The impact of Australian–PNG border management co-operation on refugee protection

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Abstract

In order to prevent non-citizens traveling irregularly to Australia, successive Australian governments have engaged in extensive bilateral border management co-operation with potential countries of origin and/or transit. PNG is one such country. This article examines Australia's border management co-operation with PNG. It examines how the co-operation impacts on the Refugee Convention rights of refugees and asylum seekers and considers whether Australia's actions are consistent with its own obligations to refugees under the Refugee Convention and with the burden sharing principle which applies between states. It concludes by articulating the broader lessons which can be drawn from the specific case.

Introduction

In late 2001 Australia's former Prime Minister declared, 'We will decide who comes to this country and the circumstances in which they come'.[1] In order to underscore the point, his Liberal/National coalition government embarked upon the so-called 'Pacific Solution'. Pursuant to Memoranda of Understanding (MoU) signed with the governments of Nauru and Papua New Guinea (PNG), the Australian government established processing facilities in Nauru and in PNG to which it took asylum seekers intercepted while attempting to enter Australian waters without authorisation. The two facilities were administered by the International Organization for Migration (IOM), under contract with the Australian government, and the protection claims of persons taken to them were considered by officers of Australia's Department of Immigration (DIAC). Australia's offshore processing arrangements attracted a great deal of criticism from throughout the Pacific region, including the following comment by the Catholic Bishops Conference of PNG and the Solomon Islands:

> Suddenly we have an Australia ready to support, with funds and infrastructure, accommodation in Papua New Guinea for people from far away. We ask why similar support has not been extended to assist us with hosting our recently arrived Melanesian refugees from Irian Jaya?[2]

While the Pacific Solution was brought to an end in February 2008 by Australia's newly elected Labor government, it marked neither the beginning nor the end of Australia's attempts to keep asylum seekers in its neighbours' backyards and out of its own. In fact, in early July 2010, Labor-led Australia again caused consternation in the region by publicly raising the possibility of establishing a 'regional processing centre' for asylum seekers in East Timor[3] in advance of proper consultation with that country let alone other regional countries.

This article does not deal with the Pacific Solution or the East Timor Solution but it does deal with the issues raised by those headline grabbing demonstrations of Australian self-absorption. What are the consequences for asylum seekers of Australia's extra-territorial border management activities? Are such activities consistent with Australia's own obligations to refugees under the 1951 Convention Relating to the Status of Refugees[4] (Refugee Convention)? And last, but not least, are they consistent with the burden sharing principle which applies between states? The article considers these issues in the context of the extensive bilateral border management co-operation between Australia and PNG which occurs day in and day out away from the media gaze. However, the conclusions drawn have some relevance beyond the particular case because the model of border management co-operation discussed is one which Australia has already replicated to varying degrees with other countries in the region and one it seems set to replicate further in the future.

The significance of border management in the Australian–PNG relationship

There are about 10,000 West Papuan refugees in PNG.[5] This number has been fairly stable for several years. In addition, PNG's Department of Foreign Affairs recently informed a PNG parliamentary committee that 'there could be more than 15,000 foreigners living illegally in the country'.[6] Most of those unlawfully present appear to be Chinese who have entered on tourist visas and overstayed.[7] However, a small but growing number are non-Melanesian asylum seekers and refugees. At the end of 2008 there were only seven non-Melanesian asylum seekers and refugees registered with the Office of the United Nations High Commissioner for Refugees (UNHCR) in PNG.[8] By December 2009 there were seventeen.[9]

Some of those unlawfully present in PNG enter through the international airport in Port Moresby.[10] Others enter PNG by crossing the PNG–Indonesian border either on foot or by motorised canoes.[11] PNG simply does not have adequate resources to police more than a fraction of the 760 km land border with Indonesia and the sea border between Indonesia and PNG is also under-patrolled.[12]

The problem from Australia's point of view is that some of the third country nationals[13] in PNG regard the country as a transit destination, with the intended final destination being Australia. There are direct commercial flights between PNG and Australia and third country nationals sometimes attempt to board those flights without having proper authorisation to enter Australia. There is also a long history of small numbers of third country nationals making their way to Daru in PNG's Western Province and attempting to cross the Torres Strait into Australia by boat.[14] However, no country in PNG's circumstances could possibly have a motivation to expend limited resources on preventing irregular movement *outward*, unless that motivation is supplied from outside.

PNG is well aware of the importance placed on border management by successive Australian governments. Not surprisingly given the importance of the bilateral relationship to PNG, Australia is able to count on a high degree of co-operation from that country on such matters[15] (as demonstrated by its participation in the Pacific Solution).

