

CHAPTER FOUR

FINDING AND ANALYSIS

A. An Overview of Refugee Settlement in Australia

Australia is a state built on immigration¹ with a proud record of successful settlement of refugees and immigrants over many decades.² Australia's immigration programme has two aspects such as, a non-humanitarian side for skilled, family migrants and a humanitarian side for refugees and others with humanitarian needs.

In addition Australia has a long history of accepting refugees, displaced persons and others fleeing persecution, beginning in the 1830s with German fleeing religious persecution in Russia and settling in South Australia. Nevertheless, Price (1990) identified 1938 as the key year in which Australia began to play a major global role in refugee resettlement when there was a substantial influx of Jews fleeing Nazi Germany. It was not until the following years of the World War II that involvement in refugee issues became a major element in Australian Government policy.³

Australia has been settling refugees for at least 170 years. The first easily identifiable group of refugees were Lutherans who began settling in

¹For a historical account of Australia's immigration regime for the last 200 years see the following texts by James Jupp: *Australian Retrospectives: Immigration* (Melbourne: Australia, 1991); "Immigrant Settlement Policy", in Gary P. Freeman and James Jupp (eds), *Nations of Immigrants: Australia, the United States, and International Migration* (Melbourne: Oxford University Press, 1992), pp. 130–144.

²E. Odhiambo-Abuya, 2004, "Refugee Status Determination in Australia: Breaking the Rules?", Kluwer Academic Publishers, Printed in the Netherlands.

³Graeme Hugo, ARC Australian Professorial Fellow *et al*, 2011, *Economic, Social and Civic Contributions of First and Second Generation Humanitarian Entrants*, Australian Government, p. 5.

South Australia in 1839 to escape restrictions on their right to worship within the state of Prussia. During the 19th century, other settlers included Hungarians, Italians and Poles leaving situations of religious and political persecution. After Federation, the new Australian nation continued to allow refugees to settle as unassisted migrants, as long as they met the restrictions imposed by the Immigration (Restriction) Act 1901, the cornerstone of the White Australia Policy.⁴

In the following three decades, small numbers of Russian, Greek, Bulgarian, Armenian, Assyrian and Jewish refugees were permitted to settle after proving they met Australia's migration criteria. Between 1933 and 1939, more than 7,000 Jews fleeing Nazi Germany were settled. In 1937, the Australian Jewish Welfare Society pioneered the first refugee settlement supporting services, with financial assistance from the Australian Government. This settlement program was cut short by the outbreak of the World War II.⁵

Transferring refugees or commonly called as resettlement, is the transfer of refugees from an asylum country to another State that has agreed to admit them and ultimately grant them permanent settlement. UNHCR is mandated by its Statute and the UN General Assembly Resolutions to undertake resettlement as one of the three durable solutions.⁶The other two

⁴Refugee Council, 2012, "History of Australia's Refugee Program", Refugee Council of Australia, available at: <http://www.refugeecouncil.org.au/getfacts/seekingsafety/refugee-humanitarian-program/history-australias-refugee-program/>, accessed on February 8th, 2017 at 11.32pm.

⁵*Ibid.*

⁶Johan Bavman, 2016, "Resettlement", UNHCR, available at: <http://www.unhcr.org/resettlement.html>, accessed on January 16th, 2017 at 10.16am.

durable solutions to the plight of refugees are local integration (in the country of refugee) and voluntary repatriation (return to one's home country). UNHCR will only consider resettlement if the other two options are not available.⁷

A resettlement is unique because it is the only durable solution that involves the relocation of refugees from an asylum country to a third country. There are 14.4 million refugees concern to UNHCR around the world, less than 1% (one percent) is submitted for resettlement.⁸ Australia's settlement services for refugees and migrants have evolved over the last 60 years from the provision of basic on-arrival accommodation and assistance, to more intensive support programs targeted at meeting the specific needs of humanitarian entrants.⁹

Australia's current settlement services comprise a range of programs such as accommodation and health services, and English language tuition and interpreting services. Over the last 10 years, the bulk of permanent migrants have been skilled and English-speaking people while settlement services have increasingly focussed on refugees and humanitarian entrants. Current trends in migration to Australia show a significant increase in the numbers of temporary migrants entering Australia. Some people eventually settle in Australia permanently and others may stay for anywhere from a few months

⁶Harriet Spinks, 2009, "Australia's Settlement Services for Migrants and Refugees", *Research Paper*, ISSN 1834-9854, Parliament of Australia.

⁷Elibritt Karlsen, 2016, "Refugee Resettlement to Australia: What Are the Facts?", Parliament of Australia, p. 2.

⁸John Bayman, 2016, *op. cit.*

⁹Harriet Spinks, 2009, *op. cit.*

to many years and then return home. Moreover, people are also divided into highly skilled people, with the imminent introduction of a seasonal migrant worker program and the rest people will be unskilled. A challenge for the future lies in considering how settlement and related services can meet the needs of this diverse group.¹⁰

Many refugees cannot go home because of continuous conflict, wars and persecution, while others also live in dangerous situations or have specific needs that cannot be addressed in the country where they have sought protection. In such circumstances, UNHCR helps resettle refugees to a third country.¹¹ Displacement of people by war, persecution or conflict and their resettlement in other countries is a major challenge faced by the world today. In 2008, UNHCR referred more than 121,000 refugees for resettlement in other countries. In that year, 65,548 refugees were resettled in 26 countries, 68% (sixty eight percent) went to the United States, and 12% (twelve percent) each resettled to Australia and Canada.¹²

In relevance, Australia has planned annual Humanitarian Program designed to respond to international refugee and humanitarian developments. The programme has two components, the onshore protection programme, which protect people who are already in Australia who are recognized as refugee under the 1951 Refugee Convention and the 1967 Protocol Related to the Status of Refugees (known as asylum seekers until their case are

¹⁰*Ibid*, p.1.

¹¹*Ibid*.

¹²James Forrest and Kerstin Hermes, 2012, "The Housing Resettlement Experience of Refugee Immigrants to Australia", *Journal of Refugee Studies*, Vol. 26, No. 2, 2012, Oxford University Press, p. 187.

determined), and the offshore resettlement programme, which offers resettlement through the UNHCR programme.¹³

In Australia, successful settlement and integration are the key objectives of the Refugee and Humanitarian Program. The Australian Federal Government Department of Immigration and Citizenship (DIAC) uses a variety of measures to assess settlement outcomes. These include economic participation (labour force outcomes, occupational status, sources of income, level of income and housing), social participation and well-being (English proficiency, satisfaction with life and Australian citizenship); and physical and mental well-being.¹⁴ The UNHCR International Handbook to Guide Reception and Integration similarly provides a definition of settlement based on integration, which is seen as a mutual, dynamic, multifaceted, and ongoing process.¹⁵

As the following table (Table 1.) indicates, the number of offshore refugee category visas granted since 1975 has varied greatly, the highest number being in the early 1980s under the Fraser Government when Australia granted 20,795 visas (mostly to Indochinese), and the lowest being 1,238 ten years later under the Hawke Government.¹⁶ From the year of 2000 onwards, the Government has slightly increased the annual quota of refugee visas to its

¹³Farida Fozdar and Lisa Hartley, 2013, “Refugee Resettlement in Australia what We Know and Need to Know”, *Refugee Survey Quarterly*, Vol. 32, No. 3, 2013, p. 3.

¹⁴*Ibid*, p. 24.

¹⁵UNHCR, 2002, “Refugee Resettlement: An International Handbook to Guide Reception and Integration”, Geneva, available at: <http://www.unhcr.org/protection/resettlement/4a2cfe336/refugee-resettlement-international-handbook-guide-reception-integration.html>, accessed on December 16th, 2016 at 9.04pm.

¹⁶The Hawke Government is the Federal Government of Australia from 11 March 1983 to 11 March 1996 and was formed by the Australian Labor Party.

current level of around 6,000 visas where it has remained for the last ten years (with one notable exception). The most dramatic increase was under the former Labor Government in 2012 when the number of offshore refugee visas granted doubled to over 12,000 in one year in response to the recommendation of the Expert Panel on Asylum Seekers.¹⁷

Table 1. Resettlement and Visas Granted in Australia.

Year	Refugee visas granted	Year	Refugee visas granted
1975-76	4,374	1996-97	3,334
1976-77	8,124	1997-98	4,010
1977-78	9,326	1998-99	3,998
1978-79	12,750	1999-00	3,802
1979-80	17,677	2000-01	3,997
1980-81	20,795	2001-02	4,160
1981-82	20,195	2002-03	4,376
1982-83	16,193	2003-04	4,134
1983-84	12,426	2004-05	5,511
1984-85	9,520	2005-06	6,022
1985-86	7,832	2006-07	6,003
1986-87	5,857	2007-08	6,004
1987-88	5,514	2008-09	6,499
1988-89	3,574	2009-10	6,003

¹⁷Expert Panel on Asylum Seekers 2012,” Report of the Expert Panel on Asylum Seekers, Canberra”, Archive website, p. 14.

1989-90	1,238	2010-11	5,998
1990-91	1,497	2011-12	6,004
1991-92	2,424	2012-13	12,012
1992-93	2,893	2013-14	6,501
1993-94	4,315	2014-15	6,002
1994-95	3,992	2015-16	6,000 (Planned)
1995-96	4,643		

Source: Immigration Department, Population flows: immigration aspects 2008–09, source data, chapter 4; 1975–1977 data provided by the Department to the Parliamentary Library in 2001; 2009–2014 data extracted from Immigration Department Annual Reports (various years); DIBP, ‘The Special Humanitarian Programme (SHP)’, Department of Immigration and Border Protection (DIBP) website.

B. The Reason of Australia to Transfer Asylum Seekers to Third Countries

In September 2012, Australian Government commenced transferring asylum seekers, who have arrived in Australia by boat, to Nauru for processing of their claims for asylum. The Australian Government has also announced its intention to commence transferring asylum seekers to Manus Island and Papua New Guinea shortly. These developments follow the release of the Expert Panel on Asylum Seekers report on 13 August 2013 which explained the passage of amendments to the Migration Act, the designations of Nauru and Papua New Guinea as ‘regional processing countries’, the adoption of Memoranda of Understanding between the governments of

Australia and Nauru and the governments of Australia and Papua New Guinea.¹⁸

In another resettlement, Australia resettled 9,399 refugees in 2015, fewer than the previous year. It was third overall but Australia fell from first to fourth per capita for the resettlement of refugees from their country of asylum, being passed by Canada, Norway and Liechtenstein. When the combined impact of refugee recognition and resettlement is considered, Australia contributed to 0.48% of the initial or further protection offered to refugees in 2015. By this measure, Australia was ranked 25th overall, 32nd on a per capita basis and 47th relative to National Gross Domestic Product (GDP).¹⁹

There has been long considerable debate regarding how Australia should handle asylum seekers, particularly those who attempt to enter Australian territory by boat without a visa, often via Indonesia and with the assistance of people smugglers.²⁰

The transfer of asylum seekers to third countries for the processing of their claims for protection raises a number of questions about whether, in doing so, Australia is complying with its international human rights obligations. As Australia's national human rights institution, Australian Human Rights Commission is mandated to monitor the Australian

¹⁸Australian Human Rights Commission, 2012, "Human Rights Issues Raised by the Transfer of Asylum Seekers to Third Countries", Australian Human Rights Commission, p. 3.

