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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 refuges 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.

[2] *See* Plaintiff M70/2011 and Plaintiff M106 of 2011 v. Minister for Immigration and Citizenship, (2011) HCA 32 (Austl.); British Broadcasting Corporation, *Australia Court Rules Out Refugee 'Swap' with Malaysia*, BBC NEWS, Aug. 31, 2011, http://www.bbc.co.uk/news/world-asia-pacific-14727471; Crystal Ja & Julian Drape, *Opponents Demand Government Rule Out Malaysia Deal*, SYDNEY MORNING HERALD, Sept. 7, 2011, http://news.smh.com.au/breaking-news-national/oppn-demands-govt-rule-out-malaysia-deal-20110907-1jwh4.html.

[3] *See* Madeleine Coorey, *Australia's Malaysia Refugee Swap Under Fire*, AFP, Sept. 16, 2011, http://www.google.com/hostednews/afp/article/ALeqM5g—

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

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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.[11] The proposal of amending Australia's immigration laws is premised on the idea that domestic law trumps international obligations.[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.[13] In 2010, only 8,250 immigrants applied as asylum seekers within the country.[14] By comparison, 55,530 noncitizens sought asylum in the United States in 2010.[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.[16] Dubbed the "boat

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[11] Scholars have recently addressed *Plaintiff M70/2011 and Plaintiff M106 of 2011* in different lights. *See* Michelle Foster, *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, *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").

[12] *See* Katina Curtis, *No Deal Yet on Asylum Seekers*, SYDNEY MORNING HERALD, Dec. 23, 2011, http://news.smh.com.au/breaking-news-national/no-deal-yet-on-asylum-seekers-20111223-1p7mm.html.

[13] *See* U.N. REFUGEE AGENCY, ASYLUM LEVELS AND TRENDS IN INDUSTRIALIZED COUNTRIES 2010 15 (2011), http://www.unhcr.org/4d8c5b109.html.

[14] *See id.*

[15] *See id.*

[16] *See* Tony Keim, *Accused People Smugglers' Boat Stranded at Sea*, THE COURIER-MAIL, Oct. 4, 2011, http://www.couriermail.com.au/news/national/accused-people-smugglers-boat-stranded-at-sea-court-told/story-e6freooo-1226158318125.

people," these immigrants have garnered attention both in the media and within the Australian government.[17]

Christmas Island, an Australian territory located in the Indian Ocean, has been designated as an "excised offshore place."[18]On this island, unlawful noncitizens, who have come to Australia via "offshore entry," are detained.[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.[20] The United Nations High Commissioner for Refugees ("the UNHCR") would then evaluate these asylum seekers' claims in Malaysia.[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.[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.[23] Section 198A further provides that Australia may remove "offshore entry person[s]" to safe third countries.[24] Under this provision, for a country to be a valid port, it must meet "relevant" human rights

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[17] Nick Butterly & Andrew Probyn Canberra, *Gillard Turns the Boat Jeat on Abbott*, THE WEST AUSTRALIAN, Sept. 24, 2011, http://au.news.yahoo.com/thewest/a/-/breaking/10329656/gillard-turns-the-boat-heat-on-abbott/.

[18] *See* DEPARTMENT OF IMMIGRATION AND CITIZENSHIP, FACT SHEET 81 - AUSTRALIA'S EXCISED OFFSHORE PLACES (2010).

[19] *See* DEPARTMENT OF IMMIGRATION AND CITIZENSHIP, *supra* note 19; *see also* 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).

[20] *See* Plaintiff M70/2011 and Plaintiff M106 of 2011, (2011) HCA 32, at ¶ 8; Siegel, *supra* note 1.

[21] *See* Plaintiff M70/2011 and Plaintiff M106 of 2011 v. Minister for Immigration and Citizenship, [2011] HCA 32, at ¶ 8.

[22] *See id.*

[23] Migration Act of 1958, (Cth) § 198(2) (Austl.).

