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THE CASE OF CHRISTMAS ISLAND: HOW INTERNATIONAL LAW AFFECTS THE AUSTRALIAN-MALAYSIAN REFUGEE DEAL

Ria Pereira*

INTRODUCTION

In July of 2011, Australia and Malaysia entered an arrangement in which Australian asylum seekers would be removed to neighboring Malaysia to have their asylum claims processed.1 Following widespread criticism in the media, Australia’s High Court (“High Court” or “Court”) ruled that such a deal violated Australia’s refugee protection laws.2 While this ruling should have put an end to the deal, Australia’s Immigration Minister, Chris Bowen, indicated that the agreement might nevertheless be feasible.3 Policy makers

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1 See Matt Siegel, Plan to Deal With Seekers of Asylum Roils Australia, N.Y. TIMES, Aug. 11, 2011, at A7.


proposed amending Australian domestic immigration laws to allow the deal to go forward unencumbered; and a bill to amend Australia’s Migration Act was subsequently introduced.4

This comment addresses the conflict and interplay between Australia’s internal laws and its international obligations. Part I of this comment describes the origin and structure of the Malaysian refugee deal.5 The existing legality of the third party schemes under Australia’s current immigration system is then examined in Part II.6 The High Court has not only expounded on third party schemes in general, but has also ruled on the legality of the 2011 Malaysian deal. The High Court’s holding and rationale is taken up in Part III.7 Given Australia’s international obligations as a State Party to the United Nations Convention Relating to the Status of Refugees (‘‘Refugee Convention’’ or ‘‘Convention’’), Part IV and V will then explore the wrongfulness of such a deal under standards of international law and effective protection.8 To further this analysis, Part VI will examine Malaysia’s treatment of refugees.9 As it currently stands, Australian law and international obligations are in agreement: the Malaysian deal would be improper. However, officials within the Australian government propose disrupting this synchronicity by amending the country’s internal laws to allow for such a deal. It is thus necessary to look at how these two bodies of governance work in synergy. Part VII addresses whether amending Australia’s Migration Act would fulfill the country’s international obligations.10

The deal has significance for both Australia and the international community. The Australian government’s continued insistence of the deal’s legality, despite the High Court’s ruling, presents a challenge to future asylum seekers in Australia. On a broader scale, the deal raises a question regarding the interplay

4 See id.
5 See infra Part I.
6 See infra Part II.
7 See infra Part III.
8 See infra Part IV, V.
9 See infra Part VI.
10 See infra Part VII.
between domestic and international law.\textsuperscript{11} The proposal of amending Australia’s immigration laws is premised on the idea that domestic law trumps international obligations.\textsuperscript{12} This rationale raises concerns about member states’ obligations under the U.N. Refugee Convention.

I. THE MALAYSIAN DEAL AND ITS ORIGINS

Australia receives about two percent of the world’s asylum claims.\textsuperscript{13} In 2010, only 8,250 immigrants applied as asylum seekers within the country.\textsuperscript{14} By comparison, 55,530 noncitizens sought asylum in the United States in 2010.\textsuperscript{15} However, it is not the lack of asylum seekers that have given rise to this controversy. Because of its proximity to Burma, Australia has become a popular destination for immigrants arriving by sea from Southeast Asia.\textsuperscript{16} Dubbed the “boat

\textsuperscript{11} Scholars have recently addressed \textit{Plaintiff M70/2011} and \textit{Plaintiff M106 of 2011} in different lights. See Michelle Foster, \textit{Reflections on a Decade of International Law: International Legal Theory: Snapshots From a Decade Of International Legal Life: The Implications Of the Failed ‘Malaysian Solution’: The Australian High Court and Refugee Responsibility Sharing At International Law}, 13 MELB. J. INT’L L. 395, 422 (2012) (explaining that, according to the Migration Act as it presently stands, any future offshore processing arrangement undertaken by Australia must accord with Australia’s international legal obligations); see also Hannah Stewart-Weeks, \textit{Out of Sight But Not Out of Mind: Plaintiff M61/2010E v. Commonwealth}, 33 SYDNEY L. REV. 831, 843-46 (2011) (arguing that the Migration Act would not necessarily have to be amended because section 198A(3) provides a way for the Minister to declare a country safe if it “meets relevant human rights standards in providing protection”).


\textsuperscript{13} See U.N. REFUGEE AGENCY, \textit{ASYLUM LEVELS AND TRENDS IN INDUSTRIALIZED COUNTRIES 2010} 15 (2011), \url{http://www.unhcr.org/4d8e5b109.html}.

\textsuperscript{14} See id.

\textsuperscript{15} See id.

people,” these immigrants have garnered attention both in the media and within the Australian government.\textsuperscript{17}

Christmas Island, an Australian territory located in the Indian Ocean, has been designated as an “excised offshore place.”\textsuperscript{18} On this island, unlawful noncitizens, who have come to Australia via “offshore entry,” are detained.\textsuperscript{19} On July 25, 2011, the Australian and Malaysian governments devised a plan by which 800 asylum seekers, who had yet to have their claims assessed in Australia, would be sent to Malaysia for processing.\textsuperscript{20} The United Nations High Commissioner for Refugees (“the UNHCR”) would then evaluate these asylum seekers’ claims in Malaysia.\textsuperscript{21}

The Australian government justified the deal as a valid exercise of power under sections 198(2) and 198A(1) of the Migration Act of 1958.\textsuperscript{22} Section 198(2) provides that an immigration officer must remove noncitizens who are determined to be unlawfully present “as soon as reasonably possible,” but does not indicate the location to which these Asylum seekers should be removed.\textsuperscript{23} Section 198A further provides that Australia may remove “offshore entry person[s]” to safe third countries.\textsuperscript{24} Under this provision, for a country to be a valid port, it must meet “relevant” human rights

