SHADOW PLAYS, SHIFTING SANDS AND INTERNATIONAL REFUGEE LAW: CONVERGENCES IN THE ASIA-PACIFIC

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Abstract While many Australians continue to see their roots in Western Europe, in matters concerning human rights and immigration control, Australia's culture and attitudes over time have become more closely aligned with those of States in its immediate geographical region. The trend finds obvious expression in the convergence of laws and policies governing the treatment of asylum seekers. This article uses as a case study various efforts made to establish regional frameworks for the management of irregular (forced) migration. The author argues that Australia's reversion to deflection and offshore processing as deterrent measures resonates with the discourse in two States that have been closely associated with the new 'arrangements': Malaysia and Indonesia. Australia's policies make express reference to laws and State behaviour in the region through what has been labelled the 'no advantage' principle governing Australia's treatment of asylum seekers presenting as unauthorized maritime arrivals (UMAs). The central idea is that these asylum seekers should gain no material advantage by reaching Australia in comparison with the situation they would face if their claims were processed in States of first refuge. If the comparators are the refugee-receiving States around Australia, the policy has to play out in the degradation of terms and conditions faced by UMAs in Australia. In the area of human rights and refugee policy, the author argues that Australia should be doing more to distinguish itself as a leader rather than follow the (generally poor) practices of its neighbours.

Keywords: Asia Pacific, comparative law, human rights, immigration detention, irregular migration, offshore processing, refugee law, regional trends.

I. REGIONAL ATTITUDES TO HUMAN RIGHTS AND INTERNATIONAL LAW

When Australia ran for election to the Security Council in October 2012 it did so within the United Nations collective known as Western Europeans and

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Others Group (WEOG).[1] The alignment reflects the fact that Australia's cultural heritage is largely European. After World War II Australia joined its British and European allies to become one of the driving forces behind the United Nations' drafting of the 'International Bill of Rights'.[2] Not only was it active in the creation of the UN Convention relating to the Status of Refugees,[3] Australia's accession to that instrument brought the Convention into force.[4] Over time, Australia has continued to play a key role in supporting the international work of the United Nations High Commission for Refugees,[5] and has developed highly sophisticated structures for determining refugee status in persons presenting as asylum seekers. It is a party to the various protocols and has accepted optional provisions that facilitate the lodging of individual complaints to the UN Human Rights Committee;[6] the Committee against Torture[7] and the Committee on the Rights of Persons with Disabilities.[8] In matters concerning human rights and immigration control, however, Australia's laws and policies have become increasingly dissonant with those of other WEOG States.

Australia stands out among those States because it has never enacted a bill of rights or other binding statutory measures that expressly implement its international legal human rights obligations.[9] Australia has traditionally had a generous planned humanitarian migration programme, but its laws and policies

[1] United Nations General Assembly, Department of Public Information 'General Assembly elects Argentina, Australia, Luxembourg, Republic of Korea, Rwanda as non-permanent members of Security Council' (Press Release, GA/11303, 18 October 2012); P McGeough, 'A Place at the Table', *The Sydney Morning Herald* (Sydney, NSW) 20 October 2012, 1.

[2] Including *Universal Declaration of Human Rights,* GA Res 217A (III), UN GAOR, 3rd sess, 183rd plen mtg, UN Doc A/810 (10 December 1948); *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966 (entered into force 23 March 1976); *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, opened for signature 10 December 1984, 1465 UNTS 85 (entered into force 26 June 1987); *International Covenant on Economic, Social and Cultural Rights*, opened for signature 16 December 1966 (entered into force 3 January 1976).

[3] See *Convention relating to the Status of Refugees* ('Refugee Convention'), opened for signature 28 July 1951, 189 UNTS 150 (entered into force 22 April 1954) art 1A(2) as amended by the *Protocol Relating to the Status of Refugees*, opened for signature 31 January 1967, 606 UNTS 267 (entered into force 4 October 1967). Australia's accession to the Convention on 22 April 1954 brought the Convention into force: see *Convention Relating to the Status of Refugees* [1954] ATS 5.

[4] ibid.

[5] Australia has pulled above its weight in the resettlement of persons recognized as Convention refugees, taking in more than 700,000 since the end of World War II. See also UNHCR, *Global Trends 2010* (Geneva) 2011 <http://www.unhcr.org/4dfa11499.html> 19.

[6] *Optional Protocol to the International Covenant on Civil and Political Rights*, opened for signature 19 December 1966 (1966) 999 UNTS 171 (entered into force 23 March 1976).

[7] UN Convention against Torture and All forms of Cruel, Inhumane and Degrading Treatment or Punishment Adopted 10 December 1984, entered into force 26 June 1987, 1465 UNTS 85 ('CAT') art 21.

[8] *Optional Protocol to the Convention on the Rights of Persons with Disabilities*, opened for signature 30 Mar 2007 (2007) 46 ILM 443 (entered into force 3 May 2008).

[9] Compare the Australian and United Kingdom (including the Privy Council applying the laws of Hong Kong) and American jurisprudence on the prolonged detention of non-citizens: *Al-Kateb v Godwin* (2004) 219 CLR 562*; R v Governor of Durham Prison, Ex parte Singh* [1984] 1 All ER

regarding irregular migrants and asylum seekers sit awkwardly with its international commitments. Australia's policy of mandatory detention of all non-citizens who enter or remain in the country without authority has drawn criticism from the UN's Human Rights Treaty Bodies.[10] In direct response to the arrival of successive waves of boats carrying undocumented asylum seekers Australia has adopted a raft of measures that are directly at odds with the most central tenets of refugee and human rights laws. It has adopted virtually every measure devised across the world to deter irregular migration, from interdiction and deflection programmes[11] through to the adoption of exclusionary provisions in its migration laws that limit access to domestic protection.[12] In early 2013, it broke new ground by enacting legislation which has the effect of denying to 'unauthorized maritime arrivals' (UMAs) the right to seek asylum or to apply for any form of visa in Australia.[13] The provisions were enacted to complement a regime that envisages the removal of UMAs who arrive on Australian territory to 'third' States.[14] The deflection regime creates a legal framework for the 'offshore' or 'regional' processing of any asylum claims. In late 2013, the then-government announced that not only would UMA asylum seekers be processed offshore, they would also be permanently resettled there if found to be Convention refugees.[15] In September 2013, the newly elected conservative government committed to adding to these measures a policy of pushing back boats carrying UMAs. The conservative party has long been committed to offshore processing and supplemented Labor's plans for permanent offshore resettlement by declaring that UMAs would be removed offshore within 48 hours of arrival in Australia.[16]

Australian governments of both conservative and liberal political persuasions have become increasingly resistant to the concept that undocumented asylum seekers should be regarded as rights bearers. This is most particularly

983; *Tan Te Lam v Superintendent of Tai A Chau Detention Centre (Hong Kong)* [1997] AC 97; *Zadvydas v Davis*, 533 U.S. 678 (2001).

[10] *A v Australia*, UNHCR Comm No 560/1993 (3 April 1997); *Bakhtiyari v Australia* UNHRC Comm No 1069/2002 (29 October 2003); *F.K.A.G. et al v Australia*, UNHRC Communication No 2094/2011 (26 July 2013) and *M.M.M. et al. v Australia*, UNHRC Communication No 2136/2012 (25 July 2013).

[11] For a summary of interdiction and deflection policies in Australia, see J McAdam and K Purcell, 'Refugee Protection in the Howard Years: Obstructing the Right to Seek Asylum' (2009) 27 Aust YBIL 87–115.

[12] *Migration Act 1958* (Cth) sections 91A–91G.

[13] *Migration Amendment (Unauthorised Maritime Arrivals) Act 2013*.

[14] *Migration Act 1958* (Cth) sections 198A (repealed), 198ABff.

[15] *Migration Act* section 198AB. Prior to the 2013 election, the then-government announced that asylum seekers processed in Manus Island, PNG, would not be resettled in Australia but would remain permanently in Papua New Guinea: Tony Burke, 'Australia and Papua New Guinea regional settlement arrangement' (Media Release, 19 July 2013).

[16] The Liberal Party policy on asylum seekers is called 'Operation Sovereign Borders': Liberal Party of Australia, 'The Coalition's Operation Sovereign Borders Policy' (July 2013) <http://www.liberal.org.au/our-plan/immigration>. During the federal election campaign then Opposition leader Tony Abbott also unveiled a policy of buying the unseaworthy boats of poor Indonesian fishers in an attempt to starve people smugglers of vessels to carry UMAs to Australia: Tony Abbott, Joint Press Conference, Darwin (Transcript of Press Conference, 23 August 2013).

the case where asylum seekers present as 'secondary movement' refugees who exercise choice in their selection of a country in which to seek refuge from persecution. Former Prime Minister John Howard captured the popular Zeitgeist in 2001 with his decision to block the admission of asylum seekers rescued at sea by MV *Tampa*, declaring famously: 'We will determine who comes to this country and the circumstances in which they come.'[17]

Australia sits in a part of the world where the discourse on rights is sometimes resisted as a Western construct that sits uneasily with Asian notions of collective responsibilities and obligation.[18] Few States in this region are parties to human rights treaties other than the Convention on the Rights of the Child[19] or, more recently, the Convention on the Rights of Persons with Disabilities.[20] The central argument in this article is that Australia's approach to irregular migration has become increasingly dissonant with that of WEOG States and has instead become increasingly aligned with that of States in its immediate geographical region.[21]

I use as a case study the various efforts that have been made by Australia to establish regional frameworks for the protection of refugees and for the management of irregular (forced) migration. The impetus for the piece came from Australia's decision in August 2012 to reopen 'offshore' processing centres on Nauru and on Papua New Guinea's (PNG's) Manus Island as deterrents to UMAs.[22] The reversion to a former conservative government's 'Pacific Solution' illustrates once again the awkwardness in Australia's relationship with its international obligations under the Refugee Convention and under international human rights law.[23]

[17] John Howard, quotation from speech delivered at the Federal Liberal Party Campaign Launch, Sydney, 28 October 2001, reported Australian Broadcasting Corporation, 'Liberals accused of trying to rewrite history', *Lateline* 21 November 2001 (Sarah Clarke).

[18] See H Kraft, 'Human Rights, ASEAN and Constructivism: Revisiting the "Asian Values" Discourse' (2001) 45 Philippines Political Science Journal 33; KD Asplund, 'Resistance to Human Rights in Indonesia: Asian Values and Beyond' (2009) 10(1) Asia-Pacific Journal on Human Rights and the Law 27, 31ff; and B Saul, J Mowbray and I Baghoomians, 'Resistance to Regional Human Rights Co-operation in the Asia-Pacific: Demythologizing Regional Exceptionalism by Learning from Europe, the Americas and Africa' in H Nasu and B Saul (eds), *Human Rights in the Asia-Pacific Region: Towards Institution Building* (Routledge 2011).

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

[20] *Convention on the Rights of Persons with Disabilities*, opened for signature 30 March 2007, 2515 UNTS 3 (entered into force 3 May 2008) ('CRPD'); *Optional Protocol to the Convention on the Rights of Persons with Disabilities*, opened for signature 30 March 2007, (2007) 46 ILM 443 (entered into force 3 May 2008).

[21] For a closer exposition of the interactions between Australia and other countries in the Asia-Pacific region in refugee matters, see E Biok *Australia and Refugees in the Asia Pacific*, (unpublished doctoral dissertation (SJD), University of Sydney, 2009).

[22] See M Crock and D Ghezelbash, 'Do Loose Lips Bring Ships? The Role of Policy, Politics and Human Rights in Managing Unauthorised Boat Arrivals' (2010) 19 GLR 238–87.