Australian–PNG border management co-operation

Capacity building

The PNG government agencies with primary responsibility for border management are the Immigration and Citizenship Service (ICS), Customs, and the Royal PNG Constabulary (RPNGC).[16] Australia is working hard to build the capacity of all three agencies to discharge that responsibility. It is doing so not for PNG's sake but for its own, that is, to manage the risk to Australia.[17]

DIAC describes ICS as having 'a great need for very close engagement' across the board and describes the level of its engagement with that agency as 'quite extensive and in-depth'.[18] As well as having two Migration Officers stationed at the Australian High Commission in PNG and an Airline Liaison Officer (ALO) stationed at Port Moresby's international airport,[19] DIAC has four officials embedded within PNG's ICS pursuant to an AusAID funded program called the Strongim Gavman Program (SGP).[20] The stated task of these deployees is 'to mentor and develop senior PNG counterparts in the areas of strategic policy development and implementation, project and program management, compliance, information technology, client service and process improvement'.[21]

DIAC has also funded and, with ICS, jointly managed the development of an 'enhanced border management IT system' for PNG.[22] The system, which 'is designed to better monitor and manage people movements in and out of Papua New Guinea', is being rolled out at posts within PNG and at designated overseas missions with the continued support of IOM's DIAC-funded PNG Border Management System Project.[23]

Australian Customs, too, considers its engagement with its PNG counterpart to be 'very important' because of the shared border.[24] There is a wide-ranging MoU on customs co-operation in place between the two agencies.[25] Four Australian Customs officers have been deployed, pursuant to the SGP, to work within PNG Customs.[26] These Australian officials are called 'advisors' but appear to be in in-line positions because 'they are able to direct and they are able to receive orders'.[27] On the other hand, they work pursuant to strict guidelines. They are not permitted to themselves arrest, detain or interview/interrogate individuals in PNG, or to volunteer advice on such matters, though they are permitted to give advice if requested to do so by PNG officials.[28]

Australian Customs also has two other PNG capacity building projects on foot which are separate from but complementary to its SGP participation.[29] One of these projects is the Australian–PNG Customs Border Security Project (BSP).[30] An achievement of the project has been the 'establishment and operation in PNG waters of Customs-led inter-agency maritime surveillance patrols'.[31]

The Australian Federal Police (AFP) have a bilateral MoU 'in relation to co-operation on law enforcement issues and the exchange of information' with the RPNGC, PNG Customs and ICS.[32] The AFP's Liaison Post in Port Moresby is staffed by a Senior Liaison Officer whose role is to broker joint investigations with PNG government agencies, collect and exchange criminal intelligence and 'look for capacity building and initiatives'.[33] As well as providing intelligence about possible transnational crime (for example, people smuggling) to PNG authorities, the AFP may actually request that the RPNGC direct resources towards putting a stop to it.[34] The AFP has found the RPNGC to be co-operative when such requests for assistance are made.[35]

Finally, officers of Australian and PNG border agencies conduct Joint Cross Border Patrols (JCBP) with the aim of preventing smuggling of guns and drugs, illegal fishing and unauthorised movement of people across the Strait.[36] Four joint patrols are conducted each year.[37]

Interception in PNG and return to PNG

In August 2003 Australia and PNG entered into an MoU dealing with Migration, Refugees, Irregular Migration and People Smuggling.[38] This MoU, which is still extant, was described by PNG's then Minister for Foreign Affairs as formalising and strengthening existing co-operation between Australian and PNG authorities in relation to the matters covered by it.[39] The Minister made the comment in the course of a statement about the arrest the previous week of thirteen foreign nationals by PNG law enforcement agencies working in 'close co-operation' with Australian authorities.[40]

Most of the continued attempts by third country nationals to cross the Torres Strait from PNG to Australia are in fact being frustrated by PNG officials

acting pursuant to border management co-operation arrangements.[41] In order to deal with the few that beat the odds, the 2003 MoU provides that if a person who has been in PNG or Australia for more than seven days crosses to the other country and claims asylum they can be returned to the country they came from and required to pursue their asylum claim in that country.[42] It is an explicit term of the MoU that if PNG accepts the return of asylum seekers under the MoU it will make a determination on the asylum claims and provide protection if needed.[43]

Thus far PNG has not invoked the return provisions of the 2003 MoU vis-à-vis Australia, but there have been at least three occasions on which the reverse has occurred. The first occasion on which Australia invoked the MoU was to return three West Papuan men who made their way to Australia's Boigu Island, via PNG, in early May 2006 and sought asylum.[44] In August 2007 five West Papuan asylum seekers, who had lived for some time in PNG, were intercepted after they crossed by boat to Australia's Saibai Island. They too were returned to PNG pursuant to the 2003 MoU.[45] The other return of which the author has knowledge is the return of a Sri Lankan Tamil man in late November 2009.[46] The man flew to Port Moresby on a valid visa in late April 2009 and two weeks later travelled by plane to Daru and then by boat to Saibai island. He was detained in Brisbane, while DIAC negotiated his return to PNG pursuant to the 2003 MoU. The man himself requested that the Minister permit him to apply for a protection visa instead,[47] explaining that he feared harm if returned to PNG. The Minister declined to do so. However, DIAC did promise the man that he would be provided with accommodation, counselling, healthcare and a living allowance by IOM upon his return to PNG.

