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The Pacific Solution - Assessing Australia's Compliance with International Law

Rachel Mansted

Bond University, rmansted@student.bond.edu.au

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The Pacific Solution - Assessing Australia's Compliance with International Law

Abstract

This article focuses on the extent to which the Pacific Solution legislative scheme implemented by the Australian Government in 2001 complies with international law. It discusses Australia's obligations in several key areas of international refugee law, seeking to elucidate the interpretative discrepancies as to the content of these obligations, and examines to what extent and in which areas the Pacific Solution complies with international law.

Keywords

pacific, solution, tampa, australia, asylum, seeker, refugee, law, international, human, rights

Cover Page Footnote

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THE PACIFIC SOLUTION – ASSESSING AUSTRALIA’S COMPLIANCE WITH INTERNATIONAL LAW

RACHEL MANSTED

Introduction

[i] The legislative scheme known as the ‘Pacific Solution’ was implemented by the Australian Government in September 2001. The three Acts comprising the scheme¹ were passed in the aftermath of a highly politicised incident in which rescued asylum seekers on board a Norwegian ship, the *Tampa*, were denied access to Australia.² The Pacific Solution retrospectively validated the government’s actions with respect to the *Tampa*, and established a new framework for processing people who travel by boat to Australia with the objective of entering illegally to seek asylum. This paper examines Australia’s obligations in several key areas of international refugee law, seeking to elucidate the interpretative discrepancies as to the content of these obligations, and examine to what extent and in which areas the Pacific Solution complies with international law.

The Pacific Solution

[1] The main thrust of the Pacific Solution is the processing of asylum seekers offshore. This is achieved through excising certain Australian territories, including Christmas Island, Ashmore and Cartier Islands and the Cocos Islands, from the Australian ‘migration zone’.³ A person who enters Australia at one of these places and becomes an unlawful non-citizen is classified as an ‘offshore entry person,’⁴ and as such cannot make a visa application in Australia.⁵ Offshore entry persons, in addition to persons *en route* to Australia intercepted on

¹ *Border Protection (Validation and Enforcement Powers) Act 2001* (Cth); *Migration Amendment (Excision from Migration Zone) Act 2001* (Cth); *Migration Amendment (Excision from Migration Zone) (Consequential Provisions) Act 2001* (Cth).

² Penelope Mathew, ‘Australian Refugee Protection in the Wake of the Tampa’ (2002) 96 *American Journal of International Law* 661.

³ *Migration Amendment (Excision from Migration Zone) Act 2001* (Cth) Schedule 1(1).

⁴ *Migration Amendment (Excision from Migration Zone) Act 2001* (Cth) Schedule 1(1).

⁵ *Migration Amendment (Excision from Migration Zone) Act 2001* (Cth) Schedule 1(4); *Migration Act 1958* (Cth) s 46A.

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the high seas or territorial sea, may be taken to ‘declared countries’ for processing.⁶ Nauru and Papua New Guinea (PNG) have been confirmed as ‘declared countries’ and participants in the Pacific Solution.⁷ At the time of writing, the government is seeking to pass legislation to extend the scope of the Pacific Solution,⁸ however this paper is confined to an analysis of the current legislative and administrative scheme.

International Law

[2] Human rights groups, legal scholars, and United Nations bodies have criticised the Pacific Solution for non-compliance with international law.⁹ Australia’s international legal responsibilities arise from customary international law¹⁰ and treaties which it has ratified.¹¹ Australia is a party to the Refugees Convention¹² and its Protocol,¹³ and to the International Covenant on Civil and Political Rights (ICCPR).¹⁴

[3] Individuals subject to the Pacific Solution arguably come under the protection of both treaties. A person is a ‘refugee’ and comes under the Refugees Convention if they are outside their State of nationality and have a ‘well-founded fear of persecution.’ should they return.¹⁵ This definition operates independently of formal recognition,¹⁶ therefore asylum seekers who

⁶ *Border Protection (Validation and Enforcement Powers) Act 2001* (Cth) Schedule 2(7); *Migration Act 1951* (Cth) s.245F(8).