[24] *Id.* § 198A(1).

standards.[25] Furthermore, such a third country must also provide protection to persons seeking asylum or returning to their countries of origin.[26]

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.[27] By refusing to house asylum seekers within Australia, the government hopes to deter immigrants from seeking illegal channels of entry.[28]

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.[29] In 2001, a Norwegian carrier ship, the *MV Tampa*, rescued 438 distressed Afghans from fishing vessels in international waters.[30] The rescued noncitizens subsequently sought asylum from the Australian government.[31] 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.[32]

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[25] *See id.*

[26] *See id.*

[27] *See* Press Release, Australian Human Rights Commission, Sending Asylum Seekers To Malaysia Is Not The Answer To Addressing People Smuggling (July 25, 2011), http://humanrights.gov.au/about/media/media_releases/2011/61_11.html).

[28] *See id.*

[29] *See* Susan Kneebone, *The Pacific Plan: The Provision of "Effective Protection?"*, 18 INT'L J. REFUGEE L. 696 (2006); *see also* Savitri Taylor, *Protection Elsewhere/Nowhere,* 18 INT'L J. REFUGEE L. 283 (2006).

[30] *See* Plaintiff M70/2011 and Plaintiff M106 of 2011 v. Minister for Immigration and Citizenship, (2011) HCA 32, at ¶ 13.

[31] *See id.*

[32] *See* Kneebone, *supra* note 30, at 696; Taylor, *supra* note 30 (for a discussion of Australia's previous third-country arrangements).

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.[33] 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.[34] Under the Migration Act, unlawful noncitizens detained under section 178 must be kept in immigration detention until they are removed from Australian borders.[35] If the noncitizen is given a final status determination of unlawful presence, s/he must then be removed "as soon as reasonably practical."[36]

Australia's Migration Act provides for these asylum seekers to be sent to territories other than their countries of origin.[37] Under Section 91D of the Migration Act, such plans are designated as "safe third country" schemes.[38] The Minister of Immigration has the ability to designate a third country as being "safe," and thus a proper port of removal.[39] An asylum claimant, who has a right to reside in a third country, cannot validly apply for a visa based on protection in Australia.[40] In addition, Australia would not have any protection obligations to such an individual.[41] 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.

[34] *See* Migration Act of 1958, (Cth) §§ 188-197 (Austl.).

[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.

[41] *See* Plaintiff M70/2011 and Plaintiff M106 of 2011 v. Minister for Immigration and Citizenship, (2011) HCA 32, at ¶ 45 (Austl.).

asylum claim, this provision prevents immigrants from "forum shopping" for the most lenient admissions system.[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.[43] Australian courts have held that such a declaration must be made by the Minister of Immigration in "good faith."[44] Furthermore, any declaration must be based on an objective evaluation that a designated country is "safe" to send migrants.[45] The declaration must also comport with obligations under the Refugee Convention.[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.[47]

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

While Australia's Migration Act does allow for certain safe third country schemes,[48] the High Court has rejected its use in the present deal.[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.[50] However, in *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

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[42] Penelope Mathew, *Current Development: Australian Refugee Protection in the Wake of the Tampa*, 96 AM. J. INT'L L. 661, 672-673 (2002).

[43] *See* Migration Act of 1958, (Cth) § 198A(3) (Austl.).

[44] *See Minister for Immigration and Multicultural Affairs v. Eshetu*, (1999) 197 CLR 611, 654 (Austl.).

[45] *See* Migration Act of 1958, (Cth) § 198A(3) (Austl.) (establishing the criteria used to evaluate a third country as safe).

[46] *See id.* § 198A(3)(iv).

[47] *See id.* §§ 198A(3)(ii)-(iii).

[48] *See id.* § 91D.

[49] *See* Plaintiff M70/2011 and Plaintiff M106 of 2011 v. Minister for Immigration and Citizenship, (2011) HCA 32 at ¶ 66-67.

[50] *See, e.g.*, Kola v. Minister for Immigration and Multicultural Affairs, (2002) 120 FCR 170, 178 (Austl.).

a country to be "safe."[51] 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.[52] If no power under section 198A exists, the person may only be validly removed once their claims are assessed and found to be lacking.[53] 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).[54]

Section 198A requires certain standards to be met before offshore entry persons may be taken to a designated country.[55] A country of deportation must provide effective procedures for assessing asylum claims.[56] Protections must be afforded to refugees[57], as well as noncitizens who are waiting for their claims to be processed.[58] A third country must also meet "relevant" human rights standards in dispensing its protection to refugees and asylum seekers.[59]

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.[60] 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]."[61]

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[51] *See* Plaintiff M70/2011 and Plaintiff M106 of 2011 v. Minister for Immigration and Citizenship, (2011) HCA 32, at ¶ 66.