[23] For a selection of the many articles written on the first 'Pacific Solution', see: K Bem et al, 'A Price Too High: The Cost of Australia's Approach to Asylum Seekers' Oxfam Australia and A Just Australia (August 2007); M Crock 'In the Wake of the *Tampa*: Conflicting Visions of International Refugee Law in the Management of Refugee Flows' (2003) 12 Pacific Rim Law and

I argue that justifications given for the shift in Australia's approach resonate with the discourse in two States that have been closely associated with the new 'arrangements': Malaysia and Indonesia.[24] When the government introduced its revised 'regional processing' framework in 2012 it argued that asylum seekers who present as UMAs should gain no material advantage by reaching Australia in comparison to the situation they would face if their claims were processed in transit States or States of first refuge.[25] The policy made express reference to policies and State behaviours in the region and took (purported) waiting times and conditions as the benchmark for Australian policy.[26] If the comparators are the refugee-receiving States around Australia, the policy has to play out in the degradation of terms and conditions faced by UMAs in Australia. Refugees and asylum seekers in Malaysia and Indonesia can face years of debilitating precariousness and uncertainty, with the Office of the United Nations High Commissioner for Refugees (UNHCR) and its implementing partners providing the only avenues for resettlement or other durable solution.

Recognizing that the economic and political centres of gravity have shifted East, Australian policy-makers have come to accept the need for Australia to engage more with Asia and to take its place in the 'Asian Century'. Australia has been quick to acknowledge that the management of irregular migration flows through States like Indonesia and Malaysia demands a high level of

Policy Journal 49; A Francis 'Bringing Protection Home: Healing the Schism between International Obligations and National Safeguards Created by Extraterritorial Processing' (2008) 20 IJRL 273; and M Foster and J Pobjoy, 'A Failed Case of Legal Exceptionalism? Refugee Status Determination in Australia's "Excised" Territory' (2011) 23 IJRL 583–631; P Mathew 'Australian Refugee Protection in the Wake of *Tampa*' (2002) 96 AJIL 661; G Noll 'Visions of the Exceptional: Legal and Theoretical Issues Raised by Transit Processing Centres and Processing Zones' (2003) 5 EJML 303; T Penovic and A Dastyari, 'Boatloads of Incongruity: The Evolution of Australia's Offshore Processing Regime' (2007) AJHR 33–61; A Schloenhardt 'To Deter, Detain and Deny: Protection of Onshore Asylum Seekers in Australia' (2002) 14 IJRL 302; and S Taylor, 'Sovereign Power at the Border' (2005) 16 PLR 55–77.

[24] These two countries are chosen for analysis in part because the author engaged in fieldwork in those countries in 2012 for the AusAid *Enabling Equality* Project (see n 1).

[25] The amendments to the *Migration Act* 1958 (Austl) were introduced in mid-August 2012 and became law on 18 August 2012. Details of the 'No Advantage' policy was announced on 23 August 2012 (C Bowen and J Gillard, 'Refugee Program increased to 20, 000 places' (Joint Media Release, Prime Minister and Minister for Immigration and Citizenship, 23 August 2012 <http://pandora.nla.gov.au/pan/141738/20130718-1402/www.minister.immi.gov.au/media/cb/2012/cb189459.htm>). People arriving in Australia after 13 August are eligible to be transferred to Regional Processing Countries. Between August and December 2012 (inclusive) there were 10,259 boat arrivals (see the graph in Lauren Wilson, 'Bad weather keeps asylum boats in port', *The Australian* (online) 22 January 2012.

[26] The 'principle' is central to a series of recommendations made by a panel appointed by the government in 2012 to advise on policies to stem the flow of boats carrying asylum seekers to Australia. See A Houston, P Aristotle and M L'Estrange *Report of the Expert Panel on Asylum Seekers*, (Department of Immigration and Citizenship (DIAC), August 2012) <http://expertpanelonasylumseekers.dpmc.gov.au/sites/default/files/report/expert_panel_on_asylum_seekers_full_report.pdf> 26 [1.21] (hereafter the Houston Report).

regional cooperation.[27] In the area of human rights and refugee policy, however, I will argue that Australia should be doing more to distinguish itself as a leader rather than follow the (generally poor) practices of its neighbours. In practice, as others have noted,[28] Australia's engagement with other States in the region over the regulation of undocumented asylum seekers seems to be encouraging and even facilitating behaviours that are at odds with basic principles of human rights law.

The article begins in Part II with a brief overview of the relationship between refugee law and general human rights law. The discussion provides the background for an historical account in Part III of the various ways in which States in the Asia Pacific have engaged with issues of asylum and irregular migration through time. I examine the genesis event for refugee law in Australia and in the region: the resolution of the refugee crisis that followed the war in Vietnam. I argue that the 'Comprehensive Plan of Action' (CPA) set the ground rules for the treatment of refugees in many of the States in the Asia-Pacific region. The influence of the CPA is borne out in the approach that Asian and Pacific States have taken to irregular migration and refugee rights, as becomes apparent through considering contemporary treatment of refugees in the two States of most relevance to Australian policy: Malaysia and Indonesia.

This is followed in Part IV with an examination of Australian policy. I argue in this section that the models adopted after Vietnam have also shaped the way Australians have since viewed their international legal obligations towards refugees. This section examines Australian policies since 2001 and the most recent iterations of 'regional policy', summed up in the 'No Advantage' approach to UMAs. As a justification for reducing or denying social rights and other support to UMAs in Australia, the 'No Advantage' principle expressly references the treatment of irregular migrants in States like Malaysia and Indonesia that are not party to the Refugee Convention. I argue that the 'No Advantage' notion lacks both sense and legitimacy as a matter of international law.

The article concludes in Parts V and VI with a critique of the most recent version of regional processing, looking particularly at the international legal implications of deflecting UMAs to processing and holding centres on Nauru

[27] See *Bali Process on People Smuggling, Trafficking in Persons and Related Transnational Crime* is a practical response to the problem of transnational crime—not a refugee resettlement programme. As UNHCR argued at a Bali Process meeting, however, if countries practice burden sharing and implement durable solutions, this will also help reduce transnational crime. The process was established to find solutions to irregular migratory movements in the Asia Pacific region. See <http://www.baliprocess.net/>. In recent years, regional consultative processes have been established in most regions of the world. See A Betts, *Global Migration Governance* (Oxford University Press 2011) 18; and M Crock and D Ghezelbash, 'Secret Immigration Business: Policy Transfers and the Tyranny of Deterrence Theory' in S Singh (ed), *The Ashgate Research Companion to Migration Theory and Policy* (Ashgate 2013) ch 27.

[28] See A Nethery, B Rafferty-Brown and S Taylor, 'Exporting Detention: Australia-funded Immigration Detention in Indonesia' (2013) 26(1) JRS 88.

and Papua New Guinea's Manus Island. Accepting that regional processing is an imperfect 'work in progress',[29] the fundamentals of the regime nevertheless leave much to be desired.

II. REFUGEE RIGHTS AND HUMAN RIGHTS

While many of Australia's neighbours may not be parties to the Refugee Convention or to the major human rights instruments, the region does not operate in an international legal vacuum. As explored in the following section, States like Malaysia and Indonesia seem to be well aware of the international frameworks for the protection of human rights. Both have undertaken to permit UNHCR to establish and run refugee status determination processes on their territories. State practice in both suggests they accept that customary international law *obliges* them to refrain from the expulsion or *refoulement* of Convention refugees who fear persecution on one of the five Convention grounds. What they do not accept is the notion that refugees might be the bearers of other human rights. It is at this point that Australia should be parting company with its non-Convention neighbours—and in fact does in respect of its treatment of refugees who arrive in the country other than as UMAs.[30]

The fact that the Refugee Convention is a human rights instrument that does much more than protect refugees against *refoulement* emerges forcefully when its provisions are charted alongside those of the other conventions that make up the international Bill of Rights. As Professor Hathaway has chronicled,[31] the rights enshrined in the Refugee Convention follow a natural hierarchy, with the range of rights protected deepening as the refugee's connections with a country grow. Hathaway's taxonomy distinguishes between simple presence in a country, lawful presence (where a person is accorded at least temporary legal status) and lawful residence (which implies a deeper and more enduring legal status in a country). This methodology can be adopted to categorize group rights enshrined in other human rights instruments that may not be express in the refugee Convention.

At the apex of the Refugee Convention is the obligation not to *refoule* or return a refugee to a place where they face persecution for one of the five Convention reasons. It is the most important protection (and right) that applies to all persons on the territory of a State party, irrespective of the person's status under immigration law. In fact this obligation not to return a person to persecution or serious abuse of human rights appears across the ICCPR,[32] the Convention against Torture[33] and the Convention on the

[29] See UNHCR Australian Regional Representation, 'UNHCR Mission to Manus Island, Papua New Guinea, 15–17 January 2013' (Report, UNHCR, 4 February 2013), available at <http://unhcr.org.au/unhcr/images/2013-02-04%20Manus%20Island%20Report%20Final.pdf>.

[30] See further the discussion below on art 31.

[31] J Hathaway, *The Rights of Refugees under International Law* (Cambridge University Press 2005).

[32] See arts 6 and 7.

[33] See art 3.

Rights of the Child,[34] as does the right to life[35] and the right to freedom from cruel, inhuman and degrading treatment or punishment.[36]

The other rights that apply thus to all refugees on a State territory by virtue of their presence alone include: freedom from arbitrary detention;[37] liberty and security of the person;[38] non-discrimination and penalization for unlawful entry;[39] freedom from deprivation;[40] access to basic health care;[41] freedom of thought, conscience and religion;[42] primary education;[43] documentation of identity and status;[44] judicial and administrative assistance;[45] and family unity.[46] In addition it must be noted that children are accorded special rights that are not affected by immigration status (or lack thereof),[47] as indeed are persons with disabilities.[48]

For refugees accorded the status of *lawful presence*, the Refugee Convention adds to the aforementioned rights the right to protection from expulsion; procedural rights; freedom of residence and internal movement and a right to self-employment. It is only when a refugee is accorded permission to remain permanently (*lawful residence*) that rights to wage earning employment;[49] fair work conditions; social security; professional practice; public relief and assistance; housing; intellectual property rights and international travel are added to the mix.

The problems facing refugees in non-Convention States like Malaysia and Indonesia arise first and foremost from their lack of legal status. Absent intervention by UNHCR and/or various relief agencies, many live with the threat of arrest and detention. They have no entitlement to income support or self-employment and little or no right to medical assistance. In sum, few of the 'universal' rights in Hathaway's taxonomy are acknowledged. As I explain in the following part, the ambivalent legal position of Convention refugees in

[34] See art 37.

[35] See Refugee Convention, art 33; ICCPR, ART 6; CAT, art 3; CRC, art 6; and CRPD, art 10.

[36] See Refugee Convention, art 33(2); ICCPR, arts 7 and 10; CAT, art 16; CRC, art 37 and CRPD, arts 15 and 16.

[37] Convention, art 31; ICCPR, arts 9 and 10; CRC, art 37(b) and (d); CRPD, arts 14 and 17.

[38] CRC art 3; CRPD arts 14, 17.

[39] Convention arts 3, 31; ICCPR, art 26; CRC, art 2; CRPD, 5; ICESCR, art 2.

[40] Convention art 20; ICCPR, arts 6(1), 7, 9(1) and 10(1); CRPD, art 28; ICESCR, arts 2(1) and 11.

[41] CRPD art 25; ICESCR art 12(1).

[42] Convention art 4; ICCPR art 18, CRC arts 13–15, CRPD art 21, ICESCR art 13(3).

[43] Convention art 22; CRC arts 23, 28; CRPD art 24, ICESCR art 13.

[44] Convention art 27; CRC art 7.

[45] Convention arts 16(1), 25; ICCPR art 14(1), CRPD arts 12, 13.

[46] ICCPR arts 17, 23(1)–(2), 24(1), CRC arts 8, 9, 10; CRPD art 23; ICESCR art 10(1). Note that this right is not specifically mentioned in the Convention but was recognized in a resolution of the Conference of the Plenipotentiaries.

[47] CRC art 22.