¹⁹UNHCR, 2016, Global Trends 2015.

²⁰Anonymous, 2016, "Refugee Law and Policy: Australia", Official blog from the Law Library of Congress, available at: <https://www.loc.gov/law/help/refugee-law/australia.php>, accessed on January 16th, 2017 at 11.21am.

Government's compliance with the obligations set out in the international human rights treaties to which Australia is a party. This paper provides an outline of the recent changes and an analysis of human rights issues raised by the transfer of asylum seekers to third countries.²¹

When discussing about the Refugee Convention, it does not explicitly authorize a transfer of a refugee or applicant for refugee status from one state party to another. Rather, authority for the legality of such transfers is assumed to be found in an omission in the text, namely, the lack of a right to be granted asylum. As it is well understood that the Refugee Convention prohibits a state from returning a person to a state in which he or she will be exposed to persecution (the obligation of non-refoulement in Article 33).²² It is often assumed by state parties that as long as Article 33 is not violated, the state is free to transfer a refugee to a third country.

Whilst Gillard acknowledged that the number of asylum seekers arriving by boat to Australia was 'very minor' and that at the current rate of arrival it would take about 20 years to fill the Melbourne Cricket Ground (MCG) with asylum seekers, she identified a number of reasons why the processing of asylum seekers in other countries was again considered necessary, namely:²³

²¹*Ibid.*

²²Article 33 of the Refugee Convention outlines the principle of non-refoulement. According to this principle, states parties must not forcibly expel or return (refouler) a refugee to a situation where their life or freedom may be threatened on account of their race, religion, nationality, membership of a particular social group or political opinion. The principle of non-refoulement has become part of customary international law and is considered to be binding on all states, even those which have not signed the Refugee Convention

²³Elibritt Karlsen, 2015, "Australia's Offshore Processing of Asylum Seekers in Nauru and PNG: A Quick Guide to the Statistics", Law and Bills Digest Section, 2015, ISSN 2203-5249, p. 1.

- a) To ensure that people who are smugglers have no product to sell and to remove the financial incentive for these smugglers to send boats to Australia;
- b) To ensure that those arriving by boat do not get an unfair advantage over others;
- c) To secure Australia's borders and create a fair and orderly migration;
- d) To prevent people embarking on a voyage across dangerous seas with the ever present risk of death;
- e) To ensure that everyone is subject to a consistent and fair assessment process;
- f) To improve the protection outcomes for refugees by establishing a framework for orderly migration within the region;
- g) To prevent the piling up of unauthorized arrivals in detention in Australia;
- h) To response to the increased numbers of unauthorized people movements in the region and around the world ; and
- i) To acknowledge that irregular migration is a global challenge that can only be tackled by nations working together.

For those people who cannot return because of continued conflict in their countries, wars or persecution, a resettlement in another country is one alternative. To aid this process, UNCHR cultural orientation, language and vocational training, as well as access to education and employment. Another alternative for those who are unable to return home is integration within the host community. This is often a complex process which places considerable

demands on both the individual and the receiving society. However, it also has benefits, allowing refugees to contribute socially and economically.²⁴

According to Naiker, the reasons for Australia, as a sending country, transferring the asylum seekers to other countries as resettlements process is because there are reasons that need to be considered by Australian government: to stop boat arrival (irregular maritime arrivals), to regularize the border of Australia, to stop people smuggling business model, to stop deaths at sea, to stop unlawful entry to Australia, biosecurity, etc.²⁵

As UNHCR said that voluntary repatriation may be one solution for refugees who have made the brave decision to return home. Together with the country of origin and international community, UNHCR tried to facilitate their choice through ‘go-and-see’ visits, education, legal aid, and family reunification. The efforts of UNHCR have helped hundreds of thousands of people to return home to countries like Angola and Somalia.²⁶

In 2014-2015, 69.9% of people were detained for unlawfully arriving by boat, 15.3% for overstaying their visa, 12.6% as a result of visa cancellation, 2.1% for unauthorized air arrival, and 0.1% for other reasons.²⁷

It must be underlined that one of the most important rights granted to refugees under the Refugee Convention is the prohibition against penalizing asylum

²⁴*Ibid.*

²⁵Interview with Madhu Naiker, an International Expert on Refugee in Australia, on January 7th, 2017 at 6.44am.

²⁶S. Rich, “Solutions”, UNHCR, available at: <http://www.unhcr.org/solutions.html>, accessed on January 16th, 2017 at 10.33am.

²⁷*Ibid.*

seekers based on the manner of their arrival to the country where they are seeking protection.²⁸

C. The Procedure of Australia to Transfer Asylum Seekers to the Third Countries based on Refugee Convention

Goodwin- Gill and McAdam argue that the return of refugee and asylum seekers to a third country is permitted by international law provided that ‘substantial evidence of admissibility’ (i. e., proof of entitlement to enter); with respect to ‘safe country’ notion must be substantive and procedural human rights guarantee’.²⁹

For UNHCR, such guarantees consist of: (1) no risk of persecution, refoulement or torture; (2) no actual risk to a person’s life; (3) prospect exists for a genuinely accessible and durable solution; (4) no risk of exposure to arbitrary explosion and deprivation of liberty, and must have an adequate and dignified means of subsistence; (5) family unity and integrity is preserved; (6) specific protection needs (such as arising age or gender) are recognized and respected).³⁰ In addition, the third country must have expressly agreed to admit the individual, comply with international refugee and human rights law

²⁸Fox Peter D, 2010, “International Asylum and Boat People: The Tampa Affair and Australia’s Pacific Solution”, *Maryland Journal of International Law*, Vol. 25/356, United State, University of Maryland School of Law, p.5.

²⁹G. S. Goodwin- Gill and J. McAdam, *The Refugee in International Law*, 399; Helena Lambert, 2012, “Safe Third Country” in the European Union: An Evolving Concept in International Law and Implications for the UK’, *Journal of Immigration, Asylum and Nationality Law*, p. 4.

³⁰E. Feller (UNHCR): UN doc. A/AC.96/SR.585, para.28 (2004), cited in G.S. Goodwin- Gill and J. McAdam, at 394; See also the Lisbon Expert Roundtable, as part of the UNHCR Global Consultation 2001, ‘Summary Conclusions on the Concept of “Effective Protection” in the Context of Secondary Movements of Refugees and Asylum Seekers’, 9-10 December 2002. Legomsky’s seven elements of effective protection in S. Legomsky, ‘Secondary Refugee Movements and the Return of Asylum Seekers to Third Countries: The Meaning of Effective Protection’, *International Journal of Refugee Law* 15 (2003), 567. EXCOM Conclusions Nos. 85 and 87.

in practice, grant access fair and efficient determination procedure, take into account any special vulnerabilities of the individual, respect the privacy of the individual and also family.³¹

Resettlement serves three equally important functions. First, it is a tool to provide international protection and meet specific needs of individual refugees whose life, liberty, safety, health or other fundamental rights are at risk in the country where they have sought refuge. Second, it is a durable solution for larger numbers or groups of refugees, alongside the other durable solutions of voluntary repatriation and local integration. Third, it can be a tangible expression of international solidarity and a responsibility sharing mechanism, allowing States to share each other's burdens, and reduce problems impacting the country of first asylum.³²

1. General Considerations on Applying the First Country of Asylum and Safe Third Country Concepts.

According to UNHCR, the 'first country of asylum' concept is to be applied in cases where a person has already, in a previous state, found international protection, that is once again accessible and effective for the individual concerned. Application of the concept requires an individual assessment of whether the refugee will be re-admitted to that country and granted a right of legal stay and be accorded standards of treatment

³¹Lisbon Expert Roundtable, 2002, "Summary Conclusions on the Concept of "Effective Protection" in the Context of Secondary Movements of Refugees and Asylum Seekers".

³²UNHCR, 2002, "Global Consultations on International Protection/Third Track: Strengthening and Expanding Resettlement Today: Dilemmas, Challenges and Opportunities", EC/GC/02/7, II A 5, available at: <http://www.unhcr.org/refworld/docid/3d62679e4.html>, accessed on January 2nd, 2017 at 10.09am; see UNHCR, 2016, "Chapter 2 The Evolution of Resettlement", UNHCR, p. 45.

commensurate with the 1951 Convention related to the Status of Refugees and its 1967 Protocol and international human rights standards, including protection from refoulement, as well as timely access to a durable solution, or not.³³

While, ‘safe third country concept’ is to be applied in cases where a person could, in a previous state, have applied for international protection, but has not done so, or where protection is sought but the status is not determined. Application of the concept requires an individual assessment of whether the previous state will re-admit the person; grant the person access to a fair and efficient procedure for determination of his or her protection needs; permit the person to remain; and accord the person standards of treatment commensurate with the 1951 Convention and international human rights standards, including protection from refoulement; or not.³⁴ A location where she or he is entitled to protect a right of legal stay and a timely durable solution are also required.³⁵

When discussing about whether the ‘safe country of origin’ and ‘safe third country’ requirements are being met, as provided in the Procedure Directive. According to the legal requirements set in Annex and

³³Department of International Protection (DIP), 2003, “Summary Conclusions on the Concept of "Effective Protection" in the Context of Secondary Movements of Refugees and Asylum-Seekers (Lisbon Expert Roundtable, 9-10 December 2002)”, UNHCR, p. 3.

³⁴UNHCR, 2013, “Legal Considerations on the Return of Asylum-Seekers and Refugees From Greece to Turkey as Part of the EU-Turkey Cooperation in Tackling the Migration Crisis Under the Safe Third Country and First Country of Asylum Concept”, UNHCR, p. 2.

