

Opinion

Crime, Policy, and Governance: Response to the Australian Government's Treatment of Refugees and Asylum-seekers

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I dedicate this paper to everyone who is pained by war and is aware of injustice in the world. Let us together, continue our march for social justice and lean on each other to sustain our needs for wisdom, hope and encouragement in attaining our global and social responsibilities.

Background of the Issue

The Australian Federal Government has since 2001 maintained a narrow construction of the refugee and asylum seekers dilemma,¹ framing the issue in political terms, and responding to the problem via harsh and expensive criminal law enforcement policies and sanctions. This has had the effect of masking the underlying problem and limiting the potential for its resolution.² The political discourse surrounding refugee and asylum seekers policy has been framed and restricted in scope of the policy-making and response to issues of *securitisation* instead of *humanitarianism*. The recent 'Regional Resettlement Arrangement between Australia and Papua New Guinea' policy response (hereinafter 'PNG'), characterised through a bilateral agreement with Papua New Guinea for the mandatory offshore processing, detention and resettlement of asylum seekers arriving to Australia,³ demonstrates this narrow construction. As it will be discovered, this policy maintains an elite-building narrative of governance through the rhetoric of national security, which is superimposed over Australia's international obligations to safeguard the rights of refugees to receive access to protection.

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¹ Adrienne Millbank, 'World's Worst or World's Best Practice? European Reactions to Australia's Refugee Policy' (2004) 12(4) *People and Place* 28-37.

² Guy Peters, 'The Problem of Policy Problems' (2005) 7(4) *Journal of Comparative Policy Analysis* 349, 353.

³ Ben Saul, 'Rudd's PNG Plan unlikely to Comply with International Law', *The Conversation* (online), 20 July 2013 <<http://theconversation.com/rudds-png-plan-unlikely-to-comply-with-international-law-16250>>.

My policy response is to reframe the ‘asylum seeker problem’ by depoliticising the framing of the policy agenda, in order to address the real issues rather than delaying the problem.⁴ As follows, the focus of my policy goal is to achieve a shift from the current ‘zero-tolerance’ approach to asylum seekers to a ‘harm-reduction’ approach for the better treatment and welfare of asylum seekers.⁵ The purpose is specifically not to criminalise asylum seekers, who are essentially the *victims* of the PNG policy. Rather, the objective seeks to limit and minimise the harms on the plight of refugees seeking asylum in Australia, associated with the detrimental consequences of mandatory detention and offshore processing.⁶

I. The Stakeholders

The PNG instrument, amongst hitherto policy responses,⁷ has severely misrepresented and restricted the key actors and institutions involved in refugee policy, pitting ‘Australia’ against ‘refugees’. However, the degree of interdependence characterising the asylum seeker dilemma engenders a wider policy network or enmeshed ‘web’, with both international and domestic stakeholders being impacted and involved at varying degrees by the policy response.⁸ The following actors and institutions play an important role in impacting the state’s policy process in how they influence, negotiate, interpret and pursue their interests wherein the outcomes of their unique individual efforts are shaped by institutional factors and varying rationalities.⁹ At the core of the policy-making, the elected and responsible government department (Department of Immigration and Citizenship) immediately interacts, within the policy-subsystem, with the public, media, government authorities (navy, police, customs), Unauthorised Maritime Arrivals (‘UAMs’ –refugee and asylum seekers and people-smugglers¹⁰). The Refugee Review Tribunal, Federal and High Court serve in escalating degrees as the review mechanisms for asylum seekers and power-checks on the executive’s authority. This policy seeks to further implicate the domestic process with the cultural practices of the following stakeholders: non-government refugee network advocate and support organisations (e.g Refugee Council of Australia,

⁴ Peters, note 2, 354-6.

⁵ Desmond Manderson, ‘From Zero Tolerance to Harm Reduction “the Asylum Problem Problem” (2013) 32(3) Refugee Survey Quarterly.

⁶ While my policy focus will be on those objectives, due regard must be given from the outset that any comprehensive policy response should be accompanied by enlarging Australia’s Refugee and Humanitarian Program intake: Refugee Council of Australia, Annual Intake Submission and Consultations (February 2013) Refugee Council of Australia <<http://www.refugeecouncil.org.au/t/isub.php>>.

⁷ John Howard, ‘2001 Election Policy Speech’ (Speech delivered at Australian Federal Election, 28 October 2001).

⁸ Peter Drahos and John Braithwaite, ‘The Globalisation of Regulation’ (2001) 9(1) Journal of Political Philosophy 103-128.