⁷ *Migration Act 1958* (Cth) s.198A; Senate Legal and Constitutional References Committee, *Report: Provisions of the Migration Amendment (Designated Unauthorised Arrivals) Bill 2006* (2006) ¶3.119; Department of Immigration and Multicultural and Indigenous Affairs, *Offshore Processing Arrangements, Fact Sheet 76: Offshore Processing Arrangements* <<http://www.immi.gov.au/facts/76offshore.htm>> (Revised 23 May 2005).

⁸ Senate Legal and Constitutional References Committee, above n 7, ¶3.208.

⁹ See, eg, Executive Committee of the High Commissioner’s Programme, *Report of the Twenty-Ninth Meeting of the Standing Committee* (2004) UN Doc A/AC.96/988 (7 July 2004) ¶25; Amnesty International, *Press Release: The Pacific Solution One Year On – punishing the refugees* <<http://web.amnesty.org.ai.nsf/recent/asa120092002>> (25 August 2002); Mathew, above n 2.

¹⁰ *Statute of the International Court of Justice* art 38(1)(b) (entered into force 26 June 1945).

¹¹ *Statute of the International Court of Justice* art 38(1)(a) (entered into force 26 June 1945).

¹² *Convention Relating to the Status of Refugees*, 189 UNTS 150 (entered into force 22 April 1954).

¹³ *Protocol Relating to the Status of Refugees*, 606 UNTS 267 (entered into force 4 October 1967).

¹⁴ See *International Covenant on Civil and Political Rights*, 999 UNTS 171, art 7 (entered into force 23 March 1976).

¹⁵ *Convention Relating to the Status of Refugees*, 189 UNTS 150, art 1A(2) (entered into force 22 April 1954); UNHCR, *Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol Relating to the Status of Refugees* (2nd ed, 1992) ¶28; UNHCR Executive Committee, *Conclusion No.82 (XLVIII)* (1997) ¶(i); Jens Vedsted-Hansen, ‘Non-admission policies and the right to protection: refugees’ choice versus states’ exclusion?’ in Frances Nicholson and Patrick Twomey (eds), *Refugee Rights and Realities* (1999) 269, 275.

¹⁶ *Convention Relating to the Status of Refugees*, 189 UNTS 150, art 1A(2) (entered into force 22 April 1954); United Nations High Commissioner for Refugees and the Lauterpacht Research Centre for International Law, ‘Expert Roundtable’ (2001) University of Cambridge, UK, 9-10 July 2001 ¶3.

are eventually deemed to be genuine refugees must have been afforded the protections under the Convention even prior to arrival in Australian territory.

[4] It is less clear as to whether the refugees subject to the Pacific Solution are within Australia's territory and subject to its jurisdiction, and thus protected under the ICCPR.¹⁷ When asylum seekers are processed offshore, they are not within the territory of Australia, however, Australia's acts with respect to the Pacific Solution cause asylum seekers to be subject to Australia's jurisdiction and thus assessable by reference to the ICCPR.

[5] The three primary international legal obligations under the Refugees Convention and ICCPR which the Pacific Solution calls into question are: the prohibitions on *refoulement*, discrimination due to illegal entry, and arbitrary detention.

The prohibition on refoulement

[6] A State is not under an international law obligation to accept a refugee into its territory.¹⁸ However, it may not, 'expel or return (*refouler*) a refugee in any manner whatsoever to the frontiers or territories where his life or freedom would be threatened...'¹⁹ A threat to life or freedom at both international and Australian law entails a well-founded fear of persecution on grounds of race, religion, nationality, or membership of a particular social group.²⁰ The ICCPR, through its prohibition on torture and degrading punishment,²¹ has also been interpreted by the Human Rights Committee to prohibit the *refoulement* of refugees at a State's frontier.²²

[7] There is one exception to the prohibition on *refoulement*, namely that a State may *refouler* a refugee where there are reasonable grounds for regarding them as 'a danger to the

¹⁷ See *International Covenant on Civil and Political Rights*, 999 UNTS 171, art 2(1) (entered into force 23 March 1976).

