

**THE PACIFIC SOLUTION OR A PACIFIC NIGHTMARE?:
THE DIFFERENCE BETWEEN BURDEN SHIFTING AND
RESPONSIBILITY SHARING**

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I. INTRODUCTION

The guarantee that persons unable to enjoy human rights in their country of nationality, who seek asylum in other countries, will not be returned to the country from which they fled is a significant achievement of international efforts to validate the assertion that those rights truly are the “rights of man.” There are currently 145 states,¹ including Australia, that are parties to the 1951 Convention relating to the Status of Refugees (Refugees Convention)² and/or the 1967 Protocol relating to the Status of Refugees (Refugees Protocol).³ The prohibition on refoulement is the key provision of the Refugees Convention. Article 33(1) of the Refugees Convention provides that no state party “shall expel or return (*refouler*) a refugee in any manner

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¹ As of February 1, 2004.

² July 28, 1951, 1954 Austl. T. S. No. 5 (entered into force for Australia and generally on April 22, 1954).

³ January 31, 1967, 1973 Austl. T. S. No. 37 (entered into force generally on October 4, 1967, and for Australia on December 13, 1973).

whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion.”⁴

The Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT)⁵ and the International Covenant on Civil and Political Rights (ICCPR)⁶ also impose on Australia, and other states that are parties to those treaties, non-refoulement obligations that are not limited in application to “refugees” within the meaning of the Refugees Convention and Protocol. Moreover, it can be said with confidence that the principle of non-refoulement is now part of customary international law.⁷ It has

⁴ 1954 Austl. T. S. No. 5 Art. 33(1).

⁵ December 10, 1984, 1989 Austl. T. S. No. 21 (entered into force generally on June 26, 1987, and for Australia on September 7, 1989) [hereinafter CAT]. Article 3 of CAT provides that “No State Party shall expel, return (*refouler*) or extradite a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture.” *Id.*

⁶ December 19, 1966, 1980 Aust. T. S. No. 23 (entered into force generally on March 23, 1976, and for Australia on November 13, 1980, (except Article 41 came into force generally on March 28, 1979, and for Australia on January 28, 1993)). Unlike CAT, the ICCPR does not actually contain an express non-refoulement obligation. Nevertheless, according to the UN Human Rights Committee General Comment on Article 2 of the ICCPR, which in this respect recaps its previous jurisprudence:

the article 2 obligation requiring that States Parties respect and ensure the Covenant rights for all persons in their territory and all persons under their control entails an obligation not to extradite, deport, expel or otherwise remove a person from their territory, where there are substantial grounds for believing that there is a real risk of irreparable harm, such as that contemplated by articles 6 and 7 of the Covenant, either in the country to which removal is to be effected or in any country to which the person may subsequently be removed.

General Comment No. 31 on Article 2 of the Covenant: The Nature of the General Legal Obligation Imposed on State Parties to the Covenant, U.N. Human Rights Committee, 80th Sess., ¶ 12, U.N. Doc. CPR/C/74/CRP.4/Rev.6 (2004). This general comment replaces *General Comment No. 3. Id.* ¶ 1.

even been argued that non-refoulement has become a peremptory norm of customary international law,⁸ though this proposition must be considered much more contentious than the former.

Unfortunately, not even the Refugees Convention places a duty on states, owed either to individual refugees or to other contracting parties, to grant asylum (permission to live in their territory), much less resettlement or citizenship to refugees. However, the Final Act of the Conference of Plenipotentiaries on the Status of Refugees and Stateless Persons does recommend that, “[g]overnments continue to receive refugees in their territories and that they act in a true spirit of international cooperation in order that these refugees may find asylum and the possibility of resettlement.”⁹

Many argue that over time a customary international law principle of burden sharing in relation to refugee flows has emerged as evidenced in part by the statement of the principle in various UN General Assembly and Economic and Social Council resolutions and by various conclusions of the Executive Committee of the Office of the United Nations High Commissioner for Refugees (UNHCR).¹⁰ This principle has also been supported by the state practice of burden sharing derived from ad hoc schemes like the Comprehensive Plan of

⁷ See Elihu Lauterpacht & Daniel Bethlehem, *The Scope and Content of the Principle of Non-Refoulement* ¶¶ 201-16 (Background Paper for Expert Roundtable Series, United Nations High Commissioner for Refugees, 2001) for a detailed justification of this proposition.

⁸ Jean Allain, *The Jus Cogens Nature of Non-Refoulement*, 13(4) INT’L J. OF REFUGEE L. 533 (2002). A peremptory norm of international law (*jus cogens*) is “a norm accepted and recognized by the international community of states as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character.” Vienna Convention on the Law of Treaties, May 23, 1969, 1974 Austl. T. S. No. 2, art. 53 (entered into force for Australia and generally on January 27, 1980).

⁹ Final Act of the United Nations Conference of Plenipotentiaries on the State of Refugees and Stateless Persons, Recommendation D (July 28, 1951), available at <http://www.unhcr.ch/cgi-bin/texis/vtx/home/+3wwBm6eNfA3wwwwnwwwwwwwhFqA72ZR0gRfZNtFqrpGdBnqBAFqA72ZR0gRfZNCfQd-oDwcaEqBaWK9WDzmxwwwwww1FqmRbZ/opendoc.htm> (last visited Apr. 3, 2005).

¹⁰ B. S. Chimni, *Development and Migration*, in MIGRATION AND INTERNATIONAL LEGAL NORMS 255, 266-67 (T. Alexander Aleinikoff & Vincent Chetail eds., 2003).

Action on Indo-Chinese Refugees,¹¹ the institutionalization of third country resettlement schemes through the UNHCR, and country of first asylum assistance.¹² It is, in fact, difficult to deny that such a principle has emerged given that it is no more than a particular manifestation of the more general duty of cooperation imposed on member states by Articles 55 and 56 of the UN Charter.¹³

The problems lie not in accepting the general principle, but in agreeing on its specific content and, even more, in achieving its practical implementation.¹⁴ As Gregor Noll pithily observed in the context of European Union practice, “burden-sharing continues to be a desideratum at best, a deceptive rhetorical veil at worst.”¹⁵ This article seeks to demonstrate that the Australian government’s Pacific Solution is a particularly egregious example of the language of burden sharing being used as a “deceptive rhetorical veil.” It then briefly considers what a true burden sharing arrangement should look like.

II. THE PACIFIC SOLUTION

On August 26, 2001, 433 mostly Afghan asylum seekers were rescued from a sinking boat by the Norwegian freighter *Tampa*.¹⁶ The *Tampa* was headed for Australia’s Christmas Island, but, on August 27, was informed by Australian authorities that the rescuees would

¹¹ *Office of the United Nations High Commissioner of Refugees: International Conference on Indo-Chinese Refugees. Report of the Secretary-General.* U.N. GAOR 44th Sess., U.N. Doc. A/44/523 (1989).

¹² Chimni, *supra* note 10, at 266-67.

¹³ *See generally* U.N. Charter art. 55 and 56 (where the duties of nations to cooperate to achieve “peaceful and friendly relations” are stated).

¹⁴ Gregor Noll, *Risky Games? A Theoretical Approach to Burden-Sharing in the Asylum Field*, 16(3) J. OF REFUGEE STUD. 236, 236 (2003).

¹⁵ *Id.*

¹⁶ SENATE SELECT COMM. ON A CERTAIN MARITIME INCIDENT, A CERTAIN MARITIME INCIDENT MAJORITY REPORT ¶ 1.1 (2002) (Austl.) [hereinafter MARITIME REPORT]. Nine of the rescuees were nationals of other countries. Meaghan Shaw, *Tampa Final Chapter as 12 Get Approval*, AGE (Melbourne, Austl.), May 20, 2004, available at <http://www.theage.com.au/articles/2004/05/19/1084917654069.html> (last visited Apr. 3, 2005).

not be allowed to disembark.¹⁷ While there were international treaties imposing obligations on ships to rescue persons in distress at sea, no clear legal obligation was imposed on any state to take responsibility for rescuees who did not wish to return home.¹⁸ Australia took advantage of this lack of clarity to insist that responsibility for the rescuees was to be decided by the *Tampa's* flag state (Norway) and the country in which the “nearest feasible port of disembarkation” was located (allegedly Indonesia).¹⁹ The assertion that the rescuees ought to have been taken to Indonesia was a highly dubious one, but from the Australian government’s perspective, the soundness of its legal position was beside the point.²⁰ The point, which the Australian government made loud and clear, was that not a single *Tampa* rescuee was going to be allowed to set foot on Australian soil. Thus began policy making on the run. Australian diplomats posted in regional countries were assigned the task of finding soil on which the rescuees could set foot (at least temporarily).²¹

It is a measure of the Australian government’s self-absorption that East Timor, which was quite literally in the middle of its transition to independent statehood, was one of the countries approached (though unsuccessfully).²² The UNHCR tried to assist Australia by proposing a plan under which the rescuees would have disembarked on Christmas Island, had their protection claims assessed by the UNHCR, and if found to be refugees, would have been resettled in other Western countries.²³ The Australian government

¹⁷ MARITIME REPORT, *supra* note 16, ¶ 1.3.

¹⁸ DAVID MARR & MARION WILKINSON, *DARK VICTORY* 51-52 (2003).

¹⁹ *Id.* at 51.

²⁰ *Id.* at 51-52

²¹ PETER MARES, *BORDERLINE: AUSTRALIA’S RESPONSE TO REFUGEES AND ASYLUM SEEKERS IN THE WAKE OF THE TAMPA* 125 (2d ed. 2002).

²² MARITIME REPORT, *supra* note 16, ¶ 10.12.

²³ UNHCR, *Australia/Tampa: UNHCR Brokering 3-Point Plan*, Briefing Notes, Aug. 31, 2001, available at http://www.unhcr.ch/cgi-bin/texis/vtx/home/+lw wBmeoD+4_wwwwwwwwwwhFqnN0bItFqnDni5AFqnN0bIcFqMve2PqAoDBa 7cwDDzmxwwwwww/opendoc.htm (last visited Apr. 3, 2005); see also *Spurned: UN Tampa Solution*, SYDNEY MORNING HERALD, Oct. 20, 2001, at 1.

rejected the plan, however, because it involved the rescuees disembarking at Christmas Island.²⁴ The Minister for Immigration at the time, Philip Ruddock, later claimed that the UNHCR and those Western countries that had indicated willingness to offer resettlement places had simply been trying to trick Australia into “shouldering all of the burden.”²⁵ The government eventually managed to resolve the *Tampa* stand-off by making arrangements for 150 of the *Tampa* asylum seekers to have their claims considered in and by New Zealand and for the remainder to be taken to Nauru to have their claims assessed.²⁶

On September 26, 2001, the Australian government procured the passage of, among other acts, the Migration Amendment (Excision from Migration Amendment Zone) Act (Migration Amendment Act).²⁷ Under this Act, Christmas Island, Ashmore and Cartier Islands, and Cocos (Keeling) Islands were defined to be “excised offshore places.”²⁸ The Migration Amendment Act also allows for the making of regulations designating other places to be “excised off-shore places.”²⁹ A person, who becomes an unlawful non-citizen by entering Australia at an “excised offshore place,” is now labeled an “offshore entry person.”³⁰ Section 46A of the Migration Act of 1958 (Migration Act) invalidates a purported visa application made by an offshore entry person who is an unlawful non-citizen in Australia.³¹ It is the Australian government’s belief that denial of access to mainland facilities and determination procedures

²⁴ *Spurned: UN Tampa Solution*, *supra* note 23, at 1.

²⁵ Caroline Overington & Kerry Taylor, *Offer on Refugees ‘a Trick’*, AGE (Melbourne, Austl.), Oct. 23, 2001, at 3.

