect refugees, Article 33 of the Convention obligates Australia to uphold the principle of non-refoulement.<sup>41</sup> Article 33

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35. *Id.* The 1967 Protocol later updated this definition by omitting the reference to the year 1951, so that “any person” may meet the definition of refugee. See 1967 Protocol Relating to the Status of Refugees, G.A. Res. 2198 (XXI), art. I ¶ 2 (16 Dec. 1966) [hereinafter Protocol Relating to the Status of Refugees].

36. See AUSTL. HUMAN RIGHTS COMM’N, ASYLUM SEEKERS, REFUGEES & HUMAN RIGHTS, SNAPSHOT REPORT 9 (2013) [hereinafter AUSTL. HUMAN RIGHTS COMM’N], available at [www.humanrights.gov.au/sites/default/files/document/publication/snapshot\\_report\\_2013.pdf](http://www.humanrights.gov.au/sites/default/files/document/publication/snapshot_report_2013.pdf).

37. U.N. High Comm’r for Refugees, *Interpreting Article 1 of the 1951 Convention Relating to the Status of Refugees* 6 (Apr. 2001), [www.refworld.org/docid/3b20a3914.html](http://www.refworld.org/docid/3b20a3914.html).

38. Ruud Lubbers, *Refugees and Migrants: Defining the Difference*, BBC NEWS, [http://news.bbc.co.uk/2/hi/in\\_depth/3516112.stm](http://news.bbc.co.uk/2/hi/in_depth/3516112.stm) (last updated Apr. 5, 2004).

39. *Id.*

40. *Id.* Lubbers contends that countries that do not allow war refugees to enter their territory are condemning them to death. *Id.*

41. The UNHCR calls non-refoulement the “cornerstone of asylum and of international refugee law,” U.N. High Comm’r for Refugees, *UNHCR Note on the Principle of Non-Refoulement* (Nov. 1997), available at [www.refworld.org/docid/438c6d972.html](http://www.refworld.org/docid/438c6d972.html).



mandates that “[n]o Contracting State shall expel or return (‘refouler’) a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion.”<sup>42</sup> Non-refoulement prohibits transferring refugees to a place where their life or freedom could be threatened—a protection the Australian government recognizes as applying to third party countries within the Pacific Solution.<sup>43</sup> Indeed, the UNHCR and refugee advocates interpret the non-refoulement obligation as extending past territorial borders.<sup>44</sup> In other words, Article 33’s protections extend to “whenever the State in question exercises jurisdiction.”<sup>45</sup>

The idea of a national responsibility to protect the rights of persons under its jurisdiction, even if they are located outside its territorial boundaries, is not merely the UNHCR’s opinion. For example, the ICCPR’s protections extend expressly to individuals within a signatory state’s territory as well as to those subject to the signatory’s jurisdiction.<sup>46</sup> Furthermore, the 1967 Protocol codifies this extraterritorial obligation and expands the Convention’s protections to member states “without any geographic limitation.”<sup>47</sup> An Australian government report explicitly recognized its obligation, which states that refugees “will be subject to a state’s jurisdiction where the state exercises ‘effective control’ over a person extraterritorially—in which case, relevant human rights obligations will apply.”<sup>48</sup> Australia is therefore liable

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42. 1951 Convention Relating to the Status of Refugees, *supra* note 34, art. 33(1).

43. See GOV’T OF AUSTL., REPORT OF THE EXPERT PANEL ON ASYLUM SEEKERS 80 (Aug. 2012) [hereinafter REPORT OF THE EXPERT PANEL ON ASYLUM SEEKERS], available at [http://expertpanelonasylumseekers.dpmc.gov.au/sites/default/files/report/expert\\_panel\\_on\\_asylum\\_seekers\\_full\\_report.pdf](http://expertpanelonasylumseekers.dpmc.gov.au/sites/default/files/report/expert_panel_on_asylum_seekers_full_report.pdf).

44. See, e.g., Sir Elihu Lauterpacht & Daniel Bethlehem, *The Scope and Content of the Principle of Non-Refoulement: Opinion*, in REFUGEE PROTECTION IN INT’L L. 87, 122 (Erika Feller, Frances Nicholson & Volker Türk eds., 2003).

45. U.N. High Comm’r for Refugees, *Advisory Opinion on the Extraterritorial Application of Non-Refoulement Obligations under the 1951 Convention relating to the Status of Refugees and its 1967 Protocol 4* (Jan. 26, 2007) [hereinafter *Advisory Opinion*], available at [www.refworld.org/docid/45f17a1a4.html](http://www.refworld.org/docid/45f17a1a4.html).

46. International Convention on Civil and Political Rights, *supra* note 25, art. 2(1).

47. 1967 Protocol Relating to the Status of Refugees, *supra* note 35.

48. REPORT OF THE EXPERT PANEL ON ASYLUM SEEKERS, *supra* note 43, at 82.

for human rights violations occurring in other countries where Australia exercises effective control over persons or territory.<sup>49</sup>

Australia is also obligated to afford refugees and asylum seekers certain rights related to their detention. For example, the Convention guarantees refugees “free access to the courts of law [in] the territory of the Contracting State.”<sup>50</sup> Likewise, the UDHR makes clear a detainee’s right to “an effective remedy by . . . competent national tribunals,” while the ICCPR entitles detainees to take their proceedings before a court so that the lawfulness of detention may be resolved.<sup>51</sup> Although the Convention does expressly allow for the detention of refugees intercepted by authorities, the UNHCR encourages signatory States to ensure detention not be prolonged, arbitrary, or used to deter future refugee migration.<sup>52</sup>

According to the U.N. Human Rights Committee,<sup>53</sup> prolonged detention becomes arbitrary and thus illegal under the ICCPR if the controlling authority cannot justify detention or cannot show that less restrictive means would achieve its goals.<sup>54</sup> In its guidelines for applying refugee law, the UNHCR comments that detention is only valid where a country pursues a legitimate purpose, and that purpose has been determined to be both necessary and proportionate for each individual detainee.<sup>55</sup> Similarly, the UDHR prohibits arbitrary detention and recognizes the right of refugees to seek asylum.<sup>56</sup>

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49. *See id.* at 79–82.

50. 1951 Convention Relating to the Status of Refugees, *supra* note 34, art. 16(1).

51. Universal Declaration of Human Rights, *supra* note 16, art. 8; International Convention on Civil and Political Rights, *supra* note 25, art. 9 (3–4).

52. An expert group of scholars organized by the UNHCR reached these conclusions. *See Lauterpacht and Bethlehem, supra* note 44.

53. The U.N. Human Rights Committee is distinct from the UNHCR, and is comprised of eighteen independent Human Rights experts. *Membership*, U.N. HUMAN RIGHTS COMMITTEE, [www.ohchr.org/EN/HRBodies/CCPR/Pages/Membership.aspx](http://www.ohchr.org/EN/HRBodies/CCPR/Pages/Membership.aspx) (last accessed September 26, 2014).

54. *See D & E v. Australia*, Comm’n No. 1050/2002 ¶ 7.2 (Aug. 9, 2006) (The U.N. Human Rights Committee was established by the ICCPR and is tasked with considering allegations that ICCPR parties are not fulfilling their obligations under the instrument, see generally International Convention on Civil and Political Rights, *supra* note 25 art. 28-47).

55. *See Detention Guidelines, supra* note 8, at 6.

56. *See Universal Declaration of Human Rights, supra* note 16, art. 9, 14(1).

The topic of living conditions afforded to detainees is also discussed by international agreements. The UDHR, ICCPR, and CAT all prohibit “cruel, inhuman, or degrading treatment or punishment.”<sup>57</sup> Moreover, the Convention prevents signatories from penalizing refugees for entering national territory illegally if the individual immediately presents himself to the authorities and shows good cause for the entry.<sup>58</sup>

These prohibitions on degrading treatment are bolstered by the Convention and ICCPR’s adherence to fairness and equality. For example, the Convention bars discrimination on the basis of race, religion or country of origin, and affords refugees treatment “not less favorable than that afforded to [foreigners] generally in the same circumstances” when addressing refugees’ housing, education, and property needs.<sup>59</sup> Additionally, the ICCPR calls for authorities to ensure refugee rights without distinctions of any kind—such as race or national or social origin—while the UDHR calls for equality before law for all people.<sup>60</sup>

By ratifying the Convention, Australia agreed to work with the UNHCR to implement the Convention’s principles and protections.<sup>61</sup> As a guardian of the Convention and Protocol, the UNHCR ensures signatory countries maintain and enforce procedures for determining the validity or invalidity of an individual’s refugee status.<sup>62</sup> Accordingly, the UNHCR makes reports and recommendations on the importance of refugee status deter-

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57. Convention Against Torture, *supra* note 32, art. 16; Universal Declaration of Human Rights, *supra* note 16, art. 5; International Convention on Civil and Political Rights, *supra* note 25, art. 7.

58. The Convention states refugees should present themselves to the authorities of an asylum country “without delay.” 1951 Convention Related to the Status of Refugees, *supra* note 34, art. 31(1).

59. For the prohibition on discrimination, see *id.* art. 3; The Convention uses the term “not less favorable than that accorded to aliens generally in the same circumstances” in provisions regarding housing (Art. 21), education (Art. 22), and property (Art. 13). *Id.*

60. International Convention on Civil and Political Rights, *supra* note 25, art. 2; Universal Declaration of Human Rights, *supra* note 16, art. 7.

61. See 1951 Convention Relating to the Status of Refugees, *supra* note 34, art. 35; Part of this cooperation involves providing the UNHCR with reports and statistics on refugees. See Introductory Note from the United Nations High Commissioner for Refugees, *supra* note 20, at 4.

62. *Id.*

mination (“RSD”) procedures available to Convention signatories.<sup>63</sup> Although the Convention itself does not mention RSD procedures, the UNHCR requires states to maintain “fair and efficient” asylum procedures accessible to those entitled to the Convention’s protection.<sup>64</sup> This requirement extends to any third party country that receives transferred refugees, thus confining Australia’s ability to transfer people only to states that can meet the asylum and RSD procedure requirement.<sup>65</sup>

### *B. Evolution of the Pacific Solution*

#### 1. From the *Tampa* to Malaysia

Australia’s Pacific Solution originates from the months following the *Tampa* incident in 2001.<sup>66</sup> With a national election just months away, former Prime Minister John Howard vowed no *Tampa* refugee passengers would settle in Australia and subsequently approached Indonesia, East Timor, and Fiji to resettle the asylum seekers.<sup>67</sup> Meeting resistance from these countries, the Australian government approached its former colony, Papua New Guinea, and the tiny, economically depressed island nation of Nauru.<sup>68</sup> These island nations quickly agreed to house and process the asylum applications of the *Tampa* refugees, decisions which paved the way for the construction of detention centers on Nauru and Papua New Guinea’s Manus Island region.<sup>69</sup>

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63. Refworld.org, a subsidiary of the UNHCR, compiles UNHCR handbooks. See REF WORLD.ORG, [www.refworld.org/rsd.html](http://www.refworld.org/rsd.html).