¹⁸ Sir Elihu Lauterpacht and Daniel Bethlehem, 'The scope and content of the principle of *non-refoulement*: Opinion' in Erika Feller, Volker Turk and Frances Nicholson (eds), *Refugee Protection in International Law* (2003) 87, 113.

¹⁹ *Ibid*; *Convention Relating to the Status of Refugees*, 189 UNTS 150, art 33 (entered into force 22 April 1954).

²⁰ *MIMA v Thiyagarajah* (1998) 80 FCR 543; Department of Immigration and Multicultural and Indigenous Affairs, *Interpreting the Refugees Convention – an Australian Contribution* (2002) 50; Paul Weis, *The Refugee Convention, 1951: The Travaux Préparatoires Analysed* (1995) 303, 341; A Grahl-Madsen, *Commentary on the Refugee Convention 1951: Articles 2-11, 13-37* (1963) 231-2.

²¹ See *International Covenant on Civil and Political Rights*, 999 UNTS 171, art 7 (entered into force 23 March 1976).

²² Human Rights Committee, *General Comment No.20* (1992) ¶9; United Nations High Commissioner for Refugees and the Lauterpacht Research Centre for International Law, above n 16, ¶4.

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security’ of that State.²³ In order to determine that such a danger is posed, refugees must be individually assessed.²⁴ The Pacific Solution does not purport to conduct individual assessments prior to moving asylum seekers offshore *en masse*. Moreover, most asylum seekers subject to the Pacific Solution would not appear to pose a ‘real risk’²⁵ to Australia’s security, as the vast majority have been granted refugee status and protection.²⁶ *Refoulement* would be seen as a disproportionate²⁷ response to any threat posed to Australia’s border security, thus Australia’s actions would not fall under the exception.

Defining the obligation

[8] Australia’s excision of certain areas from its ‘migration zone’ does not purport to relinquish sovereignty over those areas,²⁸ thus they remain Australian sovereign territory, from which refugees may not be *refouled*. Further, it is generally recognised that the *refoulement* prohibition extends to rejection at the frontier²⁹ and to a State’s conduct beyond its borders.³⁰ The issues that must be examined with respect to the Pacific Solution are whether sending refugees to Nauru and PNG constitutes *refoulement* of itself, second, whether a risk of subsequent *refoulement* from these States places Australia in breach of its obligations, and third, whether interdicting asylum seekers amounts to *refoulement*.

Direct refoulement

[9] *Refoulement* is not restricted to returning a refugee to the place from which they initially sought refuge.³¹ If Nauru or PNG can be classed as territories in which refugees are at risk of persecution, Australia will be in breach of international law.³² The major criticisms of the processing facilities are unpleasant conditions, lack of fresh water, and psychological harm caused by the uncertainty of the situation.³³ While less than desirable, the detention of asylum seekers in Nauru and PNG would not appear to amount to persecution on the grounds

²³ *Convention Relating to the Status of Refugees*, 189 UNTS 150, art 33(2) (entered into force 22 April 1954).

²⁴ Lauterpacht and Bethlehem, above n 18, 137.

²⁵ See UNHCR, above n 15, ¶42.

²⁶ Department of Immigration and Multicultural and Indigenous Affairs, above n 7.

²⁷ Weis, above n 20, 342.

²⁸ See *Aaland Islands Case* LNOJ Special Supp No 3 (1920).

²⁹ Weis, above n 20, 342; UNHCR Executive Committee, *Conclusion No.6 (XXVIII)* (1977) ¶(c).

³⁰ Guy S Goodwin-Gill, ‘The Haitian Refoulement Case: A Comment’ (1994) 6 *International Journal of Refugee Law* 103; Cf *Sale v Haitian Ctrs Council* (1993) 113 S. Ct 2549, 509 US 155.