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\begin{itemize}
\item \textsuperscript{17} Nick Butterly & Andrew Probyn Canberra, \textit{Gillard Turns the Boat Heat on Abbott}, \textit{The West Australian}, Sept. 24, 2011, \url{http://au.news.yahoo.com/thewest/a/-/breaking/10329656/gillard-turns-the-boat-heat-on-abbott/}.
\item \textsuperscript{18} See \textit{Department of Immigration and Citizenship, Fact Sheet 81 - Australia’s Excised Offshore Places} (2010).
\item \textsuperscript{19} See \textit{Department of Immigration and Citizenship, supra note 19}; \textit{see also} \textit{Migration Act of 1958, (Cth) § 5(1) (Austl.)} (defining a non-citizen as any individual who has been determined not to be an Australian citizen and an “offshore entry person” as a non-citizen who has entered unlawfully at an excised offshore place).
\item \textsuperscript{20} See Plaintiff M70/2011 and Plaintiff M106 of 2011, (2011) HCA 32, at ¶ 8; Siegel, \textit{supra} note 1.
\item \textsuperscript{22} See \textit{id.}
\item \textsuperscript{23} \textit{Migration Act of 1958, (Cth) § 198(2) (Austl.).}
\item \textsuperscript{24} \textit{Id.} § 198A(1).
\end{itemize}
standards. Furthermore, such a third country must also provide protection to persons seeking asylum or returning to their countries of origin.

While on its face the deal represents an outsourcing scheme to avoid the consumption of government resources, justification for the deal has been political rather than administrative. By refusing to house asylum seekers within Australia, the government hopes to deter immigrants from seeking illegal channels of entry.

While outsourcing refugee processing might appear to be an uncommon solution, this deal hardly marks the first time Australia has attempted to implement such a scheme. In 2001, a Norwegian carrier ship, the MV *Tampa*, rescued 438 distressed Afghans from fishing vessels in international waters. The rescued noncitizens subsequently sought asylum from the Australian government. On September 10, 2001, Australia’s Minister of Defense and the President of the Republic of Nauru devised the “Pacific Solution”, under which the asylum seekers were removed to the Polynesian island nation to have their claims processed.

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25 See id.
26 See id.
28 See id.
31 See id.
II. LEGALITY OF THIRD PARTY SCHEMES UNDER AUSTRALIA’S MIGRATION ACT

Australian officials have proposed that they can circumvent Australian law and allow for the third party deal by amending Australia’s Migration Act. An initial question therefore is whether the deal does in fact violate Australian law.

A 1992 amendment to Australia’s Migration Act established grounds for the mandatory detention and removal of noncitizens. Under the Migration Act, unlawful noncitizens detained under section 178 must be kept in immigration detention until they are removed from Australian borders. If the noncitizen is given a final status determination of unlawful presence, s/he must then be removed “as soon as reasonably practical.”

Australia’s Migration Act provides for these asylum seekers to be sent to territories other than their countries of origin. Under Section 91D of the Migration Act, such plans are designated as “safe third country” schemes. The Minister of Immigration has the ability to designate a third country as being “safe,” and thus a proper port of removal. An asylum claimant, who has a right to reside in a third country, cannot validly apply for a visa based on protection in Australia. In addition, Australia would not have any protection obligations to such an individual. Because a third country to which a person has residence ties will have the obligation of assessing his

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33 See Migration Legislation Amendment (Offshore Processing and Other Measures) of 2011, (Cth) (Austl.); see also Curtis, supra note 13.
35 See id. §§ 177-78 (defining a ‘designated person’ who is to be detained).
36 See Plaintiff M61 v. Minister for Immigration and Citizenship, (2010) 85 ALJR 133, 139-140 (Austl.).
37 See Migration Act of 1958, (Cth) § 91D (Austl).
38 See id.
39 See id. § 91D(3).
40 See id. §§ 91C(1)(b)(ii), 91E.
asylum claim, this provision prevents immigrants from “forum shopping” for the most lenient admissions system.\textsuperscript{42}

Section 198A of the Migration Act requires that a declaration be made in relation to the third country to which a migrant will be sent.\textsuperscript{43} Australian courts have held that such a declaration must be made by the Minister of Immigration in “good faith.”\textsuperscript{44} Furthermore, any declaration must be based on an objective evaluation that a designated country is “safe” to send migrants.\textsuperscript{45} The declaration must also comport with obligations under the Refugee Convention.\textsuperscript{46} For a country to be declared “safe,” migrants must be given protection both while their claims are being processed and after a final determination of their claims has been made.\textsuperscript{47}

III. THE HIGH COURT’S RESPONSE TO THE MALAYSIAN DEAL

While Australia’s Migration Act does allow for certain safe third country schemes,\textsuperscript{48} the High Court has rejected its use in the present deal.\textsuperscript{49} Up until the High Court’s ruling rejecting the Malaysian deal, Australian courts generally held that the third-party state need not be a party to the Refugee Convention before a transfer could take place.\textsuperscript{50} However, in \textit{Plaintiff M70 and M106}, the High Court ruled that Australia must consider the recipient country’s domestic laws and obligations under international law when declaring