64. Moodley, *supra* note 14, at 15 (quoting *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*, 7 (Jan. 26, 2007), available at [www.unhcr.org/home/RSDLEGAL.45fi7ala4.pdf](http://www.unhcr.org/home/RSDLEGAL.45fi7ala4.pdf)).

65. Moodley, *supra* note 14, at 6 (citing *Plaintiff M70/2011 v Minister for Immigration and Citizenship* [2011] HCA 32 ¶¶119, ¶¶124-26 (Austl.); See also Sara Dehm, *Sovereignty, Protection and the Limits to Regional Refugee Status Determination Arrangements*, 28 MERKOURIOS UTRECHT J. OF INT’L & EUR. L. 53, 57 (2012).

66. See Phillips and Spinks, *supra* note 6, at 16.

67. KAZIMIERZ BEM, NINA FIELD, NIC MACLELLAN, SARAH MEYER, TONY MORRIS, OXFAM AUSTRALIA AND A JUST AUSTRALIA, *A PRICE TOO HIGH: THE COST OF AUSTRALIA’S APPROACH TO ASYLUM SEEKERS* 11 (2007).

68. *Id.*

69. The first detention centers were administrated by the International Organization for Migration. Phillips and Spinks, *supra* note 6, at 16.

In the years following the *Tampa* Affair, from 2001 to February 2008, the Australian government intercepted and transferred to the islands for immigration processing 1,637 asylum seekers, with most transfers occurring immediately after the *Tampa* Affair.<sup>70</sup> With only one individual asylum seeker arriving by boat in all of 2002, and just several hundred intercepted between 2003 and 2008,<sup>71</sup> Prime Minister Howard declared the Pacific Solution processing scheme effectively “stopped the boats.”<sup>72</sup> But, some commentators cited a simultaneous increase in political stability in South Asia and a new Australian temporary visa program as discouraging potential refugees from seeking to enter Australia by boat as the true reason for the arrival decrease.<sup>73</sup>

In 2007, Australians saw a change in political leadership with the election of Kevin Rudd to the Prime Minister's office, and along with it, a change in Australia's approach toward boat people.<sup>74</sup> Rudd's administration formally ended offshore immigration processing, citing high costs and calling the program “unsuccessful.”<sup>75</sup> Additionally, Rudd claimed that many asylum seekers processed offshore were eventually settled in Australia, despite the government's previous assertion that they would not reach Australian soil.<sup>76</sup> The administration then developed a

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70. *Id.* at 17, 22; see generally Bridie Jabour, *Did John Howard's Pacific Solution stop the boats, as Tony Abbott asserts?*, GUARDIAN, July 19, 2013, [www.theguardian.com/world/2013/jul/19/did-howard-solution-stop-boats](http://www.theguardian.com/world/2013/jul/19/did-howard-solution-stop-boats).

71. For exact numbers of boats and refugees, see Phillips and Spinks, *supra* note 6.

72. Former Prime Minister John Howard touted his tough policies as the reason for the decrease in arrivals. Jabour, *supra* note 70.

73. The removal of the Taliban from power in Afghanistan may have discouraged refugees from trying to reach Australia, and for background on the temporary protection visa, see *id.*

74. For the change in government policy, see Jane Norman, *Asylum Seekers: Where the Parties Stand*, AUSTRALIAN BROADCASTING CORP., [www.abc.net.au/news/federal-election-2013/policy/asylum-seekers](http://www.abc.net.au/news/federal-election-2013/policy/asylum-seekers). For Kevin Rudd's 2007 victory, see *Kevin Rudd claims victory in federal election*, SYDNEY MORNING HERALD, Nov. 24, 2007, [www.smh.com.au/articles/2007/11/24/1195753362801.html](http://www.smh.com.au/articles/2007/11/24/1195753362801.html).

75. *Id.*

76. Although Rudd's announcement marked the official end to the processing scheme, the centers had effectively ceased operating in 2004. See Press Release, Senator Chris Evans, Last Refugees Leave Nauru (Feb. 8, 2008), available at <http://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;query=Id%3A%22media%2Fpressrel%2FYUNP6%22>.

new framework to process boat arrivals, which included the expansion of a detention center on Christmas Island where asylum seekers were processed under domestic law.<sup>77</sup> Refugee advocates hailed the end of offshore processing as a step in the right direction, but still emphasized the need for a policy that respected the spirit of international law.<sup>78</sup>

The end of offshore processing proved short lived, however, as successive Australian governments sought to reinstate the Pacific Solution.<sup>79</sup> In the years following the Rudd government's announcement of a more relaxed immigration policy, the number of refugees arriving in Australia by boat increased dramatically, rising from 161 in 2008, to 2,726 in 2009, 6,555 in 2010, and 4,565 in 2011.<sup>80</sup> In 2010, Australians saw yet another change in government leadership as Julia Gillard took office as Prime Minister.<sup>81</sup> Facing an increasing number of boat people arrivals, and a December 2010 incident where at least forty-eight asylum seekers died in a shipwreck,<sup>82</sup> the Gillard government sought to revive policies to discourage refugees from attempting to reach Australia.<sup>83</sup> Armed with the pretext of cracking down on "people smuggling" and reducing boat accidents, the Gillard government shopped around the South Pacific for an ally to accept the burden of processing international refugees. Prime Minister Gillard found a willing partner in Malaysia.<sup>84</sup> In 2011, Australia and Malaysia agreed to the "Malaysian Solution," a

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77. *Id.*

78. Press Release, Jennifer Pagonis, U.N. High Comm'r for Refugees, UNHCR Welcomes Close of Australia's Pacific Solution, (Feb. 8, 2008), [www.unhcr.org/47ac3f9c14.html](http://www.unhcr.org/47ac3f9c14.html) (on file with author).

79. Phillips and Spinks, *supra* note 6, at 17–18.

80. *Id.* at 22.

81. Emma Rodgers, *Gillard Ousts Rudd in Bloodless Coup*, AUSTRALIAN BROADCASTING CORP. (June 24, 2010), [www.abc.net.au/news/2010-06-24/gillard-ousts-rudd-in-bloodless-coup/879136](http://www.abc.net.au/news/2010-06-24/gillard-ousts-rudd-in-bloodless-coup/879136).

82. *Authorities: Death Toll up to 48 in Christmas Island Shipwreck*, CNN (Dec. 20, 2010), [www.cnn.com/2010/WORLD/asiapcf/12/20/australia.asylum.seekers/index.html](http://www.cnn.com/2010/WORLD/asiapcf/12/20/australia.asylum.seekers/index.html).

83. For a description of how the Gillard government turned back toward a more stringent immigration policy, see Phillips and Spinks, *supra* note 6, at 10.

84. *Gillard Announces Malaysian Solution*, SYDNEY MORNING HERALD, May 7, 2011, [www.smh.com.au/national/gillard-announces-malaysian-solution-20110507-1ed0h.html](http://www.smh.com.au/national/gillard-announces-malaysian-solution-20110507-1ed0h.html).

refugee “swap” wherein 800 asylum seekers in Australian custody would be sent to Malaysia in exchange for Australia’s resettling 4,000 persons who were already recognized as genuine refugees.<sup>85</sup>

Deeply unpopular with human rights and refugee advocates, the Malaysian Solution quickly encountered legal challenges that led to its unraveling.<sup>86</sup> In the landmark ruling *Plaintiff M70*, the High Court of Australia ruled the Malaysian Solution could not move forward over concerns that the proposal conflicted with Australian and international law.<sup>87</sup> To implement the Malaysian Solution, the Gillard government planned to invoke the Australian Immigration Minister’s statutory powers to transfer asylum seekers to Malaysia.<sup>88</sup> The High Court, however, ruled this plan impermissible because Malaysia could not guarantee the basic human rights afforded to people under international law.<sup>89</sup> As the Court noted,

Malaysia is not a party to the [1951] Convention. It does not recognise, or provide for the recognition of, refugees in its domestic law. It therefore does not provide any procedures for the determination of claims to refugee status . . . Malaysia does not bind itself, in its immigration legislation, to non-refoulement.<sup>90</sup>

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85. *Id.*; see also Editorial, *Julia Gillard Gambles on Malaysian ‘Solution,’* HERALD SUN NEWS, May 8, 2011, [www.heraldsun.com.au/news/opinion/pm-gambles-on-malaysian-solution/story-e6frfhqo-1226051760085](http://www.heraldsun.com.au/news/opinion/pm-gambles-on-malaysian-solution/story-e6frfhqo-1226051760085).

86. Bonnie Malkin, *Australia’s ‘Malaysia Solution’ Blocked by High Court*, TELEGRAPH, Aug. 31, 2011, [www.telegraph.co.uk/news/worldnews/australia-aandthepacific/australia/8732810/Australias-Malaysia-Solution-blocked-by-High-Court.html](http://www.telegraph.co.uk/news/worldnews/australia-aandthepacific/australia/8732810/Australias-Malaysia-Solution-blocked-by-High-Court.html).

87. See, e.g., *Plaintiff M70/2011 v Minister for Immigration and Citizenship* [2011] HCA 32 ¶¶119, ¶¶124-26 (Austl.); Dehm, *supra* note 65, at 54.

88. By statute, the Immigration Minister has the power to designate certain Australian territories as excised from normal Australian migration law and transfer migrants. See *Migration Amendment (Excision from Migration Zone) Act 2001* No. 127 (Austl.); Michelle Foster, *The Implications of the Failed ‘Malaysian Solution’: The Australian High Court and Refugee Responsibility Sharing at International Law*, 13 MELB. J. OF INT’L L. 395, 398-400 (2012).

89. Moodley, *supra* note 14, at 6.

90. *Plaintiff M70/2011 v Minister for Immigration and Citizenship* [2011] HCA 32, ¶249 (Austl.).