³¹ N Robinson, *Convention Relating to the Status of Refugees: Its History, Contents and interpretation: A Commentary* (1953) 161; *Convention Relating to the Status of Refugees*, 189 UNTS 150, art 33(1) (entered into force 22 April 1954).

³² See Lauterpacht and Bethlehem, above n 18, 122.

³³ Andrew Rule, ‘Spy tape reveals Nauru despair’ (2002) *The Age*: Melbourne, June 22.

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of race, religion, or other factors contemplated by the Refugees Convention.³⁴ If the Human Rights Committee's interpretation of article 7 of the ICCPR is correct³⁵ however, the definition of persecution may be expanded to include the threat of 'cruel, inhuman or degrading treatment.'³⁶ It may be easier to contend that harsh conditions in detention facilities amount to inhuman treatment, as opposed to persecution. However, under a strict interpretation of the Refugees Convention it would appear that Australia has not breached the *non-refoulement* obligation directly by transporting asylum seekers to Nauru or PNG.

Subsequent refoulement

[10] The removal of refugees to safe third States is not prohibited by the Convention,³⁷ and is arguably acceptable at customary international law. Such a concept has been referred to by the UN General Assembly,³⁸ and has been applied by the United States of America and by the European Union,³⁹ whose Dublin Convention expressly permits processing in safe third countries.⁴⁰ The majority view is that where third States are in fact 'safe', processing refugees in these States is consistent with international law.⁴¹

[11] For the Pacific Solution to comply with international law, the third States operating under the scheme must be classified as 'safe', in the sense that refugees are not subject to a risk of subsequent *refoulement*. If there is a reasonable risk that refugees could be *refouled* from PNG or Nauru, Australia will be in violation of article 33.⁴² Australia's memoranda of understanding with Nauru and PNG include non-refoulement undertakings.⁴³ However, Nauru is not a signatory to, and PNG has made significant reservations to, the Refugees

³⁴ *Convention Relating to the Status of Refugees*, 189 UNTS 150, art 1A(2) (entered into force 22 April 1954).

³⁵ See Human Rights Committee, above n 22.

³⁶ *International Covenant on Civil and Political Rights*, 999 UNTS 171, art 7 (entered into force 23 March 1976).

³⁷ Lauterpacht and Bethlehem, above n 18, 122.

³⁸ *Declaration on Territorial Asylum*, UNGA Res 2132 (14 December 1967).

³⁹ See Savitri Taylor, 'The Pacific Solution or Pacific Nightmare: The Difference between Burden Shifting and Responsibility Sharing,' (2005) 6 *Asia Pacific Law and Policy Journal* 1; Adrienne Millbank, 'World's Worst or World's Best Practice? European Reactions to Australia's Refugee Policy' (2004) 12(4) *People and Place* 28.

⁴⁰ *Convention determining the State responsibility for examining applications for asylum lodged in one of the members states to the European Communities, 'Dublin Convention'*, 97/C/254/01, art 3(5) (entered into force 1 September 1997).

⁴¹ Lauterpacht and Bethlehem, above n 18, 113; *T v Home Secretary* [1996] 2 AC 742; Cf James Hathaway, *The Law of Refugee Status* (1991) 46.

⁴² *T.I. v United Kingdom*, [2000] INLR 211, 228 (Application no. 43844/98, 7 March 2000); Lauterpacht and Bethlehem, above n 18, 122.

⁴³ Senate Legal and Constitutional References Committee, *Migration Zone Excision: An Examination of the Migration Legislation Amendment (Further Border Protection Measures) Bill 2002 Report* ¶4.43.