Presumably, the care arrangements which were made for the Sri Lankan man were an extension of the arrangements set out in the MoU on the Care, Protection and Voluntary Return of Certain Irregular Migrants from PNG, which Australia entered into with PNG and with IOM in December 2005. The 2005 MoU provides for co-operation between PNG, Australia and IOM 'in the areas of identification and processing of irregular immigrants transiting PNG who might attempt to enter Australia unlawfully'.[48] If Australia bound individuals are intercepted 'and there is no way of funding their subsistence until their cases are looked into',[49] the MoU provides that Australia will fund IOM to meet those subsistence needs, including accommodation and basic health care.[50] The MoU further provides that PNG will consider any claims for refugee status made by such individuals,[51] with IOM (funded by Australia) continuing to meet their subsistence needs through that process[52] and, where they found to be refugees, while they are awaiting resettlement.[53] Finally, the MoU provides that Australia will fund IOM to assist irregular migrants voluntarily repatriate[54] and to care for them pending return.[55]

The arrangement envisaged by the 2005 MoU has been partly operationalised by the Assisted Voluntary Return Program (AVRP) pursuant to which irregular migrants identified and intercepted by the PNG government are referred to IOM for temporary care, counselling, accommodation and travel arrangements for voluntary repatriation.[56] As at September 2009, the AVRP was being piloted in Port Moresby with a focus on irregular migrants intercepted at the international airport and the expectation was that it would be expanded beyond Port Moresby in the near future.[57] Two irregular migrants had been referred to IOM and returned home pursuant to it.[58]

PNG's Refugee Convention obligations

PNG is a party to the Refugee Convention and the 1967 Protocol relating to the Status of Refugees (Refugee Protocol)[59] and has therefore undertaken certain obligations to 'refugees' as defined in those treaties. The most significant of those obligations is the so-called *non-refoulement* obligation in article 33 of the Refugee Convention, that is, the obligation to refrain from sending a refugee to any country where he or she has a well-founded fear of being persecuted on Refugee Convention grounds. The phrase 'in any manner whatsoever' in article 33 of the Refugee Convention has the effect of prohibiting indirect as well as direct expulsion or return of the refugee to a persecuting country.[60]

The Refugee Convention also gives refugees certain rights relating to juridical status, employment and welfare. However, PNG has made reservations to, and is therefore not bound by, the following articles of the Refugee Convention: article 17(1) (wage-earning employment), article 21 (housing), article 22(1) (education), article 26 (freedom of movement), article 31 (non-penalisation of refugees unlawfully present in the country of refuge), article 32 (expulsion safeguards) and article 34 (naturalisation).

Protection from refoulement

PNG's *Migration Act 1978* provides that no non-citizen shall enter or remain in PNG unless he or she is the holder of an entry permit or falls into a category of person exempted from the entry permit requirement by the Minister for Foreign Affairs (ss 3, 7 and 20). It is a punishable offence to enter or remain in PNG in contravention of the *Migration Act* (subs 16(1)) and the Minister may also order the removal from the country of a person who is unlawfully present (s 12). However, PNG's international obligation of *non-refoulement* applies regardless of a refugee's immigration status. It follows that if PNG removes non-citizens presenting at its borders without prior authorisation, or unlawfully present in its territory, without ascertaining whether or not they are 'refugees', it risks breaching its *non-refoulement* obligation towards those who are.

Upon interception, non-citizens present in PNG without authorisation are questioned by Customs, ICS, the RPNGC and the National Intelligence

Organisation. The purpose of the questioning is to ascertain their identity, their travel route and their reasons for coming to PNG. Officials do not automatically offer persons being interviewed the opportunity to contact UNHCR because they fear that this will encourage those who are not refugees to make refugee claims.[61] However, UNHCR has been assured by ICS that four or five of the questions asked are intended to ascertain whether the interviewee may have protection needs.[62] If potential protection needs are revealed, UNHCR is supposed to be notified so that it can interview the person itself if it wishes.[63] In 2009, this procedure resulted in the referral of two Sri Lankans and one Afghan to UNHCR with a joint UNHCR–ICS refugee status determination (RSD) interview being conducted subsequently.[64] Nevertheless, there have also been near misses in terms of *refoulement*.