²⁶ Brendan Nicholson et al., *Refugee Deal a Shambles*, SUNDAY AGE (Melbourne, Austl.), Sept. 2, 2001, at 1.

²⁷ MIGRATION AMENDMENT (EXCISION FROM MIGRATION ZONE) ACT, 2001 (Austl.) [hereinafter MIGRATION AMENDMENT ACT].

²⁸ *Id.* at Schedule 1(1).

²⁹ *Id.* at Schedule 1(1)(d-g).

³⁰ MIGRATION ACT, 1958, § 5 (Austl.).

³¹ *Id.* at § 1.

will deter potential asylum seekers from making an irregular boat trip to Australia.³²

The Migration Act now allows for offshore entry persons to be taken to “declared countries.”³³ However, after procuring the insertion of the “declared country” provisions into the Migration Act, the government was still faced with the task of finding countries willing to become declared countries. Unsuccessful approaches were made to Fiji, French Polynesia, Palau, Tonga, and Tuvalu throughout September and October 2001.³⁴ Fortunately for the government, it had enough success to prevent its Pacific Solution from immediately collapsing. On September 10, 2001, Nauru signed a Statement of Principles and First Administrative Agreement (FAA) with Australia agreeing not only to host 283 of the *Tampa* asylum seekers, and 237 other asylum seekers intercepted by the Australian Navy, but also to consider Australian requests to host further groups of asylum seekers.³⁵ On October 11, 2001, Australia and Papua New Guinea signed a Memorandum of Understanding (MOU) pursuant to which Papua New Guinea agreed to host an identified group of 225 asylum seekers and to consider hosting further groups of asylum seekers.³⁶ At about the same time Australia was also pressuring Nauru to host yet more asylum seekers.³⁷ It succeeded. On December 11, 2001,

³² MIGRATION AMENDMENT ACT, *supra* note 27. (Second Reading Speech, Parliamentary Debates, House of Representatives, Sep. 18, 2001, at 30, 869-30871).

³³ MIGRATION ACT, *supra* note 30, § 198A.

³⁴ MARITIME REPORT, *supra* note 16, ¶¶ 10.14-10.15. Kiribati was, in fact, willing to give Australia the use of one of its islands in return for the kind of deal Nauru had received for assisting in the *Tampa* crisis. However, its proposal was turned down because the logistical difficulties that would have been involved in its implementation were considered too immense. *See also id.*, ¶¶ 10.15-10.17; MARR & WILKINSON, *supra* note 18, at 150.

³⁵ MARR & WILKINSON, *supra* note 18, at 150; *see also* Sian Powell, *Nauru Makes \$20m in Cash and Kind*, AUSTRALIAN, Sept. 11, 2001, at 5; Darren Gray & Kerry Taylor, *Nauru Does Bulk Deal on Asylum Seekers*, AGE (Melbourne, Austl.), Sept. 11, 2001, at 1.

³⁶ MARITIME REPORT, *supra* note 16, ¶¶ 10.50 & 10.57.

³⁷ Sian Powell & Meghan Saunders, *Nauru Holds Canberra in Suspense*, AUSTRALIAN, Oct. 10, 2001, at 9.

Australia and Nauru signed a MOU which replaced the previous agreements between the two countries and pursuant to which Nauru agreed to host up to 1,200 asylum seekers at a time.³⁸ One last success allowed Australia finally to call off its search for asylum seeker accommodation options. In January 2002, it procured an agreement with Papua New Guinea to host up to 1,000 asylum seekers.³⁹ Because of their agreements with Australia, Nauru and Papua New Guinea are now “declared countries.”

III. OFFSHORE PROCESSING CENTERS AND STATE RESPONSIBILITY

Under section 198A(3)(a) of the Migration Act, the Minister for Immigration has the power to:

- (a) declare in writing that a specified country:
 - (i) provides access, for persons seeking asylum, to effective procedures for assessing their need for protection; and
 - (ii) provides protection for persons seeking asylum, pending determination of their refugee status; and
 - (iii) provides protection to persons who are given refugee status, pending their voluntary repatriation to their country of origin or resettlement in another country; and
 - (iv) meets relevant human rights standards in providing that protection; and
- (b) in writing, revoke a declaration made under paragraph (a).⁴⁰

Apparently, Australia’s agreements with Nauru and Papua New Guinea include a non-refoulement undertaking from each of them.⁴¹

³⁸ MARITIME REPORT, *supra* note 16, ¶¶ 10.31 & 10.35.

³⁹ Mary-Louise O’Callaghan, *Wartime PNG Base Takes More Detainees*, AUSTRALIAN, Jan. 28, 2002, at 4.

⁴⁰ MIGRATION ACT, *supra* note 30, §§198A(3)(a)&(b).

⁴¹ SENATE LEGAL AND CONSTITUTIONAL REFERENCES COMM., MIGRATION ZONE EXCISION: AN EXAMINATION OF THE MIGRATION LEGISLATION AMENDMENT

However, these undertakings have the character of the agreements in which they are contained – they are political not legal. Moreover, Nauru is not a party to the Refugees Convention, and Papua New Guinea, though it is a party, has made significant reservations.⁴² As for the small matter of meeting relevant human rights standards,⁴³ neither Nauru nor Papua New Guinea are party to CAT, ICCPR or the Covenant on Economic Social and Cultural Rights.⁴⁴ It is true, however, that both Nauru and Papua New Guinea are at least bound by the non-refoulement and human rights obligations imposed on all countries by customary international law. It is also true that ultimately the question of whether these declared countries provide effective protection should be determined on the basis of their actual practice.

Persons taken by Australia to Nauru and Papua New Guinea were admitted into those countries on visas that were subject to a condition that they would not leave designated processing centers. Visa holders who attempt to leave the centers (other than on supervised excursions) can be arrested for breach of this visa condition.⁴⁵ Amnesty International,⁴⁶ Human Rights Watch,⁴⁷ and the UNHCR⁴⁸ have all concluded that, as far as international law is

(FURTHER BORDER PROTECTION MEASURES) BILL 2002 AND RELATED MATTERS REPORT ¶ 4.43 (2002) [hereinafter MIGRATION ZONE EXCISION].

⁴² Papua New Guinea does not accept the obligations contained in articles 17(1), 21, 22(1), 26, 31, 32 and 34 of the Refugees Convention.

⁴³ MIGRATION ACT, *supra* note 30, § 198A(3)(a)(iv).

⁴⁴ Nauru has signed but not ratified CAT and the ICCPR (as of June 9, 2004).

⁴⁵ MARR & WILKINSON, *supra* note 18, at 163; HUMAN RIGHTS WATCH, BY INVITATION ONLY: AUSTRALIAN ASYLUM POLICY 67 (2002).

⁴⁶ AMNESTY INTERNATIONAL, AUSTRALIA-PACIFIC: OFFENDING HUMAN DIGNITY - THE "PACIFIC SOLUTION" 17 (ASA 12/009/2002, Sept. 2002).

⁴⁷ Human Rights Watch, *Not For Export: Why the International Community Should Reject Australia's Refugee Policies*, (Briefing Paper, Sep. 2002).

⁴⁸ *Hearing on Migration Legislation Amendment (Further Border Protection Measures) Bill 2002 Before the Australian Senate Legal and*

concerned, the residents of the processing centers are in detention, notwithstanding the elaborate scheme to make it appear otherwise. The main reason for attempting to make it appear otherwise is that administrative detention of asylum seekers and refugees might well contravene the constitutions of Nauru and Papua New Guinea.⁴⁹

Of the 1,515 persons Australia has taken to the processing centers in Nauru and Papua New Guinea, 1,495 made asylum claims.⁵⁰ The UNHCR conducted refugee status determinations of 301 persons from the *Tampa* and 228 other persons who were taken to Nauru, but it did this on “an exceptional basis for humanitarian reasons.”⁵¹ Australian officials considered the claims of all other asylum seekers taken to Nauru and the claims of all asylum seekers taken to Papua New Guinea.⁵²

Initially 767 of the persons taken to Nauru and Papua New Guinea pursuant to the Pacific Solution were recognized as refugees.⁵³ Australia’s position, however, was that it would only resettle its fair share. The UNHCR pursued other resettlement options for those whose cases it had processed because of the lack of clarity about which country or countries had legal responsibility for doing

Constitutional References Committee, Official Committee Hansard 51 (Aug. 6, 2002) (evidence of Mr. Gabaudan, UNHCR).

⁴⁹ MARR & WILKINSON, *supra* note 18, at 162-63.

⁵⁰ MIGRATION ZONE EXCISION, *supra* note 41, ¶ 2.17.

⁵¹ *UNHCR Screening in Nauru*, UNHCR NEWSL. No. 2/2002 (United Nations High Comm’r for Refugees, Regional Office for Australia, New Zealand, Papua New Guinea and the South Pacific), Oct. 2002, at 5.

⁵² Theoretically, asylum seekers taken to Papua New Guinea could choose to invoke Papua New Guinea’s obligations under the Refugees Convention. However, this has not happened. SENATE FOREIGN AFFAIRS DEFENCE AND TRADE REFERENCES COMMITTEE, A PACIFIC ENGAGED: AUSTRALIA’S RELATIONS WITH PAPAU NEW GUINEA AND THE ISLAND STATES OF THE SOUTH-WEST PACIFIC REPORT ¶ 6.53 (2003) [hereinafter A PACIFIC ENGAGED REPORT].

⁵³ *Australia Completes Processing of Asylum Seekers on Nauru*, PACNEWS, Oct. 31, 2003, available at LEXIS-NEXIS ACADEMIC, World News, Asia/Pacific News Sources.

so.⁵⁴ It also reluctantly agreed to assist in the search for resettlement places for those whose cases had been processed by the Australian government, but made it clear that it was doing so “as a one-off.”⁵⁵ The UNHCR has been at pains to emphasize to other governments “that there are no lessons to be learnt from this [the UNHCR’s involvement in the Pacific Solution] and no precedents that have been set by this as far as we are concerned.”⁵⁶ While Australia and the UNHCR searched for third countries willing to resettle them, recognized refugees spent months confined within the boundaries of the “offshore processing centers” in Nauru and Papua New Guinea. These refugees were treated no differently from asylum seekers awaiting status determination and rejected asylum seekers.⁵⁷

Finding resettlement places for recognized refugees (and some other asylum seekers with resettlement needs) was a slow process. By May 26, 2004, however, 804 asylum seekers in total had been resettled after being processed in a declared country.⁵⁸ Of these, 380 individuals had been resettled by Australia (most on a temporary basis)⁵⁹ and the rest had been resettled by New Zealand and other

⁵⁴ INQUIRY INTO NEW APPROACHES TO THE ASYLUM PROCESS BEFORE THE UNITED KINGDOM HOUSE OF LORDS EUROPEAN UNION SELECT COMMITTEE, SUBCOMMITTEE F (SOCIAL AFFAIRS, EDUCATION AND HOME AFFAIRS) (Oct. 22, 2003) (Memorandum Submitted by UNCHR: Examination of Witnesses) (evidence of Erika Feller, Director, International Protection, UNHCR), *available at* <http://www.publications.parliament.uk/pa/ld/lduncorr/euf2210.pdf> (last visited Nov. 15, 2004).

⁵⁵ *Id.*

⁵⁶ *Id.*

⁵⁷ *Consideration of Budget Estimates Hearing Before the Australian Senate Legal and Constitutional Legislation Committee*, Official Committee Hansard 548 (May 30, 2002) (evidence of Mr. McMahon, DIMIA).

⁵⁸ *Budget Estimates Hearing Before the Australian Senate Legal and Constitutional Legislation Committee*, Proof Committee Hansard 76 (May 26, 2004) (evidence of Mr McMahon, DIMIA).