## 2. Moving Past *Plaintiff M70*—The Return of the Pacific Solution

With the Malaysian Solution removed as an option to process refugees, the Gillard government announced the creation of an Expert Panel on Asylum Seekers and tasked it with forming a response to asylum seekers arriving by boat.<sup>91</sup> This panel advocated for substantial changes in Australia's immigration system, and recommended an increase in the number of refugees Australia could lawfully resettle as part of its humanitarian program.<sup>92</sup> Most significant, the panel advocated reviving the Pacific Solution by re-opening refugee processing centers in Nauru and Papua New Guinea.<sup>93</sup> The panel also recommended "irregular maritime" arrivals not be permitted to apply for asylum anywhere in Australian territory, regardless of whether they reached the shores of the Australian mainland.<sup>94</sup> This made all boat arrivals eligible for transfer to third party countries. The refugee coordinator for the human rights organization Amnesty International criticized these recommendations and cited concerns regarding the legality of third country processing and Australia's possible sidestepping of its international obligations.<sup>95</sup>

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91. The panel was appointed by the Gillard government and was comprised of just three people, two of whom hailed from national defense backgrounds. For their appointments and backgrounds, see *Expert Panel on Asylum Seekers*, AUSTRALIAN GOV'T, <http://expertpanelonasylumseekers.dpmc.gov.au/> (last visited Aug. 5, 2014).

92. Recommendations 2, 4, and 5 of the panel's report suggest these changes. See REPORT OF THE EXPERT PANEL ON ASYLUM SEEKERS, *supra* note 43, at 14–16.

93. Recommendations 7, 8, 9, and 10 of the panel's report promote this policy. See *id.* at 16.

94. This recommendation was significant. Previously, only persons intercepted in waters en route to Australia, or those who arrived at an "excised offshore place," were excluded from applying for asylum. See Xanthe Emery, *Excision of the Australian Mainland for Boat Arrivals*, IMMIGRATION ADVICE & RIGHTS CENTRE (July 16, 2013), [www.iarc.asn.au/\\_blog/Immigration\\_News/post/excision-of-the-australian-mainland-for-boat-arrivals](http://www.iarc.asn.au/_blog/Immigration_News/post/excision-of-the-australian-mainland-for-boat-arrivals). For the report's text, see REPORT OF THE EXPERT PANEL ON ASYLUM SEEKERS, *supra* note 43, at 17.

95. Amnesty International hailed the humanitarian recommendations and criticized the Pacific Solution's revival. Alex Pailaro, *The Good, the Bad and the Ugly: A Guide to the 'Expert Panel on Asylum Seekers,'* AMNESTY INT'L AUSTRALIA (August 14, 2012), [www.amnesty.org.au/refugees/comments/29489/](http://www.amnesty.org.au/refugees/comments/29489/).



Undeterred by criticism, the Gillard government seized upon these recommendations and quickly passed a law through Parliament that revived the Pacific Solution.<sup>96</sup> This legislation amended Australia's Migration Act to explicitly overrule the High Court's *Plaintiff M70* decision and granted broad authority to the Australian Immigration Minister to transfer asylum seekers, including persons entitled to protections under the Convention, to other countries regardless of that country's adherence to international law.<sup>97</sup> Although the legislation achieved wide bipartisan support, human rights groups condemned the vote, with one human rights lawyer characterizing the legislation as merely "sweep[ing] vulnerable people from our doorstep to dangers elsewhere."<sup>98</sup> Despite such criticism, the Australian government moved to use its newfound power by signing a Memoranda of Understanding ("Memoranda") with Nauru and Papua New Guinea authorizing the transfer and immigration assessment of migrants held by Australia.<sup>99</sup> Notably, neither Memoranda specified the legal responsibilities of the respective governments to ensure the rights of transferees.<sup>100</sup>

### 3. Transfers Begin & Current Status

In September 2012, the Australian government formally revived the Pacific Solution with the transfer of thirty Sri Lankan men to Nauru,<sup>101</sup> followed by a transfer of nineteen men, women,

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96. Anna Caldwell, *Offshore Asylum Laws Through Parliament*, NEWS CORP AUSTRALIA NETWORK (Aug. 16, 2012), [www.adelaidenow.com.au/news/national/offshore-asylum-laws-through-parliament/story-fndo1sx1-1226451444495](http://www.adelaidenow.com.au/news/national/offshore-asylum-laws-through-parliament/story-fndo1sx1-1226451444495).

97. The Immigration Minister need only find that transferring asylum seekers is in Australia's "national interest." This is seemingly designed to impair the judiciary's review of refugee transfers. See Stephanie Constand, *Implications for Offshore Processing in Australia: The Case of Plaintiff M70/2011*, 3 MIGRATION AUSTRALIA J. 43 (2013).

98. Matt Siegal, *Reversal on Immigration Policy in Australia*, N.Y. TIMES, Aug. 15, 2012, [www.nytimes.com/2012/08/16/world/asia/immigration-reform-moves-forward-in-australia.html](http://www.nytimes.com/2012/08/16/world/asia/immigration-reform-moves-forward-in-australia.html).

99. HUMAN RIGHTS ISSUES RAISED BY THE THIRD COUNTRY PROCESSING SCHEME, *supra* note 9, at 5.

100. *Id.*

101. For the official announcement, see Press Release, Chris Bowen MP, Minister for Immigration and Citizenship, First Transfer To Nauru (Sept. 14 2012), *available at* [www.thailand.em-](http://www.thailand.em-)

and children to Papua New Guinea's Manus Island.<sup>102</sup> Since reinstating the Pacific Solution, the Australian government has shipped hundreds of refugees to the two detention centers and issued a press release for every transfer, emphasizing the policy's goal of deterring future migration to Australia.<sup>103</sup> The policy was updated in July, 2013, when Prime Minister Kevin Rudd announced a dramatic, hard line stance toward boat people, declaring that Asylum seekers who arrive by boat without a visa will never be settled in Australia.<sup>104</sup> This announcement came after a formal Regional Resettlement Agreement between Australia and Papua New Guinea which declares any intercepted maritime arrival liable for transfer to Papua New Guinea for processing and resettlement.<sup>105</sup> The agreement mandates that Papua New Guinea process transferees under its own law, and, if found to be refugees, to resettle them within Papua New Guinea.<sup>106</sup> Prime Minister Rudd acknowledged this policy's harshness and the potential for legal challenges, but cited the

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bassy.gov.au/bkok/PR2012\_Transfer\_Nauru.html; *Australia Flies First Asylum Seekers to Nauru Camp*, BBC NEWS (Sept. 14, 2012), [www.bbc.co.uk/news/world-asia-19595573](http://www.bbc.co.uk/news/world-asia-19595573).

102. Simon Cullen, *First Asylum Seekers Arrive on Manus Island*, AUSTRALIAN BROADCASTING CORP. (Nov. 21, 2012), [www.abc.net.au/news/2012-11-21/first-asylum-seekers-arrive-on-manus-island/4383876](http://www.abc.net.au/news/2012-11-21/first-asylum-seekers-arrive-on-manus-island/4383876).

103. The Department of Immigration posts press releases to its website, see, for example, Press Release, AUSTRALIAN DEPT OF IMMIGRATION AND BORDER PROTECTION, Eighteenth Group Sent to Papua New Guinea Under Regional Settlement Arrangement, (Sept. 6, 2013), *available at* [www.newsroom.immi.gov.au/releases/eighteenth-group-sent-to-png-under-regional-settlement-arrangement](http://www.newsroom.immi.gov.au/releases/eighteenth-group-sent-to-png-under-regional-settlement-arrangement).

104. *See, e.g.*, Bianca Hall and Jonathan Swan, *Kevin Rudd to Send Asylum Seekers Who Arrive by Boat to Papua New Guinea*, SYDNEY MORNING HERALD, July 19, 2013, [www.smh.com.au/federal-politics/federal-election-2013/kevin-rudd-to-send-asylum-seekers-who-arrive-by-boat-to-papua-new-guinea-20130719-2q9fa.html](http://www.smh.com.au/federal-politics/federal-election-2013/kevin-rudd-to-send-asylum-seekers-who-arrive-by-boat-to-papua-new-guinea-20130719-2q9fa.html); Matt Siegel, *Australia Defends New Refugee Policy, Despite Riot*, N.Y. TIMES, July 21, 2013, [www.nytimes.com/2013/07/22/world/asia/australia-defends-new-refugee-policy-despite-riot.html](http://www.nytimes.com/2013/07/22/world/asia/australia-defends-new-refugee-policy-despite-riot.html).

105. *Regional Resettlement Arrangement Between Australia and Papua New Guinea*, Austl.-Papua N.G., July 19, 2013, *available at* [www.dfat.gov.au/geo/png/regional-resettlement-arrangement-20130719.html](http://www.dfat.gov.au/geo/png/regional-resettlement-arrangement-20130719.html).

106. If a migrant is not deemed a refugee, Papua New Guinea is under no obligation to resettle the migrant, who is then eligible for repatriation to their home country. *See id.*

humanitarian goal of reducing people smuggling as an overriding justification.<sup>107</sup>

The Australian government's overall policy objective in off-shore processing is deterring potential asylum seekers from trying to reach Australia.<sup>108</sup> Former Prime Minister Gillard cited a "no advantage" principle to guide the Pacific Solution, the belief that those who reach Australia by boat should not receive the advantage of skipping ahead of others who have waited for lawful resettlement in Australia.<sup>109</sup> Pacific Solution proponents additionally claim the policy strikes at "people smugglers," persons who are paid thousands of dollars to smuggle desperate refugees to Australian territory, by discouraging their potential victims from ever seeking passage.<sup>110</sup>

### C. Why Nauru and Papua New Guinea?

Australia's status as a modern, industrialized economic power,<sup>111</sup> and its corresponding ability to offer economic aid to undeveloped nations, is likely the most important reason why Nauru and Papua New Guinea agreed to the offshore processing

107. Hall and Swan, *supra* note 104.

108. Both sides of Australia's political spectrum recognize this as the policy's primary goal. Tony Abbott, then Opposition Leader, remarked that "People need to understand that if they get on a boat to Australia, Nauru may not be just a brief detour on the way here . . . [w]e've got to say 'enough is enough.'" Ben Packham, *PM Julia Gillard Says Offshore Processing a Deterrent Despite Arrivals*, AUSTRALIAN (Oct. 19, 2012), [www.theaustralian.com.au/national-affairs/pm-julia-gillard-says-offshore-processing-a-deterrent-despite-arrivals/story-fn59niix-1226499411083#](http://www.theaustralian.com.au/national-affairs/pm-julia-gillard-says-offshore-processing-a-deterrent-despite-arrivals/story-fn59niix-1226499411083#).

109. *Prime Minister Julia Gillard Defends Policy on Holding Asylum Seekers in Offshore Processing Centres*, NEWS.COM.AU (Aug. 29, 2012), [www.news.com.au/national/prime-minister-julia-gillard-defends-policy-on-holding-asylum-seekers-in-offshore-processing-centres/story-fndo4eg9-1226460470892](http://www.news.com.au/national/prime-minister-julia-gillard-defends-policy-on-holding-asylum-seekers-in-offshore-processing-centres/story-fndo4eg9-1226460470892).