In 2006 UNHCR commented that:

> A lack of knowledge of the principle of non-refoulement among local and provincial officials, and the lack of procedures and guidelines protecting non-Melanesian asylum seekers from refoulement means that there is a risk of instances of refoulement occurring.[65]

UNHCR limited its observation to non-Melanesian asylum seekers because Melanesian asylum seekers are not at risk of *refoulement* for as long as PNG continues, as at present, to refrain from forcible repatriation of non-citizen Melanesians out of a sense of Melanesian solidarity. Non-Melanesian asylum seekers do not have the same advantage.

The stories of six asylum seekers intercepted in Vanimo in April 2007 illustrate the difficulties which can be faced by non-Melanesian asylum seekers outside Port Moresby. Three of the six were Burmese men who were detected and arrested by the RPNGC shortly after crossing by boat from Jayapura in Indonesia to Vanimo.[66] They were charged with having entered the country unlawfully.[67] On 20 April 2007 the men pleaded guilty to the charges in the Vanimo District Court but also informed the magistrate that they were seeking asylum.[68] The other three individuals were Nigerian men who crossed from Jayapura to Vanimo by boat a couple of weeks after the Burmese men.[69] When caught by the RPNGC they explained that their intention had been to travel on to Australia and seek asylum there.[70] UNHCR had real fears that the six men would not be allowed to remain in PNG and have their refugee status claims considered,[71] though it managed to avert that outcome by intervening and obtaining assurances from the PNG government.[72] Upon assessing the men's claims itself, UNHCR found that the three Burmese were in fact refugees.[73] Their narrowly avoided *refoulement* points to the absence of a reliable system for ensuring that asylum seekers are always given access to refugee status determination.

UNHCR has sought to reduce the possibility of unwitting *refoulement* by working with PNG's Department of Provincial and Local Government

Affairs (DPLGA) and ICS in conducting workshops to train national agencies and provincial administration staff on PNG's obligations to asylum seekers and refugees under the Refugee Convention.[74] For example, workshops are being conducted for local police, immigration, customs, defence, intelligence organisation personnel and court officials in border areas to raise their awareness of the *non-refoulement* principle to a level which makes it likely that they will refer asylum claimants they encounter to UNHCR.[75] These workshops appear to be having a positive impact.[76] However, access to process is not of much value, unless the process itself is reliable.

Section 15A of the *Migration Act* gives the Minister for Foreign Affairs and Immigration the power to grant refugee status.[77] However, there is presently no legislative framework or established administrative procedure for refugee status determination. Refugee status determination is conducted by the PNG government, but in an ad hoc manner.

In December 2000 and January 2001 approximately four hundred West Papuans (mostly women and children) fled across the PNG–Indonesian border in the wake of violence.[78] In late 2002 these individuals were interviewed by governmental and UNHCR officials. About three hundred of them were found to be refugees by UNHCR.[79] However, on 20 February 2003 the then Minister for Foreign Affairs announced that the governmental Task Force set up to assess the refugee status claims had recommended that six families be granted refugee status and that the remaining 96 families be formally required (though not physically forced)[80] to return to Indonesia and that he had accepted the recommendation.[81] Fortunately, after UNHCR expressed concern about the disparity between the government's assessment and its own,[82] the Minister announced that the rejected individuals would be given the opportunity to appeal the decisions.[83] He also announced that new refugee status determination procedures would be established to deal with future arrivals.[84] UNHCR had in fact been working with the PNG government since 2002 to develop refugee legislation for the country. It helped PNG develop a draft Refugee Law Act which was later abandoned in favour of including 'simplified, basic' refugee provisions based on a model developed by the Pacific Immigration Directors Conference as an annex to the draft *Migration Act 2005*.[85] To date, however, the *Migration Act 1978* remains in force unchanged. As the controversy surrounding the determinations made in 2003 illustrates, as long as PNG continues to deal with refugee status determination in an ad hoc manner there is a real possibility of wrongful rejections.

UNHCR attempts to compensate for the existing systemic deficiencies in PNG government RSD by providing advice on individual cases. Since UNHCR's ultimate objective is to build PNG's RSD capacity to a point where it no longer needs UNHCR assistance, it is twinning its RSD interviews with those of the PNG government[86] so that it can mentor the PNG officials through the process.[87] UNHCR then makes its own refugee

status assessment, in accordance with its usual mandate determination procedures,[88] which it shares with ICS for that agency to consider and, if of the same mind, to endorse.[89]

Unfortunately, the making of actual refugee status *decisions* by the government has been at a virtual standstill for the last few years.[90] This fact is unsurprising in the circumstances. Until recently, PNG's immigration function was in fact discharged by a severely understaffed division of PNG's Department of Foreign Affairs.[91] In May 2008 the Department of Foreign Affairs was restructured to create ICS, which is separately funded and reports directly to the Minister for Foreign Affairs and Immigration.[92] The plan is for ICS to increase its staffing to 72 officers.[93] However, the process of getting new staff in place is still underway.[94] As at 9 July 2010 ICS had a total staff of 30 officers.[95]