[52] *See id.*

[53] *See* Plaintiff M70/2011 and Plaintiff M106 of 2011 v. Minister for Immigration and Citizenship, (2011) HCA 32, at ¶ 54.

[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.).

[60] *See* NAGV and NAGW of 2002 v. Minister for Immigration and Multicultural and Indigenous Affairs, (2005) HCA 6, 213 ALR 668, at ¶ 42 (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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[62] *See* NAGV and NAGW of 2002 v. Minister for Immigration and Multicultural and Indigenous Affairs, (2005) HCA 6, at ¶ 58.

[63] *See id.*

[64] *Id.* at ¶ 27; *see also* Migration Act of 1958, (Cth) § 36(2) (Austl.).

[65] *See* Migration Act of 1958, (Cth.) § 36(2) (Austl.); NAGV and NAGW of 2002 v. Minister for Immigration and Multicultural and Indigenous Affairs, [2005] HCA 6, at ¶ 33.

[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,[70] 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."[71]

The principle of non-refoulement has long been espoused as a necessary protection for asylum seekers.[72] 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.[73] However, the principle of non-refoulement under Article 33 has subsequently been extended to include a prohibition against chain refoulement.[74] 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.[75] 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.[76]

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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[70] Convention and Protocol Relating to the Status of Refugees, G.A. Res. 2198 (XXI), U.N. Doc. A/RES/57/187, at art. 1 (Dec. 18, 2001).

[71] *See id.* at art. 2.

[72] *See id.* at art. 33.

[73] *See id.*

[74] Stephen H. Legomsky, *Secondary Refugee Movements and the Return of Asylum Seekers to Third Countries: The Meaning of Effective Protection*, ¶ 4, U.N. Doc. PPLA/2003/01 (Feb. 2003).

[75] *Id.*

[76] Convention and Protocol Relating to the Status of Refugees, *supra* note 71, at art. 33.

law.[77] The United Nations has declared that the principle of non-refoulement constitutes a rule of international customary law.[78] 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.[79] 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.[80]

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.[81] For State Parties to the Refugee Convention, there is a delineated obligation under the treaty's language to protect asylum seekers from refoulement.[82] 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.[83] The ICJ has explained that states have an obligation to act in conformity with customary law on the international stage.[84] 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

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[77] *See* Statute of the International Court of Justice, June 26, 1945, 33 U.N.T.S. 993, at art. 38, ¶ 1.

[78] *See* U.N. High Commissioner for Refugees, *The Principle of Non-Refoulement as a Norm of Customary International Law. Response to the Questions Posed to UNHCR by the Federal Constitutional Court of the Federal Republic of Germany in Cases 2 BvR 1938/93, 2 BvR 1953/93, 2 BvR 1954/93*, Jan. 31, 1994, http://www.unhcr.org/refworld/docid/437b6db64.html.

[79] *See id.*

[80] *See id.*

[81] *See id.*

[82] *See id.*

[83] *See* U.N. High Commissioner for Refugees, *supra* note 79.

[84] *See* Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.), 1986 I.C.J. 14, 425 (June 27).

new international standard.[85] The state's action will be considered to be prima facie evidence that a rule has been violated.[86]

Australia's High Court has extended the concept of non-refoulement to safe third country schemes.[87] In *NAVG*, 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.[88] Article 33, therefore, did not place any limitations on sending noncitizens to countries other than their homelands.[89] The High Court firmly rejected this reasoning.[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.[91] The Court further explained that Article 33 of the Refugee Convention should also be read in the negative.[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."[93] Thus, a state might have an obligation to

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[85] *See id.*

[86] *See id.* at 427.

[87] *See* NAGV and NAGW of 2002 v. Minister for Immigration and Multicultural and Indigenous Affairs, (2005) HCA 6, at ¶ 25.

[88] *See id.* at ¶ 24.

[89] *See id.*

[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.").

[91] *See* 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, *The Scope And Content of the Principle Of Non-Refoulement*, June 20, 2001, http://www.unhcr.org/cgibin/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).