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Convention.⁴⁴ As the memoranda are not legally binding, it has been argued that PNG or Nauru could *refouler* refugees sent to their shores for processing with impunity.⁴⁵ Legally, this assertion is unsound, as the *non-refoulement* obligation exists independently at customary international law.⁴⁶ As a matter of practicality, there may be a greater risk that refugees would be *refouled* from PNG or Nauru, as these States may appear to be less committed to the principles in the Refugees Convention. As yet however, there have ostensibly been no removals constituting *refoulement* under the Pacific Solution, either of established refugees or those waiting to be processed.⁴⁷ The political reality of the Pacific Solution is such that the declared States are not likely to relocate a refugee without Australia’s direction.

Refoulement at sea

[12] Under Australian law, asylum seekers *en route* to Australia may be intercepted and either transferred to a declared State for processing, or returned to the high seas or seas of another State.⁴⁸ As such, the Pacific Solution admits the possibility of a breach of the *non-refoulement* obligation. Publicly available details regarding interdiction operations subsequent to the *Tampa* incident are imprecise,⁴⁹ however if it were established that any refugee vessel was interdicted and refugees redirected to any State where they faced a risk of persecution, Australia would be in breach of its international obligations.

The obligation not to impose penalty for illegal entry

[13] Penalties may not be imposed on refugees ‘on account of their illegal entry,’ where such refugees come directly from a territory ‘where their life or freedom was threatened in the sense of article 1.’⁵⁰ It has been advanced that article 31 does not apply to the many asylum seekers subject to the Pacific Solution who have previously spent time in States where they had the opportunity to seek refuge.⁵¹ Conversely, it has been suggested that such a

⁴⁴ Ibid ¶3.119.

⁴⁵ Mary Crock ‘In the wake of the Tampa: Conflicting visions of international refugee law in the management of refugee flows’ (2003) 12 *Pacific Rim Law and Policy Journal* 49, 60.

⁴⁶ UNHCR Executive Committee, *Conclusion No. 25* (1982) ¶(b) – Lauterpacht and Bethlehem, above n 18, 107.

⁴⁷ Senate Legal and Constitutional References Committee, above n 7, ¶3.184.

⁴⁸ Tara Magner, ‘A Less than Pacific Solution for Asylum Seekers in Australia’ (2004) 16 *International Journal of Refugee Law* 53, 71.

⁴⁹ Senate Legal and Constitutional References Committee, above n 7, ¶3.154.

⁵⁰ *Convention Relating to the Status of Refugees*, 189 UNTS 150, art 31 (entered into force 22 April 1954).

⁵¹ Adrienne Millbank, ‘Dark Victory or Circuit Breaker: Australia and the International Refugee System Post Tampa’ (2002) 11(2) *People and Place* 24, 27.

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strict reading of the article would be inconsistent with its object and purpose.⁵² In any event, the appropriate action in cases of secondary movement would be to return refugees to the State of first asylum.⁵³ Therefore, it remains to be established as to whether the Pacific Solution does in fact impose 'penalties' under international law.

Prevention of access to Australia

[14] It may be argued that not allowing refugees to pursue asylum in the State of their choice is a penalty contrary to international law. A right to asylum has been enshrined in the Universal Declaration on Human Rights (UDHR) and a recent General Assembly resolution.⁵⁴ However, such a right is not contained in any legally binding instruments, including the Refugees Convention, and a right for refugees to seek asylum in the State of their choice is yet to crystallise at customary international law.⁵⁵ As such, preventing access to Australia is not of itself a penalty under article 31.

Limited access to Australian visa system

[15] If restricting access to Australia is not a penalty, arguably neither is the Pacific Solution's limitation of access to the Australian visa system.⁵⁶ However, it has been advanced that Australia's entire legislative scheme dealing with illegal entrants is contrary to international law, as it distinguishes between classes of visas for asylum seekers based on legality of entry alone.⁵⁷ This distinction is *prima facie* a penalty for illegal entry, but will not breach international law if objectively justifiable on administrative grounds.⁵⁸ This is of course a matter of interpretation, and Australia would certainly have a strong argument that a processing scheme for illegal entrants is an administrative necessity.