\begin{footnotesize}
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\item[\textsuperscript{42}] Penelope Mathew, \textit{Current Development: Australian Refugee Protection in the Wake of the Tampa}, 96 \textit{Am. J. Int’l L.} 661, 672-673 (2002).
\item[\textsuperscript{43}] \textit{See} Migration Act of 1958, (Cth) § 198A(3) (Austl.).
\item[\textsuperscript{44}] \textit{See} Minister for Immigration and Multicultural Affairs \textit{v. Eshetu}, (1999) 197 CLR 611, 654 (Austl.).
\item[\textsuperscript{45}] \textit{See} Migration Act of 1958, (Cth) § 198A(3) (Austl.) (establishing the criteria used to evaluate a third country as safe).
\item[\textsuperscript{46}] \textit{See} id. § 198A(3)(iv).
\item[\textsuperscript{47}] \textit{See} id. §§ 198A(3)(ii)-(iii).
\item[\textsuperscript{48}] \textit{See} id. § 91D.
\item[\textsuperscript{50}] \textit{See}, e.g., \textit{Kola v. Minister for Immigration and Multicultural Affairs}, (2002) 120 FCR 170, 178 (Austl.).
\end{itemize}
\end{footnotesize}
a country to be “safe.” When confronted with the issue of whether Australia could deport asylum seekers to Malaysia for processing, the Court held that migrants, who claim a fear of persecution by their countries of origin, may only be taken from Australia pursuant to section 198A. If no power under section 198A exists, the person may only be validly removed once their claims are assessed and found to be lacking. If, however, the migrant is ultimately determined to be a refugee, the person may only be removed pursuant to the non-refoulement provisions under section 198(2).

Section 198A requires certain standards to be met before offshore entry persons may be taken to a designated country. A country of deportation must provide effective procedures for assessing asylum claims. Protections must be afforded to refugees, as well as noncitizens who are waiting for their claims to be processed. A third country must also meet “relevant” human rights standards in dispensing its protection to refugees and asylum seekers.

Previous High Court precedent supports the fact that the government owes a “protection obligation” to those asserting asylum claims under Article 36, Section 2 of the Migration Act. Article 36 states that the criterion for a protection visa in Australia is that “the applicant for the visa is a noncitizen in Australia to whom Australia has a protection obligation under [the Convention].

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52 See id.
54 See id. at ¶ 51.
55 See Migration Act of 1958, (Cth) § 198A(3)(a) (Austl.).
56 See id. § 198A(3)(a)(i).
57 See id. § 198A(3)(a)(ii).
58 See id. § 198A(3)(a)(iii).
59 See Migration Act of 1958, (Cth) § 198A(3)(a)(vi) (Austl.).
61 See Migration Act of 1958, (Cth) § 36(2) (Austl.).
In *NAGV and NAGW of 2002 v. Minister for Immigration and Multicultural and Indigenous Affairs*, the High Court explained the fundamental difference between those noncitizens who have entered the country and those who have not.\(^{62}\) Because customary international law involves rights between states rather than individuals, an asylum seeker cannot assert a right to enter a country where an individual is not a national.\(^{63}\) However, Australia’s Migration Act fills in the gap left by international law. Section 36(2) assumes that “obligation[s] are owed . . . by Contracting States to individuals” as well as to other member states.\(^{64}\) Under Section 36(2), a protection obligation is owed to those who assert an asylum claim.\(^{65}\) An asylum applicant can take himself out of the class of noncitizens to whom Australia owes a protection obligation under the Migration Act by committing certain crimes.\(^{66}\) However, simply because a noncitizen has not had his asylum claim adjudicated does not mean that no protection obligations exist under Section 36.\(^{67}\) Similarly, in *Plaintiff M61*, the Court explained that the Migration Act is premised on the idea that Australia has a “protection obligation to individuals.”\(^{68}\) The Court held that the Migration Act is structured in such a way that the international obligations towards refugees are mirrored by Australia’s domestic law.\(^{69}\)

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\(^{63}\) See id.

\(^{64}\) Id. at ¶ 27; see also *Migration Act of 1958*, (Cth) § 36(2) (Austl.).


\(^{66}\) See *Migration Act of 1958*, (Cth) § 91U (Austl.); see also *Migration Reform Act of 1992*, (Cth) § 4(b) (Austl.).

\(^{67}\) See *NAGV and NAGW of 2002 v. Minister for Immigration and Multicultural and Indigenous Affairs*, (2005) HCA 6, at ¶¶ 2, 9 (Austl.).

\(^{68}\) *Plaintiff M61 v. Minister for Immigration and Citizenship*, (2010) 85 ALJR at 139.

\(^{69}\) Id.
IV. LEGALITY IN LIGHT OF AUSTRALIA’S INTERNATIONAL OBLIGATIONS UNDER THE REFUGEE CONVENTION

In order to be consistent with the principles of the Refugee Convention, asylum seekers, who turn to foreign governments because their own countries are unable or unwilling to provide them with protection, should be assured these governments will not in turn cast them out. Article 33 of the Refugee Convention adopts this idea of non-refoulement, stating that a contracting state will not “expel or return” a refugee to a country in which his life or freedom “would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion.”

The principle of non-refoulement has long been espoused as a necessary protection for asylum seekers. On its face, the plain language of Article 33 prohibits refoulement to a refugee’s country of origin, which poses a threat to his life or freedom. However, the principle of non-refoulement under Article 33 has subsequently been extended to include a prohibition against chain refoulement. If an asylum seeker is sent to a third country, it must not, in turn, deport the noncitizen back to the home from which he is seeking protection. Third countries might likewise be improper if the noncitizen only temporarily resided in such a country and would therefore likely be deported for failing to establish residence ties.