[48] CRPD; M Schulze *Understanding the UN Convention on the Rights of Persons with Disabilities* (Handicap International 2010) available at: <http://www.handicap-international.fr/fileadmin/documents/publications/HICRPDManual.pdf>. See also M Crock, C Ernst and R McCallum 'Where Disability and Displacement Intersect: Asylum Seekers and Refugees with Disabilities' (2012) 24(4) IJRL 735, 738–42.

[49] Convention art 17; CRPD art 27; ICESCR art 6.

these States owes much to the historical engagement of these States with both UNHCR and key Convention States.

III. THE EVOLUTION OF REFUGEE LAW AND REGIONAL PROCESSING FRAMEWORKS IN THE ASIA-PACIFIC

The mass movements of people during and after Second World War were arguably the signal events leading to the drafting of the UN Refugee Convention and the genesis of refugee law in the European context.[50] This global conflict did not have the same trigger effect on the Asia-Pacific region, however. It was not until the end of the war in Vietnam that regional cooperation frameworks were considered and adopted in this part of the world.

A. The Comprehensive Plan of Action

A critical factor in bringing States together after the Vietnam conflict was that most of Vietnam's initial refugees fled their country by boat. This was significant for two reasons. First, a truly alarming number of those taking to boats were dying at sea, the victims of military action, unseaworthy vessels, or of the pirates in the South China Seas who quickly emerged to prey on the fugitives.[51] For Australia, the humanitarian imperative of the boat people was coupled with the fact that the refugees were presenting on Australian shores. The concern caused by the unsolicited arrival of what amounted to a little over 1000 maritime asylum seekers was considerable.[52]

The regional product of the post-Vietnam situation was a framework for the orderly resettlement of fugitives from Vietnam. The 'Comprehensive Plan of Action' (CPA) emerged as a true regional processing system insofar as it involved cooperative arrangements between States of first refuge, UNHCR and States in which Convention refugees were resettled.

Australia took its place at the table to establish this framework for the resettlement of refugees from the Vietnam conflict. Along with the United States and Canada, it provided funding and expertise for the creation of the first regional processing centres in Malaysia, Thailand, Indonesia, Hong Kong and the Philippines. A central feature to the CPA was that all of these States agreed to

[50] For a discussion of this history, see JC Hathaway *The Law of Refugee Status* (Law Book Co 1990) ch 1; and G Goodwin-Gill and J McAdam *The Refugee in International Law* (Oxford University Press 2006) 35, 203ff.

[51] See W Courtland Robinson, 'The Comprehensive Plan of Action for Indochinese Refugees, 1989–1997: Sharing the Burden and Passing the Buck' (2004) 17 JRS 319; and A Helton, 'Refugee Determination under the Comprehensive Plan of Action: Overview and Assessment' (1993) 5 IJRL 544. See also M Tsamenyi, *The Vietnamese Boat People and International Law* (Griffith University 1981); J Kumin, 'Orderly Departure from Vietnam: Cold War Anomaly or Humanitarian Innovation?' (2008) 27 Refugee Survey Quarterly 104.

[52] See generally Crock and Berg *Immigration, Refugees and Forced Migration* (Federation Press, 2010), 335.

allow UNHCR to establish a presence in their countries for the purpose of conducting refugee status determinations. Refugees and asylum seekers were housed in camps, some of which remained in operation for over a decade. Countries of first asylum agreed to provide temporary refuge on condition that third States such as China, the United States, Canada and Australia agreed to take the refugees through resettlement programmes that were without precedent in size and scope. These measures were coupled with diplomatic initiatives with the victor government in Vietnam aimed at both discouraging illegal departures and facilitating legal migration.[53] The scheme also involved the repatriation of many of those who were determined not to be refugees.[54]

The significance of the CPA for the region is that it provided for the first time a legal framework for the resolution of crises involving the forced displacement of large numbers of people. It has been invoked in more recent times because of the perception that the CPA was successful in stopping the flow of boats from Vietnam in the 1980s. A downside of the scheme is that countries of first asylum were permitted to benefit without becoming party to the Refugee Convention. Thailand, Indonesia and Malaysia were not, and are still not, parties to the Refugee Convention.[55] The Convention continues not to apply in Hong Kong.[56] Only the Philippines has since acceded to the Convention (in 1981).[57] While agreeing to abide by the *non refoulement* principle, these States' involvement in practice did not extend to granting to refugees on their territories legal rights to residence, social welfare and/or citizenship.

Australia, on the other hand, did grant all of these things to the refugees it resettled. But the benefits were conferred as part of a managed process of migration. They were conferred, one might say, as part of the privilege of immigration—not as rights claimed by the refugees themselves. For the small number who arrived directly as asylum seekers, the same benefits flowed. The lack of controversy around this latter group may reflect the politics of the Vietnam conflict: public sympathy for the refugees was high. It may also reflect the very modest scale of the direct arrivals relative to the CPA admissions.

The CPA was the genesis not only of practical frameworks for managing refugee flows, but also of a conceptual framework that has continued to influence the way States in Australia's region think about refugee protection. As outlined below, States such as Indonesia and Malaysia continue to merely tolerate refugees—and to look to UNHCR for both status determination procedures and for arranging the resettlement of recognized refugees.

[53] See Y Tran, 'Comment: The Closing of the Saga of the Vietnamese Asylum Seekers: The Implications on International Refugees and Human Rights Laws' (1995) 17 HousJIntlL 463, 479.

[54] Ibid, 505.

[55] On this point see SE Davies, *Legitimizing Rejection: International Refugee Law in South East Asia* (Martinus Nijhoff 2008).

[56] On Hong Kong, see K Loper, 'Human Rights, *Non-refoulement* and the Protection of Refugees in Hong Kong' (2010) 22(3) IJRL 404, 405.

[57] See the list of parties to the Convention at the UN Treaties database <http://treaties.un.org/Pages/ViewDetailsII.aspx?& src=IND&mtdsg_no=V~2&chapter=5&Temp =mtdsg2&lang=en>.

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B. The contemporary regional context

In practice, refugees in Malaysia and Indonesia are tolerated at best. Malaysia is a party to CEDAW, the CRC and the CRPD, but not to the Refugee Convention or the core human rights instruments of ICCPR, the Convention against Torture, and the Racial Discrimination and Economic, Social and Cultural Rights Conventions. Indonesia has acceded to or signed[58] and ratified each of the human rights treaties except the Refugee Convention, but has reservations or declarations against articles of every treaty except the CRPD.

Both States allowed UNHCR to establish bases for the determination of refugee claims as a measure of their participation in the CPA. UNHCR continues to operate there, coordinating support and conducting resettlement operations for persons recognized by the agency as Convention refugees. The two States respect the principle that Convention refugees should not be *refouled* to States where the refugees might face persecution for Convention reasons. However, neither recognizes any other rights attaching to refugee status. Refugees are granted no access to government assistance and most enjoy no security or certainty during the often attenuated periods waiting for the resolution of their situation.[59]

In Malaysia, a developed country with a healthy economy and enviable standard of living, Convention refugees intermingle with a sizeable population of irregular migrants.[60] As a result, refugee issues have tended to be conflated within the framework of national security and immigration control.[61] Malaysian law provides no framework for refugee status determination, nor does it facilitate recognition and resettlement.[62] Under the *Immigration Act 1959/63* (Malaysia) refugees and asylum seekers are treated as irregular or illegal migrants. In the past, refugees have faced the same penalties as other undocumented migrants. A person who is convicted of entering without a valid entry permit carried is liable to imprisonment,[63] fines[64] and to caning (of not more

[58] Simple signature does not bind a State as a matter of international law. See *Vienna Convention on the Law of Treaties,* art 11 and A Aust, *Modern Treaty Law and Practice* (2nd edn, Cambridge 2007).

[59] For a summary of average waiting and processing times, see JRS Asia Pacific, *The Search: Protection Space in Malaysia, Thailand, Indonesia, Cambodia and the Philippines* (Clung Wicha Press 2012) 33–4.

[60] Malaysia is both a destination and transit country for refugees, who are quite mobile and live dispersed across urban areas in Kuala Lumpur and Penang. In 2012 the estimated population of refugees registered with or otherwise known to UNHCR was 100,000, mostly coming from trouble spots in Myanmar (Burma). See J Crisp, N Obi and L Umlas, 'But When Will Our Turn Come? A Review of the Implementation of UNHCR's Urban Refugee Policy in Malaysia' (Policy Development and Evaluation Service, No PDES/2012/02, UNHCR, May 2012) 1.

[61] ibid 10.

[62] *Plaintiff M70* (2010) 244 CLR 144, 170 [30] (French CJ); see *Immigration Act 1959* (Malaysia).

[63] *Immigration Act 1959* (Malaysia) section 6(3); *Federal Constitution of Malaysia*, art 5.

[64] Of up to 10,000 ringgit: *Immigration Act 1959* (Malaysia) section 6(3).

than six strokes).[65] Without official status or documentation such as work and residence permits, refugees have been vulnerable to harassment by immigration officials who have significant powers to question, arrest, prosecute, detain and remove.[66] Illegal migrants are liable to deportation at any time,[67] although there are 'credible indications that forcible deportations of asylum seekers and refugees had ceased in mid-2009'.[68] Refugees continue to be detained. Unlike Malaysian citizens, non-citizens arrested for the violation of immigration laws can be held for up to 14 days before being brought before a court.

Although it has no formal cooperation arrangement with UNHCR, the Malaysian government generally tolerates and cooperates with UNHCR's activities related to reception, registration, documentation and status determination.[69] UNHCR registers asylum seekers, conducts refugee status determinations and issues identity documents. Cooperation with UNHCR is improving, most notably following the conclusion with Australia of an 'Arrangement' that was designed to facilitate the resettlement of 4000 refugees in exchange for the reception of 800 IMAs intercepted by Australian Customs and Border Control officers.[70] During 2011 and 2012 there were fewer arrests of UNHCR-documented asylum seekers and UNHCR was given improved access to refugees in immigration detention.[71]

The strength of the Malaysian system is in the sophistication and dedication of operations established by UNHCR and associated NGOs[72] in that country—a fact that reflects at least the tacit support being offered by the Malaysian government. In spite of the improvements that appear to have followed the conclusion in 2011 of an agreement to 'exchange' refugees with Australia, lack of legal status amongst refugees continues to be an important factor leading to their vulnerability. Persons recognized as refugees in Malaysia tend to be reliant on either meagre subsistence payments from UNHCR or on wages earned through unauthorized work. With no legal right to work, refugees often have no other choice than to join the legions of irregular migrant workers upon which Malaysia's (healthy) economy relies. UNHCR facilitates jobs with

[65] *Immigration Act 1959* (Malaysia) section 6(3). On the practice of caning, see further Amnesty International, 'Abused and Abandoned: Refugees Denied Rights in Malaysia' (Report ASA 28/010/2010, Amnesty International, June 2010).

[66] *Immigration Act 1959* (Malaysia) sections 38–39A). Until recently these powers were also held by RELA ('People's Volunteer Corps', a special cadre of immigration enforcement agents). On the activities of RELA and their abuses of refugee rights, see Amnesty International, (n 65) 8ff; see further JRS Asia Pacific (n 59) 12–13.

[67] *Immigration Act 1959* (Malaysia) sections 31–35.

[68] See *Plaintiff M70* (2010) 244 CLR 144, 168–169 [28] (French CJ).

[69] *Plaintiff M70* (2010) 244 CLR 144, 168–169 [28] (French CJ); 200–201 [131] (Gummow, Hayne, Crennan and Bell JJ), 235 [249] (Kiefel J).

[70] See Crisp, Obi and Umlas (n 60) 16–17.