³⁵Global Consultation on International Protection, 2001, “Asylum Processes (Fair and Efficient Asylum Procedures)”, UNHCR, available at: <http://www.refworld.org/docid/3b36f2fca.html>, accessed on December 28th, 2016 at 2.00am.

Art. 38 (1) of the Procedure Directive, there are some requirements must be considered either a safe country of origin or safe third country.

Table 2. Themes and associated legal requirements for the concept of ‘safe country’ identified in the Procedure Directive.

Themes	Safe Country of Origin (Annex 1 Procedures Directive)	Safe Third Country (Art. 38(1) Procedures Directive)
3.1 No Risk of Persecution	Generally and Consistently No Persecution	Life and Liberty are not Threatened on Account of Race, Religion, Nationality, Membership of a Particular Social Group or Political Opinion
3.2 No Risk of Serious Harm (Including Both torture/inhuman Treatment and Threat by Reason of Indiscriminate Violence Due To Conflict)	No Torture or Inhuman or Degrading Treatment or Punishment	No Risk of Serious Harm (Definition Art. 15 Qualification Directive)
	No Threat by Reason of Indiscriminate Violence In Situations of International or Internal Armed Conflict	No Risk of Serious Harm
3.3 Respect for the <i>Non-refoulement</i> Principle	Respect for the <i>Non-Refoulement</i> Principle	Respect for the <i>Non-Refoulement</i> Principle
3.4 Access to Asylum and Content of Protection Granted		Possibility to Request Refugee Status and, If Found to be a Refugee, to Receive Protection in Accordance with Geneva Convention
3.5 Protection Provided by Relevant National Law (and The Way It	Protection Provided by Relevant Laws and Regulations and The Manner They are Applied	

Is Implemented), Observance of International Human Rights Obligations and the General Political Situation	Observance of Rights and Freedom Laid Down in ECHR, ICCPR And UNCAT	
	Effective Remedies Against Violations of Those Rights and Freedoms	
	The (General) Legal Situation, The Application of The Law Within a Democratic System and The General Political Circumstances	

Source: Asylum Procedure Directive.

a) **The Concept of First Country of Asylum**

The safe country of origin concept was introduced in the Aliens Act in 2012. The Law of 19 January 2012 established an accelerated admissibility procedure similar to the procedure that was already taken place for European Union (EU) citizens and the procedure to determine the countries of origin that are considered to be safe.³⁶ According to this provision, countries can be considered safe if the rule of law in a democratic system and the general political circumstances allow to conclude that in a general and durable manner there is no persecution or real risk of serious harm, taking into consideration the laws and regulations and the legal practice in that country, the respect for the fundamental rights and freedoms of the European Court of Human Right (ECHR) and for the principle of non-

³⁶Article 57/6 Aliens Act; Belgian Refugee Council, “The Safe Country Concepts”, available at: <http://www.asylumineurope.org/reports/country/belgium/asylum-procedure/safe-country-concepts>, accessed on January 10th, 2017 at 1.56pm.

refoulement and the availability of an effective remedy against violations of these rights and principles.³⁷

According to Article 33 (1) and 33 (2) (b) of the APD, Member States may³⁸ consider an application for international protection as inadmissible if a country which is not a Member State is considered as a first country of asylum for the applicant, which is pursuant to Article 35 APD.³⁹

The concept of first country of asylum is defined in Article 26 of the APD.⁴⁰ A country can be considered to be a first country of asylum for a particular applicant for asylum if: (a) she/he has been recognized in that country as a refugee and she/he can still avail him/herself of that protection; or (b) she/he otherwise enjoys sufficient protection in that country, including benefiting from the principle of non-refoulement; provided that she/he will be re-admitted to that country. In applying the concept of first country of asylum to particular circumstances of an applicant for asylum, Member States may take into account of Article 27 (1).⁴¹

It should be noted that Member States are not required to apply

³⁷*Ibid.*

³⁸They are not, however, obliged to do so. This remains the case notwithstanding the Commission's recommendation in its communication of 10 February 2016 (COM(2016)85); UNHCR, 2016, "Legal considerations on the return of asylum-seekers and refugees from Greece to Turkey as part of the EU-Turkey Cooperation in Tackling the Migration Crisis under the safe third country and first country of asylum concept", UNHCR, p. 2.

³⁹*Ibid.*

⁴⁰Art. 26 states "A country can be considered to be a first country of asylum for particular applicant..".

⁴¹Anonymous, "The Concept of First Country of Asylum", available at: <http://www.refworld.org/cgi-bin/texis/vtx/rwmain/opendocpdf.pdf?reldoc=y&docid=4bab55da2>, accessed on January 10th, 2017 at 10.12am.

the concept of first country of asylum, as Article 26 is a permissive provision.⁴² However, in accordance with the APD, those Member States which apply the concept are not required to examine whether an applicant qualifies as a refugee or for subsidiary protection status, where a country which not a Member State is considered as a first country of asylum for the applicant pursuant to Article 26.⁴³ In other words, the Member States may consider such kinds of considerations or requirements.

UNHCR has noted that the terms of ‘sufficient protection’ in Article 26 (b) APD is not defined. The article explicitly states only the concept including the applicant should benefit from the principle of non-refoulement. However, people who are qualified under the 1951 Convention acquire more than the right of non-refoulement. Article 26 only includes a permissive clause stating that “Member States may take into account the Article 27 (1)” which sets out four principles to be satisfied in order to apply the safe third country concept.⁴⁴

UNHCR has cautioned that the terms of ‘sufficient protection’ may not represent an adequate safeguard or criterion when determining whether an applicant can be returned safely to a first

⁴²Article 26 of APD (Asylum Procedure Directive).

⁴³Article 25 of APD .

⁴⁴Art. 27 (1) APD stipulates that Member States must be satisfied that the applicant will be treated in accordance with the following principles in the third country concerned: “(a) life and liberty are not threatened on account of race, religion, nationality, membership of a particular social group or political opinion; (b) the principle of non-refoulement in accordance with the Geneva Convention is respected; (c) the prohibition of removal, in violation of the right to freedom from torture and cruel, inhuman or degrading treatment as laid down in international law, is respected; (d) the possibility exists to request refugee status and, if found to be a refugee, to receive protection in accordance with the Geneva Convention.”

country of asylum or not.⁴⁵ In UNHCR's view, the protection in third country should be effective and available in practice. Therefore, UNHCR recommends using the terms of 'effective protection' in national legislation and suggests the elaboration of explicit benchmarks in line with the standards outlined in the 1951 Convention and the Lisbon Conclusions on 'effective protection'.

Furthermore, the capacity of the third countries to provide the effective protection, in practice should be taken into consideration by Member States, particularly if the third countries already hosting large refugee populations. Countries where UNHCR is engaged in refugee status determination under its mandate should, in principle, not be considered as first countries of asylum. UNHCR often undertakes such functions because the state has no capacity to conduct status determination or to provide effective protection. Generally, resettlement of people which recognized need of international protection is required. Then, their return to such countries should not be envisaged.⁴⁶

b) The Concept of Safe Third Country of Asylum Seekers

The safe third country notion is far less relevant in the EU following the accession of twelve new Member States since 2004, as

⁴⁵Ro Brussels, 2004, "UNHCR Provisional Comments on the Proposal for a Council Directive on Minimum Standards on Procedures in Member States for Granting and Withdrawing Refugee Status", UNCHR, available at: <http://www.refworld.org/docid/42492b302.html>, accessed on January 10th, 2017 at 10.54am.

⁴⁶UNHCR, 2010, "Improving Asylum Procedures: Comparative Analysis and Recommendations for Law and Practice", UNCHR, p. 282.

the Dublin II Regulation supersedes the safe third country concept within the EU. Other States outside the EU (Iceland, Norway⁴⁷ and Switzerland⁴⁸) have been included in the Dublin II regime so that the safe third country concept is no longer relevant with regard to those countries. Beyond these borders, none of the remaining countries now at the periphery of the Union could legitimately be considered safe. As emerged during the research of the 12 Member States surveyed, only two of which countries that reportedly apply the safe third country concept in law and practice.⁴⁹The UK has applied the concept to Canada and the United States of America.⁵⁰ Only Spain seems to extend the use of the concept, in practice and on a case-by-case basis, to some Latin American and African States.⁵¹

⁴⁷Council Decision 2001/258/EC of 15 March 2001 concerning the conclusion of an Agreement between the European Community and the Republic of Iceland and the Kingdom of Norway concerning the criteria and mechanisms for establishing the State responsible for examining a request for asylum lodged in a Member State or Iceland or Norway, available at: <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:32001D0258:EN:HTML>, accessed on February 15th, 2017 at 5.11pm.

⁴⁸Council Decision 2008/147/EC of 28 January 2008 on the conclusion on behalf of the European Community of the Agreement between the European Community and the Swiss Confederation concerning the criteria and mechanisms for establishing the State responsible for examining a request for asylum lodged in a Member State or in Switzerland, taken from <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2008:053:0003:0004:EN:PDE>, downloaded on February 15th, 2017 at 5.14pm.

⁴⁹Spain and the UK. In the Czech Republic, national law provides for the concept and there is an internal list of safe third countries that was last updated in May 2007 but not made public. Reportedly the list has not been applied since 2006. In the Netherlands, there is no available record of the application of the concept, nor the countries to which the concept has been applied, and UNHCR found no evidence of the application of the concept in its audit of case files and decisions.

⁵⁰In the UK, the Asylum Procedures Instruction on Safe Third Countries (dated Feb 2007, rebranded December 2008) gives United States of America, Canada and Switzerland as examples of countries to which returns have taken place under Part 5 of Schedule 3. Information on countries considered safe in 2008 is not available.

⁵¹Although the safe third country concept is reportedly never applied as the sole ground for inadmissibility or rejection of an application.

As said by Naiker, that according to Article 33(1) and (2) (c) of the APD, Member States may consider an application for international protection as inadmissible if a country which is not a Member State is considered as a safe third country for the applicant, pursuant to Article 38 APD.⁵² Moreover, according to the APD, a third country can only be designated as a safe third country if it fulfills four conditions related to safety and asylum practices in the third country as explained below.⁵³

- a. Life and liberty are not threatened on account of race, religion, nationality, membership of a particular social group or political opinion;
- b. The principle of non-refoulement in accordance with the Geneva Convention is respected;
- c. The prohibition of removal, in violation of the right to freedom from torture and cruel, inhuman or degrading treatment as laid down in international law, is respected; and
- d. The possibility exists to request refugee status and if it is founded to be a refugee, so does it exist to receive protection in accordance with the Geneva Convention.