⁵⁹ 221 persons received five year Secondary Movement Relocation (Subclass 451) Visas, 150 received three year Secondary Movement Offshore Entry (Temporary) (Subclass 447) Visas and three received three year Temporary Protection (Subclass 785) Visas. Five people were allowed entry to Australia on Humanitarian Stay (Temporary) (Subclass 449) Visas and were then allowed to

countries.⁶⁰ Subsequently, New Zealand resettled an additional twenty-two Afghans found to be refugees by the UNHCR following reassessment of their asylum claims in light of new country information.⁶¹ Australia, which also reassessed the asylum claims of its caseload of previously rejected Afghan asylum seekers in light of the new country information, temporarily resettled an additional 146 Afghan asylum seekers found to be refugees following that reassessment.⁶² In addition, four Iraqis and one stateless person were temporarily resettled in Australia after having their cases reassessed by the UNHCR.⁶³ As of September 16, 2004, there were eighty-two rejected asylum seekers remaining on Nauru.⁶⁴ Thirty were Afghans,

apply for and were granted Permanent Protection (Subclass 866) Visas. One person received a spouse visa. *See Hearing on Budget Estimates Before the Australian Senate Legal and Constitutional Legislation Committee*, Proof Committee Hansard 76 (May 26, 2004) (evidence of Ms. Bicket, DIMIA).

⁶⁰ Other resettlement countries included Canada, Denmark, Norway, and Sweden.

⁶¹ Kim Ruscoe, *A Home At Long Last*, DOMINION POST (Wellington, N.Z.), Sep. 11, 2004, at 5; *3 Years On, Tampa Saga Finally Over*, ILLAWARRA MERCURY, May 21, 2004, at 9. Australia took the position that it was UNHCR's responsibility to find resettlement places for those refugees in countries that, in the words of a spokesman for the Minister for Immigration, "may or may not include Australia," Meaghan Shaw, *Tampa Afghans Given Reprieve*, AGE (Melbourne, Austl.), Feb. 25, 2004, at 7.

⁶² Press Release, Australian Minister for Immigration, Afghan Refugees Arriving in Australia from Nauru, VPS 100/2004 (July 13, 2004) *available at* http://www.minister.immi.gov.au/media_releases/media04/v04100.htm (last visited Mar. 14, 2005); Press Release, Australian Minister for Immigration, Arrivals in Australia from Nauru, VPS 114/2004 (Aug. 3, 2004), *available at* http://www.minister.immi.gov.au/media_releases/media04/v04114.htm (last visited Mar. 14, 2005).

⁶³ Press Release, Australian Minister for Immigration, Arrivals in Australia from Nauru, VPS 114/2004 (Aug. 3, 2004), *available at* http://www.minister.immi.gov.au/media_releases/media04/v04114.htm (last visited Mar. 14, 2005).

⁶⁴ Sharon Mathieson, *Government Urging Asylum Seekers to Head Home*, AAP NEWSFEED, Sept. 16, 2004, *available at* LEXIS-NEXIS ACADEMIC, World News, Asia/Pacific News Sources.

forty-seven were Iraqis,⁶⁵ two were Iranians, two were Bangladeshi and one was from Pakistan.⁶⁶

The processing centers in Nauru and Papua New Guinea are managed by the International Organization for Migration (IOM). The Australian government contracted with the organization to manage the centers on an open-ended basis.⁶⁷ IOM invoices the Australian government for the costs of operating the centers.⁶⁸ In late July 2003, the processing center in Papua New Guinea was officially mothballed and is presently not in use, although the Australian government announced that the facility would be available for reactivation on short notice.⁶⁹ The processing center in Nauru, however, remains operational.⁷⁰ While the Australian government leaves operational

⁶⁵ On August 29, 2004, Australia announced that it would be reassessing the asylum claims of twenty-seven of these Iraqi nationals in light of new country information provided by UNHCR: "Overboard" Iraqis to be Reassessed, SYDNEY MORNING HERALD, Aug. 29, 2004, available at <http://www.smh.com.au/articles/2004/08/29/1093717817798.html> (last visited Mar. 14, 2005).

⁶⁶ *Howard's Pacific Solution Winds Down*, (Austl. Broadcasting Corporation Radio National AM broadcast, Sept. 9, 2004).

⁶⁷ *Consideration of Budget Estimates Hearing Before the Australian Senate Legal and Constitutional Legislation Comm.*, Official Committee Hansard 591 (May 29, 2003) (evidence of Mr McMahan, DIMIA); *Hearing on Migration Legislation Amendment (Further Border Protection Measures) Bill 2002 Before the Australian Senate Legal and Constitutional References Comm.*, Official Committee Hansard 245 (Sept. 17, 2002) (evidence of Mr McMahan, DIMIA). DIMIA has refused to provide copies of the contract to members of parliamentary committees on the basis that they are commercial-in-confidence: *Consideration of Budget Estimates Hearing Before the Australian Senate Legal and Constitutional Legislation Comm.*, Official Committee Hansard 271 (Feb. 11, 2003) (evidence of Mr McMahan, DIMIA).

⁶⁸ *Hearing on Migration Legislation Amendment (Further Border Protection Measures) Bill 2002 Before the Australian Senate Legal and Constitutional References Comm.*, Official Committee Hansard 237 (Sept. 17, 2002) (evidence of Mr McMahan, DIMIA).

⁶⁹ *Government Mothballs PNG Detention Centre*, AGE (Melbourne), July 28, 2003, available at <http://www.theage.com.au/articles/2003/07/28/1059244556821.html> (last visited Sept. 26, 2004).

⁷⁰ At the time of writing, one of the two processing centers in Nauru was also about to be mothballed. *Howard's Pacific Solution Winds Down*, *supra* note 66.

details to IOM, DIMIA has a liaison officer in Nauru and its Canberra office conducts a weekly teleconference with IOM in the course of which a “range of center management issues are discussed.”⁷¹ Security outside the perimeter of the centers, as well as law enforcement inside the centers, is provided by Australian Protective Services (APS) staff pursuant to a protocol negotiated between the Nauru police, APS and IOM.⁷² The APS personnel have been made special constables under Nauruan law and the policing responsibility supposedly lies with the Nauruan police service.⁷³ However, DIMIA liaises closely with APS and covers its costs.⁷⁴

On December 10, 2003, nine residents of the processing centers in Nauru commenced a hunger strike protesting their detention and the numbers participating grew over the next few days.⁷⁵ The Australian Minister for Immigration responded to public pressure placed upon the Australian government to resolve the hunger strike with the assertion that it was not Australia’s problem.⁷⁶ The Minister’s public position was that Australia bore no responsibility for the situation of the detainees, because the processing centers are not located within Australia’s territory but in Nauru and are “being run by

⁷¹ *Consideration of Budget Estimates Hearing Before the Australian Senate Legal and Constitutional Legislation Comm.*, Official Committee Hansard 592 (May 29, 2003) (evidence of Mr McMahon and Ms Daniels, DIMIA).

⁷² MARITIME REPORT, *supra* note 16, ¶ 10.83.

⁷³ *Hearing on Migration Legislation Amendment (Further Border Protection Measures) Bill 2002 Before the Australian Senate Legal and Constitutional References Committee*, Official Committee Hansard 246 (Sept. 17, 2002) (evidence of Mr McMahon, DIMIA).

⁷⁴ MARITIME REPORT, *supra* note 16, ¶ 10.84; *Consideration of Budget Estimates Hearing Before the Australian Senate Legal and Constitutional Legislation Committee*, Official Committee Hansard 592 (May 29, 2003) (evidence of Mr McMahon, DIMIA).

⁷⁵ Meaghan Shaw, *Nauru Hunger Strike Sparks Action*, AGE (Melbourne, Austl.), Dec. 19-20, 2003 [hereinafter Shaw], at 4; Meaghan Shaw et al., *Hunger Strikers “Not Our Problem”*, AGE (Melbourne, Austl.), Dec. 18, 2003, at 2 [hereinafter Shaw et al.].

⁷⁶ Shaw et al., *supra* note 75, at 2.

other people.”⁷⁷ Australia’s Attorney-General took the same public position.⁷⁸ At the same time, the President of Nauru stated firmly that the situation of the detainees was “certainly not Nauru’s responsibility,”⁷⁹ and Nauru’s Finance Minister accused Australia of breaching the MOU relating to the asylum seekers by failing to provide adequate medical assistance for the hunger strikers.⁸⁰ The UNHCR, however, took the position that both Australia and Nauru were responsible for the asylum seekers in the processing centers, because the centers exist pursuant to an arrangement between the two governments.⁸¹

From an international legal perspective, the UNHCR’s position that both countries are responsible for the residents of the processing centers is the correct one. Nauru owes a customary law non-refoulement obligation to asylum seekers within its territory, regardless of how those asylum seekers came to be there. Although Nauru chose to entrust the practical fulfillment of this obligation to the UNHCR and Australian officials, it did not thereby rid itself of the obligation. Nauru also owes human rights obligations under customary international law to persons within its territorial jurisdiction. Since the processing centers are located within its territory, Nauru’s human rights obligations are owed as much to the residents of the centers as to any other persons within its territory. At the very least, Nauru has an obligation under customary international

⁷⁷ *Id.* at 4. The Minister later announced that she would send John Hodges, the chairman of Australia’s Immigration Detention Advisory Committee and a former Minister for Immigration, and an Afghan community leader to Nauru to talk with the hunger strikers and consult with IOM about resolution of the strike: Shaw, *supra* note 75, at 4. She was careful to emphasise, however, that John Hodges would not be going in his official capacity as chairman of IDAG. *Id.*

⁷⁸ *Ruddock Enters Nauru Spat*, ABC NEWS ONLINE, Jan. 7, 2004, available at <http://www.abc.net.au/news/newsitems/s1021750.htm> (last visited Mar. 14, 2005).

⁷⁹ Shaw, *supra* note 75, at 4.

⁸⁰ *Ruddock Enters Nauru Spat*, *supra* note 78; *Nauru Seeking Financial Gain Over Asylum Seekers: Ruddock* (Australian Broadcasting Corporation Radio National PM broadcast, Jan. 7, 2004).

⁸¹ Shaw, *supra* note 75, at 4.

law to ensure that no one is arbitrarily detained in the centers.⁸² Possibly the “restricted visa arrangement” is consistent with Nauru’s constitution. If not, the fact that the residents of the centers are unlawfully detained under domestic law means that they are necessarily arbitrarily detained under international law. Even if domestically lawful, however, detention will be “arbitrary” under international law, unless shown to be a necessary and proportionate means of achieving a legitimate end in the particular case.⁸³ The fact that asylum seekers and refugees are confined to the processing centers without regard to individual circumstances gives rise to the inference that, in at least some cases, detention is likely to be a breach of the prohibition against arbitrary detention.

Australia also continues to bear some responsibility for the residents of the offshore processing centers. Australia’s non-refoulement obligations, once engaged, continue despite the transfer to other countries of persons to whom those obligations are owed and regardless of whether Australia has the practical ability to ensure fulfillment of those obligations.⁸⁴ Aware of this fact, Australia made sure that its arrangements with both Nauru and Papua New Guinea gave it control over the ultimate fate of the asylum seekers sent to those countries. Australia’s retention of this control helps mitigate the fact that it sent asylum seekers to declared countries without having in place a process for ascertaining whether those countries are safe.

The more difficult question is to what extent Australia can be held responsible for the manner in which those asylum seekers are or were treated while in Nauru and Papua New Guinea. Under general principles of state responsibility, the actions of Australian officials can be attributed to Australia regardless of where those actions are carried out. In other words, actions of DIMIA officials and APS staff

⁸² Penelope Mathew, *Legal Issues Concerning Interception*, 17 GEO. IMMIGR. L. J. 221, 245 (2003).