[71] UNHCR, '2013 UNHCR country operations profile – Malaysia', UNHCR 2013 <http://www.unhcr.org/cgi-bin/texis/vtx/page?page=49e4884c6&submit=GO>

[72] See L Smith-Khan, M Crock, B Saul and R McCallum, 'To "Promote, Protect and Ensure": Overcoming Obstacles to Identifying Disability in Forced Migration' (2014) (unpublished article on file with authors).

employers who need additional labour,[73] however abuse of migrant workers—including refugees—is well documented.[74]

Children are not allowed to attend government schools. Accordingly, few have access to formal education. Although some children receive basic schooling and some English language training through UNHCR and dedicated NGOs, these programmes are limited in their reach.

Asylum seekers who have not secured any form of registration with UNHCR receive little or no support,[75] although there are faith-based organizations operating outreach services.[76] Access to medical care is of particular concern. Although card-carrying refugees are eligible for discounted medical fees, these are generally beyond the means of refugees needing assistance. UNHCR is able to offer assistance in cases of critical need only. In *Plaintiff M70*[77] the High Court considered a report on conditions in Malaysia done by Australia's Department of Foreign Affairs and Trade. The Court found that protection standards in Malaysia did not meet the (now-repealed) human rights standards then required by the *Migration Act* 1958.

Whereas Malaysia is largely a destination country for refugees (particularly refugees from Myanmar (Burma), Indonesia is emerging as mainly a transit country. As in Malaysia, there is no formal legislative framework governing the treatment of refugees in Indonesia. Asylum seekers are simply classified as illegal migrants unless they come under what is known as the 2001 *Regional Cooperation Model* (discussed further below).[78] Where it is apparent to Indonesian authorities that a non-citizen (asylum seeker) intends to travel to Australia or New Zealand, the individual is directed to the International Organization for Migration (IOM) for 'management'. IOM has bases across Indonesia's provinces. IOM then refers persons who wish to make an asylum claim to UNHCR. This scheme is funded by Australia. Other faith-based NGOs provide various support services.[79]

UNHCR's presence in Indonesia is much more modest than the operations in Malaysia.[80] UNHCR conducts registration and refugee status determinations

[73] Crisp, Obi and Umlas (n 60) 1.

[74] See eg Amnesty International, *Trapped: The Exploitation of Migrant Workers in Malaysia*, (ASA 28/002/2010, 24 March 2010).

[75] In *Plaintiff M70* (2010) 244 CLR 144, French CJ noted that asylum seekers' lack of status 'has impeded access by refugees to sustainable livelihoods or formal education': at 168–169 [28] (French CJ).

[76] In Malaysia, one of UNHCR's most significant implementing partners is *A Call to Serve* (ACTS), a non-government organization established by the Jesuits. In Indonesia, a similar role is performed by the Jesuit Refugee Service.

[77] *Plaintiff M70/2011 v Minister for Immigration and Citizenship* (2011) 244 CLR 144 ('*Plaintiff M70*').

[78] See (n 29).

[79] L Smith-Khan, M Crock, B Saul and R McCallum (n 72).

[80] UNHCR's operations in Indonesia have a modest budget in comparison with those in neighbouring countries, including Malaysia. See UNHCR, '2013 UNHCR country operations profile – Asia and the Pacific', UNHCR <http://www.unhcr.org/pages/4a02d8ec6.html>. The number of persons UNHCR is assisting in Indonesia is also much lower. As of December 2012,

pursuant to a MOU with the Indonesian government. In 2010, the Director General of Immigration for Indonesia issued a Directive which recognized UNHCR's work and responsibility for asylum seekers and refugees in Indonesia.[81]

The 2010 Directive allows illegal migrants to stay in Indonesia temporarily if they have either an Attestation Letter or a letter verifying that they are seeking asylum with UNHCR, or have received recognition of refugee status from UNHCR.[82] This protects UNHCR's persons of concern from refoulement and gives them some security of (temporary) stay pending a durable solution. If they are registered, the directive does not require them to be detained. The Jesuit Refugee Service (JRS) explains further:

> If an illegal migrant who is seeking asylum comes under the mandate of an international organisation or UNHCR and are living in the community they are requested to complete a Refugee Declaration of Compliance. They are then subject to the control of the local Immigration Office. UNHCR has an obligation to report to the Directorate General of Immigration when an application for asylum has been rejected and their case has been closed. After a case has been closed, rejected asylum seekers are then subject to the immigration law and regulations in the same manner as illegal migrants.[83]

The Regional Cooperation Model has made Australia a dominant presence in Indonesia since 2001. Australia funds many of the NGOs and works closely (albeit not very effectively) with the Indonesian government in efforts to deter irregular maritime migration to Australia. The UNHCR's registration process and the failure to offer durable solutions to refugees in a timely fashion seems to have contributed to the problems surrounding the programme. UNHCR's registration process is typically a lengthy and somewhat haphazard affair, with gaps of over a year not uncommon between the time a person first presents to UNHCR and the time that they are recognized and given UNHCR documentation.[84] During that period the person will have no documentation to distinguish them from illegal migrants. There is sometimes little that UNHCR can do to assist the person if they are detained.[85]

The population of refugees in Indonesia is very much smaller than that of Malaysia. While there are similarities in the experience of refugees living on meagre agency stipends in both States, the Indonesian cohort is distinguished by the feeling of transience that pervades the asylum seeker community. Apart from the tendency for both refugees and recognized refugees to use people

UNHCR was assisting 6761 asylum seekers and 1823 refugees there: UNHCR, 'The People of Concern in Indonesia', UNHCR Indonesia <http://www.unhcr.or.id/en/who-we-help>.

[81] The 'September 2010 Directorate General of Immigration Directive on Handling of Illegal Migrants' see UNHCR, 'Government Relations & Capacity Building' UNHCR Indonesia <http://www.unhcr.or.id/en/government-relations-and-capacity-building>.

[82] JRS Asia Pacific (n 59) 17.

[83] ibid.

[84] ibid.

[85] See eg ibid 17–18.

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smugglers in a search for asylum in Australia, the areas where refugees are housed seem to enjoy little security or permanence of tenure.

IV. AUSTRALIAN APPROACHES TO ASYLUM SEEKERS PRESENTING AS UMAS

A. Australia's Response to Refugee Flows from Vietnam

Before the fall of Saigon in April 1975, Australia had virtually no direct experience of asylum seekers arriving on its territory.[86] Certainly, Australia had taken in hundreds of thousands of refugees after World War II. However, these people were admitted as *migrants*—albeit migrants who happened to be refugees.[87] In the absence of any (serious) experience of asylum seekers, there had been no call to establish procedures for determining the status of persons on its territory claiming to be refugees. When people from the region did start presenting as asylum seekers, the historical record suggests that Australia's response—from the start—was heavily influenced by its place in the world.

Australia's earliest experience of asylum seekers in any significant numbers involved forced migrants from West Papua, following Indonesia's annexation of that country in 1969. Deeply concerned not to offend its populous and militarily powerful neighbour, Australia's response to the few arrivals on the Australian mainland is best described as muted and defensive. While the term 'refugee' was readily ascribed to displaced persons brought to Australia from Europe after World War II, there was a marked reluctance to use this label for fugitives from more proximate countries.[88] It was not until the late 1970s and the arrival of maritime fugitives from the conflict in Vietnam (the first 'boat people') that formal processes for determining refugee status on Australian territory were instituted.[89] These developments echoed measures taken across the Asia-Pacific to manage the flow of refugees across the region.

From the start, the arrival of UMAs was a matter of considerable concern for the Australian government. It is noteworthy that very few asylum boats managed to travel as far as Australia—a fact that may be attributable in part to deterrent and interdiction measures. Former officials from the Department of Immigration would later speak of colleagues being charged with taking all possible measures to ensure that boats did not make it down to Australia, even if this meant 'encouraging' boats to ground on the shores of neighbouring

[86] See K Neumann, *Refuge Australia: Australia's Humanitarian Record* (UNSW Press 2004).
[87] M Crock and L Berg, (n 52) ch 12.
[88] Biok (n 21) 123; and K Neumann and S Taylor, 'Australia, Indonesia and West Papuan Refugees 1962–2009' (2010) 10 International Relations in the Asia-Pacific 1–31. The reluctance to confer status on fugitives from Irian Jaya (West Papua) was behind the landmark case of *Ran Rak Mayer v Department of Immigration and Ethnic Affairs* (1985) 157 CLR 290. See the discussion in M Crock, 'Judging Refugees: The Clash of Power and Institutions in the Development of Australian Refugee Law" (2004) 26 SydLR 51.
[89] Crock and Berg (n 52) ch 12.

countries by boring holes in them with a brace and bit.[90] Cabinet papers from the time[91] reveal that the government of the day perceived boat arrivals as a (domestic) political liability just as more recent politicians have done. The same or similar options were proposed then as now in response to the developing crisis: deterrent actions ranging from outright refoulement back to Vietnam; the mandatory detention of boat arrivals; and/or the institution of a temporary protection regime.[92] The government of 1979 chose none of these. Instead, Australia granted permanent residence to all those who sought refuge on its shores.

In the years following the end of the war, Australia was to show considerable leadership and generosity in the number of South East Asian refugees it accepted for resettlement. Coinciding with the end of the White Australia Policy, it could be said that the migration from Vietnam literally changed the face of Australia.[93] These domestic processes were a positive development. In respect of those refugees who reached the country (by regular or irregular means), Australia complied closely with the humanitarian dictates of the Refugee Convention. It also showed considerable respect for the rights articulated in the various human rights conventions to which Australia was party.

Australia's incipient hostility to asylum seekers arriving by boat and asserting *rights* to protection under the Refugee Convention became plain when the country experienced its second 'wave' of UMAs in 1989. A small number of asylum seekers arrived first from Cambodia and later from China. Some presented as 'secondary movement' refugees who had previously been resettled in China under the CPA; others as direct fugitives from the crackdown on the pro-democracy movement in that country. A Labor government in Australia responded by instituting mandatory detention for the UMAs as a deterrent measure.[94] This was followed by the introduction of a relatively short-lived scheme for granting Convention refugees temporary protection. These measures marked the first real divergence between Australia's approach and that adopted in culturally proximate countries such as the United Kingdom, Canada and the United States. For the first time, Australia's treatment of refugees on its territory began to create dissonances with its international legal obligations.[95]

The flow of refugees and asylum seekers from China was stopped in relatively short measure through a combination of enforcement measures at source and a Memorandum of Understanding that prevented asylum seekers

[90] See *Admission Impossible* (directed by Alec Morgan, *Australian Broadcasting Corporation*, 1992).

[91] Minister for Foreign Affairs, Memorandum No 380: Indo-Chinese refugees, 11 July 1979 (NAA: A12390, 380).

[92] ibid.

[93] N Viviani, 'The Indochinese in Australia, 1975–1995: From Burnt Boats to Barbecues (Oxford University Press 1996).

[94] *Migration Amendment Act 1992* (Cth); *Migration Reform Act 1992* (Cth); see *Chu Kheng Lim v Minister for Immigration, Local Government and Ethnic Affairs* (1992) 176 CLR 1.

[95] Crock and Berg (n 52) ch 12.

covered by the CPA from claiming protection in Australia.[96] Although a serious refugee-producing country, China was also the first country given 'white list' standing in Australia—as a place from which certain people would be deemed not to be in need of protection.[97]

B. The Pacific Solution Mark 1: Australia's First Attempt to Revive a Scheme for the Regional Processing of Asylum Claims

However acute the public angst over the arrival of UMAs in the 1980s, Australia's fixation with border control did not become an object of overt political warfare until 2001. Then Prime Minister Howard's decision to deny admission to asylum seekers rescued at sea became a meme for strong government, reversing the political fortunes of a party that had faced electoral defeat.

The 'Pacific Solution'[98] marked the first real point of convergence between Australian refugee policy and that of its regional neighbours after the CPA. At a basic level, the policies adopted reflected the central conflict States in the region have felt between their view of the national interest and international legal obligations that require States to protect refugees even where those seeking asylum are unwelcome.