If a Member State nevertheless wishes to rely on the safe third country concept, UNHCR considers that certain conditions should be

⁵²UNHCR, 2016, *Legal Considerations on the Return of Asylum-Seekers and Refugees from Greece to Turkey as Part of the EU-Turkey Cooperation in Tackling the Migration Crisis Under the Safe Third Country and First Country of Asylum Concept*, UNHCR, p. 5.

⁵³Article 27 (1) APD.

met to ensure that the third country is safe, i.e. that it is able and willing to determine needs for international protection and to provide effective protection, including:

- a) The applicant should be protected against refoulement and be treated in accordance with accepted international standards in the third country. As well as, safety should be ensured in practice, and not just under formal obligations that it may have assumed.⁵⁴
- b) The applicant should have a genuine connection or close links with the third country. In UNHCR's view, the mere fact of having had the opportunity to seek protection or having transited through a country which does not represent a meaningful link.⁵⁵
- c) While the Directive foresees that national legislation shall permit the applicant to challenge the presumption on the ground that she/he would be subjected to torture, cruel, inhuman or degrading treatment or punishment. It does not ensure the possibility to rebut the presumption on the basis of a fear of persecution on the 1951 Convention grounds, and other individual risks which would found an entitlement to protection such as, for instance, the fact that the third state would apply more restrictive criteria in determining the claimant's status than the State where the application has been

⁵⁴This partially reflected by Art. 27 (1) (a), (b) and (c) APD.

⁵⁵UNHCR, 2003, "Aide Mémoire: Directive on Minimum Standards on Procedures on Granting and Withdrawing Refugee Status", UNHCR, available at: <http://www.unhcr.org/refworld/docid/402a2d6e4.html>, accessed on January 16th, 2017 at 1.11pm.

presented⁵⁶ or the fact that the third state will not assess whether there is a serious and individual threat to a civilian's life or person by reason of indiscriminate violence in situations of international or internal armed conflict.⁵⁷

Moreover, the APD does not explicitly permit the applicant to challenge the concept application on the ground that its criteria stated in Article 27 (2) (a)⁵⁸, APD are not fulfilled and it would not be reasonable for him/her to go to the third country.

a. Guidance Note on Bilateral and/or Multilateral Transfer Arrangements of Asylum Seekers under UNHCR

UNHCR's position on bilateral and multilateral transfer arrangements in relation to asylum-seekers for the purposes of asylum processing remains relevant.⁵⁹ Asylum-seekers should ordinarily have their claims processed and benefit from protection in the territory of the State from which they claim protection, or which otherwise has jurisdiction over them. The primary responsibility for providing protection rests with the State from which asylum is sought.⁶⁰

⁵⁶European Court of Human Rights (ECHR), 2000, "Council of Europe: European Court of Human Rights", available at: <http://www.unhcr.org/refworld/docid/3ae6b6dfc.html> accessed on January 16th, 2017 at 1.16pm.

⁵⁷This is a ground for qualification for subsidiary protection status in accordance with Article 15 (c) Qualification Directive.

⁵⁸ Art. 27 (2) (a) APD stated that, given the nature of the connection, it must be reasonable for the applicant to go that third country.

⁵⁹UNHCR, 2013, "Guidance Note on bilateral and/or multilateral transfer arrangements of asylum-seekers ('Guidance Note on transfer arrangements')", UNHCR, available at: <http://www.refworld.org/docid/51af82794.html>, accessed on January 18th, 2017 at 8.34pm.

⁶⁰*Ibid.*

The legality and appropriateness of any bilateral/multilateral transfer arrangement need to be assessed on a case-by-case basis, subjected to its particular modalities and legal provisions. However, as UNHCR has stated previously, the assessment of a proposed arrangement should be guided by the following principles⁶¹:

- a) Although there is no obligation for asylum-seekers to seek asylum at the first effective opportunity nor an unfettered right to choose one's country of asylum. The intentions of an asylum-seeker ought to be taken into account to the possible extent.
- b) It is generally recognized that a State has jurisdiction, and consequently is bounded by relevant international refugee and human rights law obligations if it has *de jure* and/or effective *de facto* control over a territory or over people. This includes situations where a State exercises jurisdiction outside its territory, including either at sea or on another State's territory.
- c) In principle, States involved in bilateral or multilateral transfer arrangements should be parties to the 1951 Convention relating to the Status of Refugees (1951 Refugee Convention) and/or its 1967 Protocol, or otherwise parties to relevant refugee and human rights instruments. While being parties to such treaties is an important indicator, the actual practice of States and their adherence to treaty obligations and standards must be monitored by other States parties

⁶¹UNHCR, 2016, "Position Paper Bilateral and/or Multilateral Arrangements for Processing Claims for International Protection and Finding Durable Solutions for Refugees", UNHCR, p. 2.

to the arrangement, including those seeking to transfer asylum-seekers for the purpose of undergoing processing.

- d) Such arrangements should contribute to the enhancement of overall protection space in the transferring State, receiving State and/or region as a whole, and enhance responsibility sharing.
- e) An arrangement among States for the transfer of asylum-seekers is best governed by a legally binding instrument, challengeable and enforceable in a court of law by the affected asylum seekers. This arrangement would need to clearly stipulate the rights and obligations of each State and the rights and duties of asylum-seekers and refugees.

b. Article 33 of the Refugee Convention as the Safe Guards

Even if there is no risk that a refugee will suffer persecution or other human rights violations in a third state, there are still many important issues which must be considered by the sending state in order to ensure that there is no risk of indirect refoulement. It is well accepted that Article 33 applies to indirect refoulement as well as direct refoulement; that is, just as a state is prohibited from returning a refugee directly to a state in which he or she will be exposed to persecution, a state cannot return or transfer a refugee to a third state where it is foreseeable that the receiving state will in turn send the

refugee back to a country of persecution.⁶² There are some factors that the sending countries must consider in assessing whether indirect refoulement is foreseeable or not, namely:

First, the sending state validated be satisfied that the third (receiving) state has an adjudication procedure in place to assess refugee status. While the Refugee Convention does not directly impose any procedural requirements on state parties, it is well accepted that if a state is to avoid violation of a non refoulement obligation such as said in Article 33 that it must institute an adequate system of status determination to enable it ascertaining to whom it must protect people from refoulement.⁶³

Second, the third (receiving) state must guarantee an access to that system for refugees in question; thus, for example, the sending state must ensure that refugees are not barred from the system by procedural rules or other impediments. The adequacy of any refugee status determination system is irrelevant if an applicant transferred

⁶²See for example, *R. v. Secretary of State for the Home Department, ex parte Bugdaycay* [1987] AC 514 per Lord Bridge of Harwich at 532D; *R. v. Secretary of State for the Home Department, ex parte Yogathas* [2002] 4 All ER 800. This was also accepted by all parties in the Canadian litigation: as Justice Phelan noted this is consistent with the Suresh decision of the Canadian Supreme Court; see *Canadian Council of Refugees v. R.*, supra note 4 at para. 112. This was also explicitly accepted by Evans J.A. in the Federal Court of Appeal: see *R. v. Canadian Council for Refugees Appeal Decision*, supra note 14 at para. 123; see Michelle Foster, “Responsibility Sharing or Shifting? “Safe” Third Countries and International Law”, Volume 25, No 2, p. 69.

⁶³Gerald P. Heckman, 2008, “Canada’s Refugee Status Determination System and the International Norm of Independence”, volume 25, No. 2, 2008, p. 79; Michelle Foster, “Responsibility Sharing or Shifting? “Safe” Third Countries and International Law” Volume 25, No. 2, p. 70.

under a “protection elsewhere” scheme will not have access to that process on transfer.⁶⁴

Third, the sending state must be satisfied that the receiving state interprets the Refugee Convention in a manner that respects the “true and autonomous meaning” of the definition in Article 1 of the Convention.⁶⁵ In other words, if a person is likely to be recognized as a refugee in the sending state but, due to differences in interpretation he/she is unlikely to be recognized in the state to which transfer, it is being considered that the sending state is prohibited from transferring the applicant to the third state. While minor differences will be permitted, if the differences are “significant,” meaning that they will result in different treatment, then a state may not transfer a refugee to a third state.⁶⁶

2. Transfer of Asylum Seekers to Third Countries in Australia

On July 2011, the Government of Australia and Malaysia enter into agreement concerning on the transfer and resettlements of asylum seekers and refugees between both countries. The agreement was first announced on 7 May 2011 when Prime Minister Julia Gillard released a joint statement with Prime Minister of Malaysia stating that both countries would enter into a bilateral arrangement concerning the transfer of asylum seekers and refugees. The signing of the final agreement follows months of

⁶⁴*Ibid*, pp. 70-71.

⁶⁵*Ibid*.

⁶⁶R. (Yogathas) v. Secretary of State for the Home Department, 2003, 1 A.C. 920 at para. 9 [Yogathas]; Michelle Foster, “Responsibility Sharing or Shifting? “Safe” Third Countries and International Law” Volume 25, No. 2, p. 71.

negotiations between those countries and involves the International Organization for Migration (IOM) and office of the United Nations High Commissioner for Human Rights (UNHCR), both of which will be involved in the operation of the arrangement.⁶⁷

Under the agreement, Malaysia will accept the transfer of asylum seekers up to 800 people from Australia. In return, Australia will resettle 4000 recognised refugees from Malaysia over four years. The agreement will be applied to asylum seekers who have travelled, or been intercepted by Australian authorities while attempting to travel irregularly to Australia by sea after the date of signing. Notably, the agreement provides a significant level of discretion by both Governments in determining who will be subjected to transfer. Those people who are determined to be transferred by Australian Government following a pre-transfer assessment to ensure fitness and suitability to the transfer and to whom Malaysian government provides consent and approval for the transfer.⁶⁸

Furthermore, there is also regional arrangement between Australia and PNG. This Arrangement outlines further practical measures Australia and PNG will pursue together to combat people smuggling. It builds on the mutually agreed principles governing cooperation which set out in the Joint Partnership Declaration signed in Port Moresby in May 2013, notes

⁶⁷Harriet Spinks, 2011, "Australia-Malaysia Asylum Seeker Transfer Agreement", Parliament of Australia, available at: http://www.aph.gov.au/About_Parliament/Parliamentary_Departments/Parliamentary_Library/FlagPost/2011/July/Australia-Malaysia_asylum_seeker_transfer_agreement, accessed on 4th February, 2017 at 10.35am.

