

**Defiance and Compliance:  
Australia and the United Nations Convention Relating to the Status  
of Refugees**

By  
Danika Grandkoski

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## **Abstract**

An analysis of Australia's level of compliance with the United Nations Convention Relating to the Status of Refugees (the Convention) according to theories of compliance, suggests that no single compliance theory can adequately explain both instances of violation and instances of compliance.

Much of Australia's violation of the Convention, and subsequently other international human rights treaties, stems from more recent legislative changes though Australia's offshore processing initiatives.

Collectively theories of compliance are useful for identifying the driving factors which govern Australia's handling of international obligations under the Convention. Liberal compliance theory indicates civil society and non-state actors are the most influential drivers ensuring the state is held accountable for upholding its obligations and responsibilities. Constructivist compliance theory suggests the greatest pull towards non-compliance is Australia's notion of national identity which has influenced discriminatory policies throughout its history. National identity remains an influential driver as evidenced by current politicisation of discussion surrounding refugees and asylum seekers in Australia and subsequent legislative agendas.

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## Introduction

People are moving around the world at a faster rate than ever before not just for leisure but in response to political conflict, war, economic security, and natural disasters. The number of those who involuntarily flee their country of origin and are forced to seek refuge elsewhere is increasing, leaving a significant group vulnerable to increased chances of exploitation and abuse. With little or no legal protections outside their state of residence, access to safeguards and an adequate standard of living is severely diminished. This is a prominent feature in international relations rhetoric, as a states failure to extend protection undermines the universalism of human rights. While these discussions are inclusive of all vulnerable persons and groups who reside outside their country of origin, this paper focuses on one of those groups, refugees and asylum seekers, as defined under the United Nations Convention Relating to the Status of Refugees ('Refugee Convention' or 'Convention' hereafter).

Refugee status under the Convention is determined on a well founded fear of persecution based on civil or political status. While this status is determined on a threshold which includes a violation of human rights, it does not include hardship or lack of opportunity.<sup>1</sup> Therefore, while the term refugee is often used to incorrectly to describe persons in various circumstances, not all persons who have fled their home are refugees.<sup>2</sup> Asylum seekers are those who seek official recognition of status as a refugee under the Convention.

The Refugee Convention is the most comprehensive international human rights instrument for the rights of refugees. Though the Refugee Convention and all other United Nations (UN) treaties mandate a universal application of human rights standards, states frequently fall short of full compliance to these treaties.

This paper examines the extent to which Australia complies with the Refugee Convention and uses theories of compliance to reflect on the uptake of international human rights instruments. In the case of Australia, failure to acknowledge compliance risks

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<sup>1</sup> Hathaway, James. *The Law of Refugee Status*. Vancouver: Butterworths Ltd., 1991. p.vi.

<sup>2</sup> For example, persons who have departed an inhabitable city due to an earthquake, or other natural or environmental disaster are not refugees by this definition. Likewise, the definition does not cover 'internally displaced persons' within a country of political conflict, it only applies to those who seek protection while outside their country of nationality.

undermining the foundations of an international system designed to uphold the fundamental rights and protections of refugees and asylum seekers. By examining theories of compliance it is determined that no single theory can sufficiently explain Australia's level of compliance to their obligations and responsibilities under the Refugee Convention. Rather, components of the five theories discussed can assist in understanding which factors present the greatest influence in determining Australia's level of compliance to the Refugee Convention.

While there are numerous drivers, there are two factors which suggest the strongest pull towards non-compliance. By examining the historical, social and political context of Australia's broader immigration policies it becomes apparent that Australia's compliance is heavily influenced by civil society and non-state actors and a constructed ideology of national identity.

Criticism of Australia's interpretation of the Convention stems mostly from changes made to domestic legislation as a result of the state's offshore processing initiatives. The Australian government primarily defends its actions as their sovereign right based on the three justifications: border control, national identity and national security.

Those in opposition to the state's stance argue that Australia's legislation and policies around offshore processing violate, to varying degrees, critical provisions set forth in the Refugee Convention and more generally other human rights instruments and obligations as an international citizen under the UN charter. It is asserted that various amendments to domestic legislation are discriminatory and at odds with the principle foundation of the Convention; that it is not illegal for persons to seek asylum and those who seek asylum, regardless of method of arrival, are entitled to basic rights. While the Convention does allow for the detaining of refugees only when strictly necessary, Australia has been criticised for the mandatory and excessive use of detainment.<sup>3</sup> Another prominent concern by opponents is that the practice of offshore processing at an excised location significantly increases the risk of a genuine refugee being returned to the country they have fled. Collectively, these represent the greatest criticisms of Australia's level of compliance to the Convention, with concern that they undermine both the foundations of

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<sup>3</sup> Bem, Kazimierz and Nina Field, Nic Maclellan, Sarah Meyer, Dr. Tony Morris. *A Price Too High: the Cost of Australia's Approach to Asylum Seekers*. Australia: a research project funded by A Just Australia, Oxfam Australia and Oxfam Novib, 2007. Particularly for the mandatory detention of children. For further information see [http://www.hreoc.gov.au/human\\_rights/immigration/detention\\_rights.html](http://www.hreoc.gov.au/human_rights/immigration/detention_rights.html).

the Convention and an international responsibility. In addition, such breaches jeopardise other international treaties to which Australia is party, such as the International Convention on the Elimination of All Forms of Racial Discrimination (CERD), the International Covenant on Civil and Political Rights (ICCPR), the Convention on the Rights of the Child (CRC), and the Convention Against Torture and Other Cruel, Inhumane and Degrading Treatment or Punishment (CAT).

Australia is not alone with having to deal with this challenging, ever-changing balance between granting rights and protections for refugees on the one hand and the potential burden such accommodations place on the state on the other. It is also faced with the fact that the illegal operation of people smuggling and trafficking is a profitable business for some, who depend on asylum seekers willing to risk a long boat journey, and even their lives, for a chance at state protection. Many states face similar scenarios and globally countries with high refugee intake are watching with anticipation the outcome of Australia's offshore processing solution as a means of dealing with this situation.

This paper begins by providing some background to the Refugee Convention; including the evolution of the definition of refugee, the history and scope of the Convention, and the Convention in the context of international law. Following this, an examination of theories of compliance used within international relations is provided. Thirdly, non-compliance with the Refugee Convention, and consequently other related international human rights obligations, is explored within Australia's social, political and historical context. Lastly, the violations are measured and analysed according to respective theories of compliance to gain an understanding of Australia's driving factors towards compliance and non-compliance alike. It becomes apparent that civil society and non-state actors are the driver factors towards compliance while Australia's constructed ideology of national identity is the strongest influence in non-compliance.

Recognising the careful balance required to both protect refugee rights and demands placed on the state, an improved understanding of how compliance with the Refugee Convention has been negotiated within Australia will contribute to the pressing and topical dialogue on the challenges that states face in achieving compliance with their obligations to protect international refugees and uphold agreed to international human rights standards.

## Part I. The Refugee Convention

“As a result of events occurring before 1 January 1951 and owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it.”<sup>4</sup>

While this precise definition of refugee did not evolve until the mid-twentieth century, refugee rhetoric was taking place half a century earlier with the definition of refugee evolving in both juridical and social realms.<sup>5</sup>

Defining refugees from a legal point of view, a *de jure* perspective evolved to facilitate international movement of persons outside of their country of origin at a time when persons were not seen as an international responsibility if the state of origin failed to assume protection for them.<sup>6</sup> Two significant migrations included the flight of more than one million Russians between 1917 and 1922, and hundreds of thousands of Armenians fleeing the Turkish government’s tyrannical oppression and war in the early 1920s.<sup>7</sup>

By contrast, the social perspective was based on a *de facto* recognition. The scope of this definition was to protect persons adversely affected by injustice making living in the state intolerable, due to a specific situation.<sup>8</sup>

These two principles; state accountability and protection, are the essence of the Convention today.

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<sup>4</sup> Article 1(A)(2).

<sup>5</sup> Hathaway (1991).

<sup>6</sup> Hathaway (1991) p.3.

<sup>7</sup> Hathaway (1991) p.2.

<sup>8</sup> Hathaway (1991).p.4.

## *Scope of the Convention*

“The desire of European states to establish normative standards and control mechanisms to stem the arrival of immigrants perceived as non-contributing clashed head on with the enormity of a series of major population displacements within Europe during the early part of the twentieth century.”<sup>9</sup>

The United Nations Convention Relating to the Status of Refugees was a post World War II initiative, drafted between 1948 and 1951, for persons affected by events within Europe which occurred prior to 1 January 1951.<sup>10</sup> It entered into force on 22 April, 1954.

The Convention unified all previous international instruments relating to refugees and remains the most comprehensive codified international instrument pertaining to the status of refugees today.<sup>11</sup> It incorporates principles embodied in the 1948 Universal Declaration of Human Rights (UDHR) which promote the universality and interdependence, indivisibility and the interrelatedness of fundamental human rights. The foundation of the Convention draws on Article 14 of the UDHR, the provision that everyone has the right to seek asylum from persecution.<sup>12</sup> Since the proclamation of the UDHR, the rights of humans have been further recognised through a number of international human rights conventions and covenants.

As international migration became controlled and facilitated with the introduction of domestic immigration legislation, it was deemed necessary to mandate legal protection for persons who were involuntarily denaturalized. The Convention highlights the rights of these persons as a highly vulnerable, marginalised group of individuals who are outside of their state of origin without any legal protection. This protection was initially only available to those outside their state of origin, a provision of the Refugee Convention that remains today.<sup>13</sup>

The Convention has had one amendment since coming into force in the form of the 1967 Protocol Relating to the Status of Refugees (the Protocol). Due to further international

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<sup>9</sup> Hathaway (1991) p.2.

<sup>10</sup> Preamble.

<sup>11</sup> Preamble.

<sup>12</sup> Universal Declaration of Human Rights. *United Nations Document A/RES/217*. 10 December 1948. (UDHR).

<sup>13</sup> Internally displaced persons, persons who have been forced to leave their habitual residence but stay within state borders by definition, cannot be granted refugee status and subsequent treaty protection entitlements under the Refugee Convention.

refugee situations eventuating after the establishment of the Convention, the Protocol removed the geographical and temporal limitations of the Convention.

### *The Convention in context of international law*

United Nations treaties play a unique role in global governance. They set a universal codification of human rights standards and because of this, are often considered customary international law.<sup>14</sup>

While customary international law assumes in theory a position of hard law as it forms a universal human rights constitution, in practice it can waver significantly between hard and soft law. Soft law agreements fall short of the traditional definition of law; rules which have components of international law but are not legally binding. This is an essential point as legally binding rules and institutions presume compliance in a way that non-legal, non-binding rules do not.<sup>15</sup>

The Refugee Convention is voluntarily signed by a contracting state thus securing a promise to honour the obligations and responsibilities associated with the Convention. Because of this, it is considered to be binding even if there are no direct sanctions and membership can be withdrawn.<sup>16</sup> Direct sanctions can however, come from breaches of provisions which are similarly embedded in other international instruments to which Australia is party.<sup>17</sup> Australia could potentially face direct sanctions within the international community for breaches to agreed to treaties.<sup>18</sup>

It is also relevant to discuss the Refugee Convention in relation to other international human rights treaties as asylum seekers and refugees have rights independent of the Refugee Convention under these other treaties.

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<sup>14</sup> Rules that come from a general practice accepted as law.

<sup>15</sup> Raustiala, Kal and Anne-Marie Slaughter. "International Law, International Relations and Compliance." Chap. 28 in *The Handbook of International Relations*, edited by Walter Carlsnaes and Thomas Risse and Beth Simmons, 538-558. London: Sage Publications, 2002. p.538.

<sup>16</sup> Guzman, Andrew T. and Timothy L. Meyer. "International Soft Law." *Journal of Legal Analysis* 2 (2010): p.177.

<sup>17</sup> Some of these include: the International Convention on the Elimination of All Forms of Racial Discrimination (CERD), the International Covenant on Economic, Social and Cultural Rights (ICESCR), the International Covenant on Civil and Political Rights (ICCPR), the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW), the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT) and the Convention on the Rights of the Child (CRC).

<sup>18</sup> For example, breaching the provision which prohibits actions against torture as set for in CAT. Such sanctions could include monetary fines, loss of UN membership, or a loss of seat on UN hearing committees.

It has been argued that international instruments which make claims of universal human rights limit state sovereignty in principle.<sup>19</sup> However, all UN treaties are voluntarily implemented by the signing state and a UN committee such as the United Nations High Commissioner for Refugees (UNHCR). The UNHCR committee supervises the implementation and monitoring of the Convention through a mandate of non-coercive enforcement.<sup>20</sup> States take it upon themselves to choose to become a signatory or party, and to fulfil obligations under the Refugee Convention and Protocol. States can strengthen and enhance credibility to their commitment to the Convention by formally adopting provisions and protections by incorporating them into domestic legislation and policy.<sup>21</sup> Furthermore, similar to all UN human rights treaties, states are also free to denounce themselves from the Convention as per the Administrative section laid out in the treaty.<sup>22</sup>

So whilst there is dialogue around how much sovereignty a given state has in the face of globalisation, the effectiveness of the Convention ultimately rests on the state's implementation and enforcement of it. It is recognised that the granting of asylum may place an unduly heavy burden on a given state and therefore manageable and practical solutions cannot be achieved without international cooperation.<sup>23</sup>

## Part II. Compliance theory

"It is probably the case that almost all nations observe almost all principles of international law and almost all of their obligations almost all of the time." – Louis Henkin

The reality is that non-compliance to international law is common, particularly in the international human rights realm.<sup>24</sup> Given the increasing number of human rights

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<sup>19</sup> Grugel, Jean and Nicola Piper. *Critical Perspectives on Global Governance: Rights and regulation in governing regimes*. London: Routledge, 2007. See page 2 "It creates a kind of constitution that can be used as a vehicle for making claims and legitimizes non-state action on behalf of vulnerable groups".

<sup>20</sup> Preamble.

<sup>21</sup> In some states such as the Netherlands, France and Switzerland ratification results in automatic incorporation into domestic legislation.

<sup>22</sup> A one year notice is required to retract a contract with the Refugee Convention. Article 44(2).

<sup>23</sup> Preamble.

<sup>24</sup> Moore, David H. "A Signaling Theory of Human Rights Compliance." *Northwestern University Law Review* 97, no. 2 (Winter 2003): p.879.

instruments created since World War II non-compliance is prevalent, thus leading to discussion on why states comply or fail to comply with international treaties.<sup>25</sup>

The question of what influences states to comply with international law is among the most perplexing in international relations. This question is highly significant for human rights where vast amounts of resources, both administrative and monetary, go into producing robust and considered human rights treaties. Compliance to the Refugee Convention for example cannot only provide legal protection but can ultimately determine one's livelihood. Understanding the motivations that influence states to comply with international human rights instruments can assist the UN with successful promotion and protection of human rights. Understanding the factors is essential as non-compliance threatens to undermine the foundations of the Convention.<sup>26</sup> More widely, it undermines the entire UN human rights agenda. Without an insight into the drivers of compliance, gauging the impact of the fifty thousand existing international treaties has little significance.<sup>27</sup>

Compliance is defined in this section and five theories of compliance discussed within international relations discourse are summarised. Compliance theories suggest reasons why states do or do not comply. They are laid out here in order to provide a basis for analysing which factors have the greatest pull towards compliance and which have the strongest influence towards non-compliance for Australia in relation to the Convention.

### *Defining compliance*

Oran Young's definition of compliance is used in this paper and refers to the adherence to and conformity between the relevant actor's behaviour and a specified rule.<sup>28</sup> Compliance is not a binary definition in that a state either complies or does not comply. Both compliance and non-compliance can exist in varying degrees. Two concepts closely

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<sup>25</sup> Hathaway, Oona A. "Do Human Rights Treaties Make a Difference." *Yale Law Journal* 111, no. 8 (June 2002): 1935-2042.

<sup>26</sup> Burgstaller, Markus. *Theories of Compliance with International Law*. Leiden: Martinus Nijhoff Publishers, 2005.p.2.

<sup>27</sup> Ibid.

<sup>28</sup> Young, Oran R. *Compliance and Public Authority: A Theory with International Applications*. Baltimore: John Hopkins University Press, 1979.

linked and associated with determining levels of compliance are implementation and effectiveness.<sup>29</sup>

As mentioned, the Refugee Convention relies on implementation which refers to putting treaty provisions into practice, primarily through domestic legislation and enforcement.<sup>30</sup>

While implementation is a crucial step towards compliance, it is not always required, particularly where domestic practice is already in line with international treaty obligations.<sup>31</sup>

Similarly, while effectiveness, defined as the extent to which a treaty alters behaviour to further the goals of the treaty,<sup>32</sup> is often measured in association with levels of compliance, it is not directly correlated to compliance. Treaties have been found to be effective even when compliance is low; and high compliance numbers do not always signify protection standards are met effectively.

Theories on compliance put forth reasons why states either comply or do not comply with international governance. Andrew Guzman suggests that “at present, the best source of theory relevant to international law and compliance comes not from legal scholarship, but from international relations”.<sup>33</sup>

Though international relations theorists have attempted to examine and describe patterns of compliance, there is debate over whether theories can be clearly catalogued.<sup>34</sup> Few studies have focused on compliance within the human rights realm. Most empirical studies of compliance have focused on measureable governance regimes like international political economy (IPE), where there is significant international value and pressure to be involved and included into the IPE system.<sup>35</sup> This in part has to do with the generalisation which occurs in the discourse, whereby international law compliance theories often combine hard and soft law by including everything from non-binding declarations to binding treaties.

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<sup>29</sup> Raustiala and Slaughter (2002) p.539.

<sup>30</sup> Ibid.

<sup>31</sup> Ibid.

<sup>32</sup> Keohane, Robert O. *International Institutions and State Power: Essays in International Relations Theory*. Boulder: Westview, 1989.

<sup>33</sup> Guzman, Andrew T. “A Compliance-Based Theory of International Law.” *California Law Review* 90 (2002): p.1827.

<sup>34</sup> Hathaway (1991) p.5. See also Burgstaller (2005) p.95.

<sup>35</sup> Grugel and Piper (2007).

Like the Refugee Convention itself, compliance theories are challenged in that they risk being too narrow as they try to canvas a wide number of factors and variables. Though all of the theories do contain elements of philosophy, politics and sociology,<sup>36</sup> all factors and every scenario possible cannot be included. Narrowing the scope by examining a specific state and a particular Convention does not diminish the variables when considering Australia's compliance with the Refugee Convention.

A solid compliance theory should provide reasoning for why states comply with international treaties as well as why states partake in non-compliance by violating their obligations to international law. Guzman notes that while theories explain instances of compliance, none of these approaches offer a comprehensive coverage of compliance with international human rights law,<sup>37</sup> in that they do not explain instances of breach.<sup>38</sup> Below, the main theories of compliance in international law are highlighted.

### *Realist theories of compliance*

Realist scholarship views international law as having little significant impact on state behaviour. International law and global governance is assumed to be a system primarily driven and controlled by unitary states rather than a system above the state which is influenced by external institutions and international systems.<sup>39</sup> States are driven by their own political agenda and either jockey for a position within the 'international systemic power configuration' of states driven by their own political agenda,<sup>40</sup> or as a response to external threats if the state is already sitting within the elevated power structure of this international system.<sup>41</sup>

While there are varying theories of this perspective on compliance and some argue a number of influential factors<sup>42</sup> shape states' behaviour towards compliance; norms are never a feature. Markus Burgstaller notes that "the only rule applicable to the state is

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<sup>36</sup> Burgstaller (2005) p.95.

<sup>37</sup> Moore (2003) p.880.

<sup>38</sup> Guzman (2002) p.1844.

<sup>39</sup> Grugel and Piper (2007) p.5.

<sup>40</sup> Withana, Radhika. *Power, Politics, Law: International Law and State Behaviour During International Crises*. Leiden: Martinus Nijhoff Publishers, 2008. p.39.

<sup>41</sup> Burgstaller (2005) pp.96-98. Based on Mearsheimer, John J. "Back to the Future: Instability in Europe After the Cold War". *International Security* 15, no. 4 (1990):p.5-56. Reprinted in Michael E. Brown et al., eds., *The Perils of Anarchy: Contemporary Realism and International Security*. Cambridge: MIT Press, 1995.p.78-129.

<sup>42</sup> Such as power, economics, politics and foreign relations. See Burgstaller (2005) p.96.

one of rationality as there is no such thing as justice or morality across borders.”<sup>43</sup> Regardless of different thoughts on factors, all perspectives agree that national interest and power take precedence.<sup>44</sup>

Traditionally realism formed around these two main principles. In the early twentieth century E.H. Carr explained the power relationships between states. He suggested that international politics are not driven by global governance, reputation or norms but that “power is a decisive factor in every political situation . . .”.<sup>45</sup> In addition, Andrew Guzman suggests that these two interests are the primary source of behaviour focused on absolute gain from cooperation. If a state does not stand to gain as much as it could or more than that of another state, it will be more inclined to not comply.<sup>46</sup>

So whilst Hans Morgenthau alluded to realism as the “rational theory of international politics”<sup>47</sup> this perspective poses a genuine concern regarding the certainty and reliability of state compliance with the Refugee Convention. It suggests states will only assume international cooperation and burden sharing when it is in their interest to do so, disregarding ‘obligations’ if the advantage outweighs adherence.<sup>48</sup>

Realist theory would suggest that when a state enters into agreement with the Convention, it has a high level of freedom over the level of compliance which has the potential to greatly undermine the Convention. This essentially cedes its universalism and becomes a mandate whose provision is solely in service of the state.<sup>49</sup> It allows states to alter commitments to responsibilities rather than maintain compliance when circumstances change. In addition, if a state has a certain level of established non-compliance to the Convention or Protocol, such as a reservation in place, it decreases costs associated with a violation of compliance.<sup>50</sup>

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<sup>43</sup> Burgstaller (2005) p.97.

<sup>44</sup> From Sovereignty: Organized Hypocrisy, Stephen D. Krasner. Princeton, Princeton University Press, 1999. In Guzman, Andrew T. “A Compliance-Based Theory of International Law.” *California Law Review* 90 (2002): p.1841.

<sup>45</sup> Carr, E.H. *The Twenty Years Crisis: 1919-1939*. New York: MacMillan & Co Ltd, 1958.p235.

<sup>46</sup> Guzman (2002) p.1840.

<sup>47</sup> Morgenthau, Hans J. *Politics Among Nations: The Struggle for Power and Peace*. 5th Edition. New York: Alfred A Knopf, 1973.p3.

<sup>48</sup> Henkin, Louis. *How Nations Behave*. 2nd Edition. New York: Colombia University Press, 1979.

<sup>49</sup> Guzman and Meyer (2010) p.171.

<sup>50</sup> Guzman, Andrew T. “The Design of International Agreements.” *The European Journal of International Law* 16, no. 2 (2005): p.591.

Because the assumption of politics is based on power and national interest, there is inclination within this scholarship to suggest that international law does little to affect state behaviour, making compliance fickle. Realists would not deny states often act in a manner consistent with international law, however compliance is more accurately thought of as having domestic policies consistent with international policy.

### *Liberal theories of compliance*

The main principle which sets liberal theories of compliance apart from realist theories is the rejection of the assumption that compliance with international law is solely the decision of the unitary state.

Contrary to realism, liberalism argues that states do not operate in silos; rather the concept of 'international' is considered to be an array of interactions and cooperation between citizens, between states and between global and local communities. Thus, it argues that "states do not make decisions; people do".<sup>51</sup> The argument that international compliance emerges from bottom up domestic politics also differs to the realist argument of a top down approach where decisions are made by the state in the best interest of their citizens.

Liberal compliance rhetoric is commonly bound with normative scholarship. Whereas realists view international treaties as the product of powerful state agendas and underplay the role non-state actors, normative theory draws on the liberal principle which assumes international treaties are the product of transnational interactions, guided by a sense of justice and moral and ethical obligations.<sup>52</sup>

Harold Koh has been influential in this perspective, arguing that norms are formed collectively through state, non-governmental organisations, multinational corporations, and civil society interactions.<sup>53</sup> Norms then become internalised at the national level thus contributing to the formation of state identity.<sup>54</sup> Then norms get incorporated into

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<sup>51</sup> Hathaway (1991) p.5.

<sup>52</sup> Franck, Thomas. *The Power of Legitimacy Among Nations*. New York: Oxford University Press, 1990.

<sup>53</sup> Koh, Harold H. "Transnational Legal Process." *Nebraska Law Review* 75 (1996): 181-208.

<sup>54</sup> Ibid.

domestic legislation and policies, and become a factor in determining a state's behaviour towards international compliance.<sup>55</sup>

Anne-Marie Slaughter and Andrew Moravcsik also argue that the impact that non-state actors have on state compliance to international treaties is due to the internalisation of norms which takes place at the domestic level.<sup>56</sup> Their work on domestic regime compliance compliments Koh's argument by suggesting that it is the characteristics and domestic structure of the state that significantly determine compliance with international law.

Slaughter and Moravcsik argue that the commitment to international compliance is a result of domestic politics which are representative of the views of the state as states reflect the individual interests in their policy and ideology.<sup>57</sup> Slaughter notes that when applying this theory there is a variation between liberal and non-liberal states. She notes that liberal states have a “. . . form of representative democracy, a market economy based on private property rights, and constitutional protection of civil and political rights”.<sup>58</sup>

This theory stresses the role that non-state actors play including individuals or collectives of individuals within the state. When government allows non-government actors to overtly advocate for rights, and norms are internalised, then the government, which is representative of the people, has domestic policies and legislation which are rights based (Simmons 2009; Koh 2005).<sup>59</sup> Beth Simmons also emphasises the role of non-state actors noting that the transmission of norms at the domestic level can be influenced by regional networks and cooperation.<sup>60</sup> Regional organisations, systems, and agreements which promote human rights standards help ensure that treaty provisions are put into practice.

Therefore, in states where norms have not been internalised, non-compliance domestically would result in non-compliance internationally. This theory suggests then, that if states have a domestic legislation inclusive of norms, a representative government

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<sup>55</sup> Koh (1996).

<sup>56</sup> Hathaway (1991) p.5.

<sup>57</sup> Slaughter, Anne-Marie. "International Law in a World of Liberal States." *European Journal of International Law* 6, no. 4 (1995): 503-538.

<sup>58</sup> Slaughter (1995) p.509.

<sup>59</sup> Grugel and Piper (2007).

<sup>60</sup> Simmons, Beth. *Mobilizing for Human Rights*. New York: Cambridge University Press, 2009.

and judicial system which complies with rules of law, then they should have a higher level of compliance to the Refugee Convention.

Because of the internalisation within the state, norm based treaties like the Refugee Convention are considered to be the strongest influential factor on state's behaviour and compliance. Based on this assumption, it is believed that UN Conventions create an international system of norms based governance whereby rights genuinely matter.

### *Reputation theories of compliance*

Reputation theory assumes international law can affect state behaviour because states are concerned about their reputation and sanctions resulting from a violation of obligation.<sup>61</sup> The theory sits midway between realist and liberalist theories of compliance, at times drawing on the realist concept of the self-interested state, otherwise drawing on the liberal principle of cooperation and the concept of normativity.

It is generally assumed that when there is an increase of 'costs' for a violation, the level of compliance will also increase.<sup>62</sup> There are typically greater costs associated with violating hard law than soft, which realists would consider to have little 'compliance pull' as it rarely has direct sanctions for a violation of compliance. However, Andrew Guzman and Timothy Meyer (2010) note that the poor reputation a state may endure amongst the international community could prove to be a high enough cost to persuade it to comply.<sup>63</sup>

Where states may consider calculations of cost-benefit analysis, there is often low cost and high benefit associated with belonging to an international community. Following the norms of the community, in this case upholding responsibilities of the Convention, can enhance a state's position within the community or allow them to maintain a well regarded status in an interconnected community of states.

Not honouring obligations to the Convention can tarnish a state's reputation because it demonstrates that it is prepared to breach its obligations and not fulfil its responsibilities.<sup>64</sup> Liberal normative theory would suggest this is increasingly important; as a commitment to human rights standards is a key component of modern statehood,

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<sup>61</sup> Guzman (2002) p.1826.

<sup>62</sup> Guzman (2005) p.581.

<sup>63</sup> Guzman and Meyer (2010) p.177.

<sup>64</sup> Guzman (2002) p.1828.

demonstrates respect for justice and sends a message about a state's ability to follow an international code of conduct.<sup>65</sup> Jack Donnelly also adds that shame from what is perceived as norm violating behaviour can act as a significant incentive to commit to improving ones reputation as well.<sup>66</sup>

However, Guzman draws on the self interest of the state and emphasises that states are more likely to comply when there is greater transparency of a violation.<sup>67</sup> If no, or relatively few states, are likely to gain knowledge of a violation, this may present sufficient persuasion to engage in non-compliance if it is in the state's best interest. Without other states' knowledge of non-compliance, there is no loss of reputation.

Guzman also suggests that in special circumstances, such as a national crisis, non-compliance is viewed differently.<sup>68</sup> In the time of crisis, a state may be able to retain a positive reputation if at other times they are able to comply with their obligations.

Expanding on this, Ramos and Zartner suggest state compliance can additionally act as a means for self interests; that by establishing a strong reputation through demonstrating a commitment to human rights norms, makes achieving foreign policy goals easier if that action allows states to gain allegiance with both the international and domestic community. If a state is seen to ignore international human rights protections and not follow other states' compliance to treaties or allow for human rights breaches to occur domestically, its reputation can take a hit and have a direct impact on such things as securing foreign aid, investment and tourism; securing a bargaining position; obtaining leadership and gaining esteem for agenda setting; and inclusion in an international or regional organization.<sup>69</sup>

Though there is a spectrum of arguments for compliance amongst reputational perspectives, it is agreed that having a strong human rights record is a relevant factor for a state to maintain a positive international reputation.

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<sup>65</sup> Zartner, Dana and Jennifer Ramos. "Human Rights as Reputation Builder: Compliance with the Convention Against Torture." *Human Rights Review* 12, no. 1 (2011): 71-92.

<sup>66</sup> Donnelly, Jack. *Universal Human Rights in Theory and Practice*. 2nd ed. Cornell University Press, 2003.

<sup>67</sup> Guzman (2002) p.1870.

<sup>68</sup> Ibid.

<sup>69</sup> The OECD for example distributes a greater portion of foreign aid to states which have a higher level of compliance to human rights treaties than those which do not. See Zartner and Ramos (2011).

## *Constructivist theories of compliance*

In the 1990s constructivist approaches to international relations began to emerge.<sup>70</sup> Constructivists argue that international 'reality' is socially constructed through interactions, or as Alexander Wendt described it, "anarchy is what states make of it".<sup>71</sup> Whilst his use of the word anarchy may be thought to touch on realist principles like sovereignty, Wendt argues state power was never a concrete concept, but rather a non-tangible concept which was constructed by individuals.<sup>72</sup> The theory has expanded from earlier works of Hedley Bull, Friedrich Kratochwil and John Ruggie.<sup>73</sup> Ruggie particularly laid the foundation for discussions on the role of variable and constructed factors in the international system including concepts such as identity, norms, aspirations and ideologies.

Concepts which are commonly discussed in the context of the Refugee Convention: power, sovereignty, compliance, and norms are all argued to be construed meanings along with the structure in which they present themselves. International organisations like the UN and international instruments are given a meaning and a value by social dialogue and interaction.

Martha Finnemore suggests that states' behaviour cannot be viewed as independent but as a response to ideas and concepts which have been construed through social interactions. Reality and meaning are part of a continual evolutionary process impacted by social and political global interactions. Therefore, concepts such as international treaties are not a given tool or legal instrument to which states must adhere but rather an idea, a system, which has been formed through the constant process of interaction. It is a tool for discussing norm and fact.<sup>74</sup>

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<sup>70</sup> Finnemore, Martha and Kathryn Sikkink. "International Norm Dynamics and Political Change." *International Organization* 52, no. 4 (1998): 887-917. See also Slaughter, Anne-Marie, Andrew S. Tulumello and Stephen Wood. "International Law and International Relations Theory: A New Generation of Interdisciplinary Scholarship." *American Journal of International Law* 92, no. 3 (1998): p.373.

<sup>71</sup> Wendt, Alexander. "Anarchy is What States Make of it: The Social Construction of Power Politics." *International Organisation* 46 (1993): 391-425.

<sup>72</sup> Ibid.

<sup>73</sup> Raustiala and Slaughter (2002) p.544.

<sup>74</sup> Raustiala and Slaughter (2002) p.551.

Therefore, the concept of compliance would have been developed through a system of shared knowledge rather than based on the realist assumption of 'rational calculation'.<sup>75</sup> This would suggest that compliance levels would not be based on consequences of non-compliance, nor on cost-benefit analysis.<sup>76</sup>

### *Managerial theory of compliance*

Abram Chayes and Antonia Handler Chayes have developed the managerial theory of compliance. They present similar elements to Henkin, suggesting that if a state enters into an international agreement they are likely to comply with it.<sup>77</sup> They provide three main reasons for compliance; one is that there is a strong sense of obligation to comply with the provisions of the Convention as it is voluntarily consented to rather than coerced. They also note that compliance is efficient, and non-compliance is a high cost to the state. Thirdly, they argue that compliance is a result of state interactions and cooperation where processes of justification, discourse and persuasion are played out.<sup>78</sup> Because of this, "the treaty as finally signed and presented for ratification is . . . likely to be based on considered and well developed conceptions of national interest that have themselves been shaped to some extent by the preparatory and negotiating process."<sup>79</sup>

Chayes and Chayes suggest that coercive threats of enforcement are unlikely to bring about compliance nor is the fear of reputational loss because compliance results from a proactive engagement with the international community. They suggest that if reputational pull accounts for anything, it is that states want to engage in and cooperate with the international community rather than be seen to have power. Inclusion in the international community, they argue, is the new sovereignty.<sup>80</sup>

However, where there is non-compliance, they argue it is largely the result of treaty language ambiguity and parameters of the treaty which place limitations on the capacity

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<sup>75</sup> Risse, Thomas. "International Norms and Domestic Change: Arguing and Communicative Behaviour in the Human Rights Arena." *Politics and Society* 27, no. 4 (1999): 530. Early constructivist scholars see Keohane, Robert O. "International Institutions: Two Approaches." *International Studies Quarterly* 32 (1988): 379-396.

<sup>76</sup> Finnemore and Sikkink (1998).

<sup>77</sup> Chayes, Abram and Antonia Handler Chayes. "On Compliance." *International Organisation* 47, no. 2 (1993): 175-205.

<sup>78</sup> Chayes, Abram and Antonia Handler Chayes. *The New Sovereignty: Compliance with International Regulatory Agreements*. Cambridge: Harvard University Press, 1995.p.109.

<sup>79</sup> Ibid.

<sup>80</sup> Ibid, p.27.

of states to carry out obligations.<sup>81</sup> Additionally, they argue that strict compliance is unnecessary so long as the provisions of the treaty are maintained to an acceptable level as determined by the international community. It is also thought that where certain areas of state compliance to international treaties in general may be more contentious, compliance may be reported on differently than what it is in actuality to keep secrecy in the name of national security. In other words, non-compliance can exist and should not automatically be assumed to signify a complete loss of protection and safeguard.

Circumstances can change after an agreement is drawn, as seen with further population displacement after World War II and the need for broadening the definition of refugee through the Protocol. Chayes and Chayes argue that well developed treaties have the capability to evolve to meet the needs of shifting interests.

While there are many theories of compliance, those discussed here give a sufficient overview within which the Convention and the level of compliance it receives can be analysed.

### **Part III. Australia's challenges to the Refugee Convention**

This section provides an historical account of Australia's relationship to the Refugee Convention. Through specific examples, it identifies and examines instances of non-compliance to the Convention. Additionally, some violations are compounded because of Australia's obligations under other core human rights instruments. Efforts to remedy certain violations through proposed changes to domestic legislation are noted.

Australia has voluntarily consented to signing the Refugee Convention and is party to core international human rights treaties.<sup>82</sup> Whilst, unlike domestic law, there are no direct

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<sup>81</sup> Chayes and Chayes (1993). They do note that non-compliance can be the result of both a significant change in circumstance and ratification without previous intention to comply, though both are rare instances.

<sup>82</sup> The core instruments which Australia is a party to include: the International Convention on the Elimination of All Forms of Racial Discrimination (CERD), the International Covenant on Economic, Social and Cultural Rights (ICESCR), the International Covenant on Civil and Political Rights (ICCPR), the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW), the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT), the Convention on the Rights of the Child (CRC) and the Convention on the Rights of Persons with Disabilities (CRPD). See United Nations General Assembly. "National report submitted in accordance with paragraph 15 (a) of the annex to Human Rights Council resolution 5/1 Australia." *A/HRC/WG.6/10/AUS/1*. 5 November 2010. p.7.

sanctions for a violation, any state party to an international treaty agrees to be bound to upholding certain obligations. Given Australia's membership to other international human rights treaties, the state has consented to the broader responsibility for the promotion and protection of human rights standards. All responsibilities are agreed to be carried out in "good faith" and with the complying with rights outlined in the Refugee Convention does not automatically fulfil Australia's responsibility to protect asylum seekers' and refugees' rights under their other commitments.<sup>83</sup>

The UNHCR recognises that full ratification is not always a smooth and quick process and may be unachievable initially.<sup>84</sup> Due to this, and because circumstances vary from state to state, the UNHCR works alongside the state to progress towards ratification and compliance.

There are two clauses within the Convention which allow the state to proactively mediate the risks of violation towards compliance. At the time of signature, ratification, or accession, if it is known that obligations cannot be upheld, particularly where domestic legislation is inconsistent, a state can make reservations to certain provisions.<sup>85</sup> Whilst some compliance is better than none, with each reservation, the value of the overall instrument diminishes. In addition, reservations can weaken states' credibility as it demonstrates a lesser level of commitment to the rights of refugees.<sup>86</sup> As Australia declared no reservations at the time of ratification, it is bound to the Refugee Convention in its entirety.

The second clause concerns contracted states and permits withdrawal from the Convention shall it be deemed necessary.<sup>87</sup> While there have been calls within Australia for the state to withdraw, Australia would still be obliged to uphold other international obligations and obligations under the UN charter. There would be serious ramifications for the human rights protections of asylum seekers and refugees if states withdrew from the Convention.

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<sup>83</sup> United Nations. "Vienna Convention on the Law of Treaties." 23 May 1969.

<http://www.unhcr.org/refworld/docid/3ae6b3a10.html> (accessed 19 November 2011). Articles 26 and 31.

<sup>84</sup> Specifically when domestic legislation does not comply with stipulations set forth in the Convention

<sup>85</sup> The Refugee Convention permits reservations to articles other than 1,3,4,16(l),33 and 36-46 inclusive.

<sup>86</sup> Guzman (2005) p.580.

<sup>87</sup> Article 44.

The first aspect of compliance with the Refugee Convention is ratification as it signals the willingness to comply by implementing and enforcing refugee protection into domestic legislation. Yet given Young's definition, Australia cannot be said to be fully compliant simply based on the fact that they have ratified the Refugee Convention.

While it is important to consider the historical political context, current refugee debate within Australia overwhelmingly stems from more recent offshore processing initiatives. Australia puts forth the argument that offshore legislation and policy making is based on the right to sovereignty and the protection of security and national identity. Refugee advocates and other party countries express concern that Australian domestic legislation is lacking compatibility not only with provisions set forth in the Refugee Convention but that they are in violation of a number of international treaties, thus non-complying with fundamental human rights standards. The majority of violations fall under the International Covenant on Civil and Political Rights (ICCPR), the Convention on the Rights of the Child (CRC), and the Convention Against Torture and Other Cruel, Inhumane and Degrading Treatment or Punishment (CAT).

### *The right to seek asylum*

An asylum seeker is a person seeking official recognition of status as a refugee under the Refugee Convention. They are commonly labelled as illegal immigrants or queue jumpers for not complying with Australian law or for not having official documentation upon entry. However, under the Convention, an asylum seeker has the right to seek asylum and have their claim processed to determine refugee status. They are permitted to stay in Australia until that decision is made and are not illegally in Australia unless it has been determined that they do not meet the criteria set forth in the Convention.<sup>88</sup>

The term queue jumpers also suggests a disregard for Australia's system of refugee recognition in that asylum seekers are taking the places of those with existing UNHCR refugee status waiting in camps overseas to be resettled in Australia. However, along with the yearly offshore resettlement quota, Australia also has an onshore obligation, for those who seek asylum after arrival. In reality, UNHCR services are not always accessible in the country from which a refugee has come. They are often forced to leave their home without official documents and in many cases cannot get these documents from the

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<sup>88</sup> UDHR (Article 14).

government. The Convention notes that refugees should not be unfairly discriminated against because of this. Therefore, not only does Australia have the obligation under the Convention to not discriminate against asylum seekers, it also has the responsibility to not discriminate based on method of arrival.

However, over the last decade Australia has passed legislation to make it more difficult for asylum seekers to qualify for asylum as refugees under Australia's Migration Act 1958. Rather, those who may qualify for protection under the Refugee Convention could be turned away through a handful of changes in domestic legislation which became part of offshore processing initiatives.

### *The Pacific Solution*

In 2001 the Howard Government made 'unauthorised' asylum a significant campaign issue with what became known as the *Tampa* incident, by refusing to allow a Norwegian vessel, MV *Tampa*, carrying over four hundred asylum seekers into its territorial waters. Though the Keating Government implemented the practice of mandatory detention (also a violation to be discussed later), it was due to this incident that Australia's legal obligations towards asylum seekers under the Refugee Convention changed.<sup>89</sup>

Upon securing the election, the promise to get tough on 'illegal immigration' was fast-tracked and implemented through multiple changes to legislation. At the last session of Parliament for the year, seven bills affecting refugees were passed by Parliament which collectively became known as the Pacific Solution.<sup>90</sup> Three of the Bills essentially gave the Pacific Solution legislative effect by amending the Migration Act 1958. Both the Migration Amendment (Excision from Migration Zone) Bill 2001 and the Migration Amendment (Excision from Migration Zone) (Consequential Provisions) Bill 2001 excised Australian territory from the migration zone.

Excision was highlighted with the *Tampa* incident in that under the Refugee Convention, the four hundred plus asylum seekers may have been eligible for protection visas and access to the judicial review system upon their entry into Australian territorial waters. A

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<sup>89</sup> Whilst detention is not a direct violation of the Refugee Convention, this practice is in breach of Australia's other international obligations such as ICCPR, CAT and CRC.

<sup>90</sup> O'Kane, Mary. *Refugee and Asylum Seeker Issues in Australia*. Melbourne: Brotherhood of St Laurence, 2003.

few days after the MV *Tampa* had collected the asylum seekers, and a day after it had issued a distress signal based on the fact it was not receiving any assistance from Australia and was carrying a significant amount of passengers over the vessels capacity, the vessel entered Australian territorial waters near Christmas Island. The same day border protection legislation was introduced before Parliament and Christmas Island, where the MV *Tampa* asylum seekers were eventually taken, had legally been placed outside of the migration zone with the proposed amendments.

With Christmas Island deemed by law to be outside of Australian territory, asylum seekers were not automatically entitled to any rights or protections set forth in the Convention that asylum seekers are supposed to be granted upon arrival. Particularly, a number of visa subclasses were created, whereby asylum seekers were now granted temporary protection visas (TPV) which gave temporary residence and limited access to services and limited entitlements.

Additional legislation<sup>91</sup> passed under the Pacific Solution to allow for increased powers of interception (coined ‘turning back boats’) by Australian authorities outside their territorial sea boundary. This amendment essentially validated the actions of the Australian government dictating the vessel movements and controlling the movements of the asylum seekers on board the MV *Tampa*.<sup>92</sup>

Four remaining Acts<sup>93</sup> sought “to narrow the definition of a refugee and restrict independent judicial scrutiny and review of administrative decisions”.<sup>94</sup> With these remaining Acts, Australia was in effect violating their responsibility to the Refugee Convention given their legal obligations within their territory, as well as for actions taken outside their territory in international waters.<sup>95</sup>

Though the handling of the incident was heavily criticised internationally by human rights groups and the UNHCR, the election campaigning and subsequent legislation

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<sup>91</sup> The Border Protections (Validation and Enforcement Powers) Act 2001.

<sup>92</sup> Ibid. Including “to intercept, search, detain, and forcibly remove asylum seekers”.

<sup>93</sup> Migration Amendment Act (No 6) 2001; Migration Legislation Amendment (Judicial Review) Act 1998 (passed in 2001); Migration Legislation Amendment Act (No 1) 2001; Migration Legislation Amendment Act (No 5) 2001.

<sup>94</sup> O’Kane (2003) p.48.

<sup>95</sup> Crock, Mary and Ben Saul. *Future Seekers: Refugees and the Law in Australia*. Federation Press, 2002.p.102.

amendments occurred in the height of 9/11 where the notion of securing the nation and territorial integrity received widespread public support within Australia.<sup>96</sup>

The construction of 'boat' people and their threat to national security by the Howard government has been the subject of much analysis and discussion.<sup>97</sup> Howard's much repeated promise "we will decide who comes to this country and the circumstances in which they come"<sup>98</sup> was delivered with the Pacific Solution. Howard's sentiments were in direct violation of the foundation of the Convention.

When the Rudd Government was successful in winning the 2007 election the Pacific Solution essentially came to an end as part of a new approach to foreign policy.<sup>99</sup> Though the new government maintained its commitment to a tight border security regime, Rudd ran his campaign with a new focus on Australia's obligations to 'unauthorised' asylum seekers by criticising the harsh and inhumane treatment of those held in detention centres under the Howard government; noting the damage which had been done to Australia's reputation.<sup>100</sup> Temporary protection visas were abolished, a target of less than three months was put on assessing claims, offshore processing was halted and the government played an increasingly active part in the global governance arena, including re-engaging with the UNHCR, running for position of vice-chair and noting the approving remarks made by the UNHCR on changes made to the refugee policies.<sup>101</sup>

David Manne suggests that the changes to legislation were fruitless in actual deterrence of 'boat arrivals' as offshore processing was the main deterrent.<sup>102</sup> By 2010 high public interest in 'unauthorised' asylum seekers (attempting to arrive without a valid visa or authorisation) had risen again to become a contested political issue between the Gillard government and the opposition party. As there had been an increase in boats carrying

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<sup>96</sup> McDonald, Matt. "Deliberation and Resecuritization: Australia, Asylum-Seekers and the Normative Limits of the Copenhagen School." *Australian Journal of Political Science* 46, no. 2 (2011): p.286.

<sup>97</sup> McDonald (2011) p.285. See also McMaster, Don. "Asylum-Seekers and the Insecurity of a Nation." *Australian Journal of International Affairs* 56, no. 2 (2002): 279-290.

<sup>98</sup> Howard, John. "Federal election campaign policy launch speech." 28 October 2001. <http://www.australianpolitics.com/news/2001/01-10-28.shtml> (accessed 30 October 2011).

<sup>99</sup> Though the excision of some migration zones were retained, processing centres and detention centres on Nauru and Manus were closed and the temporary protection visa (TPV) scheme was abolished.

<sup>100</sup> Evans, Chris. "New Directions in Detention - Restoring Integrity to Australia's Immigration System." 29 July 2008. <http://www.minister.immi.gov.au/media/speeches/2008/ce080729.html> (accessed December 20, 2011).

<sup>101</sup> Rudd, Kevin. "Hard Heads, Soft Hearts: A Future Reform Agenda for the New Australian Government." *Progressive Governance Conference speech*, 4 April 2008: London.

<sup>102</sup> This is contested as coincidental, in that a decrease in boat arrivals coincided with global events.

asylum seekers into Australian waters, the government was criticised for having soft border policies.

### *The Malaysia Solution*

In the latest federal election, Julia Gillard and Tony Abbott engaged the country again in a normative discussion on the politics of asylum in Australia; with both sides suggesting an asylum policy which would involve suspending compliance with international obligations towards both the Refugee Convention and other human rights treaties.<sup>103</sup> Matt McDonald suggests that both parties' call for an open debate on the matter calls into question the normative commitment to these obligations.<sup>104</sup> Tolerating a discussion on the threat to national security and prejudice against asylum seekers was a way of undermining Australia's international obligations and responsibilities.

As Gillard replaced Rudd, who faced the federal election with low opinion polling in part due to his softer stance on refugees and asylum seekers, Gillard proposed a regional processing framework which she coined "a long term solution" to address two concerns including deterring people risking their lives in boats at sea and ending the criminal behaviour of a people-smuggling business which is profiting off of desperation.<sup>105</sup> In the lead up to the proposals, Gillard often commented "Australians are concerned when they see boats on our horizons" and Australians "don't want boats leaving foreign shores to journey here".<sup>106</sup> Gillard's statements suggest a strategy for both appeasing those concerned about Australia's obligations to asylum seekers and those concerned about national security.

Initial discussions to set up a regional offshore processing centre with East Timor and Papua New Guinea failed to eventuate. Meanwhile, the opposition was advocating for a deal to be made with Nauru, the most recent member to the Refugee Convention, and incidentally where one of the offshore processing centres was established under the

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<sup>103</sup> Including CAT and CRC.

<sup>104</sup> McDonald (2011) p.290.

<sup>105</sup> First major of policy speech as Prime Minister. See Gillard, Julia. "Moving Australia Forward." *Lowy Institute speech*. 6 July 2010. <http://www.lowyinstitute.org/Publication.asp?pid=1328> (accessed 20 December 2011) and Wilkinson, Marian. "Whatever it Takes." *ABC Four Corners Program*. 16 August 2010. [http://www.abc.net.au/4corners/special\\_ed/20100816/election/](http://www.abc.net.au/4corners/special_ed/20100816/election/) (accessed December 20, 2011).

<sup>106</sup> Wilkinson (2010).

Howard government.<sup>107</sup> In mid 2011, Gillard's government announced the Malaysia Solution, an arrangement whereby Australia would transfer up to 800 offshore asylum seekers to Malaysia for processing and in return accept up to 1000 UNHCR determined refugees per year for four consecutive years.<sup>108</sup>

However in a landmark case the Australian High Court (the Court) ordered an immediate injunction and later ruled the agreement to be unlawful after proceedings were launched by David Manne, representing 42 asylum seekers, of which six were unaccompanied minors. The Court found that the proposal by the government was unlawful.

The Court found that under s198(A) of the Migration Act 1958, the Minister cannot validly declare a country to send asylum seekers to for processing, when that country is not legally bound, domestically or internationally, to a human rights framework that assesses the need for protection.<sup>109</sup> Malaysia is not legally bound to provide the access and protections that the Migration Act 1958 requires, nor is Malaysia a party to the Refugee Convention or Protocol.<sup>110</sup>

Secondly, the Court found that the general powers of removal of "unlawful non-citizens" under the Migration Act 1958 cannot be used when the Migration Act 1958 "has made specific provision for the taking of asylum seekers who are offshore entry persons and whose claims have not been processed, to another country, and has specified particular statutory criteria that the country of removal must meet."<sup>111</sup>

The decision, therefore, came down to Malaysia's lack of fundamental human rights measures as there was no legal guarantee that refugee and asylum seekers' rights would be protected.<sup>112</sup>

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<sup>107</sup> Signed in June 2011. See <http://www.unhcr.org/pages/49e4889e6.html> (accessed December 21, 2011).

<sup>108</sup> Minister for Immigration and Citizenship (Australia). "Arrangement between the Government of Australia and the Government of Malaysia on transfer and resettlement." 25 July 2011. <http://www.minister.immi.gov.au/media/media-releases/pdf/20110725-arrangement-malaysia-aust.pdf> (accessed 21 December 2011).

<sup>109</sup> *Plaintiff M70/2011 v. Minister for Immigration and Citizenship; and Plaintiff M106 of 2011 v. Minister for Immigration and Citizenship*. HCA 32 (Australia High Court, 31 August 2011).

<sup>110</sup> Malaysia currently allows asylum seekers to remain in Malaysia while the UNHCR undertakes reception, registration, documentation and status determination of asylum seekers and refugees. However, Malaysia is not legally bound to, nor does it recognise, the status of refugee in domestic law.

<sup>111</sup> *Plaintiff M70/2011 v. Minister for Immigration and Citizenship; and Plaintiff M106 of 2011 v. Minister for Immigration and Citizenship*.

<sup>112</sup> United Nations General Assembly (2010) p.4.

## *Non-refoulement*

While the Malaysia Solution was deemed unlawful in part due to Malaysia having no legal guarantee for protection, the agreement exposed Australia to be in violation of Article 33, often considered the most important provision of the Refugee Convention. Article 33 prohibits a state from returning a person to a place where they might be tortured or face persecution, or where life or freedom would be threatened on account of race, religion, nationality, or membership of a particular group or political opinion.<sup>113</sup>

Australia was deemed by the Court to not be upholding their international obligation towards this provision by proposing to send asylum seekers to Malaysia, a country where protection measures for non-refoulement do not exist.

## *Freedom from discrimination*

Australia's amendments made to legislation under the Pacific Solution created categories of visas which discriminate based on method of arrival by differentiating between asylum seekers who arrive by boat to excised territories and those who arrive by plane. Regardless of how a person arrives, according to the Convention they may be a genuine refugee and thus should not be discriminated against by virtue of this. The Convention clearly states that penalties should not be imposed due to illegal presence or entry.<sup>114</sup>

The Refugee Convention additionally notes that the contracting state shall apply provisions of the Convention without discrimination as to race, religion or country of origin.<sup>115</sup> This provision draws on the broader UDHR provision that all individuals shall enjoy fundamental human rights and freedoms without discrimination.<sup>116</sup> No state can declare a reservation to this provision under the Refugee Convention. Additionally this provision is set forth in other core international human rights treaties which Australia is party to. Yet despite this, discrimination can be seen at various levels.

Australia's discriminatory practice in policy making and domestic immigration legislation versus their claimed right to state sovereignty, border security and national identity, is

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<sup>113</sup> There is an exclusion clause under Article 33(2) stating that the benefit of this provision may not be claimed by a refugee whom there are reasonable grounds for regarding as a danger to the security of that country.

<sup>114</sup> Article 31(1).

<sup>115</sup> Article 3.

<sup>116</sup> Preamble.

one of the most contested arguments in terms of the rights of refugees and asylum seekers.

Anthony Burke suggests that security discourse is deep seated and the latest reiteration post 9/11 has actually long defined an Australia where “borderphobia” is part of the Australian national identity.<sup>117</sup>

Australia has always relied on immigration to populate its shores. It is considered a receiving state and is one of few countries to have a formalised programme of permanent immigration.<sup>118</sup> The estimated resident population of Australia is 22 million people. Of this population, almost one quarter was born overseas and additionally it has the highest per capita intake of refugees internationally.<sup>119</sup>

Yet whilst Australia has responded to the international refugee situation since 1921, history has been one of exclusion as much as inclusion.<sup>120</sup> From early on, the development of Australian immigration policy has always focused on what Australia’s national identity should entail. The first Prime Minister of the federal parliament Edmund Barton noted that one of most pressing matters was in regards to the future of ‘white Australia’.<sup>121</sup> White Australia Policy would continue to be influential in the development of immigration policy for most of the twentieth century, until 1975.

Discrimination towards particular ethnic groups was one of the strongest influences in melding the Australian colonies together as Australia guarded itself from “Asiatic immigration”, the “yellow peril” and “hordes from the north”.<sup>122</sup> Exclusionary policies were established with the Immigration Restriction Act 1901, the first law enacted by the

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<sup>117</sup> Burke, Anthony. “Borderphobias: the politics of insecurity post 9/11.” *Borderlands e-journal*. 1 November 2002. [http://www.borderlands.net.au/vol1no1\\_2002/burke\\_phobias.html](http://www.borderlands.net.au/vol1no1_2002/burke_phobias.html) (accessed December 20, 2011). Burke discusses the enduring fear of Asian invasion as a driving force to Australian federation and geopolitical/national identity discourse.

<sup>118</sup> Taylor, Savitri. “From Border Control to Migration Management: The Case for a Paradigm Change in the Western Response to Transborder Population Movement.” *Social Policy and Administration* 39, no. 6 (2005): p.565. See also York, Barry. “Australia and Refugees, 1901-2002: An Annotated Chronology Based on Official Sources.” *Parliament of Australia*. 23 June 2003. [http://www.apf.gov.au/library/pubs/online/Refugees\\_contents.html](http://www.apf.gov.au/library/pubs/online/Refugees_contents.html) (accessed 10 December 2011).

<sup>119</sup> United Nations General Assembly (2010) p.3.

<sup>120</sup> Blakeney, Michael. *Australia and the Jewish Refugees 1933-1948*. Sydney: Croom Helm, 1985. Between 1921-1938 three thousand five hundred refugees were settled in Australia.

<sup>121</sup> McMaster, Don. *Asylum Seekers: Australia's Response to Refugees*. Melbourne: Melbourne University Press, 2001.

<sup>122</sup> Willard, Myra. *History of the White Australia Policy to 1920*. London: Frank Cass & Co, 1967.

government, followed by the Naturalization Act 1903 whereby non-Europeans were denied the possibility of naturalization.<sup>123</sup>

Initially after World War II in 1946, when the International Refugee Organisation<sup>124</sup> was set up to deal with Europeans who had been displaced by the war, Australia refrained from voting at the UN General Assembly due to the concern that it would bring into Australia a great number of non-Caucasians.<sup>125</sup> However, as the intake of migrants from the United Kingdom could not meet the demand for them, refugees were reconsidered.<sup>126</sup>

Though exact figures are difficult to obtain on refugee intake during this time, it is thought that approximately 170,000 refugees entered Australia between 1947 and 1952 through this scheme.<sup>127</sup> However, due to strict health requirements, Australia earned an international reputation of using refugees to fill labour shortage, rather than sharing in the international cooperation of protection.<sup>128</sup> This move towards increasing refugee uptake during this time set the tone for future refugee policy and as the intake met immigration needs the White Australian Policy began to slowly dismantle.

The Department of Immigration today considers Australia's "first step towards a non-discrimination policy" to be the revoking of deportation orders issued under the 1949 War-time Refugees Removal Act.<sup>129</sup> In 1950 Australia was instrumental in helping establish the UNHCR and was one of the first nations to sign the Refugee Convention. Over the next twenty years nearly 200,000 refugees entered Australia, though under the definition of refugee at the time, they were not protected under the Convention.<sup>130</sup> Australia did not become a signatory to the 1967 Protocol until 1973.

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<sup>123</sup> Sections 4 and 5 of the Naturalization Act 1903. *Australia*. See

[http://www.naa.gov.au/naaresources/Publications/research\\_guides/guides/immig/pages/pic020.html](http://www.naa.gov.au/naaresources/Publications/research_guides/guides/immig/pages/pic020.html).

<sup>124</sup> Predecessor to the UNHCR.

<sup>125</sup> Pittaway, Eileen. "A brief history of refugee policy in Australia." *Centre for Refugee Research, University of New South Wales*. May 2002. [http://motspluriels.arts.uwa.edu.au/MP2102edito1\\_1.html](http://motspluriels.arts.uwa.edu.au/MP2102edito1_1.html) (accessed 18 December 2011).

<sup>126</sup> York (2003).

<sup>127</sup> Ibid.

<sup>128</sup> Ibid.

<sup>129</sup> Australian Government, Department of Immigration and Citizenship. "Fact Sheet 8 – Abolition of the 'White Australia' Policy." 2009. <http://www.immi.gov.au/media/fact-sheets/08abolition.html> (accessed 20 December 2011).

<sup>130</sup> York (2003).

During this time, the Immigration Restriction Act 1901 was replaced by the Migration Act 1958, which saw some of the discriminatory provisions abolished.<sup>131</sup> In the early 1970s the Whitlam Government formally dismantled White Australia Policy to follow suit with many other western countries at the time and make a stance on racial discrimination.<sup>132</sup> In 1975 Australia furthered this stance by becoming party to the International Convention on the Elimination of all forms of Racial Discrimination (CERD).<sup>133</sup>

In light of signing CERD, contention still existed as ill harboured feelings were seen with the large intake of Vietnamese refugees after the fall of Saigon and communist victory. So whilst immigration and non-discrimination policy in government was advancing, there were also increased public fears of the high refugee intake.<sup>134</sup> It is thought that the term 'boat people' was first used during this time in reference to the Vietnamese refugees noticeably arriving by boat.<sup>135</sup> To acknowledge the significant outflow of refugees in the region during this time the UNHCR established a resettlement program, the Orderly Departure Program, which aimed to settle refugees in a more orderly fashion and to decrease those seeking asylum via boats. Negotiations took place between the UNHCR, the Socialist Republic of Vietnam and Australia to resettle over 50,000 refugees.<sup>136</sup> Robert Manne described this scheme as a policy and public achievement:

"Australians were easily panicked by the spontaneous arrival of a small number of boats. They were comfortable and relaxed about a far larger refugee program under government control."

This trend continued in the following years as Hawke's Labor government increased the number of Asian migrants who were able to join their family through another initiative, the Family Reunion Programme.<sup>137</sup> However, within time, in the early 1990s the then opposition leader John Howard argued that curbing Asian immigration would be in Australia's immediate interest.<sup>138</sup> Backing this, in 1996 Pauline Hanson's One Nation Party was formed and ran an anti-immigration, anti-multicultural platform publicly dismissing government immigration policies which had been established over the

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<sup>131</sup> Such as the dictation test.

<sup>132</sup> McMaster (2001).

<sup>133</sup> On 30 September 1975.

<sup>134</sup> McMaster (2001).

<sup>135</sup> Pittaway (2002).

<sup>136</sup> Jupp, James. *Immigration*. Second Edition. Melbourne: Oxford University Press, 1998.

<sup>137</sup> Skulan, Catherine. "Australia's Mandatory Detention of "Unauthorized" Asylum Seekers: History, Politics and Analysis Under International Law." *Georgetown Immigration Law Journal* 21 (2006): p.68.

<sup>138</sup> McMaster (2001).

previous twenty five years. The One Nation Party garnered significant support as it received nearly twenty five percent of the vote in the 1998 Queensland State Election.

“I and many Australians want our immigration policy radically reviewed, and that of multiculturalism abolished . . . if I can invite whom I want into my home, then I should have the right to have a say in who comes into my country.”<sup>139</sup>

Whilst immigration policy and Australian politics have been heavily intertwined throughout history, ‘unauthorised’ asylum did not become a central electoral issue until the Australian federal election campaign in 2001, and again in 2010. Labour and Liberal both spoke of the securitization and the threat to national security and national values that ‘unauthorised’ asylum seeking present<sup>140</sup> with Manne calling it the largest political and ideological issue to divide the Left from the Right.<sup>141</sup>

While the Refugee Convention allows for discretion in that certain individuals may be excluded from protection under the Refugee Convention particularly those who have committed crimes against peace, a war crime, crimes against humanity or a serious non-political crime outside the country of refuge, it does not allow for a blanket discrimination based on ethnicity, race or nationality.

Throughout the early 2000s whilst asylum seekers were fleeing the Taliban in Afghanistan and the dictatorship of Saddam Hussein in Iraq, national security gradually became an extension of the national identity debate and has become prevalent discourse in Australian society and politics post 9/11. Member of Parliament Bruce Baird said anti-Muslim sentiment in particular had risen since the 2001 attacks and the 2002 bombings in Bali.<sup>142</sup> This anti-Muslim sentiment was exacerbated by heightened sensitivities towards terrorism at the time. Though required under the Convention to assess the claims of all refugees without racial discrimination, ethnic groups stemming from countries with known or suspected links to terrorism were increasingly discriminated against. The majority of those seeking asylum in Australia at this time were fleeing from Sri Lanka and Afghanistan. Given the perceived security threat that “crime and terrorism are

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<sup>139</sup> Hanson, Pauline. *Australian House of Representatives Maiden Speech*. 10 September 1996.

<sup>140</sup> McDonald (2011) p.281.

<sup>141</sup> Manne, Robert. “The Nation Review: Comment: Asylum Seekers.” *The Monthly*, 2010: 8-14.

<sup>142</sup> Corder, Mike. “Racial Violence Shocks Australian City.” *Associated Press*. 11 December 2005.

international in scope”,<sup>143</sup> asylum applications for those two countries were temporarily suspended by the Rudd government while they investigated changing security circumstances in those countries.<sup>144</sup> This decision by Australia was in violation of the Refugee Convention. After lengthy consultation with the UNHCR, the temporary ban on Sri Lankan applications was lifted, while the freeze remained for Afghan applications for several months longer. Leader of the opposition Tony Abbott used this as a political platform to announce Liberal’s ‘action plan’ which would see the return of Howard era asylum policies and prevent an undermining of the Australian way of life. Abbott thus linked refugees and the threat of terrorism and questioned their values and willingness to incorporate Australian national values into their lives.<sup>145</sup> Support for these sentiments was most distressingly witnessed during the 2005 Sydney riots when demonstrators wore t-shirts which read ‘ethnic cleansing unit’ and chanted ‘Lebs go home’.<sup>146</sup>

Recently, when asked whether there was anti-Islamic or xenophobic discrimination in the policies Abbott would like to reinstate against the 3,500 “boat people” when there are 50,000 United States and United Kingdom overstayers in Australia, Abbott emphasised that the policy was about arriving with documents and legal and credible papers.<sup>147</sup> This response illustrates a complete failure to understand both the refugee situation<sup>148</sup> and the provisions of Article 33(1)<sup>149</sup> of the Convention.

Matt McDonald argues that the approach of political debate seen in the 2001 and 2010 elections encourages exclusionary views of asylum seekers, and perpetuates it as an issue of security using distinct imagery and language to illustrate their threat.<sup>150</sup> He suggests

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<sup>143</sup> Abbott, Tony. “Address to Australia Day Council.” 22 January 2010. <http://www.tonyabbott.com.au/LatestNews/Speeches/tabid/88/articleType/ArticleView/articleId/7228/AD-DRESS-TO-THE-AUSTRALIA-DAY-COUNCIL-VICTORIA-AUSTRALIA-DAY-DINNER-MELBOURNE.aspx> (accessed 11 December 2011).

<sup>144</sup> Australian Associated Press. “Rudd Defends Ban on Sri Lankan, Afghan Asylum Seekers.” *Sydney Morning Herald*, 11 April 2010.

<sup>145</sup> Abbott, Tony. “The Coalition’s Real Action Plan for Restoring Integrity and Fairness to Refugee Decision Making.” 6 July 2010. <http://www.liberal.org.au/Latest-News/2010/07/06/The-Coalitions-real-action-plan-for-restoring-integrity-and-fairness-to-refugee-decision-making.aspx> (accessed 20 December 2011).

<sup>146</sup> Aslan, Alice. *Islamophobia in Australia*. Sydney: Agora Press Australia, 2009.p.118.

<sup>147</sup> Wilkinson (2010).

<sup>148</sup> Many asylum seekers are forced to leave their country of residence in haste and unable to access appropriate documentation. In some cases oppressive authorities actively prevent migration processes from occurring.

<sup>149</sup> Particularly non-discrimination against asylum seekers who “enter or are present in their territory without authorization”.

<sup>150</sup> McDonald (2011). Such imagery and language such as ‘queue jumpers’, and stating that asylum seekers are willing to throw their children into the sea to prompt rescue. See also Parliament of Australia. “Report of Independent Assessor to Senate Select Committee on a Certain Maritime Incident.” 21 August 2002.

that the campaigning has demonstrated an ease in mobilising the issue of securitization of asylum amongst Australian society and culture. He thinks and that those beliefs are not indicative of the society or culture but it has created a fear such that policy has begun to resonate with a relatively large population of Australia.<sup>151</sup>

The UNHCR is also critical of asylum being viewed through a security prism in many parts of the world resulting in states reinforcing control measures beyond their own territory and at borders.<sup>152</sup>

### *Mandatory detention*

Under Australian legislation all non-citizens who do not hold valid visas are mandatorily detained. Most asylum seekers who arrive by boat do not hold authorised visas for entry even though they may be genuine refugees. The Refugee Convention states that detention and any restriction of movement should be enforced only when necessary and for a reasonable amount of time.<sup>153</sup>

Australia is the only Western country that mandatorily detains asylum seekers while determining status, processing a claim, and or prior to deportation.<sup>154</sup> As late as 2007 Australia allowed for indefinite detention of asylum seekers.<sup>155</sup> In 2003 Jane McAdam wrote "Australia's laws regulating the reception and processing of asylum seekers are uniquely draconian in the western world."<sup>156</sup> While Australia has the highest refugee intake per capita, offshore arrival of asylum seekers is small in comparison with other nations such as Germany, Canada, France and the Netherlands.<sup>157</sup>

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[http://www.aph.gov.au/senate/committee/maritime\\_incident\\_ctte/report/odgers.pdf](http://www.aph.gov.au/senate/committee/maritime_incident_ctte/report/odgers.pdf) (accessed December 20, 2011).

<sup>151</sup> McDonald (2011) p.282.

<sup>152</sup> UN High Commissioner for Refugees. *Note on International Protection (submitted by the High Commissioner)*. Doc. A/AC.96/1066. 26 June 2009. <http://www.unhcr.org/4a78441b9.html>.

<sup>153</sup> Article 31(2). "The contracting States shall not apply to the movements of such refugees restrictions other than those which are necessary and such restrictions shall only be applied until their status in the country is regularized or they obtain admission into another country." This provision has been expanded by the UN informally to be as short a time as reasonably necessary.

<sup>154</sup> Skulan (2006) p.64.

<sup>155</sup> Ibid.

<sup>156</sup> McAdam, Jane. "Asylum Seekers: Australia and Europe - Worlds Apart." *Alternative Law Journal* 193 (2003): p.193.

<sup>157</sup> See refugees by country at [http://www.nationmaster.com/graph/imm\\_ref-immigration-refugees](http://www.nationmaster.com/graph/imm_ref-immigration-refugees).

The UNHCR notes

It frequently occurs that the necessary distinction is not made either in law or administrative practice between asylum seekers and ordinary aliens seeking to enter the territory. The absence of such a distinction may, and in many cases does, lead to asylum seekers being punished and detained for illegal entry in the same manner as ordinary aliens.<sup>158</sup>

Australia's policy and practice of mandatory detention, has been criticised in the past for non-compliance of agreed to UN recommendations on international protection.<sup>159</sup> An investigation into and report on the mandatory detention of asylum seekers stated that there were significant problems with the practice, yet did credit Australia for some improvements to detention policy.<sup>160</sup>

Although improvements have been made to some conditions of detention, Australia's policy of mandatory detention continues to place Australia in violation of numerous other international treaties and guidelines. For example, arbitrary detention, whereby there is no legal reason to validate it<sup>161</sup> is protected under both ICCPR and CAT.

In cases brought before the Federal Court, it was determined that the likelihood of torture or death does not have to be a consideration in the decision to remove 'unlawful' persons from the state.<sup>162</sup> Whilst a provision of the Refugee Convention requires release from detention as soon as reasonably possible,<sup>163</sup> and this requirement forms a subsection of the Migration Act, consideration for what may certainly occur upon release does not have to be taken into account.<sup>164</sup>

Unity of the family as a natural and fundamental group unit of society is a fundamental principle of international human rights treaties, recommending that government take all practical measures to ensure unity of the family is maintained. Particular protection for

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<sup>158</sup> UN High Commissioner for Refugees. *Note on Accession to International Instruments and the Detention of Refugees and Asylum-Seekers. Doc EC/SCP/44.* 19 August 1986.

<sup>159</sup> UN High Commissioner for Refugees. *Note on International Protection (submitted by the High Commissioner). Doc. A/AC.96/713.* 15 August 1988.

<sup>160</sup> Bem et al (2007).

<sup>161</sup> An example of this is detaining without a charge of crime.

<sup>162</sup> Pursuant of the Migration Act 1989(6). *NATB v Minister for Immigration and Multicultural and Indigenous Affairs* [2003] FCAFC 292; Wilcox, Lindgren and Bennett JJ; 16 December 2003.

<sup>163</sup> Article 31(2).

<sup>164</sup> The court followed its decision in *M38/2002 v Minister for Immigration and Multicultural and Indigenous Affairs* (2003) 199 ALR 290.

children and girls as vulnerable groups with reference to guardianship is outlined in various treaties. In the case of asylum children, the state is meant to act as their legal guardian and consider the best interests of the child.<sup>165</sup> Australia's system of mandatory detention for children has been heavily criticised for not bearing in mind these interests and for being "fundamentally inconsistent" with CRC. Indefinite and mandatory detention of children undermines provisions which safeguard detention of children as a measure of last resort and for the shortest period of time possible.<sup>166</sup>

### *Right to equal access*

Prior to legislation being passed under the Pacific Solution, there was no real distinction between visas which were granted for offshore or onshore refugees. All visas gave entitlement for permanent residency, with no restrictions to access the services that other Australian permanent residence holders were entitled to. Legislative changes made under the Pacific Solution create different visa categories for asylum seekers depending on manner of arrival.

Despite the Convention prohibiting discrimination against anyone on the basis of refugee status, these changes limited access to the courts for review of administrative decisions on refugee status and access to legal advice for asylum seekers.

Under the Pacific Solution, a privative clause was enacted as section 474 of the Migration Act 1958.<sup>167</sup> This clause creates a process whereby decisions made under the Migration Act are deemed as privative clause decisions in that decisions under the administrative review are deemed to be final and conclusive, and cannot be subject to a judicial review; therefore cannot be challenged, appealed against, reviewed, quashed or called into question in any court.<sup>168</sup>

Additionally, legal advice is not routinely offered to asylum seekers unless it is proactively sought by the asylum seeker. Migration officers are not obliged to inform asylum seekers

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<sup>165</sup> CRC (Article 3).

<sup>166</sup> CRC (Article 37(b)). Australia has recently started to place unaccompanied children into alternative housing rather than the same detention facilities as other asylum seekers and refugees.

<sup>167</sup> Introduced under the Migration Legislation Amendment Bill (No. 4) 1997 and enacted as section 474 of the Migration Act by the *Migration Legislation Amendment (Judicial Review) Act 2001*.

<sup>168</sup> Parliament of Australia. "Legislative attempts to reduce challenges to decisions under the Migration Act 1958." *Research Note no. 15 2004–05*. 26 August 2004. <http://www.aph.gov.au/library/pubs/rn/2004-05/05rn15.html> (accessed 4 January 2012).

of their rights in applying for refugee status. The changes made to the visa processing system have created a more complex system including a demanding administrative process and time limits on initialising a visa application. Legal advice is often necessary to comprehend the process and needed by the asylum seeker throughout the duration of the process. The Australian Human Rights Commission criticised the government for the lack of legal availability and assistance and made numerous recommendations to improve access to legal advice for asylum seekers in detention, including availability of materials transcribed into first languages.<sup>169</sup>

The Convention states that if an asylum seeker's status is not regularised, the state should allow access to facilities to obtain admission into another country (as part of the non-refoulement agreement); however, under the Howard government, access to these facilities was also criticised for being virtually non-existent.<sup>170</sup>

As mistakes can and do occur, access to a judicial review including the right to appeal can be crucial when a person is potentially faced with a life or death decision based on protection or refoulement.

### *International community*

Australia has the sovereign right as a nation to determine who it offers protection to. Therefore, to an extent, non-selection of an offshore asylum seeker does not violate state obligations solely under the Refugee Convention. It is different for onshore asylum seekers who must be reviewed for refugee status and be provided protection should they meet criteria as set forth in the Convention.

While the Convention mandates the safeguards, it does not prescribe the process for refugee determination. The development and interpretation of domestic laws to adhere to international human rights obligations are at the discretion of the Australian executive, legislature and judiciary.<sup>171</sup>

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<sup>169</sup> Bem et al (2007).

<sup>170</sup> Ibid.

<sup>171</sup> Law and Justice Foundation of New South Wales. "Australian Lawyers for Human Rights." 2004. <http://www.alhr.asn.au/refugeekit/> (accessed 4 January 2012).

The UN Human Rights Council carries out a Universal Periodic Review (UPR) of the human rights records of all 192 UN Member States once every four years.<sup>172</sup> It provides an opportunity for States to declare what actions have been taken to improve human rights situations in their countries. In addition to the government report, independent human rights experts and groups and other stakeholders can also submit reports which are often self-critical of violations to international human rights treaties. The UPR also includes an international sharing of best human rights practices.

The UPR assesses to what extent states uphold their international human rights obligations by measuring the UDHR and all UN human rights instruments which have been ratified by the state against domestic legislation, policies and programmes which are relevant to provisions set forth in those instruments.

Information released in December 2011 shows that the number one issue raised in the outcome report of Australia's Universal Periodic Review (UPR) were inconsistencies at the federal, state and territory levels in relation to non-compliance with international instruments. Thirty seven recommendations were made to assist with strengthening cohesiveness to international instruments.<sup>173</sup> Recommendation points 18-21 and 121-140 all recommend Australia bring domestic legislation and practice in line with international obligations with the latter recommendations relating specifically to obligations under the Refugee Convention.

An umbrella of general inconsistencies with anti-discrimination legislation were noted.<sup>174</sup> The report referred to the recommendations of Special Rapporteurs and treaty bodies to enact a human rights bill which would ensure domestic and international consistencies prior to any legislative enactment (Australia's response is discussed below) and sought the Government's plans to address this issue. Prior to the outcome report, during Australia's Universal Period Review forum, questions were asked about specific measures

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<sup>172</sup> United Nations Office of the High Commissioner for Human Rights. "Universal Periodic Review." <http://www.ohchr.org/EN/HRBodies/UPR/Pages/UPRMain.aspx> (accessed 4 January 2012).

<sup>173</sup> This includes recommendations for removing reservations and ratification as well as compliance to existing treaties. See database of UPR recommendations at [http://www.upr-info.org/database/index.php?&limit=0&f\\_SUR=&f\\_SMR=&order=&orderDir=ASC&orderP=true&f\\_Issue=28&searchReco=&resultMax=25&response=&action\\_type=&session=&SuRRgrp=&SuROrg=&SMRRgrp=&SMROrg=](http://www.upr-info.org/database/index.php?&limit=0&f_SUR=&f_SMR=&order=&orderDir=ASC&orderP=true&f_Issue=28&searchReco=&resultMax=25&response=&action_type=&session=&SuRRgrp=&SuROrg=&SMRRgrp=&SMROrg=) (4 January 2011).

<sup>174</sup> United Nations General Assembly. "Report of the Working Group on the Universal Periodic Review Australia." *A/HRC/17/10*. 24 March 2011.p.5.

adopted to protect vulnerable groups<sup>175</sup> from discrimination and counter systematic racism.<sup>176</sup> In response, to address racial intolerance and discrimination, the delegation announced that the government would appoint a race discrimination commissioner.<sup>177</sup>

In addition to recommending further attention to incidents of racial crimes against migrants, the policy of mandatory detention reaped heavy criticism. While it recognised Australia's strong commitment to border control, the report invited Australia to review the effect of domestic legislation relating to mandatory detention and consider the wider implications of vulnerability to abuse and exploitation. It was noted that detention should only occur where strictly necessary, and both accommodation and services should be regularly reviewed. It was of particular concern that federal initiatives penalised irregular migrants and children and that they were detained for lengthy periods at remote locations. This practice was encouraged to be discontinued and the closing of Christmas Island detention centre was suggested. Additionally, wider rights protected under other international human rights instruments were noted, such as access to legal assistance and access to appropriate health care.<sup>178</sup>

The report recommended that Australia honour all obligations under Article 31 (the right to seek asylum) and 33 (the principle of non-refoulement) of the Convention. The processing of asylum-seekers' claims in accordance with the Refugee Convention and ensuring that the rights of all refugees and asylum-seekers are respected, including access to Australian refugee law, was recommended.

Australia's commitment and role in the region to combat trafficking and smuggling and addressing the growing challenge of irregular migration was recognised.<sup>179</sup> The Bali Process initiative brought together thirty eight countries in the region at the Regional Ministerial Conference on People Smuggling, Trafficking in Persons and Related Transnational Crime in Bali in February 2002.<sup>180</sup> However, while Australia strengthens anti-terrorism measures to meet international counter-terrorism obligations, it was recommended that this not be at the cost of previously existing international human

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<sup>175</sup> Ibid, p.9. Not only in relation to refugees and asylum seekers but all foreign immigrants and ethnic minorities.

<sup>176</sup> Ibid, p.5.

<sup>177</sup> The first fulltime race relations commissioner was appointed by the Attorney General in August 2011.

<sup>178</sup> United Nations General Assembly (2011) p.8.

<sup>179</sup> Ibid, p.17.

<sup>180</sup> Governments of Indonesia and Australia. "The Bali Process."

<http://www.baliprocess.net/index.asp?pageID=2145831400> (accessed 4 December 2011).

rights obligations and humanitarian principles.<sup>181</sup> It was also recommended that all fifty newly adopted pieces of legislation since 2001 be reviewed so that their application in practice is compliant with international obligations.

In response to the recommendation that Australia enact a human rights bill which would ensure domestic and international consistencies prior to any legislative decision, Australia noted that while their domestic legal system recognises and protects many basic rights and freedoms, societal divisions existed in regards to a human rights charter or bill of rights.<sup>182</sup> Currently, Australia is progressing a human rights framework which will require each new piece of legislation (introduced before Parliament) to be accompanied by an assessment of compatibility with international human rights obligations.<sup>183</sup> The framework will also create a Joint Parliamentary Committee on Human Rights with a responsibility to provide greater scrutiny of legislation compliance with international obligations.

## **Part IV. What compliance theory says about Australia's challenges**

### *Realist theory*

Realist scholarship views international law as having little significance for state behaviour due to states being driven by their own political agenda based on power and national interest, thus making compliance capricious. While this theory could be said to establish the rationale for all of the examples of Australia's non-compliance to provisions of the Refugee Convention, it does not explain compliance.

Radhika Whithana suggests that if compliance with international treaties did not matter, states would not go to the lengths they do to justify and rationalise why their behaviours are consistent with international law.<sup>184</sup> Under the Pacific Solution, Australia amended significant pieces of domestic legislation which resulted in high levels of non-compliance to the Refugee Convention. Territory which was formally part of Australia was legally removed from the Australian boundary so that when the *Tampa* asylum seekers arrived

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<sup>181</sup> United Nations General Assembly (2011).

<sup>182</sup> Ibid, p.7.

<sup>183</sup> Ibid.

<sup>184</sup> Whithana (2008) p.2.

on Christmas Island, Australia was not strictly in breach of the Refugee Convention obligations to process them under the same conditions as those who arrive onshore. While it was clearly a demonstration of Australia's political agenda based on national interests, the length that Australia went to with the introduction and enactment of this legislation to get 'around' Convention obligations, illustrates the Convention has a level of pull. Thus, realist theory does not provide a convincing argument that international law is irrelevant.

Likewise, the enactment of legislative changes does not support the realist notion that domestic policies are simply consistent with international policy. The amendments were a proactive measure by Australia. States must amend and enact domestic legislation prior to ratification of the Refugee Convention or alternatively declare reservations where there are inconsistencies and compliance cannot legally be achieved. The uptake of international humanitarian law into domestic governance also illustrates a notable level of state engagement and cooperation, rather than mere consistency, with international compliance. Therefore, it provides little explanation for the level of compliance and commitment that Australia maintained during changing circumstances.

Realist theory suggests that when Australia enters into an agreement with the Convention it maintains a high level of freedom over the level of compliance it demonstrates, and that engagement in cooperation exists solely where absolute gain is imminent. Particularly, international law is viewed as allowing flexibility as there are few direct sanctions. It could be perceived that Australia entered into agreement with Malaysia as a strategic 'absolute gain' favouring Australia because unprocessed asylum seekers would be removed from Australian responsibility in exchange for already processed and determined refugees which would have been accepted in through the yearly quota regardless. This resulted in direct sanctions when the Malaysia solution was overruled by the Australian High Court and an immediate injunction was put in place.

Realist theory would suggest that Australia ratified the Refugee Convention because it was in their best interest to do so. However, the reality of irregular migration through mass population displacement is that it places significant financial, social and administrative pressures on the state, from initial processing through to integration and resettlement. Australia would feel the financial and societal strain of the intake so it could easily be argued that what is essentially a humanitarian gesture is not in Australia's

best interest. While Australia has the highest refugee intake per capita, there are other nations party to the Refugee Convention which have a significantly higher population of refugees<sup>185</sup> where state discretion of entry into territorial borders is severely limited. Nevertheless, Australia, and no state for that matter, has withdrawn from the Convention.

Additionally, if the Convention was of little relevance, the amount of time, energy and resources put into shaping it and international law would be significantly less.<sup>186</sup> There are 192 member states of the UN and 148 of these states are party to the Refugee Convention, Protocol or both.<sup>187</sup>

Australia has also demonstrated a sense of obligation to comply with its responsibilities by directly engaging with the international normative system. They are party to every core international human rights treaty and actively take part in the UPR, having responded positively to both UN and peer review on incorporating best practice measures. One such measure was the development of a human rights framework to assess domestic legislative compliance with international human rights obligations.

Examples of Australia's non-compliance, particularly through its offshore processing initiatives, support elements of realist theory, as do statements which undermine the foundation of the Convention made by John Howard suggesting Australia can choose who comes to their shores and how they come. However, realist theory fails to explain instances of compliance to the Convention and the sense of obligation to international human rights standards which Australia has demonstrated in other areas.

### *Liberal theory*

Liberal theory suggests non-governmental actors have a significant role when discussing normative law.<sup>188</sup> There are numerous Australian non-government actors on the ground which have internalised norms and play a large role in providing a check and balance mechanism as was seen in the court case submitted against the state's agreement with Malaysia.<sup>189</sup> The increase in non-state actors voicing concern against non-compliance

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<sup>185</sup> See refugees by country [http://www.nationmaster.com/graph/imm\\_ref-immigration-refugees](http://www.nationmaster.com/graph/imm_ref-immigration-refugees).

<sup>186</sup> Guzman (2002) p.1840.

<sup>187</sup> There are 143 parties to both the Convention and the Protocol.

<sup>188</sup> Grugel and Piper (2007) p.12.

<sup>189</sup> Some of these actors include the UNHCR, Amnesty International, Refugee Council of Australia, and Human Rights Watch.

towards refugee protection has ensured this discussion makes it onto the political agenda and saw the state held accountable for its actions. Whilst they may not have international authority they can and have been highly effective.

While Australia demonstrates a high level of international cooperation, internalised norms and evidence to support the idea that “states do not make decisions; people do”, it also does not account for the high volume of discriminatory legislation and practices which violate provisions of the Refugee Convention and other human rights obligations under CERD, ICCPR, CAT and CRC.

While Australia has had a history of discriminatory immigration policies it has also relied heavily on immigration. Australia dismantled the White Australia Policy and signed CERD, in support of eliminating racial discrimination while it simultaneously stemmed the intake of refugees from Vietnam. Australia was instrumental in establishing the UNHCR, yet refrained from voting on initial protection for refugees to avoid an increase of the intake of non-Caucasians. These contradictions throughout Australian history are numerous.

The dismantling of the White Australia Policy and the gradual uptake of more inclusive immigration policies, coupled with Australia being an original member of the Refugee Convention steering committee and supporting a number of international UN human rights instruments illustrates Australia has engaged with and incorporated at least to some degree the international normative system. These norms were reflected in legislation and policy passed by Australian Parliament, elected by and representative of the Australian people. Where the state has not demonstrated consistency with international rights norms, there was a willingness to make necessary changes for compliance to be met.<sup>190</sup>

Despite this, Australia’s federal system presents practical challenges to compliance with Australia’s international human rights obligations, particularly with the assurance of human rights protections not being secured automatically with legislative changes.<sup>191</sup>

This does not support Koh’s suggestion that when there are internalised international legal norms at the domestic level, there will be a conscious effort made by policy makers to not breach the Convention. The violations seen were in part due to asylum seekers

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<sup>190</sup> Particularly at a high level including amendments to legislation and incorporation into policy making.

<sup>191</sup> United Nations General Assembly (2010) p.4.

and refugee issues becoming politicised and dominating the federal election in 2001 and again in 2010, and the construed definition of national identity.

The liberal domestic theory that constitutional and political factors of states play a part in international relations focuses on a positive correlation between the two rather than a general model.<sup>192</sup> Additionally, empirical findings suggest that liberal theory does not explain why democratic states with strong human rights ratings have lower international human rights treaty ratification rates than those with lesser ratings.<sup>193</sup>

Due to this, there can be a tendency to assume rights based treaties are unlikely to make an actual difference in reality. Others contend that they can improve respect for human rights, particularly through the internalisation of norms in more democratic countries and countries with an active rights conscious civil society. Ratification alone rarely has an absolute effect on global human rights because implementation and enforcement are still required. Neumayer suggests that an advance in human rights is more likely the more democratic the country is, and the more international non-governmental organizations its citizens participate in. Conversely, in autocratic leadership with weak civil society, ratification can have limited effect and at times even be associated with increased rights violations, thus suggesting that there is no natural tendency to comply.<sup>194</sup>

However, if there was not public pressure and the subsequent High Court decision, the offshore processing agenda in Australia could have been pushed ahead without direct sanctions and implemented globally as a standard model for offshore processing of asylum seekers elsewhere.

Australia's contradictions are partially summed up by Manne who noted that Australians do not like spontaneous arrival; a controlled arrival of the same number of asylum seekers is acceptable.

Unlike realist theory, liberal theory can provide an insight into factors which drive Australia's compliance. However, while Australia demonstrates a high level of international cooperation, internalised norms and an influential civil society which holds

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<sup>192</sup> Guzman (2002) p.1844.

<sup>193</sup> Moore (2003) p.881. See also Hathaway (2002) p.2001.

<sup>194</sup> Neumayer, Eric. "Do International Human Rights Treaties Improve Respect for Human Rights?" *Journal of Conflict Resolution* 49, no. 6 (2005): 925-953.

the state accountable for its action, the theory does not account for discriminatory practices which contradict and violate a number of human rights obligations.

### *Reputation theory*

While there are examples of Australia's consciousness over its reputation particularly where there is an increased cost associated with non-compliance, reputation theory does not explain significant breaches seen under the offshore processing legislation. Reputation theory does not explain the internationally criticised policy of mandatory detention which not only violates the Refugee Convention but several other international obligations as well.

Reputation theory suggests states are more likely to comply when there is greater transparency of a violation. If no, or relatively few states, are likely to gain knowledge of a violation, it may prove influential in deciding whether to engage in non-compliance when it is in the state's best interest. Without other states' knowledge of non-compliance, there is no loss of reputation. Australia responds to incidents which may tarnish its reputation. There was a high cost of being seen to be intolerant of multiculturalism in 1996 when Pauline Hanson's comments and sentiments were picked up internationally and labelled as racist, hate speech, and compared to Nazism.<sup>195</sup> Conscious of Australia's international reputation and subsequently the potential effect on foreign trade, particularly with the Asian region, Howard spoke overtly in favour of mending international relations at regional forums whilst simultaneously quietly reducing funding internally for immigration and multi-cultural public services.<sup>196</sup>

However, reputation is not always a driver towards compliance where there is high transparency and high cost associated with non-compliance. The practice of mandatory detention has received significant international criticism and violates the Convention along with several other core human rights treaties. While it was initiated a decade before the Pacific Solution highlighted violations, detention was not as transparent and was enacted with quieter international response initially. Progressively Australia's reputation for harsh detention policies resulted in much international criticism.<sup>197</sup> As it

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<sup>195</sup> McAdam (2003).

<sup>196</sup> Skulan (2006) p.69. In 1996 Howard merged the Office of Multicultural Affairs and the Department of Immigration and Indigenous Affairs, without added funding.

<sup>197</sup> Particularly in Austria, the UK and the Netherlands. See Human Rights Watch. "Not for Export: Why the International Community Should Reject Australia's Refugee Policies." *A Human Rights Watch Briefing Paper*.

became more transparent through investigations into the detention centres, several improvements were made with some detainees having been given more rights, the policy, the only one of its kind, still exists and is discriminatory towards particular groups.<sup>198</sup> However, Downs and Jones suggest that the reality is reputational sanctions, even total loss of reputation, may still not be enough to persuade a state to fully comply.<sup>199</sup>

Reputation theory emphasises the benefits of membership with the international community and suggests higher levels of compliance exist with the development of regional organisations and regional cooperation. While Australia has violated provisions of the Refugee Convention, it illustrated a high level of compliance to bilateral treaties and cooperation throughout the Pacific region. Such initiatives included the Bali Process which saw high international participation, the Pacific Solution and processing centres in various offshore regions, and most recently buy in from Malaysia with the Malaysia Solution agreement. However, these regional agreements have not adapted international human rights norms and instruments into their legal and policy frameworks. While Simmons suggests that the implementation of human rights norms at a regional level can lead to further compliance as regional pressure can be more persuasive than international pressure for compliance,<sup>200</sup> if bilateral agreements are initiated with countries which do not uphold the same level of protections, then compliance may not be higher due to regional cooperation alone.

A strong human rights record is a relevant factor for Australia to maintain a positive international reputation. Not honouring obligations can tarnish reputation as it demonstrates the state's preparedness to breach obligations and not fulfil responsibilities. Australia recognises this as stated through the UPR process and is thus implementing a human rights framework to illustrate the serious consideration that it pays to compliance with international obligations.

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September 2002. <http://www.hrw.org/news/2002/09/25/australian-refugee-policy-not-export> (accessed 10 December 2011).

<sup>198</sup> Unaccompanied children are no longer detained within the same environment and Australia has noted in their UPR report that the length of time in detention will be examined with the hope to implement a 90 day processing timeframe.

<sup>199</sup> Downs, George W. and Michael A. Jones. "Reputation, Compliance, and International Law." *The Journal of Legal Studies* 31, no. S1 (2002): p.95.

<sup>200</sup> Simmons (2009).

Whilst Australia has not moved significantly on mandatory detention, reputation pull certainly can be seen through international engagement. Demonstrating a seriousness and commitment to upholding international responsibility with the Refugee Convention and other UN instruments is significant to international membership. Jill Parker noted that an indication of strong human rights compliance in Europe aids chances of European Union membership, resulting in significant economic, political and security related benefits to the state.<sup>201</sup> Recently admitted members like Poland, Hungary, Romania and the Czech Republic have made significant efforts towards compliance with human rights norms, where a number of states have been blocked or delayed from membership due to their lack of compliance.<sup>202</sup> Some critics of the Convention have called for Australia to withdraw from the treaty.<sup>203</sup> However, even if Australia were to follow the correct withdrawal procedure as set forth in the Convention, and uphold a high level of compliance, it still may endure a reputational loss for its actions.<sup>204</sup>

In special circumstances, such as a national crisis, non-compliance is viewed differently. In the time of crisis, a state may be able to retain a positive reputation if at other times they are able to comply with their obligations. Maintaining immigration control as a national security measure and the influx of displaced persons have both been used as a 'national crisis' justification by Australia for offshore processing and subsequent violations to treaties. The cost of non-compliance in this situation is in part accepted to some degree because regardless of the justification, other states are attentive to Australia's offshore processing initiatives and have watched with anticipation. They want to see whether a balance can be struck in maintaining Convention compliance through offshore processing as a solution to an increased number of asylum seekers and refugees within their territories.<sup>205</sup>

Reputation theory alone does not explain Australia's violations to the Convention and other international obligations, particularly given their unique stance on mandatory detention and the criticism received. Where it is useful, is in addressing some drivers of

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<sup>201</sup> Parker, Jill. "West Meets East: A Discussion of European Union Enlargement and Human Rights." *Tulsa Journal of Comparative and International Law* 11 (2004): 603-639.

<sup>202</sup> Ibid. For more see the Human Rights Watch (2004) for discussion of Turkey's human rights violations in regards to the treatment of Kurdish minority.

<sup>203</sup> Millbank, Adrienne. "The Problem with the 1951 Refugee Convention." Vers. Research Paper 5. *Parliament of Australia, Parliament Library website*. 5 September 2000.

<sup>204</sup> Guzman (2002) p.1871.

<sup>205</sup> Including the British government, Italy, Albania, and Greece.

compliance to the Convention and international relations particularly where relations may be strained.

### *Constructivist theory*

According to constructivist theory, all concepts and ideas are given a meaning and a value by social dialogue and interaction. Commonly discussed concepts which deal with compliance to the Refugee Convention - power, sovereignty, compliance, norms - are transitory, as is the structure in which they present themselves. Therefore, the theory would suggest that concepts discussed domestically within Australia in relation to not only the Refugee Convention but to refugees and asylum seekers – concepts of identity, nationalism, security, asylum, foreign, compliance – are determined by those involved in the dialogue.

When discussing Australia's discriminating policies in relation to violations of the Convention, it is evident that the construction of national identity within Australia has historically played a significant role. Discriminatory attitudes and legislation from as early as the White Australia Policy, through to more recent discriminatory legislation under the Pacific Solution, suggests exclusionary policies were designed to protect the integrity of the state. This integrity has been and continues to rely on the concept of national identity, and what it means (and looks like) to be Australian. The panic of boats arriving with Vietnamese refugees illustrated strong sentiment towards this notion, and the 'us' became clearer by defining the 'them'.

The notion of national identity continues to change throughout Australian history influenced by dialogue and interactions. Post 9/11, through global events and security discourse, national identity is construed to include another layer, that of national security. Election campaigning and subsequent legislation amendments occurred in the height of 9/11 where the notion of securing the nation and territorial integrity received widespread public support within Australia. This security discourse is deep seated and "borderphobia" is demonstrated by at least a subset of the Australian population as evidenced by Pauline Hanson's 1998 campaign, and further demonstrated in the Sydney riots where non-white citizens, born in Australia, were targeted as the 'other'.

'Unauthorised' asylum became a central electoral issue for the last three Australian federal elections, evidence that the threat to national security and national values that

'unauthorised' asylum seeking present is influential for more than a minority of the Australian population.

According to constructivist theory states engage in decision making based on rightfulness of what norms have come to define, and thus, tend to base decision making on this rather than on the consequences of compliance or, cost-benefit analysis. It would appear that for Australia, rightfulness is often interpreted as protecting Australian citizens from a threat to national identity and security as a priority.

This attitude can be seen with Australia's practice of mandatorily detaining asylum seekers. While this practice has a high reputational cost as it breaches several international obligations and has reaped much criticism internationally, the practice continues to exist. Similarly, the hugely financial cost is also not a deterrent. A Select Committee of the New South Wales Parliament costed alternatives to detention centres, such as home detention and transitional community housing, and found the alternatives to be much more economically efficient, and much more humane.<sup>206</sup>

Likewise, the number of asylum seekers is construed to be relatively high, high enough to cause concern and fear when in fact, fewer refugees have been accepted into Australia today than twenty or even thirty years ago.<sup>207</sup>

Constructivism cannot be examined in isolation of historical or political context. Throughout Australian history, the fear of loss of national identity has been a catalyst for immigration policy. Discussions around national identity and later tied into security have paralleled discussions around 'us' and 'them' as seen with 'Asian invasion' and a panic of boats arriving with Vietnamese refugees, suspending visas for certain countries, and the construction of the terms 'illegal' and 'unauthorised' used to describe asylum seekers illustrates how concepts and systems and identity is construed through dialogue and social interactions.

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<sup>206</sup> Australian Government Department of Immigration and Citizenship. *Submission to the Joint Select Committee on Australia's Immigration Detention Network*. September 2011. p.87.  
<http://www.immi.gov.au/media/publications/pdf/2011/diac-jscaidn-submission-sept11.pdf> (accessed 4 November 2011).

<sup>207</sup> York (2003).

## *Managerial theory*

To an extent Australia supports the managerial notion that if a state enters into an international agreement they are likely to comply with it. They were involved in the establishment of the UNHCR and have demonstrated a sense of obligation by withholding declarations to the Convention and recently suggested a willingness to remedy at least some violations through a human rights framework. However, the thought that compliance occurs because it is efficient and non-compliance is highly costly to the state does not appear to be a significant deterrent as seen with significant legislative changes under the Pacific Solution and the Malaysia proposal.

While non-compliance to the Convention can be seen, compliance to regional treaties are a result of state interactions and cooperation where processes of justification, discourse and persuasion are played out as per managerial thought.

Managerial theory argues that compliance stems not from fear of reputational loss but like liberal theory, the state proactively engages in a regional and international community and thus has a desire to maintain membership which strengthens compliance. It suggest that in the absence of a threat of enforcement, treaties would essentially be stronger due to state cooperation, yet this is not always the case as seen with Australia's level of compliance.<sup>208</sup>

Australia's non-compliance with the Convention is in part a result of treaty language ambiguity and parameters of the treaty which place limitations on the capacity of states to carry out obligations as Chayes and Chayes suggest.

While the Convention is an instrument for guidance and protection it does not detail each and every individual circumstance. It was drafted to deal with a specific historical event. While the Protocol widened the scope by expanding the definition of refugee, it is still limiting in other respects.

Whilst temporal and geographic limitations were removed with the Protocol, the scope of the Convention and definition of refugee has confining parameters. Only individuals who seek asylum due to a fear of persecution on the ground of civil or political status fulfil

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<sup>208</sup> Downs, George W., David M. Rock, and Peter N. Barsoom. "Is the Good News About Compliance Good News About Cooperation?" In *International Law and International Relations*, by Beth A. Simmons and Richard H. Steinberg, 92-114. Cambridge University Press, 2006.

criteria needed for international protection under the Convention.<sup>209</sup> Status is determined on a threshold which includes a violation of human rights but does not include hardship or lack of opportunity.<sup>210</sup>

James Hathaway suggests the historical context heavily influenced the evolution of the Convention by serving a strategic political objective by Western states through a mandate of civil and political rights; and intentionally not exposing Western vulnerability in mandating coverage of economic, social and cultural rights.<sup>211</sup> Due to the failure to protect those whose socio-economic rights are at risk, Hathaway notes “the Convention adopted an incomplete and politically partisan human rights rationale”.<sup>212</sup>

So while freedom from civil and political oppression is protected, individuals who are denied other rights as set forth in ICESCR for example; such things as access to welfare, education, and healthcare cannot claim protection under the Convention. This critique is becoming more commonplace as higher instances of international migration are occurring, particularly persons from developing nations who seek protection due to natural disasters, internal state conflict and economic crises.<sup>213</sup> UN Conventions seek to protect basic civil, political, economic, social and cultural rights so that individuals are able to have an adequate standard of living internationally. Though the first declaration of human rights was drawn in 1948, Donnelly suggests it took over forty years to significantly gain traction for economic, social and cultural rights due to conscious political decisions to overtly exercise sovereignty.<sup>214</sup>

States have raised concern that the language of the Convention is too restrictive when global organisations and non-state actors cannot be held accountable for acts committed which fall outside the parameter of the definition. Thus, it has drawn criticism that it is too unforgiving in a non-uniform world and too constricting whereby there is no ability for it to evolve as needed due to changes in circumstances, globalisation and political shifts.

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<sup>209</sup> Including those who have been disenfranchised from their state of residence due to race, religion, nationality, membership of a group or political opinion.

<sup>210</sup> Hathaway (1991) p.vi.

<sup>211</sup> Hathaway (1991) p.6. “The strategic dimension of the definition comes from successful efforts of Western states to give priority in protection matters to persons whose flight was motivated by pro-Western political values.” Thus, exposing the Soviet blocs vulnerable political regime.

<sup>212</sup> Ibid, p.8.

<sup>213</sup> Ibid, p.10.

<sup>214</sup> Donnelly (2003).

The General Assembly has passed resolutions to remedy such instances. Expanding the exclusions in Article 1(F) is an example of this where the General Assembly passed a resolution on Measures to Eliminate International Terrorism which replicated the language of the Convention, asking states to consider whether terrorist acts had been engaged in prior to the granting of asylum.<sup>215</sup> Guzman and Meyer (2010) note that the main intention of the resolution was to expand states' understanding of the 'exceptions' category in the Convention. Where a state may have struggled between complying with Articles 1(A)-(C) and a desire to turn down an application based on involvement in terrorism, the resolution would bring the two in line so that compliance could be met.<sup>216</sup>

These distinctions and differing approaches to defining refugee still exist today, with the Convention definition being a burden in some cases and limiting in others. Yet while the Convention does not aim to address the magnitude of factors which cause involuntary migration, Hathaway notes that a generous interpretation of the Convention can meet the needs of at least the most acutely at risk populations outside borders of their own nation.<sup>217</sup> Where the Convention may be seen to be limiting in either scope or ambiguity, it does call for a level of interpretation to be carried out in good faith with the philosophy that was intended at the drafting of the Convention and UDHR.

Chayes and Chayes suggest that a strict compliance is unnecessary so long as the provisions of the treaty are maintained to an acceptable level as determined by the international community. Though non-compliance can exist and shall not automatically be assumed to signify a complete loss of protection and safeguard, Australia's non-compliance with the Refugee Convention occurs when protections are not provided in legislation or policy. Not only did Australia violate several provisions, they attempted to make an agreement with Malaysia, a non-signatory to the Refugee Convention where protections such as non-refoulement and non-discrimination would not be guaranteed and a country internationally known for limited human rights protections.

Circumstances can change after an agreement is drawn as seen with further population displacement after World War II and the need for the Protocol. Chayes and Chayes argue that well developed treaties have the capability to evolve to meet the needs of shifting

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<sup>215</sup> This concern was raised by states after 9/11 whereby persons who engaged in terrorist acts could still be granted asylum under the Convention.

<sup>216</sup> Guzman and Meyer (2010) p.217.

<sup>217</sup> Hathaway (1991) p.v.

interests. This point is testing the Convention currently with some calling for Australia to withdraw.

Australia supports the managerial notion that despite violations, they have maintained their membership and they have invested a great deal into compliance of the Convention. Managerial theory does not provide insight into non-compliance based on cost as a deterrent. Offshore processing and detention for asylum seekers and refugees for example, is highly costly to the state.

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While no single theory of compliance can explain Australia's level of compliance to the Convention, collectively they give a strong insight into the driving factors of compliance. Realist compliance theory can explain two instances of Australia's non-compliance with the Refugee Convention, namely legislation under the Pacific Solution and mandatory detention. Realist theory does not however, explain drivers of compliance.

Similarly, Australia has demonstrated that occasionally reputational pull is influential as seen through strategic plans such as initiating a human rights framework to better ensure compliance. However, given their unique stance on mandatory detention and the criticism received, a tarnished reputation is not always a consideration.

There is much support that Australia operates in an international normative framework on some level, as seen with the ratification of the Convention and other human rights treaties. However, where contradictions expose themselves in the violations seen through discriminatory policies and legislation, constructivist theory can explain these breaches through Australia's self-constructed notion of national identity which at times paradoxes the normative drive to comply.

Australia has demonstrated that the parameters of the Convention can at times place a heavy burden on the state, supporting Managerial theory. However, no state has withdrawn from the Convention which suggests that though it was designed in the aftermath of specific event, it still has relevance today.

## Conclusion

Australia is in violation of a number of obligations it has commitment to under the Refugee Convention, with many stemming from more recent policies and legislative amendments around offshore processing initiatives such as the Pacific Solution and the Malaysia Solution. The legislation discriminates against asylum seekers by undermining the fundamental principle