[92] *See* NAGV and NAGW of 2002 v. Minister for Immigration and Multicultural and Indigenous Affairs, (2005) HCA 6, at ¶ 23.

[93] *Id.* at ¶ 22.

protect a noncitizen simply because no other proper and safe country exists.[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.[95] In *Thiyagarajah*, a Sri Lankan applicant in Australia had previously been granted refugee status and permanent residence in France.[96] The respondent was furthermore eligible to apply for French citizenship.[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.[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.[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.[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.[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.[102]

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[94] *See id.*

[95] *See* Minister for Immigration and Multicultural Affairs v. Thiyagarajah, (1997) 80 FCR 543, 563 (Austl.).

[96] *See id.* at 565.

[97] *See id.*

[98] *See id.* at 563.

[99] *See* Rajendran v. Minister for Immigration and Multicultural Affairs, 1998 AUST FEDCT LEXIS 651, ¶ 11 (Austl.).

[100] *See* U.N. Human Right Commission, *Refugees Without an Asylum Country,* Conclusion No. 15 (XXX), (A/34/12/Add.1) (Oct. 16, 1979) [hereinafter *Refugees Without an Asylum Country*].

[101] *Id.*

[102] *See* Minister for Immigration and Multicultural Affairs v. Thiyagaraja, (1997) 80 FCR at 563.

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.[103] However, previous case law indicates that a third country must be able to provide an asylum seeker with effective protection.[104] The High Court in *Thiyagarajah* ultimately held that France was a proper third country to which the noncitizen could be deported without a substantive consideration of his asylum claim.[105] 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.[106] 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.[107]

Effective protection is a safeguard designed to protect not only noncitizens who have already been granted asylum but also applicants who assert asylum claims.[108] Claiming a credible fear from a country of origin affords an applicant with certain minimum safeguards while their claims are being adjudicated.[109] The means by which these safeguards are provided are left open by the terms of the Refugee Convention.[110] The UNHCR has acknowledged that varying

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[103] *See id.*

[104] *See generally* Rajendran v. Minister for Immigration and Multicultural Affairs, (1998) 86 FCR 526 (Austl.).

[105] *See* Minister for Immigration and Multicultural Affairs v. Thiyagaraja, (1997) 80 FCR at 563.

[106] *See id.*

[107] *See id.*; *see generally* Rajendran v. Minister for Immigration and Multicultural Affairs, (1998) 86 FCR 526 (Austl.).

[108] *See* U.N. Refugee Agency, Advisory Opinion on the Extraterritorial Application of Non-Refoulement Obligations under the 1951 Convention relating to the Status of Refugees and its 1967 Protocol, at 2-3 (Jan. 26, 2007), http://www.unhcr.org/refworld/pdfid/45f17a1a4.pdf.

[109] *See id.*

[110] *See* U.N. Human Right Commission, *Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol Relating to the Status of Refugees*, line 191, HCR/IP/4/Eng/REV (1992) [hereinafter *Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol Relating to the Status of Refugees*].

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.[111]

While each State Party is given leave to implement its own procedures for adjudicating claims based on its particular judicial and administrative structure,[112] the UNHCR has nevertheless promulgated minimum procedural standards which must be met.[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.[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.[115] Instead, a hallmark of effective protection is whether a third country's asylum processing system is fair to applicants.[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.[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.[118] Asylum seekers should first and foremost be given necessary information about the procedures they need to follow to assert asylum claims.[119] Interpreters should be provided to applicants while they are submitting their

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111 *See id.*

112 *See id.*

113 *See Refugees Without an Asylum Country*, supra note 101, at 2.

114 *See id.*

115 *See* Legomsky, *supra* note 75, at 7.

116 *See Refugees Without an Asylum Country*, supra note 101.

117 *See Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol Relating to the Status of Refugees*, *supra* note 111, at line 192.

118 *See* U.N. High Commissioner for Refugees, *Determination of Refugee Status*, No. 8 (XXVIII), A/32/12/Add.1 (Oct. 12, 1977).

119 *See id.* at e(ii).

claims to the appropriate officials.[120] 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.[121] 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.[122]

Under best practice procedures, a determination of whether a country is "safe" and will provide asylum seekers effective protection should be individualized.[123] 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.[124] 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.[125] However, asylum applicants rarely flee their homelands carrying documentation of their persecution.[126] 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(vii).