⁹ Michael Howlett and Anthony Ramesh, *Studying Public Policy: Policy Cycles and Policy Subsystems* (Oxford University Press, 2003) 53.

¹⁰ I will maintain the use of the acronym ‘UAM’ throughout this paper to refer to irregular maritime arrivals, which includes asylum seekers as utilized by DIAC. That is to maintain a level of objectivity, despite the semantic notions the term carries by de-humanising the victims of a humanitarian crisis. See Department of Immigration and Citizenship, *Asylum Statistics–Australia: Quarterly tables–March Quarter 2013*(2013) 14.

RACS¹¹), international organisations, namely UNHCR (the prominent UN Refugee Agency which upholds and monitors State's implementation and compliance with the UNHCR Convention and human rights treaties¹²) and the International Organization for Migration.¹³ Australia's regional neighbours (PNG and other Countries of Transit, e.g. Indonesia) are directly involved and implicated in implementing the asylum seekers policy agendas, with the policy outcomes affecting the Countries of Origin (resulting in the plight of asylum-seekers).

II. Current Legislation Relevant to the Issue

Global governance and institutionalised cooperation on refugees is described as a "refugee regime complex", due to the multiple overlapping and often contradictory institutions governing and shaping states' responses towards refugee protection.¹⁴ The absence of a multilateral UN formal treaty framework has resulted in States' control and management of UMAs through the focus on travel security,¹⁵ as evident in PNG. The 'PNG solution' shows how globalisation, through regional and bilateral cooperation networks, has empowered Australia to 'strategically' choose its obligations.

The 1951 Refugee Convention defines and sets out the rights of refugees to receive access to protection.¹⁶ Refugees who are recognised as being in need of 'international protection' are persons fleeing their countries because of war, conflicts and human rights violations.¹⁷ States contribute to refugee protection by means of "asylum" and "burden-sharing".¹⁸ Although the Convention does not expressly prohibit offshore processing or resettlement of individuals who seek asylum in Australia,¹⁹ being a signatory, Australia has the core obligation to refrain from sending refugees back to a state where they are at risk of persecution;²⁰ This principle of non-refoulement underpins the Convention and has been elevated through customary international law

¹¹ For a comprehensive list of Refugee support organizations please see the statement endorsed by the following NGOs: Probono Australia, Enough is Enough-Time for a New Asylum Seeker Approach (13 August 2013) <<http://www.probonoaustralia.com.au/news/2013/08/enough-enough-time-new-asylum-seeker-approach#>>.

¹² Convention Relating to the Status of Refugees, opened for signature 28 July 1951, 189 UNTS 150 (entered into force 22 April 1954): Article 35 gives UNHCR an explicit mandate to monitor implementation of the Convention.

¹³ IOM assists state's collaboration with third countries in the management of human mobility. See: International Organization for Migration, IOM Australia (2013) <<http://www.iom.int/cms/en/sites/iom/home.html>>.

¹⁴ Alexander Betts, 'The Refugee Regime Complex' (2010) 29(1) *Refugee Survey Quarterly* 12; Alexander Betts, 'Institutional proliferation and the global refugee regime' (2009) 7(1) *Perspectives on Politics*, 53–8.

¹⁵ Gill Loescher, Alexander Betts and James Milner, *The United Nations High Commissioner for Refugees (UNHCR): The Politics and Practice of Refugee Protection* (Oxford University Press, 2001).

¹⁶ Convention Relating to the Status of Refugees, opened for signature 28 July 1951, 189 UNTS 150 (entered into force 22 April 1954) Preamble.

¹⁷ Alexander Betts, 'The Refugee Regime Complex' (2010) 29(1) *Refugee Survey Quarterly* 12, 18.

¹⁸ *Ibid.*

¹⁹ Saul, note 3.

²⁰ Convention Relating to the Status of Refugees (1951) art 1(A)(2), art 33.

as a non-derogable norm.²¹ PNG bares significant resemblance with the ‘Malaysia Solution’,²² which was struck down in *Plaintiff M70 v Minister for Immigration and Citizenship* for the lack of adequate protection it failed to afford asylum seekers. This significant decision necessarily undermined the legal basis for the government’s offshore processing arrangement with Malaysia.²³ Similarly, the executive’s breaches of refugee processing are herein evident under both its domestic and international law obligations due to its failure to comply with the requirements of s 198a *Migration Act* for transferring asylum seekers,²⁴ and notable contraventions of the *UNHCR*, *ICCPR* and *UNCRC* instruments.²⁵ Those obligations, norms, and rationales all inform the cultural narrative and implementation of this policy response, which are also supplemented through various frameworks within the Human Rights Regime, Humanitarian Regime alongside the Refugee Regime, all to which Australia is a signatory.²⁶ They inform the normative, substantive standards and procedural principles recognised under the Refugee Convention for delivering justice, providing access to law, due process and indiscriminate for asylum seekers. These rules and rationalities ought to inform our domestic normative standards of the construction of ‘public interest’²⁷ upon policy-making. That is by necessarily recognising the *social* dimension of the common good, predicating policy on understanding and compassion.²⁸ Rather than basing it on ignorance and anger, with the attempt of evading both our legal and social responsibilities. It is only upon such a conception of ‘public interest’²⁹ that Australia’s accountability and legitimacy be upheld.