⁸³ International Covenant on Civil and Political Rights, Dec. 19, 1966, 999 U.N.T.S.171 [hereinafter ICCPR]; *View of the Human Rights Committee Under Article 5, Paragraph 4, of the Optional Protocol to the International Covenant on Civil and Political Rights*, 59th Sess., CCPR/C/59/D/560/1993 (Apr. 30, 1997).

⁸⁴ AMNESTY INTERNATIONAL, UK/EU/UNHCR: UNLAWFUL AND UNWORKABLE – AMNESTY INTERNATIONAL’S VIEWS ON PROPOSALS FOR EXTRA-TERRITORIAL PROCESSING OF ASYLUM CLAIMS 24-5 (IOR 61/004/2003, 2003).

which affect the residents of the offshore processing centers are attributable to Australia. Likewise the actions of persons acting on the instructions of Australia, or under the direction and control of Australia, are also attributable to Australia.⁸⁵ It is quite clear that IOM personnel are operating the offshore processing centers on Australia's instructions. Therefore, their actions too are attributable to Australia. Whether the actions of Australia's agents result in international legal liability depends, however, on whether those actions constitute a breach of Australia's international legal obligations.

Article 2(1) of the ICCPR provides, "[e]ach State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory *and* subject to its jurisdiction the rights recognized in the present Covenant."⁸⁶ It can be argued, and has been argued by some, that extraterritorial application of the ICCPR is for the most part prevented by the use of "and" instead of "or" in the description of individuals to whom ICCPR obligations are owed.⁸⁷ If Australia's human rights obligations are owed only to persons within its territory, what its agents do outside Australia cannot amount to a breach of those obligations. However, the view taken by the UN Human Rights Committee is that:

Article 2(1) of the Covenant places an obligation upon a State party to respect and to ensure rights 'to all individuals within its territory and subject to its jurisdiction', but it does not imply that the State party concerned cannot be held accountable for violations of

⁸⁵ According to Article 8 of the Draft Articles on State Responsibility adopted by the International Law Commission at its meetings on May 31 and August 3, 2001: "The conduct of a person or group of persons shall be considered an act of a State under international law if the person or group of persons is in fact acting on the instructions of, or under the direction or control of, that State in carrying out the conduct." The suggested rule is one that has considerable support in the international case law.

⁸⁶ ICCPR, *supra* note 83, art. 2, ¶ 1 (emphasis added).

⁸⁷ Gregor Noll, Jessica Fagerlund & Fabrice Liebaut, *Study on the Feasibility of Processing Asylum Claims Outside the EU Against the Background of the Common European Asylum System and the Goal of a Common Asylum Procedure* 41 (Final Report, Danish Centre for Human Rights and European Commission, 2002).

rights under the Covenant which its agents commit on the territory of another State, whether with the acquiescence of the Government of that State or in opposition to it . . . it would be unconscionable to so interpret the responsibility under article 2 of the Covenant as to permit a State party to perpetrate violations of the Covenant on the territory of another State, which violations it could not perpetrate on its own territory.⁸⁸

This view is backed by the preponderance of academic opinion,⁸⁹ and it is one with which this author agrees.

IV. PACIFIC NIGHTMARES

According to the New Zealand Government, its decision to take 150 of the *Tampa* asylum seekers was motivated by humanitarian considerations.⁹⁰ However, as David Marr and Marian Wilkinson point out, New Zealand needs Australia as an ally; not the other way around.⁹¹ Therefore, when Australia makes a request of New Zealand, there is an unspoken added incentive to come up with the most helpful response.⁹²

The relationship between Australia and the other countries of the Pacific is even more unequal. As Australia's Foreign and Trade Policy White Paper so succinctly puts it: "Australia is the region's main source of imports and investment, a leading aid donor and major defense and security partner."⁹³ In fact, most countries of the Pacific,

⁸⁸ *Lopez Burgos v Uruguay* Communication No. 52/1979 ¶ 12.3 (Human Rights Committee, July 29, 1981).

⁸⁹ See, e.g., Lauterpacht & Bethlehem, *supra* note 7, ¶ 67.

⁹⁰ MARR & WILKINSON, *supra* note 18, at 108.

⁹¹ *Id.* See also DONALD DENOON ET AL., A HISTORY OF AUSTRALIA, NEW ZEALAND AND THE PACIFIC 468 (2000).

⁹² MARR & WILKINSON, *supra* note 18, at 108.

⁹³ COMMONWEALTH OF AUSTRALIA DEPARTMENT OF FOREIGN AFFAIRS AND TRADE, ADVANCING THE NATIONAL INTEREST: AUSTRALIA'S FOREIGN AND TRADE POLICY WHITE PAPER 92 (2003) [hereinafter AUSTRALIA WHITE PAPER].

such as Kiribati, Nauru and Tuvalu, are simply too small to ever be self-sufficient.⁹⁴ Their continued survival depends in great part upon financial assistance. At the moment Australia is the second largest bilateral aid donor to the Pacific region.⁹⁵ In short, their relationship with Australia is of vital importance to the countries of the Pacific region, though the converse is far from true.⁹⁶ On the other hand, as Australia itself acknowledges, “[h]istory has tied Australia intimately to the nations and peoples of the South Pacific” and that history has given Australia “special responsibilities” to the region.⁹⁷ Australia’s historical ties with Nauru and Papua New Guinea are particularly intimate; however, rather than treating those ties as a source of special responsibilities to the islanders, Australia chose to use them for its own opportunistic ends.

A. *Nauru*

Nauru became an overseas possession of Germany in 1888. After World War I, the League of Nations placed it under the joint mandate of Australia, Great Britain and New Zealand. The mandate was actually administered by Australia.⁹⁸ When the League of Nations mandate system was replaced by the United Nations trusteeship system, Nauru was placed under the joint trusteeship of the same three countries again, with Australia as the administering power.⁹⁹ The trusteeship ended in 1968, when Nauru gained the full

⁹⁴ John Kerin, *Islands Will “Not Survive Alone”*, AUSTRALIAN, Oct. 8, 2003, at 3.

⁹⁵ A PACIFIC ENGAGED REPORT, *supra* note 52, ¶ 4.6. Japan is the largest bilateral donor in the Pacific region. *Id.*

⁹⁶ DONALD DENOON ET AL., *supra* note 91.

⁹⁷ AUSTRALIA WHITE PAPER, *supra* note 93, at 92.

⁹⁸ Helen Hughes, *Way Out for Poor Little Rich Island - The Nauru Solution*, AUSTRALIAN, Apr. 8, 2003, at 11.

⁹⁹ Case Concerning Certain Phosphate Lands in Nauru (Nauru v. Australia) (Preliminary Objections) 1992 I.C.J. 240 ¶ 8 & 47 [hereinafter Phosphate Case].

independence for which its Local Government Council had been campaigning since approximately 1956.¹⁰⁰

It perhaps seems strange at first that 9,000 people living on an island only twenty-two square kilometers in size with few resources (apart from phosphate reserves which were expected to be mined out within 20 years)¹⁰¹ would choose full independence. It is more often the case that the populations of small territorial entities decide that their interests are best served by choosing complete integration with the former colonial power or some degree of political autonomy falling short of independence. Nauru's choice seems less strange, however, when its experience of Australian administration is considered. Despite the "sacred trust of civilisation" supposedly reposed in them,¹⁰² Nauru's mandatories and then its trustees acted in such a way that most of the benefits from phosphate mining accrued to them and not the people of Nauru. The Nauruan fight for independence went hand in hand with a fight for a greater share of phosphate profits.¹⁰³ In 1989, Nauru actually brought action against Australia in the International Court of Justice seeking to recover its fair share of phosphate profits from the pre-independence period as well as compensation for damage caused by the phosphate mining.¹⁰⁴ Australia was not foolish enough to wait for a judgment. In 1993, Australia reached an out-of-court settlement with Nauru under which it agreed to pay Nauru AUD\$2.5 million per year for twenty years.¹⁰⁵ This author has some sympathy with the view that, by so doing, Australia adequately discharged the special responsibilities it had incurred toward Nauru through its past actions. Certainly, the fact that

¹⁰⁰ DENOON ET AL., *supra* note 91, at 399.

¹⁰¹ *Id.*; Hughes, *supra* note 98, at 11.

¹⁰² LEAGUE OF NATIONS COVENANT art. 22.

¹⁰³ DENOON ET AL., *supra* note 91, at 399.

¹⁰⁴ *See generally* Phosphate Case, *supra* note 99 (these were a series of cases ruled on by the International Court of Justice between 1989-1993).

¹⁰⁵ Infoplease, *Nauru*, available at <http://www.infoplease.com/ipa/A0107816.html> (last visited June 18, 2004). Nauru also received payments of AUD\$12 million each from New Zealand and the United Kingdom in settlement of any claims that might be made against them. *Id.*

Nauru was virtually bankrupt by the time it was approached to take the *Tampa* asylum seekers was largely its own fault.¹⁰⁶ Chronic political instability¹⁰⁷ was likewise a problem largely of its own making. Nevertheless, even if Australia was only a little to blame or totally blameless for the woes of which it took advantage, doing so without care as to harm thereby caused, was still wrong.

On September 10, 2001, President Rene Harris of Nauru and Australia's then Minister for Defense, Peter Reith, signed a Statement of Principles and FAA. Nauru agreed to host 283 of the *Tampa* asylum seekers and 237 other asylum seekers intercepted by the Australian Navy and also to consider Australian requests to host further groups of asylum seekers until May 1, 2002.¹⁰⁸ In return, Australia agreed to a AUD\$20 million assistance package (equal to approximately twenty percent of Nauru's gross domestic product), including AUD\$16.5 million of aid measures in the areas of power and water generation, education, and health.¹⁰⁹

On December 11, 2001, the agreement signed on September 10 was replaced by a MOU between the Republic of Nauru and the Commonwealth of Australia for Cooperation in the Administration of Asylum Seekers and Related Issues.¹¹⁰ Under the MOU, Nauru agreed to provide accommodation at two sites for a maximum of 1,200 asylum seekers.¹¹¹ In return, Australia agreed to meet all the costs associated with the asylum seekers and also promised an additional

¹⁰⁶ Hughes, *supra* note 98; *see also*, Mark Forbes, *Plan to Transplant Nauru to Australia*, AGE, (Melbourne, Austl.), Dec. 19, 2003, at 1.

¹⁰⁷ MARITIME REPORT, *supra* note 16, ¶ 10.41.

¹⁰⁸ *Id.* ¶ 10.28; MARR & WILKINSON, *supra* note 18, at 150; Sian Powell, *Nauru Makes \$20m in Cash and Kind*, AUSTRALIAN, Sept. 11, 2001, at 5; Darren Gray & Kerry Taylor, *Nauru Does Bulk Deal on Asylum Seekers*, AGE (Melbourne, Austl.), Sept. 11, 2001, at 1.

¹⁰⁹ Tom Allard & Craig Skehan, *Nauru's \$20m Australian Pay-Off for Taking Refugees*, SYDNEY MORNING HERALD, Sept. 11, 2001, at 6; MARITIME REPORT, *supra* note 16, ¶¶ 10.27-10.30.

¹¹⁰ MARITIME REPORT, *supra* note 16, ¶ 10.31.

¹¹¹ *Id.* ¶ 10.35.