110. *Id.* Many refugees flee their home countries seeking refuge from war or conflict. They are often put in great danger on their journey to Australia after paying thousands of dollars per person for illegal transit. See *Australia: Why Boat People Risk It All*, BBC NEWS (Sept. 3, 2013), [www.bbc.co.uk/news/world-asia-23933103](http://www.bbc.co.uk/news/world-asia-23933103).

111. The Economist has called Australia the "Downwonder" noting its sixteen straight years of above average economic growth, fueled by a mineral commodities boom. *Downwonder*, ECONOMIST, Mar. 27, 2007, [www.economist.com/node/8931798](http://www.economist.com/node/8931798).

scheme.<sup>112</sup> Indeed, Australia has increased economic aid to both Nauru and Papua New Guinea since the early 2000s when both countries initially agreed to process asylum seekers.<sup>113</sup> Economic aid to Papua New Guinea has increased from AU\$342 million in 2001 to over AU\$500 million in 2012, while Nauru has seen its funding nearly quadruple from AU\$6.8 million in 2002 to AU\$25.4 million in 2012.<sup>114</sup> In Papua New Guinea, Australia's monetary aid, used to ameliorate high rates of poverty, poor education, and lawlessness, has helped secure the country's place in a regional processing scheme.<sup>115</sup> For Nauru, refusing Australia's cooperation is even less of an option because Australian financial assistance accounts for 40 percent of Nauru's Gross Domestic Product,<sup>116</sup> and Australian officials are in charge of the Nauru police force and departments of finance and utilities.<sup>117</sup>

Although Australia portrays its offshore processing scheme as a joint venture with Papua New Guinea and Nauru, in reality Australia maintains near complete control of the detention center's administration and functions.<sup>118</sup> Shortly after the Gillard

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112. See Lucy Craymer, *Australia's Approach to Asylum-Seeker Issue: Outsource It*, WALL ST. J., Sept. 3, 2013, <http://online.wsj.com/article/SB10001424127887324886704579051960707104626.html>; See also Anthony Lowenstein, *Australia's Deal with Papua New Guinea is Vulture Capitalism at its Worst*, GUARDIAN, July 21, 2013, [www.theguardian.com/commentisfree/2013/jul/22/vulture-capitalism-papua-new-guinea-australia](http://www.theguardian.com/commentisfree/2013/jul/22/vulture-capitalism-papua-new-guinea-australia).

113. In 2001, the first year of the Pacific Solution, aid to Nauru increased dramatically. Joel Negin, *Aid and the Pacific Solution II: Issues and Questions*, DEVPOLICYBLOG (Oct. 30, 2012) (citing AusAID statistics), <http://devpolicy.org/aid-and-the-pacific-solution-ii-issues-and-questions-20121030/>. For annual aid records, see *Official Development Assistance (ODA) Budgets*, AUSTRALIAN GOV'T DEP'T OF FOREIGN AFFAIRS AND TRADE, <http://aid.dfat.gov.au/budgets/Pages/default.aspx> (last accessed Sept. 27, 2014).

114. AUSTRALIAN GOV'T DEP'T OF FOREIGN AFFAIRS AND TRADE, AusAID ANNUAL REPORT 2011–12, 341 (2012) available at <http://aid.dfat.gov.au/AnnualReports/Documents/rep12/ausaid-annual-report-2011-12.pdf>.

115. Lowenstein, *supra* note 112.

116. Craymer, *supra* note 112.

117. See Nic Maclellan, *What Has Australia Done to Nauru?*, GUARDIAN, July 23, 2013, [www.theguardian.com/commentisfree/2013/jul/24/australia-nauru-island-refugees](http://www.theguardian.com/commentisfree/2013/jul/24/australia-nauru-island-refugees).

118. See Regional Resettlement Arrangement Between Australia and Papua New Guinea, *supra* note 105; For Nauru, *Memorandum of Understanding Between the Republic of Nauru and the Commonwealth of Australia, Relating to the Transfer to and Assessment of Persons in Nauru, and Related Issues*,

government revived the Pacific Solution in late 2012, the Australian government hired private immigration consulting and security firms to handle the daily operation of the Nauru and Manus Island detention facilities.<sup>119</sup> The firm contracted to administer the Papua New Guinea center, G4S, has a history of failing to deliver on past contracting work and faces accusations of security lapses, neglect, and human rights violations.<sup>120</sup> The funding to pay these firms and to operate the centers, meanwhile, is provided entirely by Australia.<sup>121</sup> Detention center supplies, construction materials, facility personnel, and detainees themselves are shipped to the processing centers by the Australian government, with the Department of Immigration issuing a news release every time asylum seekers are transferred overseas.<sup>122</sup> Furthermore, the Department of Immigration's website showcases the detention centers by posting photos of transferees disembarking from planes and Australian military personnel constructing detention facilities.<sup>123</sup>

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Austl.-Nauru, Aug. 3, 2013, *available at* [www.dfat.gov.au/geo/nauru/nauru-mou-20130803.pdf](http://www.dfat.gov.au/geo/nauru/nauru-mou-20130803.pdf).

119. Press Release, Transfield Services to Provide Services to Dep't of Immigration and Citizenship, (Sept. 11, 2012), [www.transfieldservices.com/page/News\\_Centre/News/2012/Transfield\\_Services\\_to\\_provide\\_services\\_to\\_Department\\_of\\_Immigration\\_and\\_Citizenship/](http://www.transfieldservices.com/page/News_Centre/News/2012/Transfield_Services_to_provide_services_to_Department_of_Immigration_and_Citizenship/).

120. For examples of G4S' history of poor detention center management, see Wendy Bacon, *The World's 'Third Worst' Firm Runs Manus*, NEWMATILDA.COM (March 7, 2013), [www.newmatilda.com/2013/03/07/worlds-third-worst-firm-runs-manus](http://www.newmatilda.com/2013/03/07/worlds-third-worst-firm-runs-manus); Clare Sambrook, *G4S and Their Human Rights Problem*, OURKINGDOM.COM (June 6, 2013), [www.opendemocracy.net/ourkingdom/clare-sambrook/g4s-and-their-human-rights-problem](http://www.opendemocracy.net/ourkingdom/clare-sambrook/g4s-and-their-human-rights-problem).

121. In October, 2012, G4S was paid AU\$80 million to operate the Manus Island detention center, Bacon, *supra* note 120, and Australia has agreed to "bear the full cost" of the processing scheme. See Regional Resettlement Arrangement Between Australia and Papua New Guinea, *supra* note 105. For the Nauru cost, see Memorandum of Understanding Between the Republic of Nauru and the Commonwealth of Australia, *supra* note 118.

122. The index page of Australia's Department of Immigration is almost entirely comprised of press releases touting the transfer of refugees to Nauru and Papua New Guinea. See *Releases*, AUSTRALIAN GOV'T DEP'T OF IMMIGRATION AND BORDER PROTECTION, [www.newsroom.immi.gov.au/releases](http://www.newsroom.immi.gov.au/releases).

123. *New Tent Accommodation at Nauru Regional Processing Centre*, AUSTRALIAN GOV'T DEP'T OF IMMIGRATION AND BORDER PROTECTION, [www.newsroom.immi.gov.au/photos](http://www.newsroom.immi.gov.au/photos).

## II. ANALYZING THE PACIFIC SOLUTION

By accepting responsibility to uphold the rights of detainees under its control, Australia has tied its compliance with international law to the fate and well-being of asylum seekers transferred to offshore processing facilities.<sup>124</sup> This Note now focuses on how the Pacific Solutions' existing framework is inconsistent with Australia's international obligations. It examines Australia's failure to maintain proper refugee status determination procedures and uphold the right to seek asylum, its failure to ensure basic living conditions and to protect refugees from violence, and its discrimination against certain refugees and its introduction of arbitrary detention policies.<sup>125</sup>

### *A. Unfair Processes: Who is a Refugee?*

For detained asylum seekers on Nauru or Papua New Guinea to receive formal refugee classification, they must navigate through Papuan and Nauruan refugee status determination procedures.<sup>126</sup> Although some of Australia's obligations extend protections to all peoples,<sup>127</sup> formal refugee status is important because the Convention protects those individuals who meet the definition of "refugee."<sup>128</sup> The UNHCR, however, judges Papua New Guinea and Nauru as out of line with its guidelines because neither country maintains a fair and efficient RSD processing system.<sup>129</sup> Nauru, for example, has not codified international human rights obligations into domestic law, nor has it developed

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124. See *supra* Section I(C).

125. See *supra* Section II (A)-(C)

126. RSD determinations are governed by the host country's law. See PARLIAMENTARY JOINT COMM. ON HUMAN RIGHTS, EXAMINATION OF LEGISLATION IN ACCORDANCE WITH THE HUMAN RIGHTS (PARLIAMENTARY SCRUTINY) ACT 2011 40 (2013) [hereinafter PARLIAMENTARY JOINT COMM. ON HUMAN RIGHTS].

127. See *supra* Section I(A) (discussing the ICCPR, CAT, and UDHR applying to all peoples).

128. The non-refoulement protection, however, has been interpreted to apply to all people. See *Advisory Opinion, supra* note 45, at 2–3; See also Zimmerman, *supra* note 24, at 1110.

129. For the UNHCR's requirement that a Convention signatory maintain an RSD system, see *supra* Section I(A); For the UNHCR's statement, see U.N. High Commissioner for Refugees, *UNHCR Monitoring Visit to the Republic of Nauru 7 to 9 October 2013*, 9 (Nov. 26, 2013), available at [www.refworld.org/docid/5294a6534.html](http://www.refworld.org/docid/5294a6534.html) [hereinafter UNHCR Monitoring Visit to the Republic of Nauru].

an RSD procedure for stateless persons.<sup>130</sup> Although Nauru has an RSD handbook, detainees on Nauru complain of delays in processing refugee claims and of broken timeframe promises.<sup>131</sup> The situation is worse in Papua New Guinea, where the UNHCR found “no clear legislative or regulatory guidance for . . . PNG officials to follow when determining whether an asylum seeker is a refugee.”<sup>132</sup> Manus Island detainees report a lack of information regarding their claims’ processing and no response from RSD officials, while the UNHCR determined that the country simply lacks professionals capable of providing pro bono legal advice on the complex RSD procedures.<sup>133</sup>

By transferring asylum seekers to offshore processing centers with flawed RSD systems, Australia shirks its responsibility to properly determine the refugee status of persons under its control.<sup>134</sup> Along with the right to seek asylum under the UDHR, an individual transferee maintains a corresponding right to access RSD procedures in the country where he or she seeks asylum.<sup>135</sup> Australia’s stated policy of never resettling any boat people, however, pushes against this right, as even those who are found to be legitimate refugees under Nauruan or Papuan law will

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130. A “stateless person” is defined as a person “who is not considered as a national by any State under the operation of its law.” 1954 Convention Relating to the Status of Stateless Persons art. 1, Sept. 28, 1954, 360 U.N.T.S. 117 (entered into force June 6, 1960); UNHCR Monitoring Visit to the Republic of Nauru, *supra* note 129, at 9.