III. Third Wave Governance

Third Wave Governance theory helps us comprehend how the asylum-seeker ‘dilemma’ has been responded to and regulated in practice through an identification

²¹ E. Lauterpacht and D. Bethlehem, ‘The scope and content of the principle of non-refoulement’, in E. Feller, V. Turk and F. Nicholson (eds), *Refugee Protection in International Law* (Cambridge University Press, 2001).

²² Arrangement between the Government of Australia and the Government of Malaysia on Transfer and Resettlement (signed and entered into force 25 July 2011).

²³ *Plaintiff M70/2011 & Plaintiff M106 of 2011 v Minister for Immigration and Citizenship* [2011] HCA 32.

²⁴ *Migration Act 1958 (Cth) s 198a*; See also *Plaintiff M61/2010E v Commonwealth* (2010) 243 CLR 319 (M61); *Minister for Immigration and Citizenship v MZYLE (No 2)* [2011] FCA 1210 (25 October 2011).

²⁵ Convention relating to the Status of Refugees (1951) arts 31, 33, 39 (effective refugee’s protection, welfare/safety in PNG; non-refoulement obligations); International Covenant on Civil and Political Rights, opened for signature 16 December 1966, (entered into force 23 March 1967); United Nations Convention on the Rights of the Child, GA Res 44/25, UN Doc A/RES/44/25 (20 November 1989) par 3(1).

²⁶ Human Rights Regime (characterized by the human rights treaties, OHCHR and the norm of ‘complementary protection’ in International Covenant on Civil and Political Rights, opened for signature 19 December 1966, 999 UNTS 171 (entered into force 23 March 1976)); Humanitarian Regime (characterized by OCHA and the norm of ‘IDP protection’ in the 1954 Convention relating to the Status of Stateless Persons).

²⁷ Geoff Edwards, ‘Where Does The ‘Public Interest’ Lie?’ (2011) Griffith University 67, 69.

²⁸ Desmond Manderson, ‘Groundhog Day: Why the Asylum problem is like the Drug Problem’, *The Conversation* (online), 17 August 2013 <<http://theconversation.com/groundhog-day-why-the-asylum-problem-is-like-the-drug-problem-16888>>.

²⁹ Edwards, note 27, 69.

of a 'public interest' that fails to distinguish between 'public opinion' and the 'common good'.³⁰ The juxtaposition between the narratives of securitisation and humanitarianism and a political discourse, dominated by 'economic efficiency'³¹ not morality, demonstrate this.

Akin to the situation in many states, the Australian dilemma of asylum-seekers is perceived as a migration issue,³² placing the concern of refugees as a cultural narrative and rationality of travel and border control.³³ Regulating and controlling international travel has been further confounded with the political and moral rhetoric of securitisation with an attempt of excluding, filtering, and identifying irregular migrants.

The recent Abbot Government's 'Operation Sovereign Borders' policy maintains this narrow definition of refugee concerns, whilst perceiving asylum seekers as 'security threats', with policy initiatives targeted at depriving people-smugglers of their product.³⁴ The re-naming of the 'Department of Immigration and Citizenship' (DIAC) to 'Department of Immigration and Border Protection'³⁵ further relays the concerns of securitisation, superimposing refugee policy as a concern of national security. The PNG policy introduced by the Rudd Government, aimed at 'preventing deaths at sea', similarly maintains this *elite-building narrative* and *rationality* of securitisation. The issue is framed as 'crime regulation' with the objectives of addressing the 'criminality' of people-smuggling and deterring UMAs.³⁶

The political debate and subsequent policy-responses are not framed within a human rights context or narrative, to comply with Australia's international shared responsibilities under the Conventions to protect those asylum-seekers fleeing across borders, escaping conflict and persecution.³⁷ Instead, the 'public interest' is invoked as a rhetorical device for political tarnishing, manipulation and persuasion of public voters, with its alternative normative meaning conflated and downplayed;³⁸ through the power of language, an account based on heightened moral rhetoric is seen through the vilification and criminalisation of asylum seekers ("queue jumpers", "terrorists", "criminals"³⁹), fostering an 'us-vs-them' mentality amongst public voters.

The PNG response demonstrates how indeed the state is far from losing control;⁴⁰ the government's powerful 'steering' of stakeholders' interests denotes a sophisticated

³⁰ Ibid 68.

³¹ Manderson, note 28.

³² Betts, note 17, 31.

³³ Department of Foreign Affairs and Trade, People Smuggling and Trafficking in Persons, 2013 <<http://www.dfat.gov.au/issues/people-trafficking.html>>.

³⁴ Liberal Party of Australia, Our Action Contract: A strong plan for Australia (2013) <<http://shared.liberal.org.au/Share/LPA=Contract-A4.pdf>>.

³⁵ Governor-General of Australia, Administrative Arrangements Order, 18 September 2013, 26.

³⁶ Department of Foreign Affairs and Trade, People Smuggling and Trafficking in Persons, 2013 <http://www.dfat.gov.au/issues/people-trafficking.html>; Saul, note 3.

³⁷ Melissa Reid, 'Closed Borders Spur Closed Minds', Right Now Human Rights in Australia Newsletter (online), 14 January 2013 <<http://rightnow.org.au/topics/asylum-seekers/closed-borders-spur-closed-minds/>>.

³⁸ Edwards, note 27, 69.

³⁹ Reid, note 37.

⁴⁰ Mark Bevir and R Rhodes, 'The State as Cultural Practice' (2010) Oxford Scholarship Online 1, 11.

form of pluralistic regulation negotiated with Australia's regional neighbours (PNG). Internationalisation has allowed the Australian executive to govern and import its own rules, rationales and narratives within a much more-sophisticated and functionally interactive network of stakeholders.⁴¹ Under the guise of networked governance, the collaboration with PNG has been pursued by the powerful executive to maintain a semblance of legitimacy concerning the refugee dilemma whilst downplaying refugee protection: in effect, the PNG policy solution demonstrates how Australia is 'contracting out' its responsibilities to third countries,⁴² like PNG, to implement its responsibilities under the Convention, and providing it with an opportunity for deflecting blame.⁴³ The bilateral with PNG on *Trafficking in Persons and Related Transnational Crime*,⁴⁴ shows how such 'hyper-legalism' is deployed by the government to justify and legitimise its refugee policy by ascertaining *certain* domestic and international legal instruments at the expense and exclusion of many other instruments.⁴⁵ Consequently, these have increased Australia's restrictions on asylum-seekers through engaging in regional regime shifting in such a way to bypass the refugee regime without 'overtly' violating the Convention's core principles.⁴⁶

IV. Recommendations for Law Reform

The current scope of the problem captured by the PNG policy is severely narrow; it subordinates the interests of the most relevant stakeholders, refugees, having adverse consequences on asylum-seekers and other stakeholders. It restricts the opportunity to effectively address the root causes for people seeking asylum.⁴⁷ A more appropriate policy response would adopt a regulatory approach to the asylum seeker problem, aimed at limiting the harms associated with people-smuggling and asylums fleeing persecution rather than punishment. A range of mixed strategies are required to genuinely address and effectively respond to this underlying social problem;⁴⁸ the responsive regulatory approach would address the problem from different angles, upon recognising the need for a range of practical and contextual strategies.⁴⁹

The current policy's focus on targeting 'people-smugglers' is misguided as it merely presents one problem within the policy cycle. The policy makes an assumption that the harsh treatment of people-smugglers and UMAs through a zero-tolerance deterrence and coercive approach to stopping the boats is effective policy. PNG's

⁴¹ Linda Weiss, 'The State-augmenting Effects of Globalisation' 10(3) *New Political Economy* 345-353.

⁴² Mark Bevir and R Rhodes, 'The State as Cultural Practice' (2010) *Oxford Scholarship Online* 1, 11, 12, 19

⁴³ Manderson, note 28.

⁴⁴ *Trafficking in Persons and Related Transnational Crime (Bi-lateral cooperation on people smuggling with PNG)*: Department of Foreign Affairs and Trade, *People Smuggling and Trafficking in Persons*, 2013 <http://www.dfat.gov.au/issues/people-trafficking.html>.

⁴⁵ Claire Inder, 'International Refugee Law, 'Hyper-Legalism' and Migration Management: The Pacific Solution' in Martin Geiger and Antoine Pécoud (eds), *The Politics of International Migration Management* (Palgrave MacMillan, 2010) 221.

⁴⁶ Betts, note 17, 27.

⁴⁷ Tania Penovic and Azadeh Dastyari, 'Boatloads of incongruity: the evolution of Australia's offshore processing regime' (2007) 13(1) *Australian Journal of Human Rights* 33, 53.

⁴⁸ Manderson, note 28.

⁴⁹ Charlotte Wood, Mary Ivec and John Braithwaite, 'Application of Responsive Regulator Theory in Australia and Overseas' (2010) 15 *Regulatory Institutions Network*.

focus is merely on removing the ‘pull factors’ which fails to effectively address the pragmatic complexities and multiple causations for why people seek asylum—the ‘push factors’.⁵⁰ People seek asylum due to incidents of destabilisation within their countries of origin attributed to war, conflict, insecurity and human rights abuses, leading them to flee persecution.⁵¹ The inadequacy of purely retributive or deterrence-based policy justifications⁵² are evident in the accounts of asylum seekers, as during conflict the imminent abrupt decision to flee persecution bares no ‘rational calculation’. Consequently, deterrence-based policy responses are relatively ineffective and counter-productive as they do not address the root causes of the problem; national border protection policies or draconian amendments to the *Migration Act* have not deterred people from seeking asylum,⁵³ as evident in the increasing number of ‘boats’ and asylum seekers’ arrival notwithstanding harsh law enforcement regulations.⁵⁴ These have instead created severe detrimental psychological harm and victimised asylum seekers,⁵⁵ whilst posing greater risk factors on other stakeholders. Indeed, ‘zero-tolerance amounts to zero-credibility’,⁵⁶ as constant punishment and persuasion are foolish strategies, worsening it for our future.⁵⁷ A responsive regulatory approach more appropriately responds to the root causes of fleeing persecution—‘push factors’, by allowing for sufficiently adaptable policy instruments to properly respond⁵⁸ to the series of contingent and unstable international events, characterising the pragmatic complexities, of the plight of asylums fleeing across borders. By acknowledging the unpredictable patterns and complexities of why persons seek asylum, the potential for more durable solutions can be realised through collaborative capacity-building regulatory measures.⁵⁹

Identifying risk management in terms of risk removal is unhelpful for it raises expectation to levels that are impossible to obtain in reality.⁶⁰ The PNG ‘solution’ depicts this fallacy as it associates ‘risk management’ with the management of danger/threats to the public from asylum seekers. The zero-tolerance approach assumes that it eliminates the risks by ‘sending asylum seekers offshore’. Aside from

⁵⁰ Andreas Schloenhardt, ‘Australia and the Boat-People: 25 Years of Unauthorized Arrivals’ (2000) 23 *University of New South Wales Law Journal* 33, 35.

⁵¹ Janet Philips and Harriet Spinks, ‘Boat arrivals in Australia since 1976’ (Research Paper, Parliamentary Library, Parliament of Australia, 2013).

⁵² Robert Cryer, Hakan Friman, Darryl Robinson and Elizabeth Wilmshurst, *An introduction to International Criminal Law and Procedure* (Cambridge University Press, 2nd ed 2010) 25-6.

⁵³ Janet Philips and Harriet Spinks, ‘Boat arrivals in Australia since 1976’ (Research Paper, Parliamentary Library, Parliament of Australia, 2013); Manderson, note 28.

⁵⁴ Tom Arup, ‘Increase in boat people predicted: UN blames global turmoil for rise’, *The Age* (Melbourne) 11 April 2009; Manderson, note 28.

⁵⁵ Derrick Silove, Patricia Austin, and Zachary Steel, ‘No Refuge from Terror: The Impact of Detention on the Mental Health of Trauma-affected Refugees Seeking Asylum in Australia’ (2007) 44(3) *Transcultural Psychiatry* 359, 381

⁵⁶ John Braithwaite, *Restorative Justice and Responsive Regulation* (Oxford University Press, 2002) 42.

⁵⁷ *Ibid* 29.

⁵⁸ Peters, note 2, 358.

⁵⁹ John Braithwaite, ‘The Essence of Responsive Regulation’ (2011) 44(3) *UBC Law Review* 475, 476, 480.

⁶⁰ Pat O’Malley, ‘Neo-Liberalism and Risk in Criminology’ in Thalia Anthony and Chris Cunnen (eds), *The Critical Criminology Companion* (Hawkins Press, 2008) 61.

the government's notable breaches of its international responsibilities for refugee protection, off-shore processing and indefinite detaining have proven costly punitive unilateral deterrence-based measures, failing the goals of stopping asylum seekers and keeping the concern of refugees seeking asylum in ASEAN pending.⁶¹ An estimated \$700 million/year for mandatory detaining has been proven the cost to Australian taxpayers. The further costs associated with the PNG's harsh enforcement policies create, both short-term and long-term, burdens and higher costs for the government.⁶² The expensive law enforcement strategies (navy interceptions, offshore-detaining and processing) have failed to make *genuine* inroads into the underlying problems. Instead, they have aggravated the matters, compounding the risk factors and associated expenses. The combination of arbitrary and indefinite detention, coupled with PNG's harsh environmental conditions, lack of basic social and legal infrastructure, and the constant uncertainty surrounding asylum seekers have compounded the deaths, mental, physical and emotional harm whilst heightening the trauma among children and adults.⁶³ The inordinate length of detention subjects asylum seekers to mental distress which has also evidenced heightened chances of unacceptable social behaviour,⁶⁴ antithetical to the rationale of a risk management approach. These inflicted harms are essentially to those who have committed no crime other than claiming their rights under international law.⁶⁵

A responsive regulatory approach to the asylum seekers problem would construct refugee policy-making as a dilemma arising from the globalisation and internationalisation of refugee and asylum concerns in alignment with the rules and norms in the international Conventions, remaking a rationale based on humanitarianism and communitarianism rather than securitisation. Compliance with international norms confers legitimacy on Australia as a "civilised state" in the eyes of the international community, enhancing state authority.⁶⁶ Characterising asylum seekers within this global and interdependent network of domestic and international stakeholders enables domestic policy-making to be more legitimate upon adequately involving and defining all the institutions and actors involved⁶⁷ within refugee policy area as participants from the outset. This is in stark contradistinction to the government's current misrepresentation of Australia and asylum seekers as juxtaposed homogenous entities, which runs the risk of overlooking the responsibilities, rights and capabilities of these other actors.⁶⁸ This account would be

⁶¹ Probono Australia, Enough is Enough-Time for a New Asylum Seeker Approach (13 August 2013) <<http://www.probonoaustralia.com.au/news/2013/08/enough-enough-time-new-asylum-seeker-approach#>>.

⁶² Manderson, note 28.

⁶³ Bianca Hall and Jonathan Swan, 'UNHCR 'troubled' by PNG Solution', Sydney Morning Herald (online), 26 July 2013 <<http://m.smh.com.au/federal-politics/political-news/unhcr-troubled-by-png-solution-20130726-2qo8c.html>>.

⁶⁴ Ilan Katz, University of New South Wales Australia Social Policy Research Centre, The Experiences of Irregular Maritime Arrivals Detained in Immigration Detention Facilities (Final Report for the Department of Immigration and Citizenship July 2013) 30 <www.immi.gov.au/media/publications/.../IMA-experiences-IDF.docx>.

⁶⁵ Manderson, note 28.

⁶⁶ Gerrit Gong, *The Standard of "Civilization" in International Society* (Oxford University Press, 1984).

⁶⁷ Braithwaite, note 59.

⁶⁸ Howlett and Ramesh, note 9, 58.

more compatible with the features of Third Wave Governance, particularly the just and legitimate accountability of the executive by allowing refugee policy-making to be constantly negotiated and remade amongst a wide array of interactive network and stakeholders to address the plight of asylums.⁶⁹

Flowing from this, ‘Community-based processing’⁷⁰ of asylum seekers provides an effective harm reduction strategy to risk management and would strike the appropriate balance between a holistic assessment of risk whilst managing the service duty to the Australian public. It appropriately restricts the opportunities for crime and mental harm whilst minimising future risk of anti-social behaviour associated with mandatory detention.⁷¹ Although immigration detention is not intended as a sanction but an administrative process, the experience of refugees and staff has evidenced that it is necessarily a sanction.⁷² Considering the majority of UMAs upon processing for status determination, are nevertheless deemed to be genuine refugees, ‘community-based processing’ within Australia provides the more humane and cost-effective approach to addressing Australia’s refugee protection obligations.⁷³ It more rightly accords with the norms of international law and the rules and rationalities posited by many asylum seekers advocate interest groups, practically applying the principles that ‘detention should be an option of last resort’ especially for children.⁷⁴ It also aligns with the principles of promoting the ‘wellbeing’ of asylum seekers,⁷⁵ seeking to limit the harms on UMA. Rather than having dysfunctional prison-like detentions scattered across Australia, a large united community village within the rural/regional territories can be established from scratch for housing asylum seekers and refugees.

V. Implementation of this policy response

UMAs would be housed in the community, given an immigration identification card, individually assigned a caseworker and allowed to positively engage within the community. The community would host asylum seekers, after ASIO security threats clearing, during and following the status determination process (after an application is lodged and claims assessed by DIAC against the Refugee Convention and Migration Act criteria⁷⁶). It would be equipped with adequate social and economic infrastructural capacities (hospitals, schools...) to foster a strong community built on communication, education and trust. Asylum seekers would be given the opportunity to work, gain skills, whilst integrating and giving back to the community until conflict

⁶⁹ Bevir and Rhodes, note 40.

⁷⁰ Community processing initiatives are much cheaper than detention and much more humane, giving asylum seekers the chance to start contributing to the Australian society while they wait for their refugee status to be assessed. Probono Australia, note 61.

⁷¹ Department Of Health, Publications Policy and Guidance: Saving Lives: Our Healthier Nation (5 July 1999) The National Archives of The Department of Health United Kingdom <http://webarchive.nationalarchives.gov.uk/+www.dh.gov.uk/en/Publicationsandstatistics/Publications/PublicationsPolicyAndGuidance/DH_4118614>.

⁷² Katz, note 64, 24.

⁷³ Probono Australia, note 61; Manderson, note 28.

⁷⁴ Australian Human Rights Commission, A Last Resort-The National Inquiry Into Children in Immigration Detention (2004).

⁷⁵ Katz, note 64, 30.

⁷⁶ Department of Immigration and Citizenship, Refugee and Humanitarian Issues: Australia's Response (2011) Department of Immigration and Citizenship <<http://www.immi.gov.au/ima/>>.

ends in their countries of origin. This approach seeks to limit the harms on UMAs whilst efficiently addressing overcrowding and security concerns associated with mandatory detaining.⁷⁷ The costs to the Australian public would be minimised by capitalising on gains for the community in profiting from the refugees' skills and innovation.

RRT is premised on positive engagement, fostering mutual respect, trust and understanding between the regulator and the regulatee.⁷⁸ UMAs would essentially be treated with human respect, dignity and fairness, supporting their wellbeing, rather than being criminalised through mandatory punishment and detaining, which is harmful and stigmatises the asylum seekers,⁷⁹ who owe no debts to society. UNHCR and other stakeholders such as Red Cross could help foster the mutual respect, trust and understanding between the regulator and the UMAs,⁸⁰ praising them for compliance, good behaviour and positive steps within the community. RRT is premised on the assumption of trusting that individuals commonly follow the rules and will comply with low levels of intervention.⁸¹ Voluntary compliance is based on the logic that most individuals will comply with low levels of intervention when they see that the regulator has a range of escalating sanctions in response to non-compliance.⁸² Thus, the imposition of sanctions and coercive measures (such as warnings, removal of welfare benefits or removal of work opportunities, depending on the offence and proportionate to the infringement) are threatening in the background, never in the foreground.⁸³ This suggests the absence of UMAs being monitored by police and being entrusted to live in the community. Clear explanation of the conditions and procedures of compliance,⁸⁴ to both the UMAs and Australian community regarding the sanctioning process if UMAs do not cooperate would safeguard good governance.

However, the workability of this approach domestically is contingent on having a *legitimate* authority which engages the regulatee;⁸⁵ when regulation is seen more legitimate and procedurally *fair* compliance with the law is more likely.⁸⁶ Accordingly, DIAC and its sub-contractors (Serco and IHMS) would benefit largely from third party regulation, or better yet, an active co-regulatory engagement with UNHCR, rather than working against it, to cooperatively foster long-term good governance. UNHCR's standing with refugees safeguards the enforcement of this regulatory approach *democratically* due to its high credentials within the public on

⁷⁷ Katz, note 64, 55.

⁷⁸ Valerie Braithwaite, *Compliance with Migration Law*, Report for the Department of Immigration and Citizenship (Canberra, 2010) < [tps://www.immi.gov.au/media/.../pdf/compliance-migration-law.pdf](https://www.immi.gov.au/media/.../pdf/compliance-migration-law.pdf)>; John Braithwaite, 'The Essence of Responsive Regulation' (2011) 44(3) *UBC Law Review* 475, 476, 480.

⁷⁹ Reid, note 37.

⁸⁰ Valerie Braithwaite, note 78, 75.

⁸¹ Ian Ayres and John Braithwaite, *Responsive Regulation: Transcending the Deregulation Debate* (Oxford University Press, 1992).

⁸² *Ibid*; Braithwaite, note 59, 487.

⁸³ Braithwaite, note 59, 489.

⁸⁴ *Ibid*; Valerie Braithwaite, note 78, 54.

⁸⁵ Valerie Braithwaite, Kristina Murphy and Monika Reinhart, 'Taxation Threat, Motivational Postures, and Responsive Regulation' (2007) 29(1) *Law and Policy* 137-158.

⁸⁶ John Braithwaite, note 56, 33.

treatment of asylum seekers, upholding their legal rights and human rights standards. By leveraging UNHCR to its side and working cooperatively with UNHCR, the executive gains a more legitimate authority by attempting to restore Australia's international standing. This further validates Australia's order to governing irregular migration regionally whilst allowing Australia to maintain a leading *legitimate* authority within ASEAN. This becomes imminent due to UNHCR's recent scathing assessment on Australia's Regional Resettlement Arrangement with PNG,⁸⁷ which has the potential to undermine and damage both Australia's international diplomatic standing⁸⁸ and alternative regionally negotiated policy systems with Indonesia, a key stakeholder being a Country of Transit. The government would immensely benefit from an open partnership with UNHCR, as the Australian government has limited capacity to influence the flow of asylum seekers, and considering UNHCR's considerable regulatory power and influence within the global network and follow of refugees, particularly its ability to profoundly impact on state-led regulation.⁸⁹ Such a mutually beneficial partnership would allow the government to gain some predictability on the flow of asylums; besides, it endows the government with UNHCR's immense possession of theoretical and practical expertise (think-tank for policy-making)⁹⁰ on how to limit irregular migration within ASEAN and cooperatively explore strategies for refugee protection.

Domestically, this union, alongside the aforementioned stakeholders, would accordingly pave the way for a national reconciliation dialogue between the Australian public and asylum seekers. This allows for the re-framing of the 'asylum problem' through applying elements from the 'restorative justice'⁹¹ modality. The union with UNHCR rightly places the discussion within the necessary contextual focus on 'refugee protection', rather than punishment and a discourse of securitisation. Seeing the harm as the violation of people and relationships,⁹² rather than superimposing punishment on asylum seekers paves the way for dialogue and empathy between the public and asylum seekers. Herein, the potential for repairing the wronged harm can be appropriately realised through the applicability of *dialogue* and *education*⁹³ on the reasons for why people seek asylum. This mutually serves to educate the public through witnessing real refugee stories/experiences, whilst allowing refugees to learn about the 'Australian culture'— a common concern raised by the public.⁹⁴ The public would be given a greater opportunity to empathise, and to move away from the 'us-v-them' mentality whilst realising through the aforementioned 'community-based' village that they would not be 'stealing their jobs'. However, a discourse informed by eliciting shame through 're-integrative shaming' to achieve

⁸⁷ Hall and Swan, note 63.

⁸⁸ Valerie Braithwaite, note 78, 75.

⁸⁹ Ibid.

⁹⁰ Betts, note 17, 33.

⁹¹ John Braithwaite, note 56.

⁹² John Braithwaite, 'What's wrong with the sociology of punishment' (2003) 7(1) *Theoretical Criminology* 6, 65.

⁹³ John Braithwaite, note 59.

⁹⁴ Christos Tsiolkas, *Why Australia Hates Asylum Seekers* (September 2013) The Monthly Australian Politics, Society and Culture (online) <<http://www.themonthly.com.au/issue/2013/september/1377957600/christos-tsiolkas/why-australia-hates-asylum-seekers>>.

those objectives and a shift in public opinion on asylum seekers may not be appropriate.⁹⁵

VI. Conclusion

Considering that developing countries, lacking the necessary infrastructural capacities, are currently hosting the majority of the world's asylum seekers,⁹⁶ why shouldn't Australia have its 'fair share' of 'burden-sharing'. The failures and increasing dissatisfactions with zero-tolerance policy 'solutions' are evident; the current political medium provides an invaluable opportunity to reconsider all policy recommendations.

'A policy is a temporary creed liable to be changed, but while it holds good it has got to be pursued with apostolic zeal'.⁹⁷

⁹⁵ Danielle Every, 'Shame on you: The language, practice and consequences of shame and shaming in asylum seeker advocacy' (2013) *Discourse and Society*.

⁹⁶ Anthony Billingsley, *Mutual Misery: the Syrian Refugee Crisis, Lebanon and Australia* (30 October 2013) The Conversation (online) <<http://theconversation.com/mutual-misery-the-syrian-refugee-crisis-lebanon-and-australia-19304>>.

⁹⁷ Quoted by Mahatma Gandhi