⁵² James Hathaway, above n 41, 46-50.

⁵³ UNHCR Executive Committee, *Conclusion No.58 (XL)* (1989); UNHCR Executive Committee, *Conclusion No.87 (XLX)* (1999).

⁵⁴ *Universal Declaration of Human Rights* art 14(1945); UN General Assembly Resolution 55/74 (12 February 2001) ¶6.

⁵⁵ Richard Plender and Nuala Mole, 'Beyond the Geneva Convention: constructing a *de facto* right of asylum from international human rights instruments' in Frances Nicholson and Patrick Twomey (eds) *Refugee Rights and Realities* (1999) 81; Helene Lambert, *Seeking Asylum: Comparative Law and Practice in Selected European Countries* (1995) 91, 98; Vedsted-Hansen, above n 15, 269.

⁵⁶ *Migration Act 1958* (Cth) s.46A, s.46B.

⁵⁷ Mary Crock and Ben Saul, *Future Seekers: Refugees and the Law in Australia* (2002) 109.

⁵⁸ Guy S Goodwin-Gill, 'Article 31 of the 1951 Convention Relating to the Status of Refugees: non-penalization, detention and protection' in Erika Feller, Volker Turk and Frances Nicholson (eds), *Refugee Protection in International Law* (2003) 185, 189.

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Immigration detention

[16] Detaining asylum seekers who enter Australia illegally is a feature of both the Pacific Solution and Australia’s broader migration agenda.⁵⁹ However, the government maintains, and has legislated to the effect,⁶⁰ that those in offshore processing facilities are not in immigration detention, as they are free to return to their State of residence.⁶¹ This argument is at odds with Australia’s obligations under article 33 of the Convention, as the touted alternative to detention is a form of self-imposed *refoulement*.

[17] Further, detention is arguably a penalty under the Refugees Convention. The term penalty encompasses both criminal and administrative sanctions,⁶² and the *travaux preparatoires*⁶³ of the Convention indicate that ‘apart from a few days of investigation,’ detention of refugees is only necessary to combat a threat to security or mass influx.⁶⁴ Any detention thereafter would arguably become a penalty, and thus Australia would breach its international legal obligations with respect to both the Pacific Solution and broader asylum seeker policy.

Treatment of asylum seekers in offshore facilities

[18] States are accountable for breaches of international law carried out by their agents⁶⁵ or those under their direction and control,⁶⁶ even where such breaches occur outside their territory.⁶⁷ The independent contractors running the facilities in PNG and Nauru are paid by, and under the ultimate control of, the Australian government.⁶⁸ Australia remains responsible for the Australian Protective Services, despite the fact that they have been made special constables under Nauruan law,⁶⁹ as they are a State organ which Australia has placed at the disposal of another State.⁷⁰ Therefore, there can be no argument that placing asylum seekers in detention offshore under the Pacific Solution places them outside Australia’s sphere of

⁵⁹ See *Chu Kheng Lim v Minister for Immigration and Ethnic Affairs* (1992) 176 CLR 1.

⁶⁰ *Migration Act 1958* (Cth) s.198A(4).

⁶¹ Senate Legal and Constitutional References Committee, above n 7, ¶3.170.

⁶² Goodwin-Gill, above n 58, 196; *R v Secretary of State for the Home Department, ex parte Makoyi*, (1991) Eng HC, QB No.CO/2372/91 (Unreported: 21 November 1991).

⁶³ See *Vienna Convention on the Law of Treaties*, 1155 UNTS 331, art 32 (entered into force 27 January 1980).

⁶⁴ Goodwin-Gill, above n 58, 195.

⁶⁵ International Law Commission, *Draft Articles on the State Responsibility*, art 4 (2001).

⁶⁶ *Ibid* art 8.

⁶⁷ *Lopez Burgos v Uruguay*, Communication No. 52/1979 (Human Rights Committee, 29 July, 1981) ¶12.3.

⁶⁸ Taylor, above n 39.