123 *See Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol Relating to the Status of Refugees*, *supra* note 111, at line 29; *see also* Joanne van Selm, *Access to Procedures 'Safe Third Countries', 'Safe Countries of Origin' and 'Time Limits'*, UNHCR, June 2001, http://www.unhcr.org/cgibin/texis/vtx/home/opendocPDFViewer.html?docid=3b39a2403 (discussing how countries are classified as safe under the human rights obligations of the European Union).

124 *See* U.N. High Commissioner for Refugees, Asylum Processes (Fair and Efficient Asylum Procedures), ¶ 4, EC/GC/01/12 (May 31, 2001).

125 *See Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol Relating to the Status of Refugees*, *supra* note 111, at line 196.

126 *See* U.N. High Commissioner for Refugees, *UNHCR Annotations for Articles 1 to 19 of the Draft Council Directive on Minimum Standards for the Qualification of Third Country Nationals and Stateless Persons as Refugees or as Persons Who Otherwise Need International Protection and the Content of the Protection Granted*, Dec. 2002, at 6, http://www.unhcr.org/refworld/docid/437cafaa4.html.

government examiners.[127] 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.[128]

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.[129] In *M.S.S. v. Belgium and Greece*, a noncitizen claiming asylum from Afghanistan entered the European Union through Greece.[130] The Afghani finally made his way to Belgium, where he was detained.[131] He was then transferred back to Greece to have his asylum claim processed.[132] 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").[133] 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.[134] 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."[135] 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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127 *See Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol Relating to the Status of Refugees*, *supra* note 111, at line 196.

128 *See id.*

129 *See* M.S.S. v. Belgium and Greece, App. No. 30696/09, Eur. Ct. H.R., 4 (2011), http://www.unhcr.org/refworld/docid/4d39bc7f2.html.

130 *See id.*

131 *See id.*

132 *See id.*

133 *See id.* at 84 (2011).

134 *See* M.S.S. v. Belgium and Greece, App. No. 30696/09, Eur. Ct. H.R., 75 (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 supervision[142] 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

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136 *See* M.S.S. v. Belgium and Greece, App. No. 30696/09, Eur. Ct. H.R., 111 (2011).

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 Refugees To Seek Protection in Another State*, 28 MICH. J. INT'L L. 223, 283 (2007).

member states.[144]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.[145]

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.[146] Moreover, the country does not legally recognize the status of "refugee" under its domestic laws.[147] 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."[148] 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.[149] No protection is provided for noncitizens that are ultimately determined to be unlawful and expelled to their countries of origin.[150]

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).[151] Under Section 6 of Malaysia's Immigration Act of 1959/63, an unlawful noncitizen is also subject

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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.

146 *See* U.N. High Commissioner for Refugees, *States Parties to the 1951 Convention Relating to the Status of Refugees and the 1967 Protocol*, Apr. 2011,http://www.unhcr.org/3b73b0d63.html.

147 *See* DEPARTMENT OF STATE, HUMAN RIGHTS REPORT: MALAYSIA, 27 (2010).

148 U.N. High Commissioner for Refugees, *UNHCR's Views On The Concept of Effective Protection As It Relates To Malaysia*, Mar. 2005, at 1, http://www.unhcr.org.au/pdfs/Malaysia.pdf [hereinafter *UNHCR's Views On The Concept of Effective Protection As It Relates To Malaysia*].

149 *See* DEPARTMENT OF STATE, HUMAN RIGHTS REPORT: MALAYSIA, at 27 (2010) [hereinafter HUMAN RIGHTS REPORT: MALAYSIA].

150 *See id.* at 28.

151 *See* Immigration Act 1959/63, ∫ 6(3)(Malaysia).

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

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[152] *See id.*

[153] *See* HUMAN RIGHTS REPORT: MALAYSIA, *supra* note 150, at 26.

[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.

[160] U.S. Committee for Refugees and Immigrants, *World Refugee Survey 2009 – Malaysia*, June 17, 2009, http://www.unhcr.org/refworld/docid/4a40d2adc.html.

[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

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[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.

[168] *See* M.S.S. v. Belgium and Greece, App. No. 30696/09, _Eur. Ct. H.R. at 84.