The matrix of policies adopted by Australia between October 2001 and December 2007 sought to recreate a version of regional processing that on its face would operate to protect Convention refugees from refoulement, whilst denying access to a range of human rights. Just as it had done during the era of the CPA, Australia borrowed heavily from the US in its creation of 'exceptional' spaces to deny UMAs access to asylum[99] and in the adoption of interdiction and push-back operations. Islands to the North of Australia such as Christmas Island or Ashmore Reef became 'excised offshore places'. Where the Americans used the military base at Guantanamo Bay as a processing centre for fugitives from Cuba and Haiti, UMA asylum seekers interdicted by Australia were transferred to detention facilities on Nauru and PNG's Manus Island where their refugee claims were assessed.[100] Although the original plan

[96] *Migration Act* section 91D(1)(a); *Migration Regulations 1994* r 2.12A.

[97] *Migration Act 1958* (Cth) section 91A; *Migration Regulations 1994* (Cth) sch 11, 12.

[98] *Border Protection (Validation and Enforcement Powers) Act 2001* (Cth); *Migration Amendment (Excision from Migration Zone) Act 2001* (Cth); *Migration Amendment (Excision from Migration Zone) (Consequential Provisions) Act 2001* (Cth).

[99] See F Johns, 'Guantánamo Bay and the Annihilation of the Exception' (2005) 16 EJIL 613, 621; and GL Neuman, 'Anomalous Zones' (1996) 48 StanLRev 1197, 1228–33.

[100] The *Migration Amendment (Excision from Migration Zone) Act 2001* (Cth) excised certain territories from the 'migration zone' of Australia. Anyone entering Australia without a visa at one of those territories became known as an 'offshore entry person' (section 5(1) *Migration Act 1958*). Offshore entry persons are prohibited from applying for any visas unless the Minister for Immigration personally allows them: section 46A *Migration Act 1958*. The constitutional validity of this section was affirmed by the High Court in *Plaintiff M61/2010E v Commonwealth of Australia, Plaintiff M69 of 2010 v Commonwealth of Australia* [2010] HCA 41. See Foster and Pobjoy (n 24) 586–9.

was that no UMA asylum seeker would be resettled in Australia, in practice this is where most of the refugees were placed in the longer term.

The policy of offshore processing was modified after the change of government in 2007 with the closure of the centre on Nauru (The PNG centre had already been mothballed). However the legislative scheme remained unchanged.[101] The processing of UMAs continued on Australian territory, on the 'excised offshore place' of Christmas Island.

The fiction that these arrangements could operate to deny UMAs access to the Australian legal system was demolished by the High Court in 2010. In a marked departure from earlier decisions on point,[102] the Court upheld applications for judicial review brought by asylum seekers whose refugee claims had been rejected in the modified status determination procedures used on Christmas Island.[103]

C. The Failed 'Malaysian Solution'

With surging boat arrivals, the Labor government responded in 2011 by reverting to the policies of its predecessor government. The policy change was badged expressly as a version of CPA-style regional processing. An iteration that would once again place the IMA asylum seekers on truly foreign soil, the proposed policy involved the transfer to Malaysia of 800 IMA asylum seekers. In exchange, Australia agreed to resettle from that country 4,000 Convention refugees processed by UNHCR.[104] The scheme was termed a 'regional solution' to the scourge of irregular migration and promoted as a measure necessary to prevent the further loss of life at sea.[105] The agreement was embodied in a non-binding bilateral 'Arrangement' and was negotiated in May 2011 as a product of the regional collaboration known as the 'Bali Process'.[106]

[101] M Crock, 'First Term Blues: Labor, Refugees and Immigration Reform' (2010) 17 AJAdminL 1–9.

[102] *Ruddock v Vadarlis* (2001) 110 FCR 491; *P1/2003 v Minister for Immigration and Multicultural and Indigenous Affairs* [2003] FCA 1029; and *P1/2003 v Minister for Immigration and Multicultural and Indigenous Affairs* [2003] FCA 1370; see the discussion in M Crock and MA Kenny, 'Rethinking the Guardianship of Refugee Children after the Malaysian Solution' (2012) 34 SydLRev 437.

[103] *Plaintiff M61/2010E v Commonwealth of Australia, Plaintiff M69 of 2010 v Commonwealth of Australia* (2010) 243 CLR 319; See M Crock and D Ghezelbash, 'Due Process and Rule of Law as Human Rights: The High Court and the "Offshore" Processing of Asylum Seekers' (2011) 18 AJAdminL 101.

[104] The 'Arrangement' with Malaysia involved sending 800 IMAs to that country in exchange for 4,000 refugees from Malaysia. See *Arrangement between the Government of Australia and the Government of Malaysia on Transfer and Resettlement*, signed 25 July 2011, available at <http://pandora.nla.gov.au/pan/67564/20110920-1320/www.minister.immi.gov.au/media/media-releases/_pdf/20110725-arrangement-malaysia-aust.pdf>.

[105] See eg C Bowen (Minister for Immigration and Citizenship), transcript of press conference, 8 August 2011, Canberra, <http://pandora.nla.gov.au/pan/67564/20110920-1320/www.minister.immi.gov.au/media/cb/2011/cb169899.html>.

[106] See (n 18). See also UNHCR, 'Statement to the Regional Ministerial Conference on People Smuggling, Trafficking in Persons and Related Transnational Crime', 29–30 April 2003;

Its effect would have been to underscore within Australia the principle that the grant of protection is a matter of privilege rather than a right vested in the asylum seeker. The deal also operated to implicitly endorse Malaysia's reticence in ascribing obligation to the act of granting protection to Convention refugees.

While the announcement of the Malaysian 'Arrangement' did result in an initial slowdown in boat arrivals,[107] the deal fell apart when an attempt to transfer the first asylum seekers to Malaysia was successfully challenged in the High Court. In *Plaintiffs M70 and M106 v Minister for Immigration and Citizenship*,[108] the Court struck down the arrangement for a failure to comply with the terms of the *Migration Act* 1958. The majority ruled that this legislation mandated compliance with certain obligations under international human rights law.[109] As explained earlier, while Malaysia has ratified the Convention on the Rights of the Child, it is not a party to the UN Convention relating to the Status of Refugees or to any of the core human rights treaties. In the absence of any agreement by Malaysia to assume legally binding obligations in relation to Australia's asylum seekers, the Court ruled that the Arrangement did not comply with the objective requirements of the *Migration Act*.

With the option of a transfer to Malaysia removed, the scale and nature of irregular maritime migration grew exponentially, suggesting that smugglers are now very alert to policy developments. The issue became a running sore for the Labor government. In an attempt to introduce a 'circuit-breaker', the government appointed an 'Expert Panel' to provide strategic advice.[110] The panel styled its recommendations 'hard-headed but not hard-hearted', asserting that the reversion to a form of regional processing was a necessary element in finding a circuit-breaker to stop the flow of irregular arrivals—and with this the high number of people who are losing their lives at sea.[111] It was in the report of this panel that the 'No Advantage' principle had its genesis.

D. The Pacific Solution Revisited

Almost exactly one year after the High Court's ruling in *Plaintiff M70*, the government was able to use the Houston Report to secure support to amend the *Migration Act* 1958.[112] The *Migration Legislation Amendment*

see S Kneebone and S Pickering, 'Australia, Indonesia and the Pacific Plan' in S Kneebone and F Rawlings-Sanaei (eds), *New Regionalism and Asylum Seekers: Challenges Ahead* (Berghahn Books 2007) 167, 175.

[107] Department of Immigration, Answer to Question Taken on Notice, Budget Estimates Hearing, 21–22 May 2012, BE12/0262, available at <http://www.aph.gov.au/Parliamentary_Business/Senate_Estimates/legconctte/estimates/bud1213/diac/index>.

[108] *Plaintiff M70* (2011) 244 CLR 144.

[109] ibid 192 [98] (Gummow, Hayne, Crennan and Bell JJ).

[110] See Houston Report (n 26).

[111] ibid, 7, 11.

[112] The government had earlier introduced two Bills into parliament: the Migration Legislation Amendment (Offshore Processing and Other measures) Bill 2011 (in September 2011); and the

(Regional Processing and Other measures) Act 2012 created a scheme that would allow for the establishment of a regional processing scheme, free from the constraints imposed by the 2001 statutory scheme. The 2012 Act seeks to distance the Australian courts, once and for all, from the processing of refugee claims made by 'offshore entry persons'.[113] The Act is also open in its intent to create space between the process of designating a 'regional processing country' and the requirement that a designated country subscribe to a legal regime for the protection of human rights.[114] Instead of prescribing objective standards which a regional processing country must meet, the only condition on the Minister's designation power[115] is that the Minister must think that it is 'in the national interest' to designate a country.[116] Following passage of this legislation in August 2012, the government quickly concluded Memoranda of Understanding with both Nauru and PNG (in respect of Manus Island). Those States were designated for regional processing under the amended *Migration Act*.[117]

While Australia is party to the full suite of international human rights instruments, the same is not true of the States closely implicated in the new 'regional' solution. The States recently chosen by Australia as regional partners are some of the least committed to international human rights law.

Two further elements need to be considered in order to understand how these processing arrangements operate in practice. The first relates to the process for selecting candidates for referral to the centres and for determining the duration of their stay before resettlement. This quickly became an issue when the number of UMAs outstripped the places available on Nauru and Manus Island. The second concerns the legal frameworks governing both the regional processing regime and the treatment of UMAs who are not selected for referral offshore. Both are explored in the following section, together with the 'No Advantage' principle embraced by the Minister as the keystone of the 'new' approach to UMAs. It will be my argument that this principle—and the denial of rights implicit in the regional processing package—provides tangible evidence of a rapprochement between Australia's approach to refugees and irregular migration and that of its Asian neighbours.

Migration Legislation Amendment (The Bali Process) Bill 2012 (rejected by the Senate in June 2012).

[113] *Migration Act* 1958 section 198AA (b)–(c).

[114] *Migration Act* 1958 section 198AA(d).

[115] Done by the Minister in the form of a legislative instrument which is delegated legislation, but is subject to lesser Parliamentary approval requirements than other delegated legislation: *Migration Act* section 198AB(1) overrides *Legislative Instruments Act* sections 12(1), s 41.

[116] *Migration Act* 1958 section 198AB(2).

[117] *Migration Act 1958 – Instrument of Designation of the Republic of Nauru as a Regional Processing Country under subsection 198AB(1) of the Migration Act 1958*, 10 September 2012 (F2012L01851); *Migration Act 1958 – Instrument of Designation of the Independent State of Papua New Guinea as a Regional Processing Country under subsection 198AB(1) of the Migration Act 1958*, 9 October 2012 (F2012L02003).

The various versions of offshore or regional processing adopted in the management of asylum flows exemplify the tendency of Australian governments over many years to engage in a rather selective reading of the Refugee Convention, exploiting the indeterminacy of the language used in the instrument. Their insistence on the legality of Australia's long-standing mandatory detention laws as a first line of defence against UMAs[118] is one example in point. Australia's addiction to such measures has not only played out on its own territories. Its funding of immigration detention facilities in Indonesia has done little to encourage that country to adopt practices that are compliant with international human rights law.[119] Another example is the reliance placed by Australia on the reference to 'international cooperation' in the Preamble of the Convention to justify measures that in practice look more like burden shifting than burden sharing.[120]

Most importantly, however, there has been a tendency to read the Refugee Convention as an instrument that imposes on States a narrow range of obligations, the most important of which is the duty not to *refoule* or send back refugees to a place where they would face persecution on one of the Convention grounds.[121] In emphasizing this principle, the many provisions in the Convention that operate to protect the broader human rights of refugees are overlooked. As explored further in the following sections, it is on this point that Australia has parted company with its traditional WEOG partners—and fallen into step with its neighbours in the region.