The principle of non-refoulement extends past the Refugee Convention. The International Court of Justice (“ICJ”) has indicated that practices among countries that are widespread enough to constitute an international custom can be accepted as international

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71 See id. at art. 2.
72 See id. at art. 2.
73 See id.
75 Id.
76 Convention and Protocol Relating to the Status of Refugees, supra note 71, at art. 33.
The United Nations has declared that the principle of non-refoulement constitutes a rule of international customary law.\textsuperscript{77} Because of the widespread incorporation of non-refoulement provisions in regional and worldwide treaties, the UN has asserted that the principle has come to constitute an international custom as well as a rule of international law.\textsuperscript{78} The UNHCR further pointed to the inclusion of non-refoulement in the reaffirmed 1967 UN Declaration on Territorial Asylum as evidence that the principle has risen to the level of international customary law.\textsuperscript{79}

Two types of states exist in regards to non-refoulement obligations: those countries which are State Parties to the international human rights treaties; and those states which have not yet acceded to treaty obligations.\textsuperscript{80} For State Parties to the Refugee Convention, there is a delineated obligation under the treaty’s language to protect asylum seekers from refoulement.\textsuperscript{81} For states, which are not parties to either the Refugee Convention or its protocol, the principle of non-refoulement must nevertheless be respected because it has attained the status of customary international law.\textsuperscript{82} The ICJ has explained that states have an obligation to act in conformity with customary law on the international stage.\textsuperscript{83} If a state deviates from such courses of conduct, it will be treated as being in breach of such rules, rather than as a forerunner in the creation of a

\textsuperscript{79} See id.
\textsuperscript{80} See id.
\textsuperscript{81} See id.
\textsuperscript{82} See id.
\textsuperscript{83} See U.N. High Commissioner for Refugees, supra note 79.
\textsuperscript{84} See \textit{Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.)}, 1986 I.C.J. 14, 425 (June 27).
new international standard.\textsuperscript{85} The state’s action will be considered to be prima facie evidence that a rule has been violated.\textsuperscript{86}

Australia’s High Court has extended the concept of non-refoulement to safe third country schemes.\textsuperscript{87} In \textit{NAV/G}, the Minister of Immigration argued that the principle of non-refoulement under Article 33 of the Refugee Convention only protected noncitizens from deportation to their countries of origin.\textsuperscript{88} Article 33, therefore, did not place any limitations on sending noncitizens to countries other than their homelands.\textsuperscript{89} The High Court firmly rejected this reasoning.\textsuperscript{90} The Court explained that non-refoulement was a broad enough concept to include protection from asylum seekers being sent to countries where their lives or freedoms would be threatened.\textsuperscript{91} The Court further explained that Article 33 of the Refugee Convention should also be read in the negative.\textsuperscript{92} Thus, if a country is “bound by a non-refoulement obligation” with respect to a given asylum applicant, and there is no country to which the applicant can be removed without the obligation being breached, “the State in question has no choice but to tolerate that individual’s presence within its territory.”\textsuperscript{93} Thus, a state might have an obligation to

\textsuperscript{85} See id.
\textsuperscript{86} See id. at 427.
\textsuperscript{88} See id. at ¶ 24.
\textsuperscript{89} See id.
\textsuperscript{90} See id. at ¶ 91 (“If the Minister’s argument were accepted . . . it would seem to follow that Australia would never have owed protection obligations to any person.”).
\textsuperscript{91} See \textit{NAGV and NAGW of 2002 v. Minister for Immigration and Multicultural and Indigenous Affairs}, (2005) HCA 6, at ¶ 25; see also U.N. High Commissioner For Refugees, \textit{The Scope And Content of the Principle Of Non-Refoulement}, June 20, 2001, http://www.unhcr.org/cgi-bin/texis/vtx/home/opendocPDFViewer.html?docid=3b33574d1 (discussing how third country schemes fall under the auspices of Article 33 of the Convention. Not only does Article 33 require that a State Party consider whether a claimant’s life and freedom would be threatened, but also the possibility of chain migration).
\textsuperscript{93} \textit{Id.} at ¶ 22.
protect a noncitizen simply because no other proper and safe country exists.\textsuperscript{94}

While Australia must adhere to the Refugee Convention’s non-refoulement principles, the High Court has held that third country schemes are not per se prohibited under the terms of the Convention.\textsuperscript{95} In \textit{Thiyagarajah}, a Sri Lankan applicant in Australia had previously been granted refugee status and permanent residence in France.\textsuperscript{96} The respondent was furthermore eligible to apply for French citizenship.\textsuperscript{97} The High Court held that, because France would provide effective protection to the respondent, deporting him to the third country was consistent with Australia’s obligations under the Convention.\textsuperscript{98} The Federal Court subsequently expanded on the High Court’s reasoning, holding that a safe country could be designated by an applicant having minimal ties to a territory, such as being granted a temporary right to re-enter a third country.\textsuperscript{99}

The UNHCR has similarly explained that safe third country schemes do not represent a violation of a State Party’s obligations under the Convention.\textsuperscript{100} The Executive Committee of the UNHCR has conceded that if an asylum seeker has preexisting “connection[s] or close links” with another state, deportation to that country might be allowed.\textsuperscript{101} The appropriateness of this deportation, however, is dependent on whether it is “fair and reasonable” to expect the applicant to first request asylum from the third country.\textsuperscript{102}

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\begin{enumerate}
\item[94] See \textit{id}.
\item[95] See Minister for Immigration and Multicultural Affairs v. Thiyagarajah, (1997) 80 FCR 543, 563 (Austl.).
\item[96] See \textit{id} at 565.
\item[97] See \textit{id}.
\item[98] See \textit{id} at 563.
\item[99] See Rajendran v. Minister for Immigration and Multicultural Affairs, 1998 AUST FED CTLEXIS 651, ¶ 11 (Austl).
\item[100] See U.N. Human Right Commission, \textit{Refugees Without an Asylum Country}, Conclusion No. 15 (XXX), (A/34/12/Add.1) (Oct. 16, 1979) [hereinafter \textit{Refugees Without an Asylum Country}].
\item[101] Id.
\item[102] See Minister for Immigration and Multicultural Affairs v. Thiyagaraja, (1997) 80 FCR at 563.
\end{enumerate}
\end{footnotesize}
V. EFFECTIVE PROTECTION UNDER INTERNATIONAL LAW

Australian courts have clearly interpreted the Convention to allow for the deportation of noncitizens who have valid claims to asylum. However, previous case law indicates that a third country must be able to provide an asylum seeker with effective protection. The High Court in Thiagarajah ultimately held that France was a proper third country to which the noncitizen could be deported without a substantive consideration of his asylum claim. But, the determining factor in the case was not only that the respondent had previously been granted status in France, but also that the third country would provide him with effective protection. The High Court affirmed the reasoning of the Full Court when it noted that it was highly unlikely that the applicant would be in danger of chain refoulement if deported to France.