⁶⁹ *Ibid*.

⁷⁰ International Law Commission, *Draft Articles on the State Responsibility*, art 6 (2001).

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international legal responsibility. Consequently, two major issues arise concerning asylum seekers' treatment in detention: the arbitrariness of that detention and access to judicial review.

Arbitrary detention

[19] The ICCPR provides that no person shall be subject to 'arbitrary' detention, and that a person may only be deprived of their liberty 'in accordance with such procedures as are established by law.'⁷¹ According to a decision of the Human Rights Committee, while mandatory detention of asylum seekers in Australia does not of itself breach international law, there has been at least one instance in which detention of a refugee on the Australian mainland contravened article 9(1) of the ICCPR.⁷² However, the Committee's decision itself does not legally bind Australia. Moreover, the Committee did not specify the point from which detention would be classified as arbitrary,⁷³ and as such, the decision is difficult to apply to subsequent facts scenarios. The reasoning behind the decision has been openly criticised by the Australian government,⁷⁴ which maintains that compliance with the article should be assessed by reference to compliance with procedures as established by domestic law. This interpretation is consistent with other provisions of the ICCPR which import domestic rules in the absence of international standards.⁷⁵ However, such a reading would permit States to legislate in approval of manifest human rights violations, thus defeating the object and purpose of the ICCPR.⁷⁶ In any event, such an argument may in fact undermine Australia's position with respect to the Pacific Solution, and place Australia in violation of its international obligations as it has itself defined them. While detention of refugees in Australia is lawful according to domestic standards, such detention in PNG and Nauru may be incompatible with those States' constitutions,⁷⁷ and therefore does not meet the standard of lawfulness in the ICCPR, as defined by Australia.

⁷¹ *International Covenant on Civil and Political Rights*, 999 UNTS 171, art 9(1) (entered into force 23 March 1976).

⁷² *A v Australia*, Communication No. 560/1993, UN Doc CCPR/C/59/D/560/1993 (Human Rights Committee 1998) ¶9.4.

⁷³ Response of the Australian government to the views of the United Nations Human Rights Committee in *A v Australia*, 16 December 1997, ¶8 in Sam Blay and Ryszard Piotrowicz, 'The Awfulness of Lawfulness: Some Reflections on the Tension between International and Domestic Law' (2000) 21 *Australian Yearbook of International Law* 1, 10.

⁷⁴ *Ibid.*

⁷⁵ See *International Covenant on Civil and Political Rights*, 999 UNTS 171, art 12(1), art 13 (entered into force 23 March 1976).

⁷⁶ *Vienna Convention on the Law of Treaties* 1155 UNTS 331, art 31(1) (entered into force 27 January 1980).

⁷⁷ *Constitution of Nauru* [1968] art 5(1); *Constitution of Papua New Guinea* [1975] art 42.

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[20] It is suggested that compliance with article 9(1) should be tested against the emerging international standard for ‘arbitrariness,’ rather than solely upon a domestic standard of ‘lawfulness’. Indicia of arbitrariness have been held to include indefinite detention,⁷⁸ detention where there has been no fair trial,⁷⁹ detention as punishment for the exercise of a right encapsulated in the UDHR (including the right to asylum),⁸⁰ and detention contrary to the general purpose and aim of the treaty in question.⁸¹ These indicia are non-exhaustive, and arguably have not crystallised, however if applied to individual cases may better elucidate Australia’s compliance with international law.

[21] It is noted that Australia’s party status to the Rights of the Child Convention places it under an obligation to detain children only as a last resort,⁸² and to consider primarily ‘the best interests of the child’ when making decisions regarding children asylum seekers.⁸³ The Pacific Solution prima facie contravenes these provisions, as children are placed in the same facilities as adults in offshore processing facilities. However, if the detention of a child’s parent is legal, it may be in the best interests of that child to remain with their parent in detention.