Once all the new ICS officers are in place, PNG government RSD will hopefully recommence. Commendably, it appears to be the PNG government's intention to have a dedicated RSD Unit within ICS.[96] These RSD officers will be provided with specialised training by UNHCR.[97] Such training is necessary, but it is not sufficient. In order to ensure correct decisions, PNG needs also to institute a legislative framework for RSD incorporating internationally acceptable standards of procedural fairness. Continued involvement by UNHCR will be ameliorative but cannot be regarded as a failsafe. In particular, it cannot be assumed that UNHCR's own refugee status assessments will always be correct. This is because UNHCR's mandate procedures have themselves been criticised for falling short of minimum standards of procedural fairness, such as the requirement of independent review.[98] To the extent that these criticisms are valid, there is a risk UNHCR too will fail to identify some individuals who are in fact refugees.

Protection of other rights

Respect for the principle of *non-refoulement* is not the beginning and end of refugee protection. PNG is required to give effect also to the other rights set out in the Refugee Convention (apart, of course, from those to which it has made reservations). Further, article 5 of the Refugee Convention makes it clear that the rights contained in it are intended to supplement rather than impair other rights from other sources. Therefore, PNG must accord to refugees the rights to which they are entitled under the 1966 International Covenant of Civil and Political Rights,[99] the 1966 International Covenant of Economic Social and Cultural Rights[100] and other treaties to which it is a party. It is beyond the scope of this paper to discuss PNG's performance in protecting all these rights. However, it is worth describing the highest level of protection available to refugees in PNG because it is of relevance to the discussion in the next section of Australia's international obligations.

Melanesian refugees have access to Permissive Residency Permits (PRPs) and thereby access to what UNHCR describes as 'a higher standard of protection than non-Melanesian refugees'.[101] A PRP needs to be renewed every three years[102] but after eight years the permit holder is eligible for PNG citizenship.[103] Those who have a PRP get important rights such as freedom of movement, the right to work, access to health and education services and better access to the courts.[104] There are, however, conditions placed on the grant of a PRP prohibiting residence in the border areas of Western and Sepik Provinces and limiting freedom of association and freedom of political activity in PNG or West Papuan politics. Breach of these conditions leads to revocation of status.[105]

Australia's Refugee Convention obligations

Australia is also a party to the Refugee Convention and Protocol. Unlike PNG it does not have any reservations in place. However, most of the obligations contained in the treaties are clearly only owed by states party to refugees within their own territory. The only provisions which are *not* territorially limited and therefore even arguably binding on Australia within the territory of PNG are article 3 (non-discrimination), article 13 (moveable and immovable property), article 16(1) (access to courts), article 20 (rationing), article 22 (education), article 29 (fiscal charges), article 33 (*non-refoulement*) and article 34 (naturalisation).[106]

It is well-established that the article 33 obligation applies in respect of any refugee who is physically at or within the territorial borders of a state.[107] What is less clear is whether a state's article 33 obligation is potentially engaged in relation to individuals who are affected by its extraterritorial activities. However, the weight of academic opinion appears to support the view that a state's article 33 obligation is engaged at the moment when a person who is in fact a 'refugee' comes within the effective control of an agent of that state, wherever in the world this occurs.[108]

In the case of the interception activities occurring in PNG, two questions need to be considered. First, whose actions can be attributed to Australia (that is, which individuals can be treated as acting as Australian agents) and, second, do their actions amount to the exercise of effective control over asylum seekers such that Australia's *non-refoulement* obligation is engaged?

It is well established in international law that the conduct of an official of a state, who appears to be acting in their official capacity, is attributable to that state, even if, in terms of the state's domestic law, they are actually acting outside their competence.[109] It is irrelevant for the purposes of *attribution* whether an official's conduct took place within or outside the territory of the state on whose behalf they are acting or appear to be acting.[110] There is a rule that the conduct of an official loaned by one state to another is attributable only to the state to which the official has been loaned and not to the state which made the loan.[111] However, SGP officials would not fall within

this rule because they appear to be working simultaneously for PNG and Australia. It follows that the conduct of all Australian immigration, customs, police and other officials posted in PNG are attributable to Australia.

Another well-established customary international law principle of attribution is that

> [t]he conduct of a person or entity which is not an organ of the State ... but which is empowered by the law of that State to exercise elements of the governmental authority shall be considered an act of the State under international law, provided the person or entity is acting in that capacity in the particular instance.[112]

This principle developed as a safeguard against states avoiding international responsibility for the consequences of governmental activity by simply 'farming out' the conduct of those activities to the private sector or for that matter an international organisation.