V. SHADOW PLAYS: REGIONAL PROCESSING AND THE 'NO ADVANTAGE' PRINCIPLE

As noted earlier, the central obligation accepted by signatories to the Refugee Convention is that 'Convention' refugees (as defined) must not be returned ('refouled') to a country where they will face persecution on Convention grounds. The fact that non-signatory States like Indonesia and Malaysia generally do not engage in the refoulement of refugees has led many to suggest that non-refoulement has become a norm of customary international law, binding all States.[122]

[118] See Department of Immigration and Multicultural and Indigenous Affairs, *Interpreting the Refugees Convention: An Australian Contribution* (Department of Immigration and Multicultural and Indigenous Affairs, 2002) ch 11; *Chu Kheng Lim v Minister for Immigration, Local Government and Ethnic Affairs* (1992) 176 CLR 1; see also M Crock and L Berg, (n 52) 479–82.

[119] See Nethery et al (n 29).

[120] This point is made by M Foster in 'The Implications of the Failed "Malaysian Solution": The Australian High Court and Refugee Responsibility Sharing at International Law' (2012) 13 Melbourne Journal of International Law 396, 397.

[121] Refugee Convention, art 33.

[122] G Goodwin-Gill, 'Non-Refoulement and the New Asylum Seekers' in D Martin, *The New Asylum Seekers: Refugee Law in the 1980s* (Dordrecht 1986) 103; cf Hathaway (n 32); see also E Lauterpacht and D Bethlehem, 'The Scope and Content of the Principle of Non-Refoulement' in E Feller, V Türk and F Nicholson (eds) *Refugee Protection in International Law: UNHCR's Global Consultations on International Protection* (Cambridge University Press 2003) 87.

However, by ratifying the Refugee Convention and to the conventions underpinning international human rights law, Australia signalled its preparedness to do much more than simply refrain from the refoulement of refugees. It undertook to grant to refugees who reach its jurisdiction (and who are recognized as Convention refugees) a whole range of rights that deepen according to the refugee's legal relationship with their host State.[123] In *Plaintiff M70*, Justices Gummow, Hayne, Crennan and Bell noted that non-refoulement is only one of the obligations of a Convention signatory.[124] Their Honours noted that

> The extent to which obligations beyond the obligation of non-refoulement (and the obligations under Art 31 of the Refugees Convention concerning refugees unlawfully in the country of refuge) apply to persons who claim to be refugees but whose claims have not been assessed is a question about which opinions may differ . . . (But) what is clear is that signatories to the Refugees Convention and the Refugees Protocol are bound to accord to those who have been determined to be refugees the rights that are specified in those instruments including the rights earlier described.[125]

The central tenet of the Labor government's 2012 refugee policy relative to UMAs was that these asylum seekers should gain 'no advantage' by bypassing 'regular' immigration controls.[126] While the sentiments behind the Expert Panel's keystone principle are not new, the policy is unique in that it explicitly links Australia to the countries in the region. This is done by benchmarking Australia's (Convention-based) processing system with the practices of non-Convention States in its region. To the extent that countries in the region are not conferring on refugees rights that Australia should be respecting as a party to the Refugee Convention and other human rights instruments, the 'no advantage principle' has obvious shortcomings.

Translated into policy and law, the 'no advantage' principle became a proxy for delaying access to most of Convention rights (apart from non-refoulement) for 'Australia's' UMAs on two levels. The first is the temporal criterion for resettlement:[127] that is, the 'period' which must elapse before a person who is recognized as a refugee (whether in Australia or a regional processing country) will receive a permanent Australian protection visa. The second relates to the conditions in which the refugee lives while waiting for permanent residence and/or resettlement in a safe third country.

[123] Hathaway (n 31) 184.

[124] *Plaintiff M70 Plaintiff M70* (2010) 244 CLR 144, 195–6 [117] (Gummow, Hayne, Crennan and Bell JJ).

[125] ibid; see also at 225 [216] (Kiefel J).

[126] Houston Report (n 26) recommendation 1 [2.6]–[2.22].

[127] See Chris Bowen in Australian Broadcasting Corporation, *ABC24*, 'Regional processing, boat arrivals, ''no advantage'' principle, Nauru, Greens statements' 26 November 2012 (interview with Lyndal Curtis) <http://pandora.nla.gov.au/pan/141738/20130718-1402/www.minister.immi.gov.au/media/cb/2012/cb192019.htm>.

As to the first of these, the Labor government's policy was that no person—even if assessed to be a refugee—should receive a permanent Australian protection visa any faster than they would have in a refugee-processing country in Australia's region. Then Minister Bowen proclaimed that a person assessed as a refugee would receive a permanent visa,[128] but not until they 'would have under regional processing arrangements'.[129] The Labor government tried to walk a fine line between emphasizing that 'no advantage' means 'long periods of time'[130] without concurring with the conservative party's specification of a minimum wait period of five years. In practical terms, however, the Labor approach amounted to a return to the temporary protection policies of the former conservative Coalition,[131] with an interesting difference. Where the conservatives would permit UMAs to make immediate application for protection as refugees, the Labor approach was to release UMA asylum seekers into the community on documents known as temporary safe haven visas. These operate to grant temporary protection while specifying that the visa holders have no right to apply for asylum or for any other visa except at the absolute discretion of the Minister (exercising a non-reviewable, non-compellable discretion).[132] Again, this devise carries the implicit message that the grant of (enduring) protection is a gesture of sovereign goodwill, not a matter of legal obligation.

As UNHCR was quick to point out,[133] the temporal application of the 'No Advantage principle' is a practical nonsense. While refugees do

[128] Contradicting previous assertions that IMAs enjoyed 'no guaranteed resettlement in Australia'. See Department of Immigration 'Fact Sheet: The Expert Panel on Asylum Seekers and the 'no advantage' principle', *Department of Immigration and Citizenship* 2012 <http://www.immi.gov.au/managing-australias-borders/border-security/irregular-entry/no-people-smuggling/_pdf/fact-sheet-english.pdf>.

[129] Australian Broadcasting Corporation, *ABC24*, 'Regional processing, boat arrivals, 'no advantage' principle, Nauru, Greens statements' 26 November 2012 (Interview with Lyndal Curtis) <http://pandora.nla.gov.au/pan/141738/20130718-1402/www.minister.immi.gov.au/media/cb/2012/cb192019.htm>.

[130] Australian Broadcasting Corporation, *ABC24*, 'Offshore processing, boat arrivals, Sri Lankan returns, increase in humanitarian intake, 'no advantage' principle, Nauru, Manus Island' 22 November 2012 (interview with Marius Benson) <http://pandora.nla.gov.au/pan/141738/20130718-1402/www.minister.immi.gov.au/media/cb/2012/cb191935.htm>. See also Chris Bowen, 'Sri Lankan returns, Afghan return, Manus Island, Nauru, 'no advantage' principle for people onshore, humanitarian intake' (Media Release, transcript of doorstop interview, Sydney, 22 November 2012) <http://pandora.nla.gov.au/pan/141738/20130718-1402/www.minister.immi.gov.au/media/cb/2012/cb191923.htm>.

[131] Between 1999 and 2001, IMAs recognized as refugees were granted temporary protection visas that varied between three and five years in duration. See former Subclass 785. For an account of the laws operating during those years, see Crock and Berg, (n 52) ch 12.

[132] See *Migration Act* 1958, section 37A; *Migration Regulations* 1994, Sch 2, subcl 449. At time of writing the use of these visas for IMAs was the subject of a High Court challenge. See *Plaintiff M79 v Minister for Immigration and Citizenship* (2013) HCATrans 7 (8 February 2013) at <http://www.austlii.edu.au/au/other/HCATrans/2013/7.html>.

[133] Letter from Antonio Guterres to Chris Bowen, 5 September 2012, available at <http://unhcr.org.au/unhcr/images/120905%20response%20to%20minister%20bowen.pdf>.

frequently spend long periods of time languishing in countries like Malaysia,[134] it is impossible in practice to specify anything resembling a typical waiting time. Refugees from some countries are never considered for resettlement,[135] however dire their circumstances. Others are given priority and achieve positive outcomes in short measure.

As a matter of international law, there is no inherent problem in imposing temporal limitations on the protection granted to Convention refugees. In fact, Australia played a significant role during the years of the CPA in legitimizing the concept of temporary protection as an option for States receiving large numbers of asylum seekers and refugees. After the federal election in September 2013, the resurgent conservative Coalition moved to reinstate a system of temporary protection visas for UMAs, with no access (ever) to permanent residence.[136]

The real problems relate to the circumstances in which UMA refugees (and asylum seekers) are held and the entitlements given to them pending a final resolution of their situation. The second application of the No Advantage principle relates to the entitlements of the asylum seekers and refugees pending their admission or acceptance as Australian residents, whether permanent or temporary. It is this aspect of the policy that holds the greatest potential for human rights abuse.

VI. SHIFTING SANDS: AUSTRALIA'S OBLIGATIONS, REFUGEE RIGHTS AND THE MEANING OF PROTECTION

Over time, Australia has gone out of its way to argue that it is compliant with obligations it has assumed at international law. In 2002, the then government published a small book containing a detailed apologia for the complex policy settings underpinning the first Pacific Solution. These included the mandatory detention of UMA asylum seekers; the grant of temporary protection visas; restrictions on education and social security rights; and the denial of family reunion.[137] A decade later, little changed as first a Labor and then conservative Coalition governments have replicated incrementally virtually every element of

[134] JRS Asia Pacific (n 60) 33–34. The chart pp 33–4 sets out average processing times (both predicted times and actual times) for refugee status determination in Indonesia and Malaysia.

[135] To begin with, resettlement is predicated on UNHCR being permitted to run programmes to find safe third countries for refugees. Bangladesh is an example of a country with millions of refugees and no resettlement programme.

[136] Liberal Party of Australia (n 16) 7. See Migration Amendment (Temporary Protection Visas) Regulation 2013 [SLI 2013, 234]. This instrument extends the temporary protection regime to all asylum seekers who arrive in Australia without a visa (by boat or by plane) and/or who fail to pass immigration clearance. The measure was disallowed by the Senate but survives as a policy.

[137] See Department of Immigration Multicultural and Indigenous Affairs *Interpreting the Refugees Convention – an Australian Contribution* (Commonwealth of Australia, 2002) 123 ff.

the earlier scheme. Before the 2013 election the one exception was the push-back actions that were part of Operation Relex in 2001.[138]

Beginning first with the issue of the status of the UMAs relative to Hathaway's taxonomy of human rights, it will be seen that there are more than passing similarities between some of Australia's policies and those of Malaysia and Indonesia.

A. Status and Rights under International Law

In spite of the agreements reached with Nauru and PNG, a clear majority of the UMAs who have arrived in Australia since August 2012 are likely to remain in Australia, where their asylum claims will be determined under Australian law. The (Labor) government announced in late 2012 that these people would be subject to the same 'no advantage' period as UMAs transferred offshore. Over time, most UMAs have been released into the community or housed in 'Alternative Places of Detention' on visas which have the effect of conferring *lawful presence* in Australia. The status of others who remain in immigration detention is more contentious. Hathaway argues that 'the stage between "irregular" presence and the recognition or denial of refugee status . . . is also a form of "lawful presence" and hence that only those whose applications have been rejected are unlawfully present'.[139] Although the better view as a matter of international law (it is the reading of the Convention most consistent with principles of treaty interpretation), the Australian government asserts that 'mere' detainees are not lawfully present.[140] As Hathaway observes:

> If a state opts not to adjudicate the status of persons who claim to be Convention refugees, it must be taken to have acquiesced in the asylum-seekers' assertion of entitlement to refugee rights, and must immediately grant them those Convention rights defined by the first three levels of attachment.[141]

This statement certainly pertains to the UMAs released into the community on temporary safe haven visas.[142] It would also be apposite to refugees granted temporary protection visas.