⁶⁸*Ibid.*

that actually Australia and PNG have a common interest in addressing regional and also global challenges, in collaboration with the wider region, including other countries in the South Pacific. The cooperation outlined in this arrangement underlines about the strategic and enduring nature of the bilateral relationship, and the commitment of both governments to ensure that the relationship remains relevant to contemporary challenges.⁶⁹

Picture 1.

Kevin Rudd⁷⁰ and Peter O’Neill⁷¹ sign the agreement.



Source: The Drum, 2013, “Regional Settlement Arrangement with PNG”, Australia.

The statement of Australian Prime Minister Kevin Rudd during the press conference with PNG Prime Minister Peter O’Neill, said that if there any asylum seekers who arrived in Australia by boat will have no chance of being settled in Australia as refugees. He continued:

⁶⁹The Drum, 2013, “Regional Settlement Arrangement with PNG”, Australia.

⁷⁰Kevin Michael Rudd is an Australian former politician who was twice Prime Minister of Australia, from 2007 to 2010 and again in 2013.

⁷¹Peter Charles Paire O'Neill, is the Prime Minister of Papua New Guinea. He is the leader of the People's National Congress and represents the constituency of Ialibu-Pangia. He was sworn in on 4 August 2012 as the ninth Prime Minister of Papua New Guinea.

Asylum seekers taken to Christmas Island will be sent to Manus and elsewhere in Papua New Guinea for assessment of their refugee status. If they are found to be genuine refugees they will be resettled in Papua New Guinea... If they are found not to be genuine refugees they may be repatriated to their country of origin or be sent to a safe third country other than Australia. These arrangements are contained within the Regional Resettlement Arrangement signed by myself and the Prime Minister of Papua New Guinea just now.

3. Refugees and Asylum Seekers Offshore Processing Policies in Australia

Offshore processing (referred to Australian Government as “regional processing”) is the term used to describe the arrangements by which Australia sends people seeking asylum who arrive by boat to either Nauru or Manus Island in PNG, where their refugee claims are determined. Australia is the only country in the world that uses other countries to process refugee claims. Offshore processing is justified by the Australian Government as “breaking the people smuggler’s business model” by removing the financial incentive to send boats to Australia and ensuring that those who arrive by boat do not gain an “unfair advantage” over others.⁷²

a. Julia Gillard Labor Government (2010-2013)

In June 2010 Julia Gillard replaced Kevin Rudd as the leader of

⁷²Refugee Council of Australia, 2014, “Australia’s Offshore Processing Regime”, Australia Government.

the Labor party, and as the Prime Minister of Australia.⁷³ The Gillard Government subsequently held discussions with a number of countries including East Timor, PNG, and Malaysia. On 25 July 2011, Australian Government signed an asylum seeker transfer agreement with Malaysian Government. In addition, Australian Government also signed a Memorandum of Understanding (MOU) with PNG Government on the possibility of transferring and assessment of certain asylum seekers to an offshore processing centre in Manus Province in August 2011.⁷⁴

Since its announcement, the agreement has attracted criticism from several quarters, including the Opposition, the Greens, and refugee and human rights advocates. The primary criticism has concerned on human rights standards and treatment of refugees and asylum seekers in Malaysia, which are not a signatory to the Refugees Convention.⁷⁵

In its country operation profile for Malaysia, UNHCR states that asylum seekers and refugees are vulnerable to be arrested for immigration offences and may be subjected to detention, prosecution, whipping and deportation. In June 2010, Amnesty International released a report chronicling human rights abuses suffered by refugees and asylum seekers in Malaysia, including the lack of work rights, and

⁷³The Decision of High Court of Australia, 2010, “Plaintiff M61/2010E v Commonwealth of Australia and Ors; Plaintiff M69 of 2010 v Commonwealth of Australia and Ors, [2010] HCA 41”, taken from <http://www.hcourt.gov.au/assets/publications/judgment-summaries/2010/hca41-2010-11-11.pdf>, downloaded on February 4th, 2017 at 11.38am.

⁷⁴C Bowen (Minister for Immigration and Citizenship), Australia and Papua New Guinea sign MOU, media release, available at: <http://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;query=Id%3A%22media%2Fpressrel%2F1115937%22>, accessed on February 4th, 2017 at 11.44am.

⁷⁵Harriet Spinks, 2011, *op. cit.*

threat of possible arrest, caning, detention and deportation.⁷⁶

On 31 August 2011, the High Court found that Immigration Minister's declaration of Malaysia as a country in which asylum seekers could be taken for processing was invalid under the Migration Act since Malaysia was not a party to the 1951 Refugees Convention and did not offer protection to, nor process, asylum seekers.⁷⁷ Although their arrangement remained the Gillard Government's policy preference, without the support of the Coalition and the Greens for legislative amendment it was not possible to pursue this option.⁷⁸

b. Second Rudd Government (June - September 2013)

On 7 September 2013, Australian federal election resulted in a government change with Liberal Party leading a new coalition government headed by Prime Minister Tony Abbott.

Under the Regional Resettlement Arrangement, existing asylum seeker populations on Manus Island and Nauru who would not be to third country resettlement would be moved to Australia to have their claims processed there. All new arrivals by boat would be transferred to Papua New Guinea and Nauru which women and families with children are transferred to Nauru. Those people with successful refugee claims

⁷⁶*Ibid.*

⁷⁷The Decision of High Court of Australia, 2011, "Plaintiff M70/2011 v Minister for Immigration and Citizenship; Plaintiff M106 of 2011 v Minister for Immigration and Citizenship (2011) 244 CLR 144, [2011] HCA 32", available at <http://www.austlii.edu.au/au/cases/cth/HCA/2011/32.html> accessed on February 4th, 2017 at 5pm.

⁷⁸J Gillard (Prime Minister) and C Bowen (Minister for Immigration and Citizenship), Joint press conference, transcript, taken from http://parlinfo.aph.gov.au/parlInfo/download/media/pressrel/2280021/upload_binary/2280021.pdf;file_Type=application%2Fpdf#search=%22media/pressrel/2280021%22, downloaded on February 4th, 2017 at 11.54am.

would not be settled in Australia, but instead in Nauru or Papua New Guinea respectively, or possibly a third country. However, Nauruan authorities later denied the claim that refugees would be permanently resettled in Nauru.⁷⁹

c. Tony Abbot Coalition Government (September 2013 – 2015)

Federal election in September 2013 resulted in a government change with Liberal Party leading a coalition government headed by Prime Minister Tony Abbott. One of Mr. Abbott's key election promises was to "stop the boats".⁸⁰

Moreover, Abbott government's Operation Sovereign Borders policy appeared to stop irregular maritime who arrived in Australia. The new Government also reintroduced Temporary Protection Visas on 18 October 2013 for refugees which were already in Australia, as one element of their-policies to stop arrival of asylum seeker boats. In the first six months of 2013 (under Labor), 13.108 people arrived by boat, during the first half of 2014 (under the Abbott Coalition Government) there was no boat arrived in Australia.

⁷⁹Daniel Flitton, 2013, "Nauru Denies Rudd Claim Refugees Will Be Resettled on Island," The Sydney Morning Herald, available at: <http://www.smh.com.au/federal-politics/federal-election-2013/nauru-denies-rudd-claim-refugees-will-be-resettled-on-island-20130804-2r7q5.html>, accessed on February 4th, 2017 at 3.17pm.

⁸⁰Amnesty International Publications, 2013, "Human Rights Violations at Australia's Asylum Seekers Processing Centre on Manus Island, Papua New Guinea", International Secretariat Peter Benenson House, p. 16.

On 4 December 2013, in response to the Senate disallowance of Temporary Protection Visas, Minister Morrison⁸¹ announced that the capping of onshore protection visas at 1,650 places for the financial year. This is equal to the number that had already been issued meaning that no further protection visas would be issued until July 2014. The Minister stated that this step fulfilled the Government's commitment that no asylum seekers who had arrived in Australia by boat would receive a protection visa. At the time of writing, the cap extended to all asylum seekers, including those who arrived by plane. The Minister had indicated that he may might have further announcements in relation to plane arrivals.⁸²

d. Malcolm Turnbull Government' (2015 - Current)

As explain by Naiker, Turnbull is continuing policy from previous government, i.e. Abbot and Gillard. Both sides of government see the third country as a solution.⁸³ Asylum seekers who attempt to reach Australia by boat will never be allowed to enter the country, even if they are genuine refugees and seek to come as tourists decades later, under legislation to be introduced by Immigration Minister Peter Dutton,⁸⁴ when Parliament returns. The lifetime ban has been applied to all adults detained at the Manus Island or Nauru detention centres since

⁸¹Scott Morrison (born 13 May 1968) is an Australian politician. He has been a Liberal Party member of the Australian House of Representatives representing the Division of Cook in New South Wales since the 2007 federal election.

⁸²Amnesty International Publications, 2013, *loc. cit.*

⁸³Interview with Madhu Naiker, an International Expert of Refugee in Australia, on February 7th, 2017 at 4:59am.

⁸⁴ The Hon Peter Dutton MP as the Minister for Immigration and Border Protection.

July 19, 2013 - including to those people who have chosen to return home. Children who were brought by their parents or unaccompanied would be exempted.⁸⁵

According to Turnbull, the new laws will prohibit those people who attempt to reach Australia by boat from making a visa application in the future. That means even if they make a life in whatever country that finally agrees to host them, there are no business trips or holidays to Australia from then on.⁸⁶

Picture 2.

Prime Minister Malcolm Turnbull and Immigration Minister Peter Dutton.



Source: Alex Ellinghausen, 2016, “Asylum Seekers Who Come by Boat Banned for Life under New Laws”, available at: <http://www.smh.com.au/federal-politics/political-news/asylum-seekers-who-come-by-boat-banned-for-life-under-new-laws-20161029-gsdvf7.html>, accessed on February 6th, 2017 at 9.50pm.

⁸⁵Alex Ellinghausen, 2016, “Asylum Seekers Who Come by Boat Banned for Life Under New Laws”, available at: <http://www.smh.com.au/federal-politics/political-news/asylum-seekers-who-come-by-boat-banned-for-life-under-new-laws-20161029-gsdvf7.html>, accessed on February 6th, 2017 at 9.50pm.

⁸⁶Max Chalmers, 2016, “No Moral Compass: Desperate Malcolm Turnbull And A Spite-Filled Asylum Seeker Policy”, available at: <https://newmatilda.com/2016/11/02/no-moral-compass-desperate-malcolm-turnbull-and-a-spite-filled-asylum-seeker-policy/>, accessed on February 9th, 2017 at 12.55am.