AUD\$10 million in aid measures.¹¹² Unlike the FAA, the text of the MOU specified no end-date for Nauru's commitment, but Australia appears to have given Nauru the very strong impression that the May 1, 2002, end-date specified in the FAA continued to be applicable.¹¹³ When in June 2002, there were still 1,000 asylum seekers being held on Nauru, President Rene Harris peevishly referred to the Pacific Solution as his "Pacific Nightmare" and complained that Australia had not actually handed over the aid it had promised.¹¹⁴ President Harris was not alone in his discontent. At about the same time that DIMIA was testifying to Australia's Senate Legal and Constitutional Legislation Committee that the Pacific Solution had provided additional employment for the local islanders,¹¹⁵ non-government sources were reporting that most of the employment opportunities were actually going to expatriates and that the unemployed locals were "deeply resentful" of this fact.¹¹⁶ The locals also complained about the impact of the asylum seeker facilities on their access to basic services such as drinkable water (a scarce commodity in Nauru), hospitals, and schools.¹¹⁷ Australia focused its efforts on placating

¹¹² *Id.* ¶¶ 10.36-10.38.

¹¹³ OXFAM COMMUNITY AID ABROAD, SUBMISSION NO. 19 TO THE AUSTRALIAN SENATE FOREIGN AFFAIRS DEFENCE AND TRADE REFERENCES COMM. INQUIRY INTO AUSTRALIA'S RELATIONS WITH PAPUA NEW GUINEA AND THE ISLAND STATES OF THE SOUTH-WEST PACIFIC, (2002), *available at* http://www.aph.gov.au/Senate/committee/FADT_CTTE/png/submissions/sublist.htm [hereinafter OXFAM COMMUNITY AID ABROAD, SUBMISSION NO. 19] (last visited Mar. 14, 2005).

¹¹⁴ John Kerin et al., *Warning of New Refugee Boats on Way*, AUSTRALIAN, June 10, 2002, at 1.

¹¹⁵ *Consideration of Budget Estimates Hearing Before the Australian Senate Legal and Constitutional Legislation Committee*, Official Committee Hansard 552 (May 30, 2002) (evidence of Mr. Killesteyn, DIMIA).

¹¹⁶ Judy Hunt, *Update from Nauru*, REFUGEE COUNCIL OF AUSTL. NEWSL. (Refugee Council of Austl.), July 2002, *available at* http://www.refugeecouncil.org.au/html/news_and_events/news/newsletter_july2002.html#nauru (last visited Mar. 15, 2005).

¹¹⁷ MARITIME REPORT, *supra* note 16, ¶ 10.44; Sian Powell, *Unwanted and Sitting in Limbo*, AUSTRALIAN, July 22, 2002, at 11.

President Rene Harris and succeeded.¹¹⁸ On December 9, 2002, Australia signed a new MOU with Nauru that replaced the previous MOU signed on December 11, 2001, and was to have effect until June 2003. Pursuant to the new MOU, Nauru agreed to provide accommodation for a maximum of 1,500 asylum seekers at any one time. In return, Australia pledged a further AUD\$14.5 million worth of development assistance to Nauru.¹¹⁹

On January 9, 2003, Nauru's President found himself at the receiving end of a no-confidence vote. Australia's Department of Foreign Affairs and Trade was quick to deny that the no-confidence vote had anything to do with dissatisfaction over the asylum seeker processing center and to emphasize that it expected the same cooperation on asylum seekers from the new government.¹²⁰ Bernard Dowiyogo was appointed President in place of Rene Harris on January 18, 2003, but he died seven weeks later of natural causes.¹²¹ This, coupled with the fact that Nauru was having Parliamentary elections in May 2003, meant that Australia's efforts to negotiate a new deal for the continued use of the asylum seeker processing centers on Nauru were somewhat hampered.¹²² Predictably, the May 2003 elections did not help stabilize the government in Nauru. Ludwig Scott became President of Nauru for a few months but lost a no-confidence motion on August 8, 2003. Rene Harris once again became President of Nauru.¹²³

¹¹⁸ OXFAM COMMUNITY AID ABROAD, SUBMISSION NO. 19, *supra* note 113.

¹¹⁹ Press Release, Australian Minister for Foreign Affairs, MOU on Asylum Seekers Signed with Nauru (Dec. 10, 2002), *available at* http://www.foreignminister.gov.au/releases/2002/fa181_02.html (last visited Mar. 15, 2005).

¹²⁰ John Kerin, 'Coup' Leaves Nauru in Crisis, AUSTRALIAN, Jan. 10, 2003, at 1.

¹²¹ A PACIFIC ENGAGED REPORT, *supra* note 52, ¶ 7.58.

¹²² John Kerin et al., *Nauru Aid Deal Talks Left in Political Limbo*, AUSTRALIAN, Apr. 10, 2003, at 8.

¹²³ DEPARTMENT OF FOREIGN AFFAIRS DEFENCE AND TRADE, REPUBLIC OF NAURU COUNTRY BRIEF (Oct. 2004), *available at* http://www.dfat.gov.au/geo/nauru/nauru_brief.html (last visited Mar. 14, 2005).

Before the end of June 2003, Australia managed to secure nothing more than Nauru's agreement to allow the then existing arrangements to continue pending finalization of another MOU.¹²⁴ However, since the Nauruan state likely would have long since ceased to function without the AUD\$30 million in aid it received from Australia pursuant to the two previous MOUs,¹²⁵ the eventual finalization of another MOU was a foregone conclusion. On February 25, 2004, Australia and Nauru finally signed a new MOU pursuant to which Nauru received an aid package worth AUD\$22.5 million and Australia retained the right to continue using the asylum seeker processing centers in Nauru until at least June 2005.¹²⁶ It is a measure of exactly how poor a bargaining position Nauru was in, that it agreed also to allow Australian officials to take charge of its finances and its police force.¹²⁷ Shortly thereafter, Nauru, which was once again in the midst of a financial and constitutional crisis,¹²⁸ was persuaded to enter into a treaty with Australia specifying the powers and immunities of the Australian officials in legally binding form.¹²⁹

¹²⁴ *Budget Estimates Supplementary Hearings Before the Australian Senate Legal and Constitutional Legislation Committee*, Official Committee Hansard 167 (Nov. 4, 2003) (evidence of Mr. McMahon, DIMIA).

¹²⁵ Mark Forbes, *Plan to Transplant Nauru to Australia*, AGE (Melbourne, Austl.), Dec. 19, 2003, at 1.

¹²⁶ Press Release, Australian Minister for Foreign Affairs, Treaty Enables Australian Assistance for Nauru (Apr. 19, 2004), available at http://www.foreignminister.gov.au/releases/2004/fa054_04.html (last visited Mar. 14 2005); Press Release, Australian Minister for Foreign Affairs, New Memorandum of Understanding Signed with Nauru (Mar. 5, 2004), available at http://www.usaid.gov.au/media/release.cfm?BC=Media&Id=6395_4494_4799_4518_709 (last visited Mar. 14, 2005).

¹²⁷ Mark Forbes & Orietta Guerrera, *Deal keeps Nauru for Asylum Seekers*, AGE (Melbourne, Austl.), Mar. 6, 2004, at 6; Press Release, Australian Minister for Foreign Affairs, New Memorandum of Understanding Signed with Nauru, (Mar. 5, 2004), available at http://www.usaid.gov.au/media/release.cfm?BC=Media&Id=6395_4494_4799_4518_709 (last visited Mar. 14, 2005).

¹²⁸ Mary-Louise O'Callaghan, *Nauru to Face New Risk of Collapse*, WEEKEND AUSTRALIAN, Apr. 17-18, 2004, at 15.

¹²⁹ Press Release, Australian Minister for Foreign Affairs, Treaty Enables Australian Assistance for Nauru (Apr. 19, 2004), available at http://www.foreignminister.gov.au/releases/2004/fa054_04.html (last visited Mar.

When announcing the treaty, the Foreign Minister took the opportunity to “reinforce Australia’s continuing commitment to working cooperatively with Nauru in addressing its long-term challenges *alongside the management of the Offshore Processing Centres.*”¹³⁰

B. *Papua New Guinea*

The modern state of Papua New Guinea is made up of the eastern half of the large island of New Guinea and hundreds of small surrounding islands.¹³¹ From 1884 until World War I, the eastern half of New Guinea was divided between Germany and Australia (technically Britain until 1905). After World War I, German New Guinea was made an Australian mandate territory by the League of Nations, becoming an Australian trust territory after World War II. Australia administered the trust territory of New Guinea together with its own Territory of Papua as the Territory of Papua and New Guinea.¹³² In 1975, the Territory of Papua and New Guinea achieved independence (or more accurately had independence thrust upon it).

Throughout the period of Australian administration, Australia was more intent on using Papua New Guinea as a buffer against possible invasion and ensuring that Australian companies reaped the economic rewards of exploiting its immense natural resources than in serving the interests of Papua New Guinea’s people. For a long while, too, Australia was uncertain whether it wanted Papua New Guinea to eventually become an independent state or to become part of Australia. Perhaps, because of this, it did very little to prepare Papua

14, 2005). The Agreement between Australia and Nauru concerning Additional Police and Other Assistance to Nauru, May 10, 2004, Austl. T. S. No. 21 (entered into force on July 29, 2004).

¹³⁰ Press Release, Australian Minister for Foreign Affairs, Treaty Enables Australian Assistance for Nauru (Apr. 19, 2004), *available at* http://www.foreignminister.gov.au/releases/2004/fa054_04.html (emphasis added) (last visited Mar. 14, 2005).

¹³¹ The western half of the island of New Guinea is now the Indonesian province of West Papua.

¹³² Infoplease, *Papua New Guinea*, *available at* <http://www.infoplease.com/ipa/A0107875.html> (last visited Mar. 30, 2004).

New Guinea for independence until the 1960s.¹³³ According to Donald Denoon et al.:

The shape of the future came into focus in 1966 when a delegation of Papua New Guinean legislators asked the Australian government if they had a real option to become the Seventh Australian State. That may have been a debating point, but it was not illogical: free association had just been instituted for the Cook Islands [by New Zealand]. What made it unthinkable was its timing: white and black Australians were not yet equal citizens at home and 'white Australia' still informed migration policy. Predictably, the Australian cabinet took fright at three million Melanesians crossing Torres Strait to demand jobs, schools, pensions and other rights of citizens. Instead they resolved that Papua New Guinea's destiny was independence.¹³⁴

Independence for Papua New Guinea was also the preference of the United Nations General Assembly.¹³⁵ The problem from the point of view both of Australia and the United Nations was that living in the colony of Papua New Guinea was not one self-identifying nation of people but rather many tribes of people who spoke 700 unrelated languages and distrusted each other.¹³⁶ Australia "solved" this problem by manufacturing the trappings of nationhood (a flag, an anthem, a national day, etc.) for Papua New Guinea and telling its inhabitants that they were henceforth to consider themselves one nation.¹³⁷ Australia then exited Papua New Guinea in haste, ignoring

¹³³ See generally Sam Kari, *Australia's Role and Papua New Guinea's National Goals and Directive Principles*, in *SOCIAL CHANGE IN THE 21ST CENTURY*, 2002 CONFERENCE PROCEEDINGS (B.E. Hanna et al. ed., 2002).

¹³⁴ DENOON ET AL., *supra* note 91, at 400.

¹³⁵ See generally G.A. Res. 3284, U.N. GAOR, 29th Sess., U.N. Doc. A/9747 (1974); G.A. Res. 3109, U.N. GAOR, 28th Sess., U.N. Doc. A/9416 (1973).

¹³⁶ 2 DIETRICH RAUSCHNING, *THE CHARTER OF THE UNITED NATIONS: A COMMENTARY* 1112 (Bruno Simma ed., 2d ed. 2002).