[138] Prime Minister Julia Gillard, New Zealand Prime Minister John Key, 'Joint Statement by Prime Ministers Key and Gillard: February 2013' (Media Release, 9 February 2013) <http://www.pm.gov.au/press-office/joint-statement-prime-ministers-key-and-gillard-february-2013>; Australia strikes refugee deal with NZ', *ABC News* (online) 10 February 2013 <http://www.abc.net.au/news/2013-02-09/australia-to-send-some-asylum-seekers-to-nz/4509682>.

[139] Hathaway (n 32) 174, 183; see also *Rajendran v Minister for Immigration and Multicultural Affairs* (1998) 166 ALR 619 (Full Federal Court).

[140] *Plaintiff M47-2012 v Director General of Security* [2012] HCA 46 (5 October 2012). In that case, a majority seemed to prefer the view that where Australia's laws did not authorize presence for the purposes of pursuing a claim to refugee status, asylum seekers are not lawfully present and cannot therefore claim the rights attaching to the 'lawful presence' level of attachment, and thereby deferred to national rather than international understandings of lawful presence, although Heydon J did not criticize, but distinguished, *Rajendran* (at [253]).

[141] Hathaway (n 31) 185, ie rights up to and including those attaching to lawful presence.

[142] See (n 132).

The status of transferees to Nauru is even clearer than that of UMAs in Australia. Upon arrival in that country, UMAs are granted an Australian Regional Processing Visa[143] valid for an initial period of three months, renewable indefinitely as long as the Australian government continues to pay the $1000 monthly visa charge. The status of transferees to PNG is less obvious. There is no visa equivalent to the Australian Regional Processing Visa. At best, it seems that they remain without status, and are simply tolerated by the government in fulfilment of its diplomatic promises to Australia. Nevertheless, this tolerance supports an argument that transferees to Manus Island are lawfully present in PNG. At worst, they are simply 'present' and are entitled only to the most basic protections.

As explored further below, UMAs in all three States are liable to detention, in fact if not in name. When released on temporary visas, asylum seekers in Australia have few entitlements at law. They enjoy no right to work, through self-employment or otherwise. Under the Labor government they did however enjoy a right to free legal advice. The conservative Coalition vowed to abolish this entitlement upon its election in September 2013. It also promised to deny asylum seekers access to review of adverse decisions.[144]

B. Discrimination and Penalties

As many argued in relation to the Pacific Solution policies,[145] it is very difficult to see how Australia's approach to UMAs does not amount to discrimination and the imposition of penalties based on legal status and mode of arrival. On this occasion the very language used implies a penalty in the sense that the obverse of advantage is disadvantage. This has been more than borne out in practice. The situation facing persons transferred to either Nauru or PNG in 2012–13 was dire. Accommodation was rudimentary, with transferees in Manus Island suffering indignities that varied from the absence of doors (lack of privacy) through to rain-soaked bedding and endemic disease.[146]

C. Detention

In January 2013, the number of people in immigration detention (including 'alternative places of detention') in Australia exceeded 10,000 for the first time

[143] See *Immigration Regulation 2000* (Nauru) regs 2 and 9A(1)(a).

[144] Liberal Party of Australia, 'The Coalition's Policy to Clear Labor's 30,000 Border Failure Backlog' (August 2013) <http://www.liberal.org.au/our-policies> 7.

[145] G Goodwin-Gill, 'Article 31 of the 1951 Convention relating to the Status of Refugees: Non-penalization, detention, and protection', in E Feller, V Türk, F Nicholson, (eds), *Refugee Protection in International Law: UNHCR's Global Consultations on International Protection* (Cambridge University Press 2003) 185.

[146] See UNHCR Australian Regional Representation (n 29).

in the country's history.[147] As conditions within the centres have deteriorated, the incidence of deaths, self-harm and other injuries once again began to escalate.[148] Australia's policy of mandatory incarceration for non-citizens (including asylum seekers) entering without authorization has attracted criticisms from many sources, both within Australia and international fora.[149] In spite of semantic arguments about what constitutes detention—for example UMAs transferred to Nauru and Manus Island are deemed under Australian law not to be in detention[150]—the reality is that most of Australia's UMAs continue to be detained, sometimes for very lengthy periods. While the conditions in Australian detention facilities are far superior to the majority of immigration detention facilities in Malaysia and Indonesia, in recent years Australia has detained many more people than either of these two States. The situation is not without irony, given the expressed desire of Australia's Labor government to reduce the immigration incarceration rate.[151]

D. Deprivation

UMAs in Australia who are not referred offshore for regional processing now find themselves in situations of great uncertainty. Observance of the non-refoulement principle means that they receive de facto temporary protection, yet without the comfort of a formal status. The policy of successive governments has been that people who arrive by boat and are subsequently released on bridging visas will have no work rights and will receive only basic accommodation assistance, and limited financial support.[152] It is difficult to

[147] Department of Immigration and Citizenship, 'Immigration Detention Statistics Summary', *Department of Immigration and Citizenship*, 31 December 2012 <http://www.immi.gov.au/managing-australias-borders/detention/_pdf/immigration-detention-statistics-dec2013.pdf>.

[148] Australian Human Rights Commission, Asylum seekers, refugees and human rights: Snapshot Report (2013), available at <http://www.humanrights.gov.au/publications/asylum-seekers-refugees-and-human-rights-snapshot-report>, 6–12.

[149] *A v Australia* UN Doc CCPR/C/59/D/560/1993*; Mr C v Australia*, UN Doc CCPR/C/76/D/900/1999; *Baban v Australia*, UN Doc CCPR/C/78/D/1014/20011; *Bakhtiyari v Australia*, UN Doc CCPR/C/79/D/1069/2002; *D and E v Australia*, UN Doc CCPR/C/87/2D/1050/2002; *Shafiq v Australia*, UN Doc CCPR/C/88/D/1324/2004; *Shams and ors v Australia*, UN Doc CCPR/C/90/D/1255; see also Concluding Observations of the Committee Against Torture: Australia, UN Doc CAT/C/AUS/CO/I (15 May 2008) at <http://www2.ohchr.org/english/bodies/cat/docs/co/CAT-C-AUS-CO1.pdf>; Crock and Berg (n 52) ch 4.

[150] *Migration Act* 1958 section 198AD(11) provides that a person who is 'being dealt with' under the 198AD(3) power to take them to a regional processing country 'is taken not to be in immigration detention'.

[151] Senator Chris Evans, 'New Directions in Detention – Restoring Integrity to Australia's Immigration System', Australian National University, Canberra, Tuesday 29 July 2008, available at <http://pandora.nla.gov.au/pan/67564/20081217-0001/www.minister.immi.gov.au/media/speeches/2008/ce080729.html>.

[152] Chris Bowen, 'No advantage onshore for boat arrivals' (Media Release, 21 November 2012) <http://pandora.nla.gov.au/pan/141738/20130718-1402/www.minister.immi.gov.au/media/cb/2012/cb191883.htm>.

see how this can be compliant with the terms of the Refugee Convention and human rights instruments which protect against 'deprivation'. The potential for psychological harm in persons subjected to these pressures on top of the life stresses that lead to their flight to Australia is obvious. Under the first iteration of the Pacific Solution, UMAs recognized as refugees were at least processed and accorded work rights when recognized as Convention refugees.[153] Having been roundly critical of the earlier policies as cruel and wrong in principle,[154] there is more than a little irony in the fact that the Labor government constructed a regime that could be both more punitive and less certain.[155] The practical effect of the no advantage principle is that the lived experiences of UMAs in Australia have the potential to resemble those of asylum seekers in Malaysia and Indonesia.

E. Family Unity

Unlike refugees granted temporary protection in Europe,[156] Australia has chosen to follow States like Malaysia and Indonesia where asylum seekers cannot sponsor family members living in foreign countries for reunification purposes. The justifications given by Australia for its policies also resonate strongly with those given by its neighbours.[157] This is a matter of particular concern in relation to unaccompanied asylum-seeker children. Until August 2012, unaccompanied children granted protection in Australia as refugees could sponsor family members under 'split family' provisions. The Explanatory Memorandum to the amending regulations[158] justified the change in

[153] Department of Immigration and Citizenship, Answer to Question Taken on Notice, Budget Estimates Hearing, 21–22 May 2012, BE12/0265, available at <http://www.aph.gov.au/Parliamentary_Business/Senate_Estimates/legconctte/estimates/bud1213/diac/index>.

[154] Parliament of Australia, *Parliamentary Debates*, House of Representatives, 13 May 2003, 14006 (Julia Gillard).

[155] Migration Regulations 1994— Specification under paras 050.613A(1)(b) and 051.611A(1)(c) —Classes of Persons—November 2012 operates to make work rights discretionary for persons granted a BVE Subclass 050 or a BVE Subclass 051 visa under section 195A of the *Migration Act* 1958.

[156] 'EU Council Directive 2001/55/EC of 20 July 2001 on minimum standards for giving temporary protection in the event of a mass influx of displaced persons and on measures promoting a balance of efforts between Member States in receiving such persons and bearing the consequences thereof' *Official Journal of the European Communities* 7 August 2001.

[157] See, for example, comments made by the head of immigration detention in Indonesia, Djoni Muhammad, who justified the slowness of processing activities in Indonesia on the basis that 'If the asylum seekers in Indonesia got sent there sooner it would just be like an advertisement. Other people waiting in Malaysia and other places would immediately come here saying: it's good in Indonesia; it's a much swifter process there': Australian Broadcasting Corporation, 'Offshore processing won't make a difference: Indonesian detention centre boss', PM, 2 November 2012.

[158] See Department of Immigration and Citizenship, 'Amendments Regarding the Eligibility of Irregular Maritime Arrivals to Apply for a Visa, or to Propose Family, under the Humanitarian Program', *Department of Immigration and Citizenship,* 2012 <http://www.immi.gov.au/legislation/amendments/2012/120928/lc28092012-01.htm>.

policy made in response to the Houston Report by reference to arguments that resonate strongly in States like Malaysia and Indonesia. It reads:

> The protection of the family unit under Articles 17 and 23 (of the International Covenant on Civil and Political Rights (ICCPR)), does not amount to a right to enter Australia where there is no other right to do so. Avoiding interference with the family or protecting the family can be weighed against other countervailing considerations including the integrity of the migration system and the national interest.

Australia's mandatory detention laws have been defended as measures designed to prevent the admission of persons who chose this option voluntarily over their freedom to depart to any other country.[159] So too is the argument now made that Australia cannot be held responsible when families chose to separate by sending a member out in search of asylum:

> As refugees are unable to return to their country of origin, if family reunification is not available there is the potential that some refugees may be permanently separated from their family. However, Australia considers that changes to family reunification does not amount to a separation of the family as there has been no positive action on the part of Australia to separate the family. An [UMA] becomes separated from their family when they choose to travel to Australia without their family. To this end, Australia does not consider that Articles 17 and 23 are engaged. Even if Articles 17 and 23 were engaged, the change does not seek to remove the ability of [UMAs] in Australia to achieve family reunification; it simply places [UMAs] on an equal footing with all other Australian citizens and permanent residents wanting their family to join them in Australia. Australia considers that this is a necessary, reasonable and proportionate measure to achieve the legitimate aim of preventing [UMAs] from making the dangerous journey to Australia by boat.[160]

Once again, this aspect of Australian policy aligns more closely with the approach taken by Indonesia and Malaysia than it does with policies in comparable WEOG States.

F. The Situation of 'Transferees' in Nauru and PNG

International law requires that if refugees are to be transferred to a third country, that country must provide effective protection. What cannot be done directly cannot be done indirectly: a Convention State cannot abdicate its responsibilities by deflecting refugees to a State that will not comply with the

[159] See *A v Australia* UN Doc CCPR/C/59/D/560/1993; rejected in *Amuur v France* (1992) 22 EHRR 533.