Concerns have also been raised the ban that may contravene article 31 of the international refugee convention, which states that signatory nations shall not penalise refugees for illegal entry when they have come directly from a territory where their life or freedom is threatened.⁸⁷

4. Transfer of Asylum Seeker and Responsibility to the Safe Third Country

The adoption and implementation of protection elsewhere policies are now so well entrenched in state practice, and ostensibly approved by the UNHCR, that one may assume it is futile to consider whether such policies are permitted at international law.⁸⁸

The action of transferring asylum seekers is known as the transfer of responsibility to a safe third country. The Refugee Convention does not explicitly authorize a transfer of a refugee or applicant for refugee status from one state party to another. Rather, authority for the legality of such transfers is assumed to be found in an omission in the text, namely, the lack of a right to be granted asylum. As is well understood, the Refugee Convention prohibits a state from returning a person to a state in which he or she will be exposed to persecution (the obligation of non-refoulement in Article 33). It is thus often assumed by state parties that as long as Article

⁸⁷Staff writers, 2016, "Turnbull to Propose Law that Bans Boat Asylum Seekers from Australia Permanently", News Corp Australia Network, available at: <http://www.news.com.au/national/turnbull-to-propose-law-that-bans-boat-asylum-seekers-from-australia-permanently/news-story/793919195011e35c15471918b007c8a1>, accessed on February 6th, 2017 at 9.59pm.

⁸⁸Michelle Foster, *op. cit.*, p. 65.

33 is not violated, the state is free to transfer a refugee to a third state.⁸⁹ It would be problematic to transfer the responsibility.

Discussing the concept of safe third country it does not violate the 1951 Refugee Convention letter unless the sending country transfers asylum seekers to a country where they will face the persecution. Problems emerge when states started to deviate from these established practices. This suggests that they felt under no legal obligation to examine in their territory the applications lodged there.⁹⁰

The idea of the transfer of responsibility to a safe third country is a procedural mechanism to send asylum seekers to other countries which are considered to have responsibility for asylum seekers, so that the sending country (the transferring state) can avoid the responsibility for assessing the petition seekers asylum, because the recipient countries (the receiving state) are considered more feasible.⁹¹

In the international law, the safe third country concept is designed to be applied to asylum seekers or refugees who have existing protection in a third country to which they can return. In short, the safe third country is generally a country where an asylum seeker or refugee has a right of re-entry, and residence (including temporary) and they will not be refouled or sent back to a country in which they have a well-founded fear of persecution or where their life or freedom are threatened.⁹²

⁸⁹*Ibid*, p. 66.

⁹⁰*Ibid*.

⁹¹*Op, cit*, p. 15.

⁹²*Ibid*, p. 6.

In the case of resettlement agreements with the Governments of Papua New Guinea and Malaysia regarding transfer of asylum seekers to the third country is actually not violating the Refugee Convention and International Law. But, since the fact that international law prohibits Australia to repatriate or send back the asylum seekers whom seeking asylum in Australian's territory, is considered a breach to the international law. Australian's government assumed that they deserve to conduct a transfer of responsibility to measure the asylum request in the safe third country for asylum seekers. Even though, the condition of the third country (PNG and Malaysia) is not really safe for asylum seekers.

Even if there is no obligation under international law to grant asylum to refugees, states are still bounded by the principle of non-refoulement as defined in article 33 of the 1951 Convention. This principles provides that no refugee shall be returned to any country where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion. This principle is now generally considered to be a part of customary international law.⁹³ It must be noted that the principle is not limited to those formally recognised as refugees.⁹⁴ In other words, asylum-seekers should not be returned to any country where they would face persecution and they benefit from such a prohibition until they are declared that they

⁹³Sir Elihu Lauterpacht and D. Bethlehem, 2003, "The Scope and Content of the Principle of Non Refoulement: Opinion", in E. Feller. V. Trk and F. Nicholson (eds.), "Refugee protection in International Law: UNHCR's Global Consultations on International Protection", Cambridge University Press, pp. 87-177.

⁹⁴*Ibid*, pp. 116-118.

are not going to be refugees.⁹⁵ It is clearly shown that Australia repatriate or turning back of asylum seekers is already infringed the international law.

a. The Accountability of Australia as the Transferring State

Debates about which states should provide refugee protection and how they should do so are not new. Nevertheless, they have taken on a new dimension over the last few years as states are exploring to elaborate proposals to “manage” refugee movements and/or “improve” refugee protection.⁹⁶

There is a strong argument that once a refugee has acquired rights in the sending state, the sending state must ensure that those rights are respected in the receiving state⁹⁷ and that they will not be seriously harmed in the process.⁹⁸

Even if there is no risk that a refugee will suffer persecution or other human rights violations in a third state, there are still many important issues which must be considered by the sending state in order to ensure that there is no risk of indirect refoulement. It is well accepted that Article 33 applies to indirect refoulement as well as direct refoulement; that is, just as a state is prohibited from returning a refugee directly to a state in which he or she will be exposed to persecution, a

⁹⁵Catherine Phuong, “Identifying States’ Responsibilities towards Refugees and Asylum Seekers”, p. 2, taken from <http://www.esil-sedi.eu/sites/default/files/Phuong.PDF>, downloaded on February 5th, 2017 at 6.47pm.

⁹⁶*Ibid.*

⁹⁷Michigan Guidelines, *supra* note 1 at para. 8.

⁹⁸Interview with Madhu Naiker, an International Expert of Refugee in Australia, on February 7th, 2017 at 4.59am.

state cannot return or transfer a refugee to a third state where it is foreseeable that the receiving state will in turn send the refugee back to a country of persecution.⁹⁹ There are also some factors that must be considered by a sending country whether indirect refoulement is foreseeable.

First, the sending state must verify that the third (receiving) state has an adjudication procedure in place to assess refugee status. While the Refugee Convention does not directly impose any procedural requirements on state parties, it is well accepted that if a state is to avoid violation of a non-refoulement obligation such as explained in Article 33, it must institute an adequate system of status determination to enable it to ascertain to whom it must protect people from refoulement.¹⁰⁰

Second, the third (receiving) state must guarantee access to which is a system for refugees in question; thus, for example, the sending state must ensure that refugees are not barred from the system by procedural rules or other impediments. The adequacy of any refugee status determination system is irrelevant if an applicant is transferred under a “protection elsewhere” scheme that will not have access to that

⁹⁹For example, *R. v. Secretary of State for the Home Department, ex parte Bugdaycay* [1987] AC 514 per Lord Bridge of Harwich at 532D; *R. v. Secretary of State for the Home Department, ex parte Yogathas* [2002] 4 All ER 800. This was also accepted by all parties in the Canadian litigation: as Justice Phelan noted this is consistent with the Suresh decision of the Canadian Supreme Court; see *Canadian Council of Refugees v. R.*, supra note 4 at para. 112. This was also explicitly accepted by Evans J.A. in the Federal Court of Appeal: see *R. v. Canadian Council for Refugees Appeal Decision*, supra note 14 at para. 123.

¹⁰⁰Michelle Foster, *op. cit.*, p. 70.

process on transfer.¹⁰¹

Third, the sending state must be satisfied which means that the receiving state interprets Refugee Convention in a manner that respects the “true and autonomous meaning” of the definition in Article 1 of the Convention.¹⁰² In other words, if a person is likely to be recognized as a refugee in the sending state but due to differences in interpretation, he/she is unlikely to be recognized in the state to which he/she is transferred to, it is being considered that the sending state is prohibited from transferring the applicant to the third state.¹⁰³

b. The Accountability of Receiving Countries

1) Papua New Guinea

The Commission acknowledges that Papua New Guinea is a signatory to the Refugee Convention.¹⁰⁴ Based on UNHCR’s first-hand experience in PNG over for 30 years, it expressed a concern about high levels of violent crime in there which is often directed to foreigners, and it noted that asylum seekers and refugees were especially vulnerable to xenophobia and racism among the local population. While PNG has a Migration Act, it does not contain

¹⁰¹This has been noted as an issue of concern recently by the European Parliament in the context of the Dublin system: “whereas there is evidence that some Member States do not guarantee effective access to a procedure for determining refugee status”: supra note 5 at para. D.

¹⁰²R. (ex parte Adan) v. Secretary of State for the Home Department [2001] 2 A.C. 477; (2001) 2 W.L.R. 143 at 154 (per Lord Steyn) [Adan].

¹⁰³Michelle Foster, *op. cit.*, p. 71.

¹⁰⁴Australian Human Right Commission, 2011, “Inquiry into Australia’s Agreement with Malaysia in Relation to Asylum Seekers”, Sydney, p. 20, taken from, http://www.humanrights.gov.au/sites/default/files/content/legal/submissions/2011/20110914_asylum_seekers.pdf, downloaded on February 8th, 2017 at 11.53pm.

any procedural or substantive guidance about how refugee status determination should be undertaken.¹⁰⁵

Picture 3.
The condition of refugees in PNG.



Source: Louise Evans, 2015, “The Secrecy Surrounding Australia's Asylum Camps”, Sydney, Australia, available at: <http://www.bbc.com/news/world-australia-31827074>, accessed on February 6th, 2017 at 8.53pm.

Australia's policy of detaining asylum seekers in offshore facilities, for months, even years, has attracted strong criticism from bodies such as the United Nations. But government secrecy surrounding the operation of these isolated centres means many Australians know little about what life is like for those detained inside.

When it refers to the guidelines within Guidance Note, PNG is known as the third country which means that the state has accepted asylum seekers from Australia and they required to

¹⁰⁵Nations High Commissioner for Refugees, 2013, “UNHCR Monitoring Visit to Manus Island, Papua New Guinea”, take from <http://unhcr.org.au/unhcr/images/20131126%20Report%20of%20UNHCR%20Visit%20to%20Manus%20Island%20PNG%2023-25%20October%202013.pdf>, downloaded on February 6th, 2017 at 8.58pm.

provide protection to asylum seekers. At this point of view, PNG status is still being developing countries, and it is considered unready to accept asylum seekers. The condition shall be regarded as violating the clauses of the Guidance Note.

Picture 4.

The map of Australia and third countries.



Statistics and Mapping Section, 2003, "Parliamentary Library", available at: [http://www.aph.gov.au/About Parliament/Parliamentary Departments/Parliamentary Library/pubs/%20BN/2012-2013/PacificSolution](http://www.aph.gov.au/About_Parliament/Parliamentary_Departments/Parliamentary_Library/pubs/%20BN/2012-2013/PacificSolution), accessed on February 9th, 2017 at 12.25am.