Effective protection is a safeguard designed to protect not only noncitizens who have already been granted asylum but also applicants who assert asylum claims. Claiming a credible fear from a country of origin affords an applicant with certain minimum safeguards while their claims are being adjudicated. The means by which these safeguards are provided are left open by the terms of the Refugee Convention. The UNHCR has acknowledged that varying

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103 See id.
106 See id.
109 See id.
methods of adjudicating claims, including integrating the processing of asylum claims into the general immigration system, might nevertheless be in line with a country’s obligations under the Refugee Convention.\textsuperscript{111}

While each State Party is given leave to implement its own procedures for adjudicating claims based on its particular judicial and administrative structure,\textsuperscript{112} the UNHCR has nevertheless promulgated minimum procedural standards which must be met.\textsuperscript{113} The Executive Committee of UNHCR has explained that “fair and effective protection” includes procedures minimally sufficient to allow for the identification of noncitizens that should benefit from protection under the terms of the Refugee Convention.\textsuperscript{114} For example, it is not sufficient to designate a third country as “safe” based solely on whether that country is a State Party to the Refugee Convention.\textsuperscript{115} Instead, a hallmark of effective protection is whether a third country’s asylum processing system is fair to applicants.\textsuperscript{116} The U.N.’s General Counsel has recommended that a fair system of asylum adjudication must include a determination of claims by an impartial authority and an effective system of appeal.\textsuperscript{117}

At the twenty-eighth session of the High Commissioner’s Programme in October, 1977, the Executive Committee delineated certain minimum procedural requirements that would constitute effective protection of asylum applicants.\textsuperscript{118} Asylum seekers should first and foremost be given necessary information about the procedures they need to follow to assert asylum claims.\textsuperscript{119} Interpreters should be provided to applicants while they are submitting their

\textsuperscript{111} See id.
\textsuperscript{112} See id.
\textsuperscript{113} See Refugees Without an Asylum Country, supra note 101, at 2.
\textsuperscript{114} See id.
\textsuperscript{115} See Legomsky, supra note 75, at 7.
\textsuperscript{116} See Refugees Without an Asylum Country, supra note 101.
\textsuperscript{118} See U.N. High Commissioner for Refugees, Determination of Refugee Status, No. 8 (XXVIII), A/32/12/Add.1 (Oct. 12, 1977).
\textsuperscript{119} See id. at c(ii).
claims to the appropriate officials. While countries often do not recognize the right of an applicant to have appointed counsel, noncitizens seeking asylum should nevertheless be granted an adequate opportunity to obtain counsel. Finally, while an applicant’s claim is pending an initial determination or appeal, the asylum seeker should not be removed from the country from which he is seeking protection.

Under best practice procedures, a determination of whether a country is “safe” and will provide asylum seekers effective protection should be individualized. An examination should be conducted by a state to determine whether the third country would not apply more restrictive criteria in adjudicating a particular claim than the country the applicant is already in. The Executive Committee of the UNHCR has acknowledged that the prevailing legal standard among countries places the burden of proof in establishing asylum on the noncitizen submitting the claim. However, asylum applicants rarely flee their homelands carrying documentation of their persecution. Given that the sole evidence for many applicants will be their own testimony, the Executive Committee has explained that the duty to ascertain all relevant facts is shared between an applicant and

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120 See id. at e(iv).
121 See id.
122 See id. at e(yii).
124 See U.N. High Commissioner for Refugees, Asylum Processes (Fair and Efficient Asylum Procedures), ¶ 4, EC/GC/01/12 (May 31, 2001).
government examiners. For a country to have effective procedural protections, the system of adjudicating claims must take into account and make allowances for unsupported yet credible statements by applicants.

The UNHCR does not stand alone in its emphasis on the effective processing of asylum claims. The ICJ has similarly linked the principle of non-refoulement to a third country having an adequate system of adjudicating asylum claims. In *M.S.S. v. Belgium and Greece*, a noncitizen claiming asylum from Afghanistan entered the European Union through Greece. The Afghani finally made his way to Belgium, where he was detained. He was then transferred back to Greece to have his asylum claim processed. The Grand Chamber of the European Court of Human Rights held that Belgium breached its obligation of non-refoulement under Article 3 of the European Convention on the Protection of Human Rights and Fundamental Freedoms (“ECHR”). The court emphasized that shortcomings in a third country’s system of processing asylum claims alone could violate a deporting state’s international obligations of non-refoulement. The court explained that Belgium “knew or ought to have known” that the noncitizen, when deported to Greece, had “no guarantee that his asylum application would be seriously examined by the Greek authorities.” In designating Greece as an improper third country, the court pointed to deficiencies in the Greek system of processing asylum claims, including claimants not receiving adequate

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128 See id.
130 See id.
131 See id.
132 See id.
133 See id. at 84 (2011).
135 Id. at 75; See also *DEPARTMENT OF STATE, HUMAN RIGHTS REPORT: GREECE*, 14(2010)(discussing the refugee protection system in Greece. Greece’s asylum system has been characterized as “gravely dysfunctional” in its identification of individuals seeking asylum and its processing of claims.)
information from Greek officials, a shortage of interpreters, and
claimants not being given sufficient opportunity to secure legal aid.136
Because of backlogs in the Greek asylum processing system,
excessive delays in both initial asylum determinations and subsequent
appeals were further indicated as negative factors in Greece’s
immigration system.137

VI. MALAYSIA’S TREATMENT OF REFUGEES

International standards and safeguards indicate that a third
country will be considered improper based on deficiencies in its
processing of asylum claims alone.138 For Malaysia to therefore
constitute a proper third country, standards of protection articulated
by the international community must be met.139 In order to determine
whether Malaysia would constitute an effective third country, it is
necessary to examine Malaysia’s system of processing asylum claims,
as well as its treatment of asylum seekers.