[169] *See World Refugee Survey 2009 – Malaysia, supra* note 161.

process and access to a fair and impartial system of asylum determination and appeal,[170] 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.[171]

VII. CAN DOMESTIC REGULATIONS TRUMP INTERNATIONAL OBLIGATIONS?

Australia's Constitution dictates that treaty ratification is the function of the Commonwealth Executive,[172] while the passage of laws affecting the Commonwealth is a function of the Commonwealth Parliament.[173] Because of this separation of powers, a treaty is not incorporated into domestic law unless it is implemented by legislation.[174] This concept has traditionally been known as dualism.[175] A dualist system requires international laws to be translated to domestic regulations in order to take effect.[176] Without such execution, litigants would have no cognizable claim in national courts based on international provisions.[177]

In the vast majority of cases, statutory construction circumvents problems related to incorporation.[178] 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.

172 *See* AUSTRALIAN CONSTITUTION § 61; *see also* Department of Foreign Affairs and Trade, *Treaties and Treaty Making* (2011), http://www.dfat.gov.au/treaties/making/making2.html.

173 *See* AUSTRALIAN CONSTITUTION § 1.

174 *See* Department of Foreign Affairs and Trade, *supra* note 173.

175 *See* John H. Jackson, *Status of Treaties in Domestic Legal Systems: A Policy Analysis*, 86 AM. J. INT'L L. 310, 323; *see also* Melissa A. Waters, *Creeping Monism: The Judicial Trend Toward Interpretive Incorporation of Human Rights Treaties*, 107 COLUM. L. REV. 628 (2007).

176 *Id.*

177 *Id.*

178 *See generally* Minister for Immigration and Ethnic Affairs v. Teoh, (1995) 183 CLR at 273, 32 ALD 420 (Austl.).

domestically.[179] 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.[180] 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.[181] On September 21, 2011, a bill to amend the Migration Act of 1958 was introduced in the Australian House of Representatives.[182] The purpose of this bill was to "replace the existing framework in the Migration Act for taking offshore entry persons to another country."[183] The bill called for the repeal of section 198A, the basis for the High Court's 2011 ruling against the Malaysia deal.[184] 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."[185]

The proposed amendment to the Migration Act would circumvent the specific ruling of the High Court which disallowed the Malaysian deal.[186] 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.").

[180] *See generally* Minister for Immigration and Ethnic Affairs v. Teoh, (1995) 183 CLR at 273.

[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*

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187 *See* Minister for Immigration and Ethnic Affairs v. Teoh, (1995) 183 CLR at 293.

188 *See id.* at 279.

189 *See id.* at 281.

190 *See id.* at 293.

191 *See id.* at 301.

192 *See* Minister for Immigration and Ethnic Affairs v. Teoh, (1995) 183 CLR at 301.

193 *See id.* at 275-76.

194 *See id.* at 274.

195 Tien v. Minister for Immigration and Multicultural Affairs, (1998) 53 ALD 32 (Aust.).

and Multicultural Affairs as a counter-example.[196] In this case, a Ministerial Direction under s 499 of the Migration Act of 1958 was at issue.[197] The Ministerial Directions indicate that the best interest of a child should be taken into account only in cases involving parental relationships.[198] These Directions provide a narrower best interest analysis than provided for under the Convention on the Rights of the Child.[199] Nevertheless, the Court found that the Ministerial Direction provided sufficient "executive indication to the contrary."[200] 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.[201] 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*.[202] In *Ex*

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196 *See* Baldini v. Minister for Immigration and Multicultural Affairs, (2000) FCA 173, ¶ 4; *see also* Wendy Lacey, *In the Wake of Teoh: Finding Appropriate Government Response*, 29 Fed. L. Rev. 219 (2001) (for a discussion of Baldini and its impact on post-Teoh legislation).

197 *See* Baldini v. Minister for Immigration and Multicultural Affairs, (2000) FCA 173, ¶ 4.

198 *See id.*

199 *See id* at ¶ 30.

200 *See id.*

201 *See* Joint Statement from the Minister for Foreign Affairs and the Attorney General, *International Treaties and the High Court Decision in Teoh,* May 10, 1995; Joint Statement from the Minister for Foreign Affairs and the Attorney General and Minister for Justice, *The Effect of Treaties in Administrative Decision-Making*, Feb. 25, 1997.