¹³⁷ DENOON ET AL., *supra* note 91, at 400.

the economists and others who urged it to ensure Papua New Guinea's future economic viability before leaving it to its fate.¹³⁸

Presently, according to most social indicators, Papua New Guinea is performing worse than the rest of the Asia-Pacific region and nearly as badly as sub-Saharan Africa.¹³⁹ According to Windybank and Manning, "[t]oday's conditions are mainly the product of structural imbalances in the economy that existed at independence, and of conventional policies that failed to correct them."¹⁴⁰ Australia must, therefore, shoulder some of the blame for the fact that a country, which could have been one of the richest in the world, is in fact one of the poorest and least developed.¹⁴¹

Poor living standards are by no means the end of Papua New Guinea's problems. It also suffers from an extensive breakdown of law and order. In Papua New Guinea's Highlands the breakdown is nearly complete. However, Graeme Dobell suggests that "before we get too sanctimonious about that breakdown [we should] remember that Australian smugglers and Australian marijuana smokers have had a large role in transforming the Highlands - the 'Gold' flowed south to Australia and high powered rifles and shotguns flowed north."¹⁴²

Another problem for Papua New Guinea is that "[d]emocracy has been hijacked by those responsible for and benefiting from the 'systemic and systematic' corruption of public institutions."¹⁴³ Papua New Guinea Parliamentarians tend to look after the interests of their own language groups instead of those of the country as a whole and

¹³⁸ Kari, *supra* note 133.

¹³⁹ Susan Windybank & Mike Manning, *Papua New Guinea on the Brink*, 30 THE CENTRE FOR INTERNATIONAL STUDIES 1 (2003).

¹⁴⁰ *Id.*

¹⁴¹ DENOON ET AL., *supra* note 91, at 399-400; Kari, *supra* note 133.

¹⁴² Graeme Dobell, *The South Pacific - Policy Taboos, Popular Amnesia and Political Failure*, Paper presented at the Australian Security in the 21st Century Seminar Series, Menzies Research Centre (Feb. 12, 2003) available at http://www.mrcld.org.au/uploaded_documents/southpacificlecture.pdf (last visited Apr. 2, 2005).

¹⁴³ Windybank & Manning, *supra* note 139, at 1.

ascribe it to Melanesian culture.¹⁴⁴ Perhaps lying at the base of Papua New Guinea's problems is "the misfit between its national parliamentary and bureaucratic institutions and the values of the small-scale landowning societies that continue to claim the allegiance of most of the people."¹⁴⁵ The existence of the misfit is of course attributable to Australia's role in Papua New Guinea's past, and the fact that it exited that role abruptly without bothering to properly resolve the misfit.¹⁴⁶

What Australia did for Papua New Guinea, after its speedy exit from the colonial role, was to pour more than AUD\$300 million bilateral aid into the country annually.¹⁴⁷ A motivating factor for the aid was to ensure that Papua New Guinea remained a friend and/or a client and thus continued to be Australia's buffer against invasion.¹⁴⁸ Since Papua New Guinea has been economically dependent on Australia to this date,¹⁴⁹ it had a powerful incentive to agree to Australia's request that it become part of the Pacific Solution. The incentive was made even more powerful by the fact that Australia made its request at the same meeting of Australian and Papua New Guinea officials at which the details of an Australian promise to

¹⁴⁴ *Id.* at 9.

¹⁴⁵ Donald Denoon, *Papua New Guinea's Crisis: Acute or Chronic?* 164(3) *WORLD AFFAIRS* 115 (2002). *See also* Windybank & Manning, *supra* note 139, at 9.

¹⁴⁶ Denoon, *supra* note 145, at 115.

¹⁴⁷ Windybank & Manning, *supra* note 139, at 10.

¹⁴⁸ *Id.* Australia has recently realized that, if regional stability is to be maintained, Papua New Guinea must be prevented from "descending into anarchy and corruption." Steve Lewis & Jeremy Roberts, *PNG Salvage to Cost Us \$800m*, *AUSTRALIAN*, Dec. 12, 2003, at 1. To this end, Australia has managed to negotiate a deal with Papua New Guinea pursuant to which Papua New Guinea has been promised AUD\$800 million of aid over five years additional to the annual AUD\$330 million in aid which it usually receives from Australia, and Papua New Guinea has agreed to let Australia deploy hundreds of its own police in the country and appointing persons of its own choice to key public service posts. *See also* The Joint Agreement on Enhanced Cooperation between Australia and Papua New Guinea, June 30, 2004, Austl. T. S. No. 24 (entered into force on Aug. 13, 2004).

¹⁴⁹ *PNG and Australia Confirm Aid Talks* (Australian Broadcasting Corporation Radio Australia News broadcast, Sept. 16, 2003).

provide AUD\$20 million assistance for reform of the Papua New Guinea Defense Forces was being negotiated.¹⁵⁰

On October 11, 2001, Australia's High Commissioner to Papua New Guinea and the Secretary of Papua New Guinea's Department of Foreign Affairs signed a MOU between the Government of Australia and the Government of the Independent State of Papua New Guinea, Relating to the Processing of Certain Persons, and Related Issues.¹⁵¹ Pursuant to the MOU, which had an expiry date of October 21, 2002, Papua New Guinea agreed to host an identified group of 225 asylum seekers and to consider hosting further groups of asylum seekers at a facility located within the Lobrum Naval Patrol Boat Base on Los Negros Island in Manus Province.¹⁵² Not long after the signing of the MOU, Australia asked Papua New Guinea to consider hosting up to 1,000 asylum seekers at the Lobrum Base. The Papua New Guinea Foreign Affairs Minister at that time, John Pundari, rejected this request, but was consequently sacked by the then Prime Minister, Sir Mekere Morauta.¹⁵³ In January 2002, Papua New Guinea agreed to the Australian request.¹⁵⁴

The only formal funding commitment that Papua New Guinea received in exchange for its assistance was that Australia would meet all the costs associated with the asylum seekers, including the costs of refurbishing the Lobrum Base.¹⁵⁵ However, the spin-off benefits were expected to be many. First, the Lobrum Base was an operating naval base¹⁵⁶ so improvement of its physical infrastructure would provide a lasting benefit to the Papua New Guinea Defense Force. Second, the

¹⁵⁰ MARR & WILKINSON, *supra* note 18, at 159; MARITIME REPORT, *supra* note 16, ¶¶ 0.45-10.46.

¹⁵¹ MARITIME REPORT, *supra* note 16, ¶ 10.50.

¹⁵² *Id.* ¶¶ 10.57 & 10.61.

¹⁵³ *Id.* ¶ 10.60.

¹⁵⁴ *Id.* ¶ 10.59; O'Callaghan, *supra* note 39, at 4.

¹⁵⁵ MARITIME REPORT, *supra* note 16, ¶¶ 10.52-10.54.

¹⁵⁶ *Consideration of Budget Estimates Hearing Before the Australian Senate Legal and Constitutional Legislation Committee*, Official Committee Hansard 271 (Feb. 11, 2003) (evidence of Mr Killesteyn, DIMIA).

local community would also benefit from Australian funded upgrading of electricity, water, sewerage and other essential services.¹⁵⁷ Further, although Papua New Guinea, unlike Nauru, did not receive a promise of extra development assistance, it did benefit from the fast tracking of several important AusAID projects. The new Papua New Guinea Minister for Foreign Affairs, John Waiko, did not doubt that this was a reward for services rendered.¹⁵⁸

Underscoring the poverty of Papua New Guinea's Manus Island, "the province's deputy governor, Job Pomat, handwashes his clothes in a stream near his home."¹⁵⁹ It is not surprising then that many locals welcomed the employment opportunities and other boosts to the local economy that the asylum seeker processing center was expected to provide. The expected economic benefits were realized to some degree.¹⁶⁰ However, church leaders complained that the social impacts were not quite so benign, as prostitution and the drug trade were among the economic enterprises which were given a boost by the presence of the processing center and its associated personnel.¹⁶¹

In retrospect, the decision to serve as one of Australia's "declared countries" appears to have contributed to the defeat of Prime Minister Merkere Morauta's government in the elections held in August 2002. Sir Michael Somare, who headed the incoming government, had been a vocal opponent of the processing center. As Prime Minister, however, Sir Michael Somare's overriding concern was Papua New Guinea's parlous budgetary situation. On August 13, 2002, Sir Michael Somare had a face-to-face meeting with Australia's Prime Minister, John Howard. He walked away from the meeting

¹⁵⁷ MARITIME REPORT, *supra* note 16, ¶ 10.55; A PACIFIC ENGAGED: REPORT, *supra* note 52, ¶ 6.51.

¹⁵⁸ MARITIME REPORT, *supra* note 16, ¶ 10.54. *See also* MARES, *supra* note 21, at 130.

¹⁵⁹ Greg Roberts, *A Prison in Paradise*, SYDNEY MORNING HERALD, Feb. 6, 2002, at 11.

¹⁶⁰ MARITIME REPORT, *supra* note 16, ¶ 10.55.

¹⁶¹ OXFAM COMMUNITY AID ABROAD, SUBMISSION NO. 19, *supra* note 113.

with a promise of more Australian aid. Shortly thereafter, he stated publicly, “[w]e will allow the [asylum seekerprocessing] centre to continue, and hopefully it will fade out eventually.”¹⁶² Subsequently, Australia and Papua New Guinea entered into a new agreement under which Papua New Guinea agreed that Australia could continue to use the Manus facility to accommodate up to 1,000 asylum seekers at a time until October 2003.¹⁶³ In fact, as previously mentioned, the facility was officially mothballed at the end of July 2003, though there was a renewal of the MOU to October 2004. At the time of writing, the Australian Government was reportedly seeking a two-year renewal of the MOU, although the Papua New Guinea Government had previously indicated that it did not wish to renew the MOU when it expired.¹⁶⁴

V. INTERPRETING NIGHTMARES

In the Australian Government’s rhetoric, its Pacific Solution is an example of a regional approach to dealing with people smugglers and asylum seekers through cooperation and burden-sharing. This claim would be a lot more credible if the Pacific Solution were a *regional* plan for dealing with the *regional* problem of asylum seekers. It certainly is not a regional plan, because Australia did not even consult with key regional institutions, let alone involve them in a meaningful way.¹⁶⁵ Moreover, it certainly is not a plan for dealing with the regional problem of asylum seekers. Papua New Guinea, for example, has long been host to thousands of asylum seekers crossing the border from the Indonesian province of Papua (formerly Irian

¹⁶² “*Big Brother*” Howard Pledges More Aid to PNG, AUSTRALIAN, Aug. 14, 2002, at 8.

¹⁶³ *Consideration of Budget Estimates Hearing Before the Australian Senate Legal and Constitutional Legislation Committee*, Official Committee Hansard 263 (Feb. 11, 2003) (evidence of Ms. Daniels and Mr. McMahon, DIMIA).

¹⁶⁴ ABC News Online, *PNG Asked to Keep Empty Immigration Centre Open*, Sep. 22, 2004, available at <http://www.abc.net.au/news/newsitems/200409/s1205042.htm> (last visited Nov. 15, 2004).

¹⁶⁵ OXFAM COMMUNITY AID ABROAD, *ADRIFT IN THE PACIFIC: THE IMPLICATIONS OF AUSTRALIA’S PACIFIC REFUGEE SOLUTION* 7 (Feb. 2002).

Jaya).¹⁶⁶ However, the Pacific Solution does not address the situation of these asylum seekers even though Papua New Guinea is a participant in it.¹⁶⁷ The Pacific Solution deals only with asylum seekers who happen to be heading for Australia.