One of the initial and resounding objections by the media to
the Malaysian deal was that Malaysia had yet to become a member of
the Refugee Convention.140 Being a member of the Convention does
not simply mean that a country acknowledges the need to uphold
human rights standards for those seeking asylum.141 The UNHCR
also casts a net of supervision142 over the member states.143 The
regulations put in place by the Convention were designed to provide
a uniform system of asylum protection and adjudication between

137 See id. at 39.
138 See id. at 75.
139 See id.
140 See British Broadcasting Corporation, supra note 2; see also Ja & Drape,
supra note 2.
141 See Convention and Protocol Relating to the Status of Refugees, supra
note 71, at 2.
142 See id. at 4.
143 See Michelle Foster, Protection Elsewhere: The Legal Implications of Requiring
member states. In fact, the concept of safe third countries originated as a way for member states with common protection obligations to share the burden of processing asylum claims.

Because Malaysia is not a State Party to the Refugee Convention, it does not have an obligation to comply with the minimum protections listed in the treaty as would a member state. Moreover, the country does not legally recognize the status of “refugee” under its domestic laws. The UNHCR has indicated that the country does not have any “constitutional, legislative or administrative provisions dealing with the right to seek asylum or the protection of refugees.” This lack of legal recognition means that a system has not been established for providing protection for the specific processing and protection needs of refugees. No protection is provided for noncitizens that are ultimately determined to be unlawful and expelled to their countries of origin.

Under Malaysian law, anyone entering the country without appropriate documentation is subject to mandatory imprisonment for a maximum period of five years and a fine not exceeding RM10,000 (approximately $3,000 USD). Under Section 6 of Malaysia’s Immigration Act of 1959/63, an unlawful noncitizen is also subject

144 See Plaintiff M70/2011 and Plaintiff M106 of 2011 v. Minister for Immigration and Citizenship, (2011) HCA 32, at ¶ 117 (“What is clear is that signatories to the Refugees Convention and the Refugees Protocol are bound to accord to those who have been determined to be refugees the rights that are specified in those instruments including the rights earlier described.”).

145 See id. at ¶ 19.


150 See id. at 28.

to whipping of not more than six strokes.152 Since the Malaysian Immigration Act was amended in 2002, the Malaysian government reported in June 2009 that 47,914 noncitizens had been subjected to physical punishment for immigration offenses.153 Amnesty International has similarly estimated that as many as 10,000 immigrant prisoners are caned in the country annually.154

In some ways, the Malaysian government has not been blind to the holes existing in its immigration policy. The UNHCR has noted that Malaysia has shown a “considerable degree of cooperation” with UNHCR officials.155 The country has not impeded humanitarian organizations that enter the country and provide assistance to the refugee population.156 Those already granted refugee status by the UNHCR are not deported and are generally given preferential treatment in detention centers.157 Likewise, those with UNHCR cards were given access to health care and limited access to NGO clinics.158 The country, however, does not provide access to formal education, even to noncitizens with UNHCR cards.159

Yet, this situational compliance does not alleviate the broader and deeper problems in Malaysia’s refugee policy. In the Annual World Refugee Survey, the UNHCR characterized Malaysia’s refugee processing as a system comprised of “arbitrary arrest[s], detention[s] and deportation[s]” of refugees.160 Malaysia’s immigration system furthermore does not seem to take into account the danger of chain refoulement.161 The UNHCR noted that during 2008, Malaysia

152 See id.
154 See AMNESTY INT’L, A BLOW TO HUMANITY—TORTURE BY JUDICIAL CANING IN MALAYSIA 5 (2010).
155 UNHCR’s Views On The Concept of Effective Protection As It Relates To Malaysia, supra note 149, at 1.
156 See HUMAN RIGHTS REPORT: MALAYSIA, supra note 150, at 27.
157 See id.
158 See id.
159 See id. at 28.
161 See id.
deported at least 1,000 asylum seekers to Thailand, which has been known to refoule noncitizens to Myanmar.\(^{162}\)

Malaysia’s adjudication of asylum claims has been criticized as including inconsistencies and corruption. In the 2008 Annual World Refugee Survey, the UNHCR described how authorities in immigration holding facilities do not permit detainees to make phone calls upon their arrest.\(^{163}\) In order to inform anyone of their arrest or to seek aid, the detainees generally had to bribe police officers.\(^{164}\) Malaysia also has a history of not following the letter of its international obligations.\(^{165}\) Despite Malaysia being a State Party to the Convention on the Rights of the Child, the country does not provide primary education opportunities or free health services to most asylum seeking children.\(^{166}\) The UNHCR has further observed that the country has failed to consistently implement political decisions, specific laws and regulations or even oral agreements with the UNHCR to establish a system of refugee protection and evaluation.\(^{167}\)