202 *See* The Administrative Decisions (Effect of International Instruments) Bill of 1995, (Cth)(Austl.); Administrative Decisions (Effect of International Instruments) Bill of 1997, (Cth)(Austl.); Administrative Decisions (Effect of International Instruments) Bill of 1999, (Cth) (Austl.); *See also* Administrative Decision (Effect of International Instruments) Act of 1996 (SA) (Austl.) (Southern Australia, as opposed to the Commonwealth, has enacted legislation which invalidates *Teoh*'s language).

parte Lam, a noncitizen who had established a family in Australia was subject to deportability based on a number of criminal convictions.[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.[204] The High Court, however, expressed reservations about the language in *Teoh*.[205] The notion was reiterated that, in the Australian system, treaty obligations that have not been enacted by legislation are not self-executing.[206] The High Court suggested that *Teoh* might represent an incompatibility to this principle.[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."[208]

Despite a retreat at both the political and judicial levels, *Teoh* still represents good law in the Commonwealth.[209] Furthermore, decisions by the Administrative Appeals Tribunal indicate that lower courts continue to follow the High Court's reasoning in *Teoh*.[210] In *Yad Ram v. Department of Immigration and Ethnic Affairs*, the Tribunal reviewed the denial of an application for a spousal visa.[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.[212] While *Teoh* remains contentious within Australia, standards annunciated by the international community bolster the

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[203] *See* In re Minister for Immigration and Multicultural Affairs; Ex parte Lam, (2003) 214 CLR 1 (Austl.).

[204] *See* Minister for Immigration and Ethnic Affairs v. Teoh, (1995) 183 CLR at 291.

[205] *See* In re Minister for Immigration and Multicultural Affairs; Ex parte Lam, (2003) 214 CLR 1 (Austl.).

[206] *See id.*

[207] *See id.*

[208] *See id.*

[209] *See* MATTHEW GROVES & H. P. LEE, AUSTRALIAN ADMINISTRATIVE LAW: FUNDAMENTALS, PRINCIPLES, AND DOCTRINES 306 (2007).

[210] *See* Department of Immigration and Ethnic Affairs v. Ram, (1996) 69 FCR 431, 432 (Austl.).

[211] *See id.* at 432.

[212] *See id.* at 436.

High Court's decision.[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.[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.[215] This character of "wrongfulness" is not affected if a law is deemed proper within a country.[216]

The continued existence of *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 *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.[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.[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

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[213] *See, e.g.*, Vienna Convention on the Law of Treaties art. 27, May 23, 1969, 1155 U.N.T.S. 331 ("A party may not invoke the provisions of its internal law as justification for its failure to perform a treaty.").

[214] *See id.*

[215] *See* International Law Commission's Draft Articles on Responsibility of States for Internationally Wrongful Acts art. 3, 56 U.N. GAOR Supp. (No. 10) at 1, U.N. Doc. A/56/10 (2001) ("[t]he characterization of an act of a State as internationally wrongful is governed by international law. Such characterization is not affected by the characterization of the same act as lawful by internal law."); *see also* RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 111 cmt. a (1987) ("[F]ailure of the United States to carry out an obligation [of international law] on the ground of its unconstitutionality will not relieve the United States of responsibility under international law.").

[216] *See id.*

[217] *See* Minister for Immigration and Ethnic Affairs v. Teoh, (1995) 183 CLR at 289.

[218] *See* Vienna Convention on the Law of Treaties, *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.[219]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.[220]

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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[219] *See* Minister for Immigration and Ethnic Affairs v. Teoh, (1995) 183 CLR at 289.

[220] *See* The Administrative Decisions (Effect of International Instruments) Bill of 1995, (Cth)(Austl.); Administrative Decisions (Effect of International Instruments) Bill of 1997, (Cth)(Austl.); Administrative Decisions (Effect of International Instruments) Bill of 1999, (Cth)(Austl).

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.

[221] *See* UNHCR, *The 1951 Convention Relating to the Status of Refugees and its 1967 Protocol: Signing On Could Make All The Difference,* UN REFUGEE AGENCY (Aug. 2001), http://www.unhcr.org/3bbdb0954.html.