131. UNHCR Monitoring Visit to the Republic of Nauru, *supra* note 129, at 8–9; For general information on the Nauru RSD handbook, see REPUBLIC OF NAURU DEP’T OF JUSTICE & BORDER CONTROL, REFUGEE STATUS DETERMINATION HANDBOOK (Aug. 2013), *available at* [www.naurugov.nr/media/33067/nauru\\_rsd\\_handbook\\_august\\_2013.pdf](http://www.naurugov.nr/media/33067/nauru_rsd_handbook_august_2013.pdf).

132. U.N. High Commissioner for Refugees, *Monitoring Visit to Manus Island, Papua New Guinea 23 to 25 Oct. 2013*, 2 (Nov. 2013), *available at* [www.refworld.org/docid/5294aa8b0.html](http://www.refworld.org/docid/5294aa8b0.html) [hereinafter *Monitoring Visit to Manus Island, Papua New Guinea*].

133. The detention center on Manus Island was found to have only two or three RSD officials available for refugee assessment. *Id.* at 8–9.

134. BEM, FIELD, MACLELLAN, MEYER, MORRIS, *supra* note 67, at 45 (quoting Conference Report, Susan Kneebone, *The Legal and Ethical Implications of Extra-territorial Processing of Asylum Seekers: the Safe Third Country Concept* 37 (Nov. 22, 2005), [http://repository.forcedmigration.org/show\\_metadata.jsp?pid=fmo:5367](http://repository.forcedmigration.org/show_metadata.jsp?pid=fmo:5367)).

135. *See id.*; *See generally* MASSIMO FRIGO, INT’L COMM. OF JURISTS, MIGRATION AND HUMAN RIGHTS LAW, PRACTITIONERS’ GUIDE NO. 6, at 61–64 (2011); For the UDHR right to seek asylum, see *supra* Section 1(A).

never be resettled in Australia.<sup>136</sup> Removing the option of resettlement in Australia amounts to a punishment for those individuals seeking asylum by boat, a practice forbidden by the Convention, as long as an asylum seeker presents himself to the authorities after entering territorial borders.<sup>137</sup> For boat people, it is standard practice to meet this requirement by communicating their location to authorities after entering Australian waters.<sup>138</sup>

### *B. Life on the Islands: Confronting Harsh Challenges*

After arriving at Papua New Guinea or Nauru detention centers, transferred asylum seekers are subject to horrid living conditions, high levels of violence, prolonged detention, and an inability to access a legal system to challenge their detentions.<sup>139</sup> Indeed, the life of a refugee within a Pacific Solution processing center is fraught with challenges that deviate from Australia's commitments under the ICCPR, CAT, UDHR and the Convention.<sup>140</sup>

Amnesty International characterizes the conditions within Pacific Solution detention centers as "human rights catastrophes,"<sup>141</sup> and Australia's Parliamentary Joint Committee on Hu-

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136. See *supra* Section I(B)(3).

137. For the prohibition on penalizing refugees should they present themselves to authorities, see *supra* Section I(A).

138. In an exposé, a reporter embedded himself with boat people on their journey from Indonesia to Australia. After entering Australian territory, asylum seekers often request a "rescue" by Australian authorities and provide coordinates of their location for pickup. See Luke Mogelson, *The Dream Boat*, N.Y. TIMES MAG., Nov. 15, 2013, [www.nytimes.com/2013/11/17/magazine/the-impossible-refugee-boat-lift-to-christmas-island.html](http://www.nytimes.com/2013/11/17/magazine/the-impossible-refugee-boat-lift-to-christmas-island.html).

139. See, e.g., AMNESTY INT'L AUSTRALIA, THIS IS BREAKING PEOPLE: HUMAN RIGHTS VIOLATIONS AT AUSTRALIA'S ASYLUM SEEKER PROCESSING CENTRE ON MANUS ISLAND, PAPA NEW GUINEA 36–45 (2013) [hereinafter THIS IS BREAKING PEOPLE], available at [www.amnesty.org/en/library/info/ASA12/002/2013/en](http://www.amnesty.org/en/library/info/ASA12/002/2013/en); Monitoring Visit to Manus Island, Papua New Guinea, *supra* note 132, at 17–19.

140. For Australia's obligations under these instruments, see *supra* Section I(A).

141. Press Release, Amnesty Int'l, Nauru Camp A Human Rights Catastrophe With No End In Sight (Nov. 23, 2012), available at [www.amnesty.org.au/images/uploads/news/NauruOffshoreProcessingFacilityReview2012.pdf](http://www.amnesty.org.au/images/uploads/news/NauruOffshoreProcessingFacilityReview2012.pdf).



man Rights (“Parliamentary Committee”) recognizes the conditions as out of line with the country’s legal obligations.<sup>142</sup> Amnesty International issued a scathing assessment of the quality of life within Nauru’s detention center, calling the living conditions “not suitable for cattle” and describing how detainees must live in cramped, oven-like army tents.<sup>143</sup> One veteran healthcare worker characterized the detention center as like a “concentration camp,” rife with suicide attempts and widespread mental distress over each detainee’s uncertain future.<sup>144</sup> The squalid, distressful living conditions are not confined to Nauru, as similar conditions exist at the Manus Island detention center.<sup>145</sup> Moreover, Australia’s own human rights watchdog, the Australian Human Rights Commission, condemns the adverse mental health impacts detainees suffer as a result of prolonged camp detention.<sup>146</sup> It further notes that several asylum seekers have committed suicide, while others suffer from high rates of anxiety, depression, and sleep disorders.<sup>147</sup>

The UNHCR condemns this detainee treatment as harsh and unsatisfactory given Australia’s inextinguishable commitments to international agreements.<sup>148</sup> Indeed, the ICCPR, CAT and UDHR<sup>149</sup> prohibit the cruel or inhumane treatment of persons by a country that is a party to these agreements.<sup>150</sup> The Parliamentary Committee, convened to examine the Pacific Solution’s

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142. PARLIAMENTARY JOINT COMM. ON HUMAN RIGHTS, *supra* note 126, at 83.

143. Nauru Camp A Human Rights Catastrophe With No End In Sight, *supra* note 141.

144. Veteran nurse Marianne Evers breached a confidentiality agreement to describe the conditions at the camp, which forfeits her future employment with the Australian government. See Interview by Karen Barlow with Marianne Evers, Veteran Nurse (May 2, 2013), [www.abc.net.au/lateline/content/2013/s3684057.html](http://www.abc.net.au/lateline/content/2013/s3684057.html).

145. For a thorough account of the living conditions on Manus Island, see generally, THIS IS BREAKING PEOPLE, *supra* note 139, at 37–43.

146. AUSTL. HUMAN RIGHTS COMM’N, *supra* note 36, at 10–11; For the Commission being the country’s human rights observer, see *supra* Section I(A).

147. AUSTL. HUMAN RIGHTS COMM’N, *supra* note 36, at 10–11.

148. For the UNHCR’s condemnation of the camp’s living conditions, see Monitoring Visit to Manus Island, Papua New Guinea, *supra* note 132, at 17–19; For UNHCR citing Australia’s commitment to international agreements, see *id.* at 11.

149. According to the UNHCR, it is permissible to strengthen claims of human rights violations using the UDHR. See *supra* Section I(A).

150. *Id.*

compatibility with human rights, recognized Australia's prohibition on sending an asylum seeker to a place where they may face cruel, inhumane, and degrading treatment as absolute and not subject to limitation.<sup>151</sup> After examining evidence related to detention center conditions, the Parliamentary Committee agreed with the UNHCR that detention center conditions fall short of Australia's prohibition against degrading treatment under the ICCPR and CAT.<sup>152</sup> Human rights groups have also derided these conditions as yet another punishment for seeking asylum by boat, which is impermissible under the convention's prohibition against discouraging refugee migration.<sup>153</sup>

The Pacific Solution additionally exposes asylum seekers to a high threat of violence after transfer, a threat that could lead to violations of Australia's non-refoulement obligation.<sup>154</sup> Papua New Guinea in particular is no safe haven for refugees—it has one of the highest rates of sexual violence in the world,<sup>155</sup> criminal gangs roam the nation's capital,<sup>156</sup> warfare between ethnic tribes rages in the countryside,<sup>157</sup> and violence and torture perpetrated against civilians by Papuan police is the norm.<sup>158</sup> The

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151. PARLIAMENTARY JOINT COMM. ON HUMAN RIGHTS, *supra* note 126, at 52.

152. For the Committee citing the UNHCR, see *id.* at 76–77; For its conclusion that the centers do not meet treaty standards, see *id.* at 82–83.

153. See Amnesty Int'l, *Nauru Camp A Human Rights Catastrophe With No End In Sight*, *supra* note 141; For the Convention prohibiting the punishment of refugees, see *supra* Section I(A).

154. Exposing a transferee to violence would violate the Convention. See *generally Advisory Opinion*, *supra* note 45, at 2–6.

155. A recent U.N. study found that 60 percent of interviewed Papuan men admitted to engaging in sexually based violence against women. U.N. PARTNERS FOR PREVENTION, *WHY DO SOME MEN USE VIOLENCE AND HOW CAN WE PREVENT IT?* 2–3 (Sept. 2013), available at [www.partners4prevention.org/resource/why-do-some-men-use-violence-against-women-and-how-can-we-prevent-it-quantitative-findings](http://www.partners4prevention.org/resource/why-do-some-men-use-violence-against-women-and-how-can-we-prevent-it-quantitative-findings).

156. David Flickling, *Raskol Gangs Rule World's Worst City*, *GUARDIAN*, Sept. 21, 2004, [www.theguardian.com/world/2004/sep/22/population.davidflickling](http://www.theguardian.com/world/2004/sep/22/population.davidflickling).

157. Though the pace has slowed in recent years, there are still incidents of small scale “wars” between rival Papuan tribes. See Joseph Castro, *Old Traditions Ease Tribes' Modern Warfare*, *LIVESCIENCE.COM* (Sept. 27, 2012), [www.livescience.com/23521-enga-tribal-wars-traditions-peace.html](http://www.livescience.com/23521-enga-tribal-wars-traditions-peace.html); For a recent example, see *Grenade Attack in Papua New Guinea Kills as Many as 34 People as Tribal War Rages*, *NEWS.COM.AU* (Nov. 12, 2013), [www.news.com.au/world/grenade-attack-in-papua-new-guinea-kills-as-many-as-34-people-as-tribal-war-rages/story-fndir2ev-1226758575308](http://www.news.com.au/world/grenade-attack-in-papua-new-guinea-kills-as-many-as-34-people-as-tribal-war-rages/story-fndir2ev-1226758575308).