Malaysia’s deficiencies in asylum processing act as a counterexample to what the international community characterizes as a safe third country. Similar to the International Court of Justice’s reasoning in *M.S.S. v. Belgium and Greece* that a third country was improper because there was no guarantee that asylum applications would be considered fairly and properly due to processing deficiencies,\(^{168}\) the failure of the Malaysian system to protect against the dangers of internal corruption and chain refoulement suggest that Malaysia would not be a proper third country.\(^{169}\) Furthermore, similar to the reasoning of the UNHCR that hallmarks of a safe third country include applicants being given information about their

\(^{162}\) See id.  
\(^{163}\) See id.  
\(^{164}\) See id.  
\(^{165}\) See *World Refugee Survey 2009 – Malaysia*, supra note 161.  
\(^{166}\) See id.  
\(^{167}\) See UNHCR’s Views On The Concept of Effective Protection As It Relates To Malaysia, supra note 149, at 1.  
\(^{169}\) See *World Refugee Survey 2009 – Malaysia*, supra note 161.
process and access to a fair and impartial system of asylum determination and appeal, reports indicating that detainees must resort to bribery to gain access to outside resources intimate that Malaysia lacks the internal system needed to meet international standards.

VII. CAN DOMESTIC REGULATIONS TRUMP INTERNATIONAL OBLIGATIONS?

Australia’s Constitution dictates that treaty ratification is the function of the Commonwealth Executive, while the passage of laws affecting the Commonwealth is a function of the Commonwealth Parliament. Because of this separation of powers, a treaty is not incorporated into domestic law unless it is implemented by legislation. This concept has traditionally been known as dualism. A dualist system requires international laws to be translated to domestic regulations in order to take effect. Without such execution, litigants would have no cognizable claim in national courts based on international provisions.

In the vast majority of cases, statutory construction circumvents problems related to incorporation. It is uncontroverted that a country has the sovereign power to determine the means by which international agreements are implemented.

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170 See Refugees Without an Asylum Country, supra note 101.
171 See World Refugee Survey 2009 – Malaysia, supra note 161.
173 See AUSTRALIAN CONSTITUTION § 1.
174 See Department of Foreign Affairs and Trade, supra note 173.
176 Id.
177 Id.
domestically. The principle that ambiguities in legislation should be construed in accordance with treaty obligations circumvents the majority of conflicts between the international and domestic fields. However, under a system that requires incorporation for treaty provisions to take on the force of law, it is theoretically possible to change the direct obligations which a treaty would impose by amending Australian domestic law.

Just such an amendment was proposed after the High Court ruled against the Malaysian deal. On September 21, 2011, a bill to amend the Migration Act of 1958 was introduced in the Australian House of Representatives. The purpose of this bill was to “replace the existing framework in the Migration Act for taking offshore entry persons to another country.” The bill called for the repeal of section 198A, the basis for the High Court’s 2011 ruling against the Malaysia deal. In place of this component, a new section would provide that “the designation of a country to be an offshore processing country need not be determined by reference to the international obligations or domestic law of that country.”

The proposed amendment to the Migration Act would circumvent the specific ruling of the High Court which disallowed the Malaysian deal. However, case law indicates that despite this incorporation requirement, treaties still impose some indirect

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179 See id.; Kartinyeri v. Commonwealth, (1998) 195 CLR 337, 384 (Austl); see also International Covenant on Civil and Political Rights, G.A. Res. 2200A (XXI), ¶ 2, U.N. Doc. A/6316 (Mar. 23, 1976) (“Where not already provided for by existing legislative or other measures, each State Party to the present Covenant undertakes to take the necessary steps, in accordance with its constitutional processes and with the provisions of the present Covenant, to adopt such legislative or other measures as may be necessary to give effect to the rights recognized in the present Covenant.”).


181 See Migration Legislation Amendment (Offshore Processing and Other Measures) of 2011, (Cth)(Austl).

182 See id.

183 Id. at 2.

184 See id. at 17.

185 Id.

186 See Department of Foreign Affairs and Trade, supra note 173.
obligations absent being implemented by legislation.\(^{187}\) In *Minister for Immigration and Ethnic Affairs v. Teoh*, a Malaysian immigrant was ordered deported after being convicted of possessing heroin.\(^{188}\) The Federal Court held that the deportation order had been improperly issued because of a failure to consider the hardship to Teoh’s wife and her children if Teoh was refused legal status.\(^{189}\) On review, the High Court affirmed the Federal Court’s decision, reasoning that the Convention on the Rights of the Child required the hardship suffered by the children to be considered.\(^{190}\) The High Court’s reasoning can be applied not only to the Convention on the Rights of the Child, but also to other treaties to which Australia is a State Party.\(^{191}\) The High Court reasoned that, while international agreements must be incorporated into domestic law to have effect, ratification alone holds significance.\(^{192}\) The High Court held that Australia’s ratification of an international agreement raised a “legitimate expectation” that the standards set forth in the treaty would be followed.\(^{193}\) Absent a “statutory or executive indication to the contrary,” the obligations and rights annunciated in treaties are treated as directives on government policy.\(^{194}\)

*Teoh* contains no reference to what would constitute adequate “statutory or executive indication to the contrary.” Here, subsequent Australian case law is instructive. In *Tien v. Minister for Immigration and Multicultural Affairs*, the Court interpreted sufficient “indications to the contrary” to refer to statements made at the time a treaty is entered into, “rather than to statements made years after the treaty came into force.”\(^{195}\) Take the case of *Baldini v. Minister for Immigration*...
and Multicultural Affairs as a counter-example. In this case, a Ministerial Direction under s 499 of the Migration Act of 1958 was at issue. The Ministerial Directions indicate that the best interest of a child should be taken into account only in cases involving parental relationships. These Directions provide a narrower best interest analysis than provided for under the Convention on the Rights of the Child. Nevertheless, the Court found that the Ministerial Direction provided sufficient “executive indication to the contrary.” The take-away from post-Teoh interpretations of “statutory or executive indication to the contrary” is that such indication must be clear and must exist at the time that international obligations are reduced to domestic law.