In fact, the Australian Minister for Immigration and Border Control has conceded that Australia is unable to guarantee the safety of every asylum seeker in the PNG detention facility. The stark reality is that a young Iranian asylum seeker, Reza Berati, was murdered on Manus Island in February 2014. In addition, asylum seekers have reported living in constant fear in detention and

staying awake in shifts to watch over each other; and many asylum seekers have suffered serious injuries in there.¹⁰⁶

Even according to APD, PNG does not fully meet the criteria as a safe third country. APD determines several conditions that must be met for a safe third country, among others. All the requirements has been mentioned previously in the discussion. By that points and considerations, it can be known that Australia has ignored the safe third country concept due to both Malaysia and PNG, do not meet the criteria of safe third country.

Furthermore, Australian action in the transfer of asylum seekers also justified under international law if it complies the elements as listed in the Guidance Note on a bilateral and / or multilateral Transfer Arrangements of Asylum Seekers which is issued by UNHCR, as well as elements of customary international countries in the world. Since Australia's bilateral agreement made with PNG does not meet the elements of asylum seekers transfer agreement, so that the agreement is considered null and void. Whether Transferring Country or Receiving Country, both have the responsibility for asylum seekers. One of the main responsibilities of both countries is to provide protection to asylum seekers and adhere to the principle of international law or non refoulement principle.

¹⁰⁶Azadeh Dastyari, 2014, "Deterring and Denying Asylum Seekers in Australia", CCN News, available at: <http://edition.cnn.com/2014/06/20/opinion/australian-human-rights-op-ed/>, accessed on February 9th, 2017 at 12.15am.

2) Malaysia

On May 7, 2011, the Gillard Government announced the Malaysian solution, which was a deal that was made when Malaysia agreed to accept 800 asylum seekers who had arrived by boat in Australia in exchange for Australia accepting 4000 refugees from Malaysia.¹⁰⁷ Malaysia also agreed to facilitate ‘...[t]ransferees’ lawful presence [in Malaysia]’, treat transferees ‘with dignity and respect and in accordance with human rights standards’ and ‘respect the principle of non-refoulement’.¹⁰⁸ However, Malaysia is not a signatory to the Refugee Convention, International Covenant on Civil and Political Rights (ICCPR) or Convention Against Torture (CAT), and has a terrible record of abusing against asylum seekers and refugees according to an Amnesty International report points on asylum seekers. Also Malaysia did not guarantee adequate safety of asylum seekers, including human rights assurances, so that the Minister could in good faith not make a declaration under section 198A, and thus the agreement with Malaysia was considered invalid. This made the Malaysian solution was ended before it was started. However,

¹⁰⁷Anonymous, 2011, “Australia and Malaysia Sign Transfer Deal”, Australia Minister for Immigration and Citizenship, available at: <http://www.minister.immi.gov.au/media/cb/2011/cb168739.htm>>, accessed on February 6th, 2017 at 8.26pm.

¹⁰⁸Anonymous, “Arrangement between the Government of Australia and the Government of Malaysia on Transfer and Resettlement”, Australia Minister for Immigration and Citizenship, pp. 6–7, taken from <http://www.minister.immi.gov.au/media/media-releases/_pdf/20110725-arrangement-malaysia-aust.pdf>, downloaded on February 6th, 2017 at 8.29pm.

the Government still faced attacks on the continuing boat arrivals, leading it to commission the Expert Panel Report on Asylum Seekers.¹⁰⁹

In relevance, transferring asylum seekers to Malaysia increases the risk that they will be returned to persecution or danger in their countries of origin, in breach to these non-refoulement obligations.¹¹⁰

This transfer arrangement creates a situation in which Australia's non-refoulement obligations are, passed on to Malaysia. In other words, Australia places itself in a position in which it relies on Malaysia to comply with the non-refoulement obligations that are in fact owed to asylum seekers by Australia. The Commission is not convinced that there are adequate safeguards to ensure that these obligations will be respected in Malaysia.¹¹¹

D. The Role of the United Nations in Maintaining International Peace and Human Rights.

Disputes are inextricably linked to international relations. Increasingly these disputes are no longer just primarily between states but also between

¹⁰⁹Asher Hirsch, 2013, "Offshore Processing of Asylum Seekers Breaches International Human Rights Law", available at: <https://asherhirsch.com/2013/06/23/offshore-processing-of-asylum-seekers-breaches-international-human-rights-law/>, accessed on February 6th, 2017 at 8.35pm.

¹¹⁰Australian Human Right Commission, 2011, "Inquiry into Australia's Agreement with Malaysia in Relation to Asylum Seekers", Sydney, pp. 7-8, taken from http://www.humanrights.gov.au/sites/default/files/content/legal/submissions/2011/20110914_asylum_seekers.pdf, downloaded on February 8th, 2017 at 11.53pm.

¹¹¹*Ibid.*

states and other parties like international organizations and other non-state actors, and between these actors mutually.¹¹²

The United Nations is an international organization founded in 1945. It is currently made up of 193 Member States. The mission and work of the United Nations are guided by the purposes and principles contained in its founding Charter.¹¹³ The purposes of the UN are set out in article 1 of the Charter as follows:¹¹⁴

1. To maintain international peace and security, and to that end: to take effective collective measures for the prevention and removal of threats to the peace, and for the suppression of acts of aggression or other breaches of the peace, and to bring about by peaceful means, and in conformity with the principles of justice and international law, adjustment or settlement of international disputes or situations which might lead to a breach of the peace;
2. To develop friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples, and to take other appropriate measures to strengthen universal peace;
3. To achieve international co-operation in solving international problems of an economic, social, cultural, or humanitarian character, and in promoting and encouraging respect for human rights and for

¹¹²Peace Palace Library, "Settlement of International Disputes", available at: <https://www.peacepalacelibrary.nl/research-guides/settlement-of-international-disputes/settlement-of-international-disputes/>, accessed on May 4th, 2017 at 4.59pm.

¹¹³United Nations, "About the UN", available at: <http://www.un.org/en/about-un/>, accessed on May 6th, 2017 at 5.57am.

¹¹⁴Article 1 of UN Charter.

fundamental freedoms for all without distinction as to race, sex, language, or religion; and

4. To be a centre for harmonizing the actions of nations in the attainment of these common ends.

The Charter of the United Nations is not only the multilateral treaty which created the organization and outlined the rights and obligations of those states signing it, it is also the constitution of the UN, laying down its functions and prescribing its limitations. Foremost amongst these is the recognition of the sovereignty and independence of the member states. Under article 2 (7) of the Charter, the UN may not intervene in matters essentially within the domestic jurisdiction of any state (unless enforcement measures under Chapter VII are to be applied).¹¹⁵

This provision has inspired many debates in the UN, and it came to be accepted that colonial issues were not to be regarded as falling within the article 2(7) restriction. Other changes have also occurred, demonstrating that the concept of domestic jurisdiction is not immutable but a principle of international law delineating international and domestic spheres of operations. As a principle of international law it is susceptible of change through international law and is not dependent upon the unilateral determination of individual states.¹¹⁶

Discuss about the rule and human rights, actually all human beings have the right to be treated with dignity and respect” (para. 27). Such

¹¹⁵Malcolm N. Shaw, 2008, *International Law Six Edition*, Cambridge University Press, p. 1205.

¹¹⁶*Ibid.*

dignity and respect are afforded to people through the enjoyment of all human rights and are protected through the rule of law. The rule of law is the vehicle for the promotion and protection of the common normative framework. It provides a structure through which the exercise of power is subjected to agreed rules, guaranteeing the protection of all human rights.¹¹⁷

However, respect for the rule of law and human rights forms the essence of the protection of refugees, returnees and stateless persons. The Office of the United Nations High Commissioner for Refugees (UNHCR) has a mandate to provide international protection to refugees, including promoting the accession to international refugee instruments and other relevant human rights instruments. UNHCR's activities are also focused on assisting in the strengthening of legal structures that would enhance the rule of law, including in the area of transitional justice.¹¹⁸

1. International Law and Sovereignty

It has long been asserted that actually the relationship between international law and national law is a matter of active concern in many legal orders. Most would agree that the relationship is neither fully clarified nor clearly delineated. Discuss about the relationship between international law and national law continues to engage many opposing views.

¹¹⁷United Nations and the Rule of Laws, "Rule of Law and Human Rights", United Nations, available at: <https://www.un.org/ruleoflaw/rule-of-law-and-human-rights/>, accessed on May 6th, 2017 at 6.54am.

¹¹⁸ United Nations and the Rule of Laws, "Refugee Law", United Nations, available at: <https://www.un.org/ruleoflaw/thematic-areas/international-law-courts-tribunals/refugee-law/>, accessed on May 6th, 2017 at 6.57am.

Besides being complex theoretically, and at many times exhausting, the relationship between international law and national law can be examined through looking at a particular and narrowly-viewed case; in particular the relationship can be more easily analyzed when looking at a specific legal order. Many constitutions contain norms that regulate the position of international law in the domestic legal order. Actually the two system are different through their source of law. National law originates in the will of the state itself, while international law is based on the common will of contracting states.

Public debate in recent years has increasingly linked the concept of border protection with the arrival of asylum seekers to Australian shores. The Minister for Immigration and Multicultural and Indigenous Affairs has stated on many occasions, in the context of unauthorized boat arrivals that as a sovereign country Australia has the right to defend the integrity of its borders.¹¹⁹ Australian courts have also affirmed the right of Australia to determine who does and does not enter and remain in Australia.¹²⁰

The Department of Foreign Affairs and Trade (DFAT) Australia reiterates this point in its Information Kit on treaties:

“Ratification of international treaties does not involve a handing over of sovereignty to an international body. Treaties may define the scope of a State's action, and treaties which Australia ratifies may influence the way in which Australia behaves, internationally and domestically. Implicit,

¹¹⁹DIMIA, Fact Sheet 70, Border Control, available at: <http://www.immi.gov.au/facts/70border.htm>, accessed on May 5th, 2017 at 11.34pm.

¹²⁰Minister for Immigration and Multicultural and Indigenous Affairs and Minister for Foreign Affairs, Government Rejects UN Report on Arbitrary Detention, Joint Media Release, Parliament House, Canberra, available at: http://www.minister.immi.gov.au/media_releases/ruddock_media02/r02107.htm, accessed on May 5th, 2017 at 11.35pm.

however, in any Australian decision to ratify a treaty is a judgment that any limitations on the range of possible actions which may result are outweighed by the benefits which flow from the existence of a widely endorsed international agreement".¹²¹

By ratifying Refugee Convention and other treaties, Australia has explicitly agreed to ensure that new laws be enacted or existing laws be applied in a manner that gives proper expression to its treaty obligations. Such an act of national will is a positive expression of Australia's independence and an affirmative exercise of sovereignty.