Rather than being an example of burden-sharing, the Pacific Solution is an example of burden-shifting. Burdens are shared when they are consensually redistributed in a manner that is fair to all countries involved. Burdens are shifted when they are redistributed by one country to other countries unilaterally and/or in an unfair manner. At the time the Pacific Solution was introduced, various intergovernmental, non-government and church organizations throughout the Pacific region characterized it as an attempt by Australia to use its economic power to dump its problem on its extremely poor, politically unstable and socially vulnerable neighbors, without any thought for the damage that it might cause.¹⁶⁸ Comparisons were made with the past use by Britain, France and the United States of their Pacific colonies and trust territories for nuclear weapons testing.¹⁶⁹ The comparisons were not entirely apposite, because, in approaching the governments of other nominally independent nations, the Australian government was not abusing the position of a trustee. The comparisons were apt however, in so far as they underscored the point that in approaching its neighbors Australia was attempting to exploit its asymmetric power relationship with them to achieve an outcome that was more in its own interests than theirs. In the case of Nauru and Papua New Guinea, it succeeded. The Australian government was able to take into account of all economic, political and social costs and benefits to Australia (and the Coalition political parties) in arriving at the price it was willing to pay to transfer asylum seekers to Nauru and Papua New Guinea. However, it is very clear from what transpired after the bargains were struck that

¹⁶⁶ Jane Mason & Nancy Vogt, *East Asia and the Pacific*, in *WORLD REFUGEE SURVEY*, at 107 (U.S. Committee for Refugees ed., 2003)

¹⁶⁷ OXFAM COMMUNITY AID ABROAD, SUBMISSION NO. 19, *supra* note 113.

¹⁶⁸ MARITIME REPORT, *supra* note 16, ¶¶ 10.22-10.23.

¹⁶⁹ Greg Fry, *The 'Pacific Solution'?* in *REFUGEES AND THE MYTH OF A BORDERLESS WORLD* 23, 30-31 (William Maley et al. eds., 2002).

the governments of Nauru and Papua New Guinea did not factor in the social and political costs to their respective countries (or even their own political parties) when they accepted Australia's offers. They did not, because they could not. Both governments were too desperate for money and too dependent on Australia's continued patronage to bargain with the Australian government on equal terms.¹⁷⁰

VI. SPREADING NIGHTMARES

In the Australian government's view, the Pacific Solution is a success because it seems thus far to have greatly reduced unauthorized boat arrivals to Australia. However, all that Australia is accomplishing is the deflection of irregular population movements to other destinations. This, too, is burden-shifting. New Zealand was "repaid" for the assistance it provided to Australia in relation to the *Tampa* asylum seekers by being set up as the new target for people-smuggling operations in the Asia-Pacific region.¹⁷¹ It responded by introducing border protection measures similar to those introduced by Australia.¹⁷²

It is ironic that, after East Timor successfully resisted Australia's initial attempt to draw it into the Pacific Solution, one of the first boatloads of irregular movers attempting the trip from Indonesia to New Zealand was forced to stop in East Timor due to the deteriorating condition of their boat.¹⁷³ Australia and New Zealand both pressured East Timor to prevent the boat from continuing its

¹⁷⁰ See ALEXANDER BETTS, *NEW ISSUES IN REFUGEE RESEARCH, THE POLITICAL ECONOMY OF EXTRA-TERRITORIAL PROCESSING: SEPARATING "PURCHASER" FROM "PROVIDER" IN ASYLUM POLICY* (United Nations High Commissioner for Refugees, Working Paper No. 91, 2003).

¹⁷¹ Reuters, *People Smugglers Go North*, HERALD SUN (Melbourne, Austl.), Aug. 17, 2002, at 20.

¹⁷² Human Rights Watch, *supra* note 47 (citing *Transnational Organised Crime Act* (N.Z.)).

¹⁷³ Meghan Saunders & Sophie Morris, *Four-boat "Ghost Fleet": Finally Accounted For*, AUSTRALIAN, Aug. 26, 2002, at 4; Don Greenlees, *Sri Lankan Boatpeople Forced to Stay in East Timor*, AUSTRALIAN, Aug. 5, 2002, at 9.

journey.¹⁷⁴ On Australia's "advice" the fifty-six Sri Lankan men on board were brought ashore in Dili, East Timor and had their predicament handled by the UNHCR and IOM.¹⁷⁵ Some of the men made asylum claims.¹⁷⁶ However, the UNHCR was not called upon to process any asylum claims because all of the men, including those who initially made asylum claims, agreed to return voluntarily to Sri Lanka with the assistance of IOM.¹⁷⁷

According to Australia, what the incident made clear was that "the regional approach to people-smuggling is working."¹⁷⁸ From Australia's point of view it probably was, but what about from East Timor's point of view? If the men had made successful asylum claims, East Timor would have had to host them until the UNHCR found resettlement places. (Those places would not have been found in Australia, since from Australia's point of view that would send the "wrong message" to people-smugglers). If the men had made unsuccessful asylum claims but had been unwilling to leave voluntarily, neither the UNHCR nor IOM could have assisted East Timor, as forcible repatriation is outside their mandates. It would have been left to East Timor to deport the men or otherwise decide their fate.¹⁷⁹ Australia, faced with either of these scenarios, would have been able to respond without feeling the cost. The same cannot be said of East Timor, which was and still is struggling to find its feet as a newly independent country. In addition, it is trying to manage the

¹⁷⁴ Greenlees, *supra* note 173, at 9.

¹⁷⁵ Kimina Lyall, *Asylum Seekers Put Dili to the Test*, WEEKEND AUSTRALIAN, Aug. 3-4, 2002, at 4. East Timor was not yet a party to the Refugees Convention, though it has subsequently become a party, and it did not have any asylum processes of its own in place.

¹⁷⁶ *Lankans Retract Claim for Asylum in East Timor*, DAILY NEWS (Sri Lanka), Aug. 21, 2002, available at <http://www.dailynews.lk/2002/08/21/wor01.html> (last visited Mar. 14, 2005). These were later retracted. *Id.*

¹⁷⁷ *Parliamentary Debates*, Australian House of Representatives, 5589 (Official Hansard ed., Aug. 26, 2002) (Statement of Mr. Downer).

¹⁷⁸ *Id.*

¹⁷⁹ Greenlees, *supra* note 173, at 9.

return of thousands of its own nationals from the Indonesian province of West Timor.¹⁸⁰

Australia was disarmingly frank in acknowledging that its Pacific Solution had indeed resulted in the deflection of irregular population movements to other destinations. The then Australian Minister for Immigration let it be known that he had evidence that people-smugglers who previously targeted Australia were now setting their sights on America and Europe.¹⁸¹ Having exported the problem, he set about exporting the “solution.” The solution according to the Minister was for other Western countries to follow Australia’s example.¹⁸²

The Australian Minister for Immigration was probably preaching to the converted. For example, Tara Magner points out that in 1994, the United States government responded to a mass outflow of Haitian and Cuban asylum seekers by intercepting them at sea and taking them to offshore processing centers which it established on a short-term basis in places like Antigua and Dominica and on a long-term basis in the Bahamas, Panama and, of course, Guantanamo Bay.¹⁸³

More recently in late March 2003, the United Kingdom (UK) government announced that it was putting a proposal to the European Union (EU) called the “Zones of Protection” proposal.¹⁸⁴ This proposal called for the creation of “Regional Protection Areas” in countries located within asylum seekers’ regions of origin, where asylum seekers would receive international protection pending

¹⁸⁰ Jana Mason & Nancy Vogt, *East Asia and the Pacific*, WORLD REFUGEE SURVEY 2003 107, 118 (United States Committee for Refugees ed. 2003).

¹⁸¹ Reuters, *People Smugglers Go North*, *supra* note 171, at 20.

¹⁸² Mark Phillips, *Act on Illegals, Urges Ruddock*, ADVERTISER (Adelaide, Austl.), Sept. 30, 2002, at 6.

¹⁸³ Tara Magner, *A Less Than “Pacific” Solution for Asylum Seekers in Australia*, 16 INT’L J. OF REFUGEE L. 53 (2004).

¹⁸⁴ Press Release, UK Home Secretary, Statement on Zones of Protection, STAT010/2003 (Mar. 27, 2003) available at http://index.homeoffice.gov.uk/n_story.asp?item_id=424 (last visited Mar. 14, 2005).

repatriation or resettlement.¹⁸⁵ It also called for the creation of “Transit Processing Centers” in countries located just outside the EU’s borders, in which those seeking asylum from EU countries could be held while their claims were processed by the UNHCR.¹⁸⁶

The Dutch and Danish governments were particularly enthusiastic in their reception of the UK proposal, since they had intermittently worked on similar models of their own during the preceding two decades.¹⁸⁷ Austria, too, was interested in taking the proposal forward.¹⁸⁸ In the end, the proposal did not receive EU endorsement because Germany and Sweden were implacably opposed to it on human rights grounds.¹⁸⁹ The UK, nevertheless, indicated its intention to proceed with the implementation of the proposal by itself.¹⁹⁰ The UNHCR, which expressed unease with several aspects of the UK proposal, made it clear that it would not play the key role envisaged because it considers refugee status determination to be a

¹⁸⁵ *Id.*; Amnesty International Australia, *Fact Sheet UK’s Regional “Protection” Proposal: The Pacific Solution Revisited*, AMNESTY INTERNATIONAL AUSTRALIA, available at http://www.amnesty.org.au/whats_happening/refugees/resources/fact_sheets/UK_proposal (last visited Sept. 26, 2004).

¹⁸⁶ Press Release, UK Home Secretary, Statement on Zones of Protection, *supra* note 184; *Fact Sheet: UK’s Regional “Protection” Proposal: The Pacific Solution Revisited*, AMNESTY INTERNATIONAL AUSTRALIA, available at http://www.amnesty.org.au/whats_happening/refugees/resources/fact_sheets/UK_proposal (last visited Jun. 18, 2004); Press Release, Australian Minister for Immigration, UK Asylum Proposals Worth Consideration, (Apr. 3, 2003) available at http://www.minister.immi.gov.au/media_releases/ruddock_media03/r03021.htm (Australia’s then Minister for Immigration observed in a press release that the latter part of the British proposal bore “a remarkable similarity” to Australia’s Pacific Solution and “warmly welcome[d]” it)(last visited Apr. 2, 2005).

¹⁸⁷ AMNESTY INTERNATIONAL, UK/EU/UNHCR: UNLAWFUL AND UNWORKABLE – AMNESTY INTERNATIONAL’S VIEWS ON PROPOSALS FOR EXTRA-TERRITORIAL PROCESSING OF ASYLUM CLAIMS, *supra* note 84, at 9.

¹⁸⁸ *Id.*

¹⁸⁹ UNHCR Clarifies Position on British Plans for Refugees, UN WIRE, June 23, 2003, available at http://www.unwire.org/UNWire/20030623/449_5645.asp (last visited Oct. 5, 2004).

¹⁹⁰ *Id.*

state responsibility.¹⁹¹ Having been rebuffed by the UNHCR and rebuffed also in its attempts to persuade Eastern European countries to host Transit Processing Centers,¹⁹² the UK seems to have placed that aspect of the proposal on hold for the time being.¹⁹³ Nevertheless, the lesson is clear: dealing with asylum seekers by burden-shifting is not an Australian aberration, but rather a model which holds political appeal for many Western Governments.

VII. SHARING RESPONSIBILITY

If irregular population movements are deflected to countries with less capacity to absorb them, any adverse impact on their economy will eventually flow through to others.¹⁹⁴ If they cause extreme social upheaval in those countries, that too will have an international ripple effect.¹⁹⁵ Implementing local or regional solutions to the problems of irregular movement, without thought for the international consequences, also causes tension between nations and, thus, threatens world peace.¹⁹⁶ In other words, local or even regional

¹⁹¹ AMNESTY INTERNATIONAL, UK/EU/UNHCR: UNLAWFUL AND UNWORKABLE – AMNESTY INTERNATIONAL’S VIEWS ON PROPOSALS FOR EXTRA-TERRITORIAL PROCESSING OF ASYLUM CLAIMS, *supra* note 84, at 9.

¹⁹² Alan Travis, *Letwin Pledges to Keep Asylum Seekers Out*, GUARDIAN (UK) Oct. 8, 2003, at 10.