Recent years have seen a retreat from the ruling in Teoh. Only a few short weeks after Teoh’s ruling, Australia’s then-existing Attorney General and Minister of Foreign Affairs issued a joint statement denouncing the High Court’s reasoning that unincorporated treaties impose a “legitimate expectation” under domestic law. What followed included not only multiple attempts to overturn the decision in the Australian Parliament, but also a retreat by the High Court itself from its language in Teoh. In Ex


198 See id.

199 See id at ¶ 30.

200 See id.


parte Lam, a noncitizen who had established a family in Australia was subject to deportability based on a number of criminal convictions.\textsuperscript{203} Based on the precedent in Teoh, it appeared that there was a “legitimate expectation” that the best interests of the children who would be left behind should be taken into account to comport with Australia’s treaty obligations.\textsuperscript{204} The High Court, however, expressed reservations about the language in Teoh.\textsuperscript{205} The notion was reiterated that, in the Australian system, treaty obligations that have not been enacted by legislation are not self-executing.\textsuperscript{206} The High Court suggested that Teoh might represent an incompatibility to this principle.\textsuperscript{207} Teoh’s continued significance, the High Court suggested, would depend on the limitations that are to be placed on the case’s language and on “the basis upon which Teoh rests.”\textsuperscript{208}

Despite a retreat at both the political and judicial levels, Teoh still represents good law in the Commonwealth.\textsuperscript{209} Furthermore, decisions by the Administrative Appeals Tribunal indicate that lower courts continue to follow the High Court’s reasoning in Teoh.\textsuperscript{210} In Yad Ram v. Department of Immigration and Ethnic Affairs, the Tribunal reviewed the denial of an application for a spousal visa.\textsuperscript{211} The Tribunal applied Teoh and found that the spousal visa should be issued based on the best interests of a child who would be affected by the decision.\textsuperscript{212} While Teoh remains contentious within Australia, standards annunciated by the international community bolster the

\textsuperscript{203} See In re Minister for Immigration and Multicultural Affairs; Ex parte Lam, (2003) 214 CLR 1 (Austl).
\textsuperscript{204} See Minister for Immigration and Ethnic Affairs v. Teoh, (1995) 183 CLR at 291.
\textsuperscript{205} See In re Minister for Immigration and Multicultural Affairs; Ex parte Lam, (2003) 214 CLR 1 (Austl).
\textsuperscript{206} See id.
\textsuperscript{207} See id.
\textsuperscript{208} See id.
\textsuperscript{210} See Department of Immigration and Ethnic Affairs v. Ram, (1996) 69 FCR 431, 432 (Austl.).
\textsuperscript{211} See id. at 432.
\textsuperscript{212} See id. at 436.
High Court's decision.\textsuperscript{213} The Vienna Convention on the Law of Treaties indicates that a country’s domestic laws cannot provide a justification for an international treaty violation.\textsuperscript{214} The International Law Commission of the United Nations has further indicated that a country’s legislation being deemed ‘wrongful’ is governed by international law.\textsuperscript{215} This character of “wrongfulness” is not affected if a law is deemed proper within a country.\textsuperscript{216}

The continued existence of \textit{Teoh} indicates that amending Australia’s domestic refugee law would not be an effective means to circumvent obligations under the Refugee Convention. As the High Court in \textit{Teoh} indicated, while an amendment to the refugee processing system can properly alter the means by which asylum claims are adjudicated, the ends which result from the process must nevertheless comport with the standards and obligations delineated in the Refugee Convention.\textsuperscript{217} Furthermore, international standards delineated by such instruments as the Vienna Convention on the Law of Treaties appear to specifically address and prohibit nations from circumventing their international obligations by changing their internal laws.\textsuperscript{218} The weight of such standards indicates that any amendment designed to allow for an improper third party deal will be in violation of Australia’s international obligations. While altering the Migration Act would overcome the immediate blockade by


\textsuperscript{214} See id.


\textsuperscript{216} See id.


\textsuperscript{218} See Vienna Convention on the Law of Treaties, \textit{supra} note 214, at art. 27.
overturning the High Court’s 2011 ruling, international standards indicate that Australia would still violate its obligations under the Refugee Convention.

CONCLUSION

An amendment to Australia’s Migration Act is not an antidote to the Malaysian deal. While amending Section 198A of the Migration Act has the effect of overturning the discrete High Court ruling declaring the Malaysian deal improper, Australia’s international obligations remain.

Certain questions remain unanswered. The conclusions of this comment are based on the continued vitality of the High Court's holding in *Teoh* that Australia’s ratification of an international treaty, in the absence of statutory or executive indication to the contrary, raises a “legitimate expectation” that the standards set forth in the treaty will be followed. While *Teoh* still stands as good law in the Commonwealth, the High Court’s language in *Lam* and the Executive’s issuance of a statement denouncing *Teoh*, leave the “legitimate expectation” standard on shaky grounds.

Further, only the shortcomings in third party schemes have been addressed. It has been argued that a country such as Malaysia, which is not a State Party to the Refugee Convention and whose system of immigration processing is riddled with problems, cannot constitute a proper third country. While this comment has suggested that certain standards of asylum processing might bring a country up to international standards of human rights, a discussion of what would generally be considered a safe third country is beyond the scope of this discussion.

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The Refugee Convention emphasizes that its State Parties are sovereign states which are nevertheless part of an international community.221 While the means by which protection is provided to refugees is the province of domestic law, to determine the ends that are ultimately met a member state must look outwards to its role as an actor on the international stage.