158. A U.N. torture expert discovered civilian torture when he made unannounced visits to police stations and government buildings. See Press Release,

violence that plagues Papua New Guinea does not end at the gates of the Manus Island detention center, as reports have emerged of sexual assault and violence amongst detainees, with the staff of the detention center failing to proactively prevent violence.<sup>159</sup> Meanwhile, the UNHCR has warned that refugees within Papua New Guinea face a serious threat of violence, as non-Melanesian<sup>160</sup> refugees are vulnerable to racism, xenophobia, and are unlikely to integrate into local society should they ultimately resettle there.<sup>161</sup>

Australia violates the Convention's non-refoulement provision whenever it knowingly transfers asylum seekers to a place where they could be persecuted or face violence.<sup>162</sup> This protection against refoulement is interpreted broadly and applies to all

UN News Centre, *Level of Police Violence in Papua New Guinea Alarms UN Expert on Torture* (May 26, 2010), [www.un.org/apps/news/story.asp?NewsID=34818&Cr=torture&Cr1#.Un9KvuIWSSo](http://www.un.org/apps/news/story.asp?NewsID=34818&Cr=torture&Cr1#.Un9KvuIWSSo). In June 2013, Papuan police officers allegedly slashed the ankles of over 70 men on the outskirts of Port Moseby. Liam Fox, *PNG Judge Launches Inquiry into Reports Police Slashed Ankles of Men*, AUSTRALIAN BROADCASTING CORP. (June 6, 2013), [www.abc.net.au/news/2013-06-06/an-png-police-charged-after-slashing-ankles/4737476](http://www.abc.net.au/news/2013-06-06/an-png-police-charged-after-slashing-ankles/4737476).

159. See, e.g., Paul Farrell and Oliver Laughland, *Sex Assaults at Manus Island Centre Appear Likely to go Unpunished*, GUARDIAN, Nov. 1, 2013, [www.theguardian.com/world/2013/nov/01/sex-assaults-manus-island-unpunished](http://www.theguardian.com/world/2013/nov/01/sex-assaults-manus-island-unpunished). A former security officer at the detention center additionally discussed widespread suicide attempts. See Interview by Mark Davis with Rod St. George, *Manus Island Whistleblower* (July 23, 2013) (transcript available at [www.sbs.com.au/dataline/story/transcript/id/601700/n/Manus-Whistleblower](http://www.sbs.com.au/dataline/story/transcript/id/601700/n/Manus-Whistleblower)).

160. "Melanesia" refers to the Pacific island arc extending from Indonesia through to Papua New Guinea, Fiji, and the Solomon Islands. The region shares similar beliefs and culture. See Roger M. Keesing, *Melanesian culture*, Encyclopedia Britannica, [www.britannica.com/EBchecked/topic/373679/Melanesian-culture](http://www.britannica.com/EBchecked/topic/373679/Melanesian-culture).

161. U.N. High Comm'r for Refugees, *Submission by the U.N. High Comm'r for Refugees for the Office of the High Comm'r for Human Rights' Compilation Report, Universal Periodic Review: Papua New Guinea* 5 (Nov. 2010), available at <http://www.refworld.org/docid/4ccfe3cf2.html>.

162. The Australian government is not ignorant of the violent nature of Papua New Guinea society. Indeed, the Department of Foreign Affairs warns travelers to exercise a high degree of caution due to high crime, ethnic conflict, and crimes against foreigners. See *Papua New Guinea Overall*, [smartraveller.gov.au](http://smartraveller.gov.au), [www.smartraveller.gov.au/zw-cgi/view/Advice/Papua\\_New\\_Guinea](http://www.smartraveller.gov.au/zw-cgi/view/Advice/Papua_New_Guinea) (last visited Jan. 8, 2014); For Australia's violation of the Convention by exposing transferees to violence, see *supra* Section I(A).

detainees, including those whose refugee status has not been determined.<sup>163</sup> Furthermore, refoulement is seen as encompassing general violence, such as the circumstances faced by detainees in processing centers, and not just state-based persecution.<sup>164</sup> Additionally, offshore processing raises the risk of violating the non-refoulement provision by promoting an atmosphere of “constructive refoulement”—that is, when a host country does not order individuals to leave or forcibly remove them, but instead creates a situation that leaves individuals “no real choice” but to leave.<sup>165</sup> The UNHCR has found such a constructive refoulement environment within the Papua New Guinea refugee detention center, due to degrading treatment and officials pressuring detainees to voluntarily repatriate themselves to their home countries.<sup>166</sup> Amnesty International Australia agrees that the detention centers’ degrading environments promote constructive refoulement, and further cites arbitrary detention as well as refugee’s uncertainty regarding their ultimate fates as the primary reasons that persons accept repatriation to their home country.<sup>167</sup>

While in Australian custody, refugees in Papua New Guinea and Nauru detention centers must not be subject to arbitrary or prolonged detention, but instead must be granted access to a legal system to contest their detention or legal status as provided for by the ICCPR, Convention, and UDHR.<sup>168</sup> Detained asylum seekers have, however, encountered challenges when dealing

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163. See *Advisory Opinion*, *supra* note 45, at 2–3; see also Zimmerman, *supra* note 24, at 1110.

164. See FRIGO, *supra* note 135, at 97 (citing Note on Non-Refoulement, UNHCR, 28th Sess., Aug. 23, 1977, ¶ 4, U.N. Doc. EC/SCP/2 (1977)).

165. Christian Mommers, *Between Voluntary Repatriation and Constructive Expulsion? Exploring the Limits of Israel’s Actions to Induce the Repatriation of Sudanese Asylum Seekers 5* (unpublished paper, Institute of Immigration Law, Leiden University) (available at [www.clb.ac.il/AsylumSystem/Temp\\_Protection.doc](http://www.clb.ac.il/AsylumSystem/Temp_Protection.doc)). Constructive refoulement is of great concern for NGOs worldwide, which is made clear in a statement during a UNHCR hearing. Executive Comm. of the High Comm’r’s Program, *NGO Statement on International Protection* (June 22-24, 2010), <https://icvnetwork.org/system/files/versions/doc00004347.doc>.

166. The UNHCR additionally concluded that this puts into doubt the legitimacy of any incidences of asylum seekers voluntarily repatriating themselves to their home countries. See *Monitoring Visit to Manus Island, Papua New Guinea*, *supra* note 132, at 24–25.

167. THIS IS BREAKING PEOPLE, *supra* note 139, at 87.

168. See *supra* Section I(A).

with third country legal systems.<sup>169</sup> Nauru's legal system, for example, struggles with conducting legal proceedings such as criminal trials, as the country has limited legal aid, few lawyers, and one courtroom.<sup>170</sup> After a group of Nauru detainees faced criminal charges following a detention camp riot, a former Nauru Justice Secretary voiced concern that the asylum seekers would not receive a fair trial because the island's legal infrastructure could not handle complicated tasks.<sup>171</sup> Such flaws in Nauru's legal system have adversely affected asylum claims, and have led to prolonged detention for those transferred there. From September, 2012, to October, 2013, just one refugee status determination was finalized, a situation the UNHCR deemed unacceptable.<sup>172</sup> Similar conditions exist in Papua New Guinea, where there was not a single refugee determination finalized between November, 2012, and October, 2013.<sup>173</sup> These processing delays are not limited to offshore processing. In May, 2013, the Australian Minister for Immigration revealed that all boat arrival refugee claims since August, 2012, filed by 19,000 people, had faced prolonged processing delays regardless of whether the claim was made within Australia or offshore in a third country.<sup>174</sup>

### C. A Questionable Policy: Arbitrariness and Discrimination

By tying an asylum seeker's detainment and refugee determination to a "no advantage" principle, without regard to the reasonableness and proportionality of detention to an individual's

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169. Oliver Laughland, *Nauru Riot Accused 'Are Unlikely to Get Fair Trial'*, GUARDIAN, July 26, 2013, [www.theguardian.com/world/2013/jul/27/nauru-riot-accused-fair-trial](http://www.theguardian.com/world/2013/jul/27/nauru-riot-accused-fair-trial); See generally Monitoring visit to the Republic of Nauru, *supra* note 129 at 8–9.

170. Interview by Philippa Tolley with Geoffrey Eames, Chief Justice in Nauru, (July 31, 2013), (transcript available at [www.radionz.co.nz/international/programmes/datelinepacific/20130731](http://www.radionz.co.nz/international/programmes/datelinepacific/20130731)).

171. Laughland, *supra* note 169.

172. The single instance of refugee determination was for a child that had been separated from her parents, which the report insinuates was an easy determination. See Monitoring visit to the Republic of Nauru, *supra* note 129, at 9.

173. Monitoring Visit to Manus Island, Papua New Guinea, *supra* note 132, at 8.

174. Bianca Hall, *Alarm Over Asylum Underclass*, SYDNEY MORNING HERALD, May 29, 2013, [www.smh.com.au/federal-politics/political-news/alarm-over-asylum-underclass-20130528-2n9ks.html](http://www.smh.com.au/federal-politics/political-news/alarm-over-asylum-underclass-20130528-2n9ks.html); See also Triggs, *supra* note 13, at 6–7.

case, Australia violates the ICCPR and UDHR's prohibition on arbitrary detention.<sup>175</sup> Both the Parliamentary Committee and Australian Human Rights Commission raise concerns that the Pacific Solution's "no advantage" principle results in unnecessarily prolonged and arbitrary detention.<sup>176</sup> By mandating offshore processing and prohibiting resettlement to an entire set of asylum seekers—those who arrive by boat—Australia is violating the UNHCR's rules for assessing refugee claims individually.<sup>177</sup> As held by the UNHCR, Australian authorities must not detain asylum seekers unless detention is necessary, based on a case-by-case assessment of the individual asylum seeker.<sup>178</sup> Under UNHCR guidelines, asylum seekers must not be detained for longer than necessary, and, where the justification to detain is no longer valid, the asylum seeker should be released.<sup>179</sup> Despite these guidelines, Manus Island detainees have been informed that there are no timeframes for processing their refugee claims, and that the RSD procedure could take from two to five years.<sup>180</sup>

Likewise, the Pacific Solution is applied in a discriminatory manner because offshore processing applies only to those who arrive by boat, and does not extend to those who arrive by alternate means.<sup>181</sup> For example, when a person enters Australian territory via an airport and makes an asylum claim, he or she is processed via an "onshore" system under domestic law.<sup>182</sup> Many asylum seekers arriving by air enter the country lawfully under

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175. The Australian Parliament's own Commission report highlights the arbitrariness of the policy. *See, e.g.*, PARLIAMENTARY JOINT COMM. ON HUMAN RIGHTS, *supra* note 126, at 79–80; *See also* THIS IS BREAKING PEOPLE, *supra* note 139, at 92–93; Monitoring Visit to Manus Island, Papua New Guinea, *supra* note 132, at 17. For the relevant provisions of the ICCPR and UDHR, see *supra* Section I(A).