The functions fulfilled by the arrangements which Australia has in place with PNG are border management, refugee status/asylum claim determination and asylum seeker/refugee care and protection, which can all be described as governmental functions.[113] In Australia's case, the point of the arrangements is to ensure that the functions are carried out extra-territorially but that does not detract from their governmental character. The real question is whether the arrangements are ones under which a non-state actor is being 'empowered by the law' of Australia to carry out any of the governmental functions in question. The correct interpretation of the 'empowered by law' requirement seems to be a broad one which encompasses a situation in which a governmental agency, which is empowered by legislation to discharge a particular function, lawfully delegates the function whether by contract or otherwise.[114] Since IOM has been lawfully contracted and funded by DIAC to carry out some governmental functions in PNG, its conduct in so doing is most likely attributable to Australia.

Turning to the second question of whether the actions of Australian agents amount to the exercise of effective control over asylum seekers in PNG, the answer as far as Australian officials posted in PNG are concerned is very likely 'no'. As explained earlier in this paper, Australian officials are very careful to refrain from actions which would amount to exercise of effective control such as arresting or detaining third country nationals within PNG. The fact that they achieve their desired outcomes just as well making requests, and giving advice to PNG officials does not change the fact that their own actions do not amount to exercise of effective control over the individuals in question. What about IOM? Assuming for the moment that IOM is acting as agent for Australia, it cannot be said that IOM is exercising control over asylum seekers simply by providing them with assistance pursuant to the 2005 MoU. If the arrangement operates in such a way that

asylum seekers are subject to IOM's will it would be a different matter, but there is no evidence of that at this early stage of implementation.

Different considerations arise in relation to asylum seekers who enter Australian territory but are then returned to PNG pursuant to the 2003 MoU. The problem here is that one thing that the Refugee Convention does not do is to impose an obligation on states to give refugees permission to enter or remain in their territory, let alone resettle them or grant them citizenship. This omission gives states party to the Refugee Convention the scope to send asylum seekers to a third state without necessarily being in breach of their Convention obligations even if those asylum seekers happen to be refugees.

The Michigan Guidelines on Protection Elsewhere[115] were formulated by a group of refugee law experts in 2007. According to the preamble, they take as their starting point the undeniable fact that '[r]efugees increasingly encounter laws and policies which provide that their protection needs will be considered or addressed somewhere other than in the territory of the state where they have sought, or intend to seek, protection'. The preamble goes on to point out that such policies are not necessarily illegitimate because they can be used to 'more fairly allocat[e] protection responsibilities among states'. On the other hand, to the extent that states put the emphasis on 'elsewhere' rather than 'protection' in implementing such policies, they have the potential to result simply in 'the denial to refugees of their rights under the Refugee Convention and international law more generally'. The guidelines identify the requirements which must be met in order for protection elsewhere policies to achieve sharing of protection responsibilities between states 'without compromising the entitlements of refugees'.

Most of the guidelines reflect the drafters' consensus view 'on the minimum international legal requirements for valid protection elsewhere policies', but guidelines 14 and 16 were put forward simply as recommendations for progressive development of the law.[116] This paper proceeds on the assumption that all of the guidelines except 14 and 16 do in fact correctly articulate the existing minimum requirements at international law, though not everyone would agree. The crunch question is 'what are the legal consequences which follow from conformity or non-conformity with the minimum legal requirements?' According to the language of some of the guidelines, by meeting the minimum legal requirements specified a sending state can successfully assign (guideline 2) or transfer (guidelines 4 and 5) protection responsibility to the receiving state. The proposition appears to be that, if a transfer meets the minimum legal requirements articulated in the guidelines, any protection obligations of the sending state which may have been engaged in relation to the individual concerned are adequately satisfied by the transfer itself.

Turning now from the consequences of conformity with the minimum legal requirements to the consequences of non-conformity, the mere fact a state is implementing a protection elsewhere policy which does not meet

the minimum legal requirements does not mean that it is acting in an internationally unlawful manner. Rather the consequence of non-conformity with those requirements is that the sending state's own protection obligations to the persons transferred remain engaged. Since the sending state has through the transfer placed the fulfilment or otherwise of those obligations beyond its control, and within the control of the receiving state instead, it has effectively placed itself at continuous risk of breaching its protection obligations.

According to guideline 1, 'protection elsewhere policies are compatible with the Convention so long as they ensure that refugees defined by Art. 1 enjoy the rights set by Arts. 2–34 of the Convention'. As previously mentioned, PNG has made reservations to several of these articles. However, this fact does not automatically preclude Australia from transferring asylum seekers to PNG. According to guideline 3, what is required is that the sending state come to a 'good faith empirical assessment … that refugees defined by Art. 1 will *in practice* enjoy the rights set by Arts. 2–34 of the Convention in the receiving state'. Guideline 3 continues:

> Formal agreements and assurances are relevant to this inquiry, but do not amount to a sufficient basis for a lawful transfer under a protection elsewhere policy. A sending state must rather inform itself of all facts and decisions relevant to the availability of protection in the receiving state.