Judicial review

[22] Article 9(4) of the ICCPR states that ‘Anyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings before a court, in order that the court may decide...on the lawfulness of his detention and order his release if the detention is not lawful.’⁸⁴ Further, the Refugees Convention provides that refugees shall have ‘free access to the courts of law on the territory of all Contracting States.’⁸⁵ Asylum seekers subject to the Pacific Solution are unable to appeal to the Australian Federal Court regarding their application for protection,⁸⁶ or the circumstances of their detention.⁸⁷ The High Court retains

⁷⁸ *Inter-American Commission, Report of the Situation of Human Rights in Argentina*. OEA/Ser.L/V/II.49, Doc 19, 140 (1980), in Sam Blay and Ryszard Piotrowicz, ‘The Awfulness of Lawfulness: Some Reflections on the Tension between International and Domestic Law’ (2000) 21 *Australian Yearbook of International Law* 1, 16-17.

⁷⁹ Report: United Nations Working Group on Arbitrary Detention, UN Doc E/CN.4/1993/24 (12 January 1993).

⁸⁰ *Ibid.*

⁸¹ *Van Droogenbroeck v Belgium* (1982) 4 EHRR 433.

⁸² *Convention on the Rights of the Child*, 1577 UNTS 3, art 37(b) (entered into force 20 November 1989).

⁸³ *Convention on the Rights of the Child*, 1577 UNTS 3, art 3(1) (entered into force 20 November 1989).

⁸⁴ *International Covenant on Civil and Political Rights*, 999 UNTS 171, art 9(4) (entered into force 23 March 1976).

⁸⁵ *Convention Relating to the Status of Refugees*, 189 UNTS 150, art 16(1) (entered into force 22 April 1954).

⁸⁶ See Department of Immigration and Multicultural and Indigenous Affairs, above n 7.

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jurisdiction to review cases on the basis of jurisdictional error, but cannot order the release of refugees from detention where such an order would have no basis in Australian domestic law.⁸⁸ Australia's legislation explicitly states that courts may not order the release of offshore entry persons and transitory persons from detention.⁸⁹ This aspect of the Pacific Solution would appear to be in direct contravention of article 9(4).

Conclusion

[23] While transferring asylum seekers to the developing States of Nauru and PNG for processing is a politically and ethically charged matter, the content of Australia's obligations under international refugee law is largely unclear and ambiguous. The Refugees Convention arguably does not adequately deal with the management of refugees entering States illegally by boat,⁹⁰ and there is a lack of consistent State practice and *opinio juris* to indicate the applicable law for regulating offshore arrivals. Precisely defining the content of international legal principles which would regulate the Pacific Solution often becomes a conflict between a strict interpretation of treaty obligations and an aspirational adherence to the spirit of the Convention. Nevertheless, it is likely that the implementation of the Pacific Solution is in violation of several of Australia's international legal obligations. The primary cause for international legal concern is the detention of refugees for extended periods under adverse conditions and without access to judicial review. Detaining refugees in this manner may be illegal under the ICCPR, and may also constitute a penalty for illegal entry as prohibited under the Refugees Convention. Ironically, the features of the Pacific Solution which make it a unique legislative scheme, in particular offshore processing, appear to be in compliance with international law. Thus, while Australia's implementation of the Pacific Solution has deserved much of the criticism levelled at its international legality, only certain aspects of the scheme can conclusively be categorised as violations of Australia's international legal obligations.

⁸⁷ Martin Flynn and Rebecca LaForgia, 'Australia's Pacific Solution to Asylum Seekers' (2002) *LAWASIA Journal* 31, 42.

⁸⁸ *Constitution of the Commonwealth of Australia 1901* (Cth) s.75(v); *Plaintiff S157/2002 v The Commonwealth* [2003] HCA 2 (4 February 2003).

⁸⁹ *Migration Act 1958* (Cth) s.183.

⁹⁰ Ernst Willheim, 'MV Tampa: The Australian Response' (2003) 15 *International Journal of Refugee Law* 159; Magner, above n 48, 68.