¹⁹³ *International Protection Project Update*, (Refugee Council, London), Sept. 2003, at 7.

¹⁹⁴ The regional and worldwide impact of the Asian financial crisis is evidence of the complete interdependence of national economies in the present era. *See e.g.*, Sheryle Bagwell, *Europe’s Immunity to Asian Virus Starts Its Slow Breakdown*, AUSTRALIAN FINANCIAL REVIEW, Oct. 12, 1998, at 53; Malcolm Maiden, *The Week the World Woke in Fright*, AGE (Melbourne, Austl.), Oct. 10, 1998, at 1.

¹⁹⁵ Social instability in a country can lead to political and/or economic instability, thereby threatening the security and/or prosperity of trading partners and so on.

¹⁹⁶ James Nafziger, *The General Admission of Aliens under International Law* 77 AM J. INT’L L. 804, 821-2 (1983); GIL LOESCHER, REFUGEE MOVEMENTS AND INTERNATIONAL SECURITY 41-55 (1992).

solutions are not just sub-optimal, they are completely self-defeating. So what is the alternative?

As part of its Convention-plus initiative, the UNHCR is seeking to “facilitate the resolution of refugee problems through multilateral special agreements.”¹⁹⁷ It is working with groups of interested states to develop “generic multilateral agreements” on three matters: “the strategic use of resettlement as a tool of protection, a durable solution and a tangible form of burden-sharing; more effective targeting of development assistance to support durable solutions for refugees...; and clarification of the responsibilities of States in the event of secondary movements.”¹⁹⁸ These generic multilateral agreements are intended to serve as templates for “situation-specific multilateral agreements designed to resolve a particular refugee situation.”¹⁹⁹ The idea is that the generic agreement will “set out shared understandings and commitments which can be relied upon and incorporated into situation-specific multilateral agreements designed to resolve a particular refugee situation.”²⁰⁰ The European Commission and the governments of Denmark, the Netherlands, and the UK have already promised funding to the UNHCR for a preparatory project aimed at developing a Comprehensive Plan of Action for Somalia.²⁰¹ The UNHCR is also encouraging the application of a Convention Plus approach to developing comprehensive solutions for Afghan asylum seekers and refugees,²⁰² and it is discussing with states the possibility of

¹⁹⁷ UNITED NATIONS HIGH COMMISSIONER FOR REFUGEES, CONVENTION PLUS AT A GLANCE (2004).

¹⁹⁸ *Id.*

¹⁹⁹ *Id.*

²⁰⁰ *Id.*

²⁰¹ David Lambo, *Talking Points for the Director of the Africa Bureau*, Address Before the High Commissioner’s Forum (Mar. 12, 2004), available at <http://www.unhcr.ch/cgi-bin/texis/vtx/home/opendoc.pdf?tbl=PROTECTION&id=407110c42&page=protect> (last visited Apr. 2, 2005).

²⁰² Ekber Menemencioglu, *Talking Points for the Director, CASEWANAME Bureau*, Address Before the High Commissioner’s Forum (Mar. 12, 2004), available at <http://www.unhcr.ch/cgi-bin/texis/vtx/home/opendoc.pdf?tbl=PROTECTION&id=407110c81&page=protect> (last visited Apr. 2, 2005).

developing similar plans for dealing with certain other protracted refugee situations.²⁰³

The problem with relying on situation-specific agreements being negotiated on an ad hoc basis is that success is made dependent on the existence of a political will to undertake each specific exercise. As the Assistant High Commissioner has noted, “comprehensive arrangements have not been always pursued even for refugee situations that warranted them.”²⁰⁴ While it makes sense to negotiate situation-specific agreements in the short-term where the political will clearly exists, doing so should not be a substitute for the long-term goal of negotiating a non-situation specific multilateral agreement on responsibility-sharing.

The choice of terminology describing the obligation as “responsibility-sharing” rather than “burden-sharing” is deliberate. As others have pointed out, whether asylum seekers are a burden or benefit depends, among other things, on the time frame adopted. Very often, measures such as resettlement impose short-term costs but bring long-term benefits or at least opportunities to the receiving country.²⁰⁵ Terminology which assumes that the short-term outcomes are the relevant ones is unhelpful. Even more importantly, as Stephen Legomsky points out, “burdens do not eliminate obligations, [and i]t is useful to have terminology that makes that point.”²⁰⁶ Terminology which focuses attention on ‘responsibility for protection’ helps regime participants keep firmly in mind that the primary purpose of such a regime is not (or at least ought not to be) to compensate them for, or insure them against, the costs of dealing with asylum seekers, but to adequately safeguard the human rights of those asylum seekers. Thielmann speculates that:

²⁰³ Kamel Morjane, *Statement by Mr. Kamel Morjane*, United Nations Assistant High Commissioner, Address Before the High Commissioner’s Forum (March 12, 2004), available at <http://www.unhcr.ch/cgi-bin/texis/vtx/home/opendoc.pdf?tbl=PROTECTION&id=407110d1b&page=protect> (last visited Apr. 2, 2005).

²⁰⁴ *Id.*

²⁰⁵ Noll, *supra* note 14, at 236-37; STEPHEN LEGOMSKY, SECONDARY REFUGEE MOVEMENTS AND THE RETURN OF ASYLUM SEEKERS TO THIRD COUNTRIES: THE MEANING OF EFFECTIVE PROTECTION 33 (PPLA/2003/01, UNHCR, Dept. of Int’l Protection, 2003).

²⁰⁶ LEGOMSKY, *supra* note 205, at 33.

If non-cooperation in this area is seen as leading to the under-provision of ‘protection’ and increased human suffering, states might accept an agreement on the basis of their commitment to human rights, despite the fact that the redistributive effects of a particular burden-sharing regime are not stacked in their favour.²⁰⁷

While the equitable distribution of costs should not be the primary purpose of a global regime for managing asylum seekers, it is beyond question a legitimate secondary purpose. The greatest problem encountered in determining an equitable distribution is identifying what the costs in fact are and measuring them in a way that enables comparison and equitable reallocation. In particular, political and social costs are not easily, if at all, quantifiable in monetary terms. This is why many countries prefer regimes that redistribute people (i.e. asylum seekers and refugees), and with them all conceivable associated costs, to regimes which purport to redistribute costs through financial transactions.²⁰⁸

“Sharing” people rather than money carries two great risks. First, the hardship to the people being moved around at the convenience of states may be too heavily discounted or even entirely ignored.²⁰⁹ The second risk, as exemplified by the Pacific Solution, is that the countries which end up on the receiving end of the people-sharing will be those countries with the least power to ensure that the so-called sharing is equitable.²¹⁰ Apropos the second risk, since the problems of asymmetrical bargaining power are most acute in bilateral negotiations and least in multilateral ones,²¹¹ the negotiation

²⁰⁷ Eiko Thielmann, *Editorial Introduction*, 16(3) J. REFUGEE STUDIES 225, 228 (2003).

²⁰⁸ ALEXANDER BETTS, *NEW ISSUES IN REFUGEE RESEARCH, THE POLITICAL ECONOMY OF EXTRA-TERRITORIAL PROCESSING: SEPARATING “PURCHASER” FROM “PROVIDER” IN ASYLUM POLICY* (United Nations High Commissioner for Refugees, Working Paper No. 91, 2003); Noll, *supra* note 14, at 244.

²⁰⁹ Thielmann, *supra* note 207, at 232.

²¹⁰ BETTS, *supra* note 208.

²¹¹ *Id.*

of a *global* responsibility-sharing regime involving redistribution of people, which is equitable to all states, is very possible. The more intractable problem presented by a people-sharing approach is ensuring that the costs to the people involved are identified and minimized throughout the redistribution process. This author's view is that redistribution of people should occur only by way of resettlement of recognized refugees and similarly situated persons, with due weight being given to legitimate reasons why they prefer one resettlement country over another, e.g. having family in one country and not the other. The costs of hosting asylum seekers and processing their applications, on the other hand, are more appropriately shared through financial transactions, as opposed to allowing the state, with which an asylum seeker lodges a claim, to shunt the person around from pillar to post.

Since most of the world's asylum seekers are hosted by developing countries, equitably sharing the responsibility for their welfare and security, pending achievement of a durable solution, would involve developed countries funding measures that would strengthen the host country's capacity to meet those needs. The UNHCR's Agenda for Protection assigns the UNHCR the task of producing a Handbook on Strengthening Capacities in Host Countries for the Protection of Refugees as guidance for its staff and partners.²¹² Such a document will no doubt articulate those capacity building measures considered to be the best practice. For example, the Agenda for Protection itself refers to measures that are "anchored within national, regional and multilateral development agendas" and simultaneously benefit refugees and the communities hosting them.²¹³

As for the determination of protection claims, what is most important in the context of a global regime, is the achievement of universal consistency in the actual assessment of claims. The inevitable by-product of inconsistency is that asylum seekers are given an incentive to forum shop. There is something to be said, therefore, for the processing of protection claims being entrusted to a

²¹² EXECUTIVE COMMITTEE OF THE HIGH COMMISSIONER'S PROGRAMME, REPORT OF THE FIFTY-THIRD SESSION OF THE EXECUTIVE COMMITTEE OF THE HIGH COMMISSIONER'S PROGRAMME 53, U.N. Doc. A/AC.96/973 (2002).

²¹³ JOSE RIERA & MARILYN ACHIRON, AGENDA FOR PROTECTION 60 (3rd ed., UNCHR 2003).

single international agency rather than being undertaken by individual states. However, it is imperative that the agency processing such claims is doing so *on behalf* of states. Responsibility for refoulement must still lie with every state which directly or indirectly refoules an individual through reliance on an incorrect decision. Otherwise, states have little incentive to construct a global processing regime, which produces correct decisions.

By itself, protection claim processing does nothing more than allow states to know whether the return of a claimant to their country of origin would be a breach of their international legal obligations. Alone, it is not a resolution of the plights of the individuals concerned. Persons found not to have valid protection claims can be returned to their country of origin. However, those found to have long-term international protection needs must either be allowed to settle in the country in which they lodged their asylum application or be given the opportunity to resettle in a third country. It is at this point that the need for global rules pertaining to the equitable sharing of people arises. Otherwise, the people concerned will inevitably take matters into their own hands.

The total number of annual resettlement places made available worldwide pursuant to a global regime must be adequate to ensure that all protection claimants can be offered a durable solution within a reasonable time. Otherwise, an incentive for irregular movement will remain. Already, several European countries are considering providing resettlement places as a way of lessening the impetus for irregular movement.²¹⁴ These efforts are a good start. However, in order for the availability of resettlement to have an impact on irregular movement, the total number of places available annually will have to be a great deal more than at present. The United Nations High Commissioner for Refugees' ambitious "dream for the future" is for every developed country to provide an annual resettlement quota of 0.1 percent of their existing population.²¹⁵ This quota is well within the absorption capacities of the countries concerned. It will also make resettlement a genuinely available solution for those who need it most.

²¹⁴ Gary Troeller, *UNHCR Resettlement: Evolution and Future Direction*, 14(1) INT'L J. REFUGEE L. 85, 85 (2002).

²¹⁵ MARES, *supra* note 21, at 242-43.

VIII. CONCLUSION

Achieving goal congruence is the greatest obstacle to be overcome in negotiating any cooperative regime. If the construction of a truly global regime is attempted, the problems of achieving goal congruence will be especially acute and probably insurmountable unless all participants are willing to focus on long-term objectives. The problem in practice is that the short-term pain of adjustment that may well be experienced by some Western countries will tend to figure much larger in political calculations than any long-term gain. It seems a safe prediction that the practical realization of the sort of responsibility-sharing regime optimistically outlined herein, is a long way off. However, the first step towards attaining the real thing lies in recognizing and rejecting all counterfeits, including that of the Pacific Solution.