It follows that the formal assurance contained in the 2003 MoU that PNG will provide returnees with access to RSD and provide those found to be refugees with protection is not in itself a sufficient basis for a transfer of asylum seekers from Australia to PNG.

Guideline 4 sets out three alternative bases on which a sending state can reasonably form a belief that a person being transferred will have access to refugee rights in the receiving state: i) the receiving state acknowledges the refugee status of the person being transferred; ii) it will in fact ensure that the transferee enjoys the rights set out in articles 2–34 of the Refugee Convention 'without need for recognition of refugee status'; or iii) it will 'afford the person transferred a *meaningful* legal and factual opportunity to make his or claim to protection' (emphasis added). In the case of non-Melanesian asylum seekers, i) may be applicable in particular cases, but is not good enough in circumstances where it is known that even recognised refugees are not in practice given access to all the rights set out in articles 2–34 of the Refugee Convention. As for ii) and iii), as explained above, neither would be applicable as things presently stand in PNG. While the provision of assistance under the 2005 MoU to those returned to PNG certainly makes them better off than they would have been otherwise, it does not give them full enjoyment of Refugee Convention rights. Therefore, any return by Australia to PNG of non-Melanesian asylum seekers would not result in an internationally valid transfer of protection responsibility for those individuals from Australia to PNG.

Unlike non-Melanesian asylum seekers, Melanesian asylum seekers have access to PRPs. Closer investigation of the precise nature of rights and conditions attached to PRPs would be required in order to ascertain whether PRP holders enjoy in practice all of the rights set out in articles 2–34 of the Refugee Convention (even though PNG has refused to make a formal commitment to ensure this in relation to some rights). At first glance, however, the prohibition of residence in the border areas may not conform to the obligation in article 26 of the Refugee Convention (freedom of movement 'subject to any regulations applicable to aliens generally in the same circumstances') to which PNG of course has made a reservation but Australia has not. Since the right in article 26 is predicated on 'lawful presence', it is probably going too far to say that the West Papuan asylum seekers thus far transferred to PNG were entitled to the benefit of Article 26 in Australia at the time of the transfer. However, it is the case that by transferring them to PNG Australia precluded them from acquiring a benefit that they would have acquired under the Convention had they been allowed to remain in Australia. In these circumstances, it is arguable that return by Australia to PNG of the West Papuans did not result in an internationally valid transfer of protection responsibility for those individuals from Australia to PNG.

Fair sharing?

The Preamble of the Refugee Convention sets out as one of the reasons for the adoption of the Convention, the consideration that

> the grant of asylum may place unduly heavy burdens on certain countries, and that a satisfactory solution of a problem of which the United Nations has recognised the international scope and nature cannot therefore be achieved without international co-operation.

Most would accept that a customary international law principle of burden-sharing in relation to refugees has now emerged as evidenced by the statement of the principle in various UN General Assembly and Economic and Social Council resolutions, various conclusions of the Executive Committee of the High Commissioner's Program and so on, and supported by state practice of burden-sharing from ad hoc schemes like the Comprehensive Plan of Action on Indo-Chinese Refugees to the institutionalisation through UNHCR of third country resettlement schemes and so on.[117] The burden-sharing principle requires that states act in a manner which ensures that the burdens of refugee protection are equitably distributed.

Australia is a high-income OECD economy.[118] PNG has a lower-middle-income economy.[119] Around 40 per cent of PNG's population lives in poverty[120] and its social indicators (life expectancy, infant mortality and so on) are 'well below the averages for lower middle income countries'.[121] PNG's level of aid dependency is high and 70 per cent of the aid it receives

comes from Australia.[122] Given that the PNG government is unable even to protect and fulfil the human rights of its own population of six million without international assistance, it is obviously not well-placed to provide effective protection to the refugees and asylum seekers it is hosting.

Whatever indicator of host country contribution relative to capacity one considers, PNG's refugee burden is higher than that of Australia.[123] The spirit of the burden-sharing principle would therefore surely require a country positioned as Australia is to engage with PNG in a manner calculated to reduce the burden imposed on PNG by asylum seekers and refugees. In fact the reverse is true. All of Australia's border management capacity building expenditure in PNG seems directed at preventing irregular travel from PNG to Australia and it appears to have been remarkably successful in achieving that objective. However, not content with anything less that absolute control of its borders, Australia has also entered into an MoU with PNG which requires that country to readmit third country nationals who have transited PNG en route to Australia in search of asylum. In comparison to its expenditure on border management capacity building, Australia's expenditure on refugee protection capacity building in PNG is very small. There is no evidence that Australia has made a real effort to ensure that PNG has the capacity to correctly identify and appropriately deal with intercepted asylum seekers in the course of its border management activities or that it has made a real effort to strengthen RSD in PNG. The 2005 MoU pledges Australian funding for care and maintenance of irregular migrants pending RSD or voluntary repatriation as applicable, but only if they were intercepted en route to Australia. Finally, refugees and asylum seekers present in PNG are not the beneficiaries of any targeted assistance from AusAID[124] though they do derive some incidental benefit from AusAID's PNG country program.[125]