Refugee law is a politically pragmatic means of reconciling the generalized commitment of states to self-interested control over immigration to the reality of coerced migration. Since the early part of this century, governments have recognized that if they are to maintain control over immigration in general terms, they must accommodate demands for entry based on particular urgency. To fail to do so is to risk the destruction to those broader policies of control, since laws and institutional arrangements are no match for the desperate creativity of persons in flight from serious harm. By catering for a subset of those who seek freedom of international movement, refugee law legitimates and sustains the viability of the protectionist norm.¹²²

All states in the contemporary world, including great powers, are compelled to justify their behaviour according to legal rules and accepted

¹²¹Department of Foreign Affairs and Trade, Australia and International Treaty Making Information Kit, available at: <http://www.austlii.edu.au/au/other/dfat/infokit.html#QnA>, accessed on May 5th, 2017 at 11.42pm.

¹²²Conlan Sue, 2005, "The International Council on Human Rights Policy Review Meeting Migration: Human Rights Protection of Smuggled Persons", Geneva, taken from, http://www.ichrp.org/files/papers/138/122_Conlan.pdf, downloaded on May 5th, 2017 at 11.48pm.

norms. States may conform but not necessarily obey. Due to the State of Nature, Hart argued international law contains rules that nations comply out of a moral, not legal, obligation.¹²³

In effect, Hart defined obedience to international rules as conforming or complying, but never obeying. While a realist might argue that some states comply for the sake of reputation or to appear legitimate, they might not want to comply in the first place. However, conforming and not obeying does not necessarily mean states are not committed. Instead, the capacity of a state to comply with legal rules and accepted norms is a key factor.

Essentially, states do not always comply with norms because they may lack the capability to carry out their obligations. For example, in weak states, new norms may not have the ability to be implemented by domestic institutions, or new norms could conflict with existing norms.¹²⁴

2. The Problem of Resettlement of Asylum Seekers and the Relationship with Universal Declaration of Human Rights

Australia entered in to the agreement with Malaysia actually is one of two cases which explain in the previous pages. In July of 2011, Australia and Malaysia entered an arrangement in which Australian asylum seekers would be removed to neighbouring Malaysia to have their asylum claims processed. Signed on July 25, 2011, this policy stipulated that the next 800 asylum seekers intercepted attempting to reach Australia by boat after that

¹²³ Hart, Herbert, 1997, *The Concept of Law*, Oxford, Clarendon Press.

¹²⁴ Morrow, James, 2007, *When Do States Follow the Laws of War?*, p. 560.

date would be sent to Malaysia to have their claims for asylum heard there. In turn, Australia would have accepted 4,000 UNHCR-certified refugees currently residing in Malaysia for permanent resettlement – 1,000 a year over the next four years.¹²⁵

A legal challenge against the policy lodged in the High Court of Australia by refugee lawyer David Manne saw this deal declared illegal on August 31, with the Court decreeing that asylum seekers could not be processed offshore unless the country in which processing would occur had certain legal safeguards in place to protect asylum seekers, safeguards Malaysia lacks.¹²⁶ The bilateral agreement actually is aimed to be a solution for asylum seekers.

The solution of Malaysia would have further eroded the fundamental right of people fleeing persecution to seek protection from a Convention country. By denying safe haven to those who would arrive on their shores uninvited, the Australian government would have, through their actions, diminished the value other states place on fulfilling their international obligations, paving the way for other countries to deny refugee to those seeking sanctuary if politically prudent. Sending asylum seekers to Malaysia would have also run the risk of legitimising current shortcomings in their treatment of asylum seekers and refugees.¹²⁷

¹²⁵Luke Lovell, 2011, "Why Australia's 'Malaysian Solution' is no Solution at all", *Oxford Monitor of Forced Migration*, Volume 1, Number 2, 2011, p. 38.

¹²⁶*Ibid.*

¹²⁷*Ibid.*

Discussing, whether the solution given by both states reached the concern about what this agreement would have meant for the people transferred, because Malaysia is not a party to the Refugee Convention and as such considers refugees and asylum seekers illegal immigrants. This failure to recognise asylum seekers means that people seeking refuge in Malaysia often find themselves placed into immigration detention.

The question is what would the Malaysian Solution have solved, and for whom? Unfortunately for the 800 asylum seekers set to be transferred to Malaysia under this arrangement, the policy was a political fix and not a human rights-oriented solution. While the move to resettle 4,000 refugees currently residing in Malaysia was a positive one, it should not have come at the cost of the mental and physical well-being of 800 other potential refugees, who would have faced an uncertain future in that country.¹²⁸

As explain in Article 14 of the Universal Declaration of Human Rights (UDHR) proclaims in its first paragraph: “Everyone has the right to seek and to enjoy in other countries asylum from persecution.”¹²⁹Essentially, it is the right of an individual to leave his country of residence in pursuit of asylum. The basis for this right is the principle that "a State may not claim to ‘own’ its nationals or residents”.

The right of an individual to leave his country can thus be seen as a part of modern customary international law. With the adoption of the International Covenant on Civil and Political Rights, the right of an

¹²⁸*Ibid.*

¹²⁹Article 14 (2) of Universal Declaration of Human Rights.

individual to leave his country became written law binding on the states parties to the Covenant. Article 12 (2) of the Covenant states that, "[e]veryone shall be free to leave any country, including his own".¹³⁰

The second paragraph contains the following qualification: "This right may not be invoked in the case of prosecution genuinely arising from non-political crimes or from acts contrary to the purposes and principles of the United Nations." To the extent that it covers situations where an individual is fleeing legitimate prosecution and not persecution, article 14 (2) UDHR describes a particular set of circumstances which do not fall within the terms of article 14 (1). However, article 14 (2) also applies where a person would be at risk of persecution in the country seeking to prosecute him or her for a crime within its scope. As such, it constitutes an exclusion provision.¹³¹

3. The View of Bilateral Agreement based on United Nation Charter (UN Charter)

Human rights and the UN Charter actually the idea that these rights should become part of international law and should be protected at an international level is relatively recent, taking shape with the establishment of the United Nations itself. The UN Charter proclaims in its preamble that "promoting and encouraging respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language or religion" is a primary purpose of the United Nations, and Member States of the UN

¹³⁰International Covenant on Civil and Political Rights (ICPP), *supra note 25*, art. 12 (2).

¹³¹Sibylle Kapferer, 2008, "Article 14 (2) of the Universal Declaration of Human Rights and Exclusion from Refugee Protection", *Refugee Survey Quarterly*, Vol. 27, No. 3, 2008, UNHCR, p. 54.

pledge themselves to take action in co-operation with the UN to achieve this purpose.¹³²

According to Article 103 of UN Charter “in the event of a conflict between the obligation of the members of the United Nations under the present Charter and their obligations under any other international agreement, their obligation under the present Charter shall prevail”. But it must be underline one of the goals of bilateral agreement between Australia with PNG and Malaysia actually is to stop people smuggling.

However, the problem arise is not because of the content of the agreement but the parties of the resettlement itself. As mention earlier Australia as transferring country and Malaysia / PNG as receiving country can't guarantee the protection of refugees in the third country. Even though if there is a conflict in their agreement, the dispute must be settle by negotiation, mediation, conciliation or other peaceful means of their choice. It is clearly states in the Article 33 of UN Charter.

By seeking to transfer asylum seekers offshore for domestic political gain, this policy would have only further eroded the institution of asylum. Although the Malaysian Solution may have helped to arrest the Australian government's sliding public approval, it would not have been a real solution. The policy is testament to the tension that exists globally between states trying to court domestic political popularity by being tough on border control and still living up to their international human rights obligations.

¹³²Anonymous, 1995, “Human Rights and Refugee Protection”, UNHCR, taken from <http://www.unhcr.org/uk/3ae6bd900.pdf>, downloaded on May 5th, 2017 at 9.14pm.

By electing to prioritise domestic popularity, vulnerable people fleeing persecution would have unfortunately lost out under the Malaysian Solution. Now that the High Court has deemed it invalid, it will be of interest to see how the Australian government attempts to balance its international obligations and domestic political concerns in its response.

As explained in the previous pages, it can be concluded that Australia do the transfer of asylum seekers to the third countries because of some reasons that have already been mentioned. Two of the reasons why Australia do the transfer are that because they consider to stop the people smuggling business model and stop unlawfully entry to Australia. Even though, the action of transferring asylum seekers is known as the transfer of responsibility to a safe third country. However, the reason is similar with the reason why the receiving country receives the asylum seekers from other countries, that it is because they had the same commitment. One of the commitments between transferring and receiving countries are to combat people smuggling.

The resettlement which is done by Australia with the Governments of PNG and Malaysia regarding transfer of asylum seekers to the third country is actually not violating the Refugee Convention and also international Law. It must be underlined that there will be no risk that refugee will face the persecution or other human rights violations in the third countries. However, there are still many important issues that must be considered by a sending country in order to ensure that there will be no risk of indirect refoulement has regulated in the Article 33 of Refugee Convention.

Referring to the history of PNG and Malaysia, it can be concluded that the rights and obligations of the receiving countries are the same as the sending countries. Recipient countries must also comply with the provisions as the principles contained in the Refugee Convention. Similarly, their responsibility which is also an extension of the responsibility of the sending country. Therefore, the recipient country is not directly bound to the Refugee Convention.

The most important above it all is the assurance that Malaysia and PNG do not violate the principle of non-refoulement and they respect the human rights of asylum seekers. Unfortunately, the action which was done by PNG and Malaysia in order to carry out their responsibility to provide the protection in the form of shelter and also application will be open, fair and efficient are not yet to be seen in those countries.

Furthermore, recipient countries, both Malaysia and PNG, are responsible to fulfill the rights of asylum seekers. These countries should provide protection to asylum seekers and adhere to the principle of International Law on Refugees, particularly the principle of non-refoulement. Referring to the guidelines within Guidance Note, then Malaysia and PNG as the third countries, the states which accept asylum seekers from Australia is required to provide protection to asylum seekers and respect the principle of non-refoulement which define in article 33 of Refugee Convention.

Furthermore, it is clearly mention in the article 14 (1) that everyone has the rights to seek and enjoy in other countries asylum from prosecution.

Event Australia did not violated the principle of non- refoulement but Australia applies indirect refoulement it means returning the asylum seekers to a country where he / she will be exposed to prosecution.