[160] Explanatory Statement to Migration Amendment Regulation 2012 (No 5), Select Legislative Instrument 2012 No 230 issued by the Minister for Immigration and Citizenship under the Migration Act 1958.

terms of the Convention.[161] It is worth noting in this context that Article 2(1) of the ICCPR requires States to afford the rights to persons within their *jurisdiction* as well as within their *territory*. As noted earlier, Australia has traditionally taken some care to frame its policies so as to facilitate a discourse of human rights compliance.[162] It is no longer a statutory requirement that States to which Australia sends its UMA asylum seekers comply with any human rights standards. Even so, the Labor government put some effort into encouraging both Nauru and PNG to enact legislation that aligns with the basic tenets of international human rights law.

Neither PNG nor Nauru are bound by the same range of international human rights instruments as Australia. The Memoranda of Understanding between Australia and Nauru and Australia and PNG contained vague human rights commitments, but were not couched in binding language.[163] On the other hand, both PNG and Nauru have constitutions which protect individual rights.[164] Nauru has taken steps to enact legislation that is facially compliant with the Refugee Convention and other key human rights instruments, including those involving children.[165]

One of the many problems facing Australia's government is that the arrangements in both countries to house and process UMA asylum seekers has not met with universal acceptance in either country. There have been at least two challenges to the PNG facilities on constitutional grounds. In January 2013 the PNG opposition leader, Belden Namah, filed an application in the National Court for a permanent injunction against the Manus Island processing centre on the grounds that it was unconstitutional. He sought an order that the transferees already in PNG be returned to Australia. Mr Namah argued that holding UMAs in the Manus Island Centre was against PNG's constitution, which prohibits arbitrary detention. Incarceration for extended periods is only permissible for persons found by a court to have broken the law. The case was dismissed but was again attempted once the permanent resettlement plan was announced.[166] In February 2013, the Nauruan government was faced with

[161] See UNHCR Executive Committee Conclusion No 85 (1998); Executive Committee Conclusion No 87 (1999).

[162] This is reflected in the language used in 2001 to legislate for the creation of the first Pacific Solution. See *Migration Act* 1958, section 198A(3).

[163] Whether an instrument constitutes a treaty as defined by the Vienna Convention on the Law of Treaties depends on its terms. These MOUs do not appear in the Australian Treaty Series and, most crucially, do not suggest an intention to be bound by international law: see G Triggs, *International Law: Contemporary Principles and Practices* (LexisNexis 2006), 499–500.

[164] *Constitution of the Independent State of Papua New Guinea 1975*, art 5; *Constitution of Nauru 1968*, Part II, Protection of Fundamental Rights and Freedoms, art 3.

[165] *Refugees Convention Act 2012* (Nauru); *Asylum Seekers (Regional Processing Centre) Act 2012* (Nauru).

[166] Eoin Blackwell, 'PNG court denies order for refugee ban', *The Australian*, 14 February 2013 <http://www.theaustralian.com.au/news/breaking-news/png-court-denies-order-for-refugee-ban/story-fn3dxix6-1226577890384>; Firmin Nanol, 'PNG opposition resurrects legal challenge to Australia's asylum policy', *Australia Network News* (online), 20 August 2013 <http://www.abc.net.au/news/2013-08-20/png-opposition-resurrects-legal-challenge-to-aust-asylum-pol/4900512>.

significant internal tensions (including the sudden resignation of the foreign minister) over the establishment and running of the facilities.[167] A constitutional challenge to the regime in that country failed,[168] although rioting by the asylum seekers detained there has played havoc with the practical implementation of Australia's plans in the country.[169]

G. Procedural Safeguards

While the Refugee Convention (and other human rights treaties) speak clearly of the rights of refugees, the Convention is largely silent on the procedures that must be adopted by States parties in determining refugee status. Both the Expert Panel and the Labor government relied on a statement by UNHCR that

> under certain circumstances, the processing of international protection claims outside the intercepting State could be an alternative to standard 'in-country' procedures. Notably, this could be the case when extraterritorial processing is used as part of a burden-sharing arrangement to more fairly distribute responsibilities and enhance available protection space.[170]

Two observations can be made in respect of Australia's regional processing scheme. First, the UNHCR policy from which that statement is extracted is quite specific as to the 'certain circumstances' in which third country processing would be legitimate. Those conditions are discussed further below. The Panel and government chose to ignore another passage from the conclusion of the same document they cite, which stresses that

> In general, processing of intercepted persons will take place inside the territory of the intercepting State. This is consistent with the responsibilities owed by the intercepting State to persons within its de jure or de facto control under international refugee and human rights law.[171]

Second, it cannot really be said of Australia's regional arrangements that they 'more fairly distribute responsibilities and enhance available protection space'. 'Regional processing' in its contemporary Australian guise outsources the responsibility to assess the claims of those who arrive in Australia's jurisdiction or at its borders to poor, under-resourced and remote States. The difference between this so-called regional processing package of legislation

[167] 'Detention-camp business behind Nauru turmoil, says opposition MP', *Radio New Zealand International* (online) 14 February 2013 <http://www.rnzi.com/pages/news.php?op=read&id=74017>;

[168] See *AG & Ors v Secretary of Justice* [2013] NRSC 10 (18 June 2013).

[169] 'Six months to rebuild asylum centre: Nauru', *SBS World News* (online) 26 July 2013 <http://www.sbs.com.au/news/article/2013/07/26/six-months-rebuild-asylum-centre-nauru>.

[170] UNHCR, Protection policy paper: Maritime interception operations and the processing of international protection claims: legal standards and policy considerations with respect to extraterritorial processing' November 2010, *Refworld* <http://www.unhcr.org/refworld/docid/4cd12d3a2.html>.

[171] ibid 16.

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and a genuine regional cooperation framework is that a genuine framework of regional cooperation would involve burden sharing, including a system providing asylum seekers with genuine opportunities to access status determination processes as an alternative to irregular maritime travel; mutual resettlement obligations; and cooperation with UNHCR.[172] The Australian scheme assumes, but does not guarantee, resettlement for people who are assessed to be refuges. There is a lack of reciprocal obligations or resettlement undertakings on the part of receiving States because the ultimate obligation to resettle those recognized as refugees remains with Australia (where the grant of a protection visa is now a matter of discretion rather than obligation).

VII. CONCLUSION

By voluntarily ratifying the Refugee Convention, Australia undertook to acknowledge and respect the rights of refugees who come within its jurisdiction, acting at all times in good faith.[173] Yet, with the 2012 'regional solution', the Australian government distanced itself from the obligation to determine whether the UMAs who come to Australia in search of asylum are in fact refugees as defined in the Refugee Convention. On its face, the matrix of policies does little to ensure the protection of rights in those affected. The very concept that Australia should be using non-Convention States in its region as a benchmark for managing refugee flows is problematic. The trend begun by the Labor government was continued with the switch in September 2013 to a conservative Coalition. Renaming Australia's immigration agency the 'Department of Immigration and Border Protection', new immigration Minister, Scott Morrison MP, issued an edict in October 2013. Henceforth, he decreed, his Department should refer to UMAs as 'illegal migrants', while those in custody should be termed 'detainees' rather than 'clients'.[174]

The most obvious problem with the so-called 'no advantage' principle—and with the way that it has been put into practice—is that it starts from a false premise. This is that UMAs taken in by Australia gain an 'advantage' over persons who seek admission from abroad as refugees or humanitarian migrants. Indeed, in some respects the principle seems to be a new way of expressing the idea that asylum seekers are 'queue-jumpers' who take the places of 'legitimate refugees' who wait for resettlement in UNHCR camps around the world.

As a matter of international law, such ideas are without any legitimacy. Refugees situated (overseas) in States of first refuge and refugees presenting (onshore) as asylum seekers fall into two very different legal categories. People

[172] On cooperation with UNHCR, see the Refugee Convention art 35.
[173] See Vienna Convention on the Law of Treaties, art 26.
[174] See AAP, 'Scott Morrison defends calling asylum seekers ''illegal''', *Sydney Morning Herald*, 21 October 2013, available at <http://www.smh.com.au/federal-politics/political-news/scott-morrison-defends-calling-asylum-seekers-illegal-20131021-2vw0r.html>.

processed by UNHCR in its camps around the world and categorized by that agency as suitable candidates for resettlement in third States may be refugees, but they have no legal claim on Australia or on any other country in which they are not physically present. In contrast, people who physically arrive at the territory of a Convention party directly engage the international obligations set by the Convention. Persons resettled in Australia from refugee camps overseas are admitted as migrants—and as a matter of goodwill. It is the challenge of international refugee law that the Convention creates obligations in State parties that sit uneasily with the sovereign right of States to determine who comes into their territory and the circumstances in which they come. The dissonance in the emotions generated by the refugee as victim and the refugee as proactive agent of their own destiny was captured well by then UN High Commissioner for Refugee, Ruud Lubbers in 2001:

> In Pakistan, I visited the infamous Jalozai camp, where thousands of Afghans are crammed together in inhumane and unsanitary conditions. When this camp appears on television screens in industrialized countries, there is – rightly – shock, sympathy and condemnation. But when one of these Jalozai Afghans is found hiding under a Eurostar train or arrives in a wealthy country on a leaky fishing vessel, they will suddenly cease to be an object sympathy and fall into that sweeping category of people branded 'bogus and illegal'. . .a modern day version of the plague-rat.[175]

By revisiting policies and practices that were devised to disrupt flows of irregular maritime asylum seekers at the end of the war in Vietnam, Australia has aligned itself quite expressly with the States in its geographical region. In so doing the country is plainly acting in breach of a range of obligations it has assumed under international law. It is actively encouraging States in the region to emulate its bad behaviour. If the funding of detention centres in Indonesia is one example in point, the whole matrix of arrangements with Nauru and PNG is another. Predicated on the imperative of deterring people from risking their lives at sea, Australia's 'regional solution' to UMAs is likely to be remembered in time as well-meaning but fundamentally misconceived policy-making. Early indications are that the reopening of detention and processing centres on Nauru and Manus Island—and the reintroduction of a (de facto) temporary protection regime will not stem the flow of boats. In fact, the boats are unlikely to stop in the absence of an effective push-back (refoulement) operation. Such a measure would truly offend the central tenets of the Refugee Convention and related human rights instruments—if indeed it could be achieved given the complex geographical and political realities of a country like Indonesia. As was the case with earlier versions of interdiction and deflection policies, those caught by the deterrent measures have been and will continue to be harmed.

[175] See 'Don't Kick Refugees Just to Score Points', *The Australian*, 20 June 2001, 13.

The fact that Australia is able to engage in all or any of these measures—from push-backs through detention and the imposition of policies that undermine the health and well-being of asylum seekers—is testament to its practical alienation from the WEOG States with which it remains culturally aligned. Australia is not only surrounded by States that have not subscribed to many of the key human rights conventions. It is also in a region where there is no framework for holding States to account when they do act in contravention of their international legal obligations. The domestic litigation surrounding the introduction of Australia's deterrent measures finds no parallel in international fora. There is no equivalent in the Asia-Pacific to the European Court of Human Rights which in February 2012 ordered Italy to pay EUR 15,000 to each of a group of Eritrean and Somali IMA asylum seekers who were pushed back to Libya by the Italian coastguard.[176] That case confirms the dominant view—in Europe at least—that international human rights law operates beyond the territory of States where actions are taken to prevent individuals from reaching a State's territory.[177] So also should the rule of international human rights law flourish in the Asia-Pacific, were Australia to remember and respect its cultural and legal heritage.

[176] See *Hirsi Jamaa et al v Italy* App No 27765/09 (Eur Ct HR 23 February, 2012).

[177] The Grand Chamber of the European Court, ruled that Italy had breached its obligation to protect the applicants from torture and inhuman or degrading treatment (art 3 of the European Convention on Human Rights. It had also engaged in the collective expulsion of non-nationals contrary to art 4 of Protocol No 4 to the European Convention. This was so even though the applicants never reached Italian territorial waters. See JA Hessbruegge, 'European Court of Human Rights Protects Migrants against "Push Back" Operations on the High Seas' at <http://www.asil.org/insights120417.cfm> (accessed 14 February 2013).