Conclusion

Australia is forcing asylum seekers who might otherwise present their claims in Australia to rely on PNG for protection instead, by actively encouraging and assisting the PNG government to intercept irregular movers (including asylum seekers) in PNG territory and by returning to PNG the few asylum seekers who do manage to travel to Australia via PNG. From a refugee protection perspective, there are two problems with this policy. First, there can be no confidence at the present time that refugees in PNG will be identified as such and accorded the protection to which their status entitles them. Second, PNG's reservations to the Refugee Convention mean that refugees are entitled to less protection in PNG than in Australia.

As long as PNG remains unable to make reliable refugee status determinations and/or fails in practice to accord to refugees all of the Convention rights to which they would be entitled in Australia, Australia places itself at risk of breaching its own international obligations by returning to PNG those asylum seekers who have travelled to Australia

via PNG. If it wishes to avoid the risk, Australia should itself consider the protection claims of such individuals and provide protection if need be.

Australia has probably managed to avoid engaging its own Refugee Convention obligations in relation to asylum seekers who are intercepted in PNG territory. Nevertheless, it should make a greater contribution towards ensuring that any refugees among those intercepted in PNG are identified and protected. As well as being the morally right thing to do in relation to the individuals concerned, it is what is required if the spirit of the burden-sharing principle is to be observed. Refugee protection capacity building should, therefore, be an integral part of all of Australia's border management capacity building activities. In particular, Australia should:

- work with the PNG government and UNHCR to train all officials with border management responsibilities to identify and deal appropriately with asylum seekers;
- encourage and assist PNG to enact a sound legislative framework for RSD;
- assist the PNG government to allocate adequate personnel resources to RSD to enable decisions to be made within a reasonable timeframe; and
- work with the PNG government and UNHCR to ensure that PNG's RSD decision makers have adequate training, access to reliable country information and everything else necessary to make correct refugee status determinations.

To the best of the author's knowledge, PNG is the only transit country, apart from China, with which Australia presently has a safe third country agreement. However, during the time of the Pacific Solution, Australia also had such an agreement with Nauru, and if the proposed East Timor Solution goes ahead, it will presumably have one with East Timor. As the Australian government has emphasised, East Timor is a party to the Refugee Convention and Protocol. What the Australian government has failed to mention is that East Timor has made reservations to articles 16(2) (access to courts on the same terms as nationals), 20 (rationing), 21 (housing), 22 (education), 23 (public relief) and 24 (labour protection and social security) of the Refugee Convention. Of course, as explained in relation to PNG, Australia could still justifiably treat East Timor as a safe third country if refugees taken there would *in practice* enjoy all of the rights set out in articles 2–34 of the Refugee Convention. However, given that East Timor has a lower-middle-income economy[126] with low human development,[127] this seems highly unlikely. Even if, as seems likely, Australia completely underwrites the care of those taken to East Timor, it still would not be equivalent to full enjoyment of Convention rights.

Turning to interception of asylum seekers in transit countries, in 2009–10 DIAC funded IOM to provide care and maintenance for such individuals

not only in PNG, as discussed above, but also Indonesia and East Timor.[128] The interception and care arrangement with Indonesia and IOM has been in place since early 2000 and is fairly well-known to the Australian public as a result of the intermittent media attention it has received since late 2008 when unauthorised boat arrivals to Australia via Indonesia started picking up pace again. However, the East Timor arrangement, like the PNG arrangement, has thus far operated under the radar.

DIAC's budget for 2010–11 and forward estimates included, in addition to a budget item for 'management and care of irregular immigrants in Indonesia', a separate item entitled 'regional co-operation and capacity building' with, inter alia, the following objectives:

> To assist the facilitation of bona fide people movements while preventing and deterring irregular movements, including people smuggling and trafficking, in our region and in source/transit countries.
>
> To support international organisations for the care of irregular migrants intercepted en route to Australia.[129]

The more broadly specified item is conveniently capable of covering not only PNG and East Timor, but also any other countries with which it may become expedient to establish such arrangements in the future. It is in keeping with the burden-sharing principle for Australia to fund the care of asylum seekers intercepted at its urging in countries less well-off. The problem is that there are many countries which engage in border management co-operation with Australia but receive no refugee protection assistance from it. Moreover, as discussed in the context of PNG, funding the care of intercepted asylum seekers is not alone enough to place Australia in a position in which it can be characterised as fairly sharing the burden of refugee protection with countries in the region rather than simply shifting the burden to them.

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