176. PARLIAMENTARY JOINT COMM. ON HUMAN RIGHTS, *supra* note 126, at 59–60, 73; AUSTL. HUMAN RIGHTS COMM'N, *supra* note 36, at 16.

177. For mandating offshore processing and prohibiting resettlement, see *supra* Section I(B)(3); For the UNHCR guidelines, see *Detention Guidelines*, *supra* note 8, at 6–7.

178. *Id.* at 26.

179. *Id.*

180. Monitoring Visit to Manus Island, Papua New Guinea, *supra* note 132, at 10.

181. *See* PARLIAMENTARY JOINT COMM. ON HUMAN RIGHTS, *supra* note 126, at 83.

182. Mike Steketee, *You Heard We're Stopping The Boats? You Heard Wrong*, GLOBAL MAIL (Aug. 13, 2012), [www.theglobalmail.org/feature/you-heard-were-stopping-the-boats-you-heard-wrong/335/](http://www.theglobalmail.org/feature/you-heard-were-stopping-the-boats-you-heard-wrong/335/).

a short stay visa—which are easier to obtain if the traveler is from a pre-approved country.<sup>183</sup> This selective application of offshore processing is directed solely towards boat people, and goes against the ICCPR and UDHR's guarantee of equal protection for all persons under law.<sup>184</sup>

Indeed, statistics from the Australian Department of Immigration show a disparity in national origin between refugee claims made by those arriving by air and those arriving by boat from mid-2012 to mid-2013.<sup>185</sup> During that period, the top three countries of origin for refugee arrivals by air were China, India, and Pakistan, while the top three countries of origin for refugees arriving by boat were Afghanistan, Iran, and Iraq.<sup>186</sup> While 794 Afghani, Iranian, and Iraqi nationals arrived by air, a much greater number, 5,906, arrived by boat.<sup>187</sup> If these statistics reveal a targeted and discriminatory application of offshore processing based on one's national origin, the policy would violate the Convention's prohibition on discrimination and its corresponding ban on affording some foreigners more favorable treatment than others in the same circumstance.<sup>188</sup> This result would also violate ICERD, as ICERD's monitoring agency has found that differential treatment based on national origin in refugee status determinations violates ICERD's provisions.<sup>189</sup>

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183. *Id.* For a list of the countries open to short stay visas, refer to *Temporary Work (Short Stay Activity) Visa Online Application*, DEP'T OF IMMIGRATION AND BORDER PROTECTION, [www.immi.gov.au/Services/Pages/temporary-work-short-stay-activity-online-application.aspx](http://www.immi.gov.au/Services/Pages/temporary-work-short-stay-activity-online-application.aspx) (last accessed Jan. 14, 2014).

184. Amnesty International recognizes this as violating the UDHR. *See THIS IS BREAKING PEOPLE*, *supra* note 139, at 89; For the ICCPR, refer to *supra* Section I(A).

185. *See generally* DEP'T OF IMMIGRATION AND CITIZENSHIP, ASYLUM STATISTICS—AUSTRALIA 4–11 (2013), *available at* [www.immi.gov.au/media/publications/statistics/asylum/\\_files/asylum-stats-march-quarter-2013.pdf](http://www.immi.gov.au/media/publications/statistics/asylum/_files/asylum-stats-march-quarter-2013.pdf).

186. The statistics for air arrivals measure individuals who applied for a refugee protection visa, while the statistics for boat arrivals measure refugee status determinations that have commenced. *See id.* at 4, 10.

187. *Id.*

188. *See supra*, Section I(A).

189. FRIGO, *supra* note 135, at 63 (quoting Rep. of the Comm. of Racial Discrimination, 57th session, Mar. 4–22, Aug. 5–23, 2002, 21, ¶ 79, U.N. Doc. A/57/18, Supp. No. 18 (2002)).

### III. A BETTER PATH FORWARD

This Note argues that, if Australia is to comply with its obligations under international law, it must heed the calls of human rights groups and close its offshore processing detention centers, and instead begin to process asylum seekers under its domestic law.<sup>190</sup> As an alternative to the Pacific Solution's existing framework, Australia could uphold the rights of asylum seekers by determining refugee status through its domestic legal infrastructure and assimilating refugees using existing humanitarian guidelines.<sup>191</sup> Moreover, the Australian government can decrease boat people arrivals without violating its human rights obligations by working with partner countries to address the root causes of asylum seeker migration.<sup>192</sup>

#### *A. Domestic Refugee Processing: A Feasible Alternative*

The alternative of processing asylum seekers under Australian domestic law is made possible by the country's well-established history of settling large numbers of international migrants.<sup>193</sup> Furthermore, Australia maintains thorough procedures for determining an individual's refugee status, an obligation imposed by the UNHCR but lacking in Nauru and Papua New Guinea.<sup>194</sup>

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190. U.N. High Comm'r for Refugees, *Despite Progress, UN Finds Faults with Australia's Off-Shore Asylum Processing Centre*, UN NEWS CENTRE (July 12, 2013), [www.un.org/apps/news/story.asp?NewsID=45396&Cr=asylum&Cr1=#.UtvmlXLROIWE](http://www.un.org/apps/news/story.asp?NewsID=45396&Cr=asylum&Cr1=#.UtvmlXLROIWE).

191. For humanitarian services available to newly settled refugees and immigrants, see *Fact Sheet 66 – Humanitarian Settlement Services*, DEP'T OF IMMIGRATION AND BORDER PROTECTION, [www.dss.gov.au/our-responsibilities/settlement-and-multicultural-affairs/publications/fact-sheet-66-humanitarian-settlement-services](http://www.dss.gov.au/our-responsibilities/settlement-and-multicultural-affairs/publications/fact-sheet-66-humanitarian-settlement-services) (last accessed Aug. 22, 2014).

192. See generally Jane McAdam, *Australia and Asylum Seekers*, 25 INT'L J. OF REFUGEE L. 435 (2013).

193. See, e.g., Barry York, *Australia and Refugees, 1902-2002: An Annotated Chronology Based on Official Sources*, PARLIAMENT OF AUSTRALIA, [http://www.aph.gov.au/About\\_Parliament/Parliamentary\\_Departments/Parliamentary\\_Library/Publications\\_Archive/online/Refugeescontents](http://www.aph.gov.au/About_Parliament/Parliamentary_Departments/Parliamentary_Library/Publications_Archive/online/Refugeescontents) (last updated June 16, 2003); See also *History of Australia's refugee program*, REFUGEE COUNCIL OF AUSTRALIA, [www.refugeecouncil.org.au/frhp-hist.php](http://www.refugeecouncil.org.au/frhp-hist.php) (last accessed Jan. 15, 2014).

194. For a guide on applying for refugee status, see ASYLUM SEEKER RESOURCE CENTRE, *APPLYING TO STAY IN AUSTRALIA AS A REFUGEE*, available at [www.asylumexplained.asrc.org.au/wp-content/uploads/2012/04/Fact\\_Sheet\\_2\\_RSD-Process\\_FINAL.pdf](http://www.asylumexplained.asrc.org.au/wp-content/uploads/2012/04/Fact_Sheet_2_RSD-Process_FINAL.pdf) (last accessed Aug. 22, 2014).



For example, asylum seekers arriving in Australia can apply for refugee status and a corresponding Protection Visa<sup>195</sup> through the Department of Immigration and Border Control.<sup>196</sup> If one's refugee claim is denied, the asylum seeker is entitled to a review under Australia's independent Refugee Review Tribunal system, wherein claims are reconsidered based on the merits of an individual's application.<sup>197</sup> This system, therefore, allows asylum seekers a chance to contest their legal status, as the ICCPR and Convention require, and serves as a safeguard to protect the right of refugees to seek asylum.<sup>198</sup>

After receiving a Protection Visa under domestic law, a refugee in Australian territory is not subject to refoulement or to degrading treatment afforded to those processed offshore.<sup>199</sup> On the contrary, Australia's Humanitarian Settlement Services program provides services tailored to the newly arrived refugees' needs, and assists the arrival with obtaining housing and an orientation to life in Australia.<sup>200</sup> The Department of Immigration additionally provides grants to NGOs that work with immigrant and multicultural communities. Indeed, the UNHCR has praised Australian efforts to integrate refugees into Australian society.<sup>201</sup> Furthermore, the International Red Cross offers financial

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195. The Protection Visa is reserved for refugees and grants the holder authority to live and work in Australia. See *Protection Visa (Subclass 866)*, AUSTL. GOV'T DEP'T OF IMMIGRATION AND BORDER PROT., [www.immi.gov.au/Visas/Pages/866.aspx](http://www.immi.gov.au/Visas/Pages/866.aspx) (last accessed Jan. 16, 2014).

196. For the means of applying for a visa, see *id.*

197. See MIGRATION REVIEW TRIBUNAL-REFUGEE REVIEW TRIBUNAL, ANNUAL REPORT 2009-2010 14-16 (Oct. 2010).

198. From July, 2012, to June, 2013, the RRT overturned 1,372 of 3,757 of the Department of Immigration's initial Protection Visa denials. See generally MIGRATION REVIEW TRIBUNAL-REFUGEE REVIEW TRIBUNAL, RRT CASELOAD SUMMARY: 2012-13, Table 20, available at [www.mrt-rrt.gov.au/AnnualReports/MRTRRTAR201213.pdf](http://www.mrt-rrt.gov.au/AnnualReports/MRTRRTAR201213.pdf); For the international instruments, refer to *supra* Section I(A).

199. For the degrading treatment in offshore third country centers, see *supra* Section II(B).

200. See generally *Humanitarian Settlement Services Onshore Orientation Program*, DEP'T OF IMMIGRATION AND CITIZENSHIP, available at [www.immi.gov.au/living-in-australia/delivering-assistance/government-programs/settlement-programs/hss.htm](http://www.immi.gov.au/living-in-australia/delivering-assistance/government-programs/settlement-programs/hss.htm) (last accessed Jan. 16, 2014).

201. See *Grants Information*, DEP'T OF IMMIGRATION AND BORDER PROTECTION, [www.immi.gov.au/about/reports/grants/](http://www.immi.gov.au/about/reports/grants/) (last accessed Aug. 22, 2014); Ben Farrell, *High Commissioner Praises Refugee Resettlement and Integration in Australia and New Zealand*, U.N. HIGH COMM'R FOR REFUGEES (Feb. 27, 2012), [www.unhcr.org/4f4b51a26.html](http://www.unhcr.org/4f4b51a26.html).

assistance to asylum seekers awaiting the result of their RSD, while the Australian Human Rights Commission provides assistance by filing and resolving lawsuits related to government discrimination based on age, gender, or race.<sup>202</sup> In short, Australia's legal infrastructure can support a more balanced approach to its immigration system and is able to move away from the Pacific Solution's extreme, illegal trappings.

### *B. A Better Regional Cooperation Plan*

Any solution to stopping the flow of migrants to Australia must not focus on deterring asylum seekers, but instead should address the underlying reasons why people seek protection in Australia.<sup>203</sup> Although the offshore processing policy is well known to potential asylum seekers, many choose to undertake the journey and gamble on reaching Australian territory because the alternative is persecution, violence, or life in a warzone.<sup>204</sup> After leaving their home countries, asylum seekers often pass through nations that do not have refugee protection obligations and must sometimes avoid local authorities who would persecute them if apprehended.<sup>205</sup> A solution, therefore, is to alleviate migrant persecution in regions and countries asylum seekers may pass through on their journey to Australia.<sup>206</sup>

A first step to this goal is for Australia and the international community to encourage other Pacific nations to become more hospitable to accepting refugees, in effect increasing the number of destination countries where an asylum seeker could find protection.<sup>207</sup> Australia must therefore call upon countries, such as Thailand, Malaysia, and Indonesia, to accede to international refugee instruments such as the 1951 Convention and work with

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202. *Asylum Seeker Assistance Scheme*, AUSTRALIAN RED CROSS, [www.redcross.org.au/files/20120203\\_ASAS\\_Fact\\_Sheet\\_.pdf](http://www.redcross.org.au/files/20120203_ASAS_Fact_Sheet_.pdf) (last accessed Jan. 17, 2014); *See generally* AUSTRALIAN HUMAN RIGHTS COMMISSION, ANNUAL REPORT 2012–2013 (2013).

203. McAdam, *supra* note 192, at 447.

204. *See id.* at 448; *See also Australia: Why Boat People Risk It All*, *supra* note 110.

205. HARRIET SPINKS, DESTINATION ANYWHERE? FACTORS AFFECTING ASYLUM SEEKERS' CHOICE OF DESTINATION COUNTRY 6-8 (Feb. 5, 2013).

206. McAdam, *supra* note 192, at 447.

207. *See generally* AMNESTY INT'L, SUBMISSION TO THE EXPERT PANEL ON ASYLUM SEEKERS (July 19, 2012), [www.amnesty.org.au/images/uploads/ref/Amnesty-submission-refugeeexpertpanel.pdf](http://www.amnesty.org.au/images/uploads/ref/Amnesty-submission-refugeeexpertpanel.pdf).

the UNHCR and other humanitarian organizations to assist refugees in those countries.<sup>208</sup> Australia's relationship with Indonesia is particularly important because Indonesia serves as the last leg of a long journey for many asylum seekers.<sup>209</sup> Indeed, Indonesia's established people smuggling business, geographic proximity to Australia, and absence of a framework to handle refugee processing encourages many asylum seekers to pay for passage to Australia.<sup>210</sup>

Despite the important regional relationship between Australia and Indonesia, Australia's missteps have threatened to derail recent progress on the struggle against people smuggling.<sup>211</sup> In 2013, reports revealed Australia's intelligence agencies had spied on the Indonesia's President, which led to Indonesia suspending operations to stop people smuggling and intelligence exchanges.<sup>212</sup> Australia further strained the bilateral relationship through "Operation Sovereign Borders," a military-led effort to curb boat arrivals that resulted in Australian naval forces entering Indonesian waters to turn back asylum seeker boats.<sup>213</sup> To

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208. None of these countries are a party to the Convention. See U.N. High Comm'r for Refugees, *States Parties to the 1951 Convention relating to the Status of Refugees and the 1967 Protocol*, available at [www.unhcr.org/3b73b0d63.html](http://www.unhcr.org/3b73b0d63.html); See also SUBMISSION TO THE EXPERT PANEL ON ASYLUM SEEKERS, *supra* note 207, at 2–4.

209. CAT BARKER, THE PEOPLE SMUGGLERS' BUSINESS MODEL 6–8 (Feb. 28, 2013), available at [www.aph.gov.au/About\\_Parliament/Parliamentary\\_Departments/Parliamentary\\_Library/pubs/rp/rp1213/13rp02](http://www.aph.gov.au/About_Parliament/Parliamentary_Departments/Parliamentary_Library/pubs/rp/rp1213/13rp02).

210. Human smuggling routes and networks intersect within Indonesia. See *id.* The UNHCR has condemned the Indonesian absence of a framework to process refugee claims. Vivian Tan, *Playing the waiting game in Indonesia*, U.N. REFUGEE AGENCY (Oct. 30, 2013), [www.unhcr.org/527113036.html](http://www.unhcr.org/527113036.html).

211. In August, 2013, Ministers from Pacific countries met in Jakarta and agreed on strategies to address people smuggling. Luke Hunt, *Indonesian Meet Heralds Crackdown on People Smuggling to Australia*, DIPLOMAT, Aug. 23, 2013, <http://thediplomat.com/2013/08/indonesian-meet-heralds-crackdown-on-people-smuggling-to-australia/>.

212. Michael Bachelard, *Spying Scandal: Australian Flags Burnt as Protests Heat Up in Indonesia*, SYDNEY MORNING HERALD, Nov. 21, 2013, [www.smh.com.au/federal-politics/political-news/spying-scandal-australian-flags-burnt-as-protests-heat-up-in-indonesia-20131121-2xx9k.html](http://www.smh.com.au/federal-politics/political-news/spying-scandal-australian-flags-burnt-as-protests-heat-up-in-indonesia-20131121-2xx9k.html); *Indonesia Halts Australia Co-operation Amid Spying Row*, BBC NEWS (Nov. 20, 2013), [www.bbc.co.uk/news/world-asia-25000545](http://www.bbc.co.uk/news/world-asia-25000545).

213. Lenore Taylor, *Australia's Naval Incursion Will Worsen Relations, Indonesia Warns*, GUARDIAN, Jan. 16, 2014, [www.theguardian.com/world/2014/jan/17/scott-morrison-australia-indonesian-waters](http://www.theguardian.com/world/2014/jan/17/scott-morrison-australia-indonesian-waters); For details of Operation Sovereign Borders, see Morrison, *supra* note 11.

repair the Indonesian relationship, Australia must respect Indonesia's request to halt naval incursions, and must agree to an Indonesian proposal creating an ethics code for intelligence collection and sharing.<sup>214</sup>

Despite these feasible alternatives, Australia continues to use its regional economic power to promote its hard line immigration policy while the country moves further away from compliance with international law. In April, 2014, Australia announced it was nearing an agreement with Cambodia in which Cambodia would accept and resettle many of the refugees currently detained on Nauru and Papua New Guinea.<sup>215</sup> Cambodia, one of the region's poorest countries with a dubious human rights record, receives millions in economic aid annually from Australia.<sup>216</sup> Furthermore, in what multiple outlets called a flagrant violation of the 1951 Convention's prohibition against refoulement, in July, 2014, Australia returned to Sri Lanka forty-one asylum seekers who faced criminal charges and jail time because they had left the country unofficially.<sup>217</sup>

## CONCLUSION

Few could have predicted that the journey of the refugees aboard the *M/V Tampa* would so drastically reform Australia's immigration system. By voluntarily ratifying and signing inter-

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214. Indonesia has said following these recommendations will restore normal diplomatic relations and cooperation. Oliver Laughland, *Indonesian President Offers Australia Spying Truce*, GUARDIAN, Nov. 26, 2013, <http://www.theguardian.com/world/2013/nov/26/indonesian-president-australia-spying-truce>.

215. Rod McGuirk, *Australia Says Cambodia Could Resettle Refugees*, ASSOCIATED PRESS, May 22, 2014, <http://news.yahoo.com/australia-says-cambodia-could-resettle-refugees-031953904.html>. The plan was quickly condemned by Amnesty International, which once again accused Australia of shirking its international responsibilities. See *Australia and Cambodia Should Scrap Asylum Seeker Deal*, AMNESTY INTERNATIONAL (May 1, 2014), <http://www.amnesty.org/en/news/australia-cambodia-scrap-asylum-seeker-deal-2014-05-01>.

216. Lindsay Murdoch, *Plan for Cambodia to Accept Australia's Asylum Seekers*, SYDNEY MORNING HERALD, Apr. 30, 2014, [www.smh.com.au/world/plan-for-cambodia-to-accept-australias-asylum-seekers-20140430-zr1i6.html#ixzz38ANpopJh](http://www.smh.com.au/world/plan-for-cambodia-to-accept-australias-asylum-seekers-20140430-zr1i6.html#ixzz38ANpopJh).

217. Stephanie March, *Sri Lankan Asylum Seekers Facing Criminal Investigation After Being Handed Back by Australian Authorities*, AUSTRALIAN BROADCASTING CORP. (July 7, 2014), [www.abc.net.au/news/2014-07-07/morrison-confirms-sri-lankans-returned-after-interception/5575924](http://www.abc.net.au/news/2014-07-07/morrison-confirms-sri-lankans-returned-after-interception/5575924).

national human rights instruments, Australia assumed the burden of giving effect to the protections and principles there within. Though changes in control of government rightly give rise to new policies, it behooves Australia's public and elected leaders to honor the country's obligations under international law.

While stopping people smuggling and maintaining territorial sovereignty are noble goals, a valid solution to reducing an influx of unauthorized migrants must not infringe on the rights of vulnerable refugees. In practice, the Pacific Solution's transfer of asylum seekers to Nauru, Papua New Guinea, and other countries amounts to a discriminatory and arbitrary punishment for seeking asylum. This subjects detainees to unjust and degrading treatment and prolonged detention, all of which violates the protections of the ICCPR, CAT, Convention, UDHR, and ICERD.<sup>218</sup> Australia must, therefore, close its offshore detention centers, and instead adopt the alternative of processing asylum seekers under its well-established domestic immigration legal infrastructure. To truly "stop the boats," Australia must partner with countries in the region to formulate comprehensive solutions, while ensuring that its domestic response does not run roughshod over the sovereignty of its neighbors.

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218. *See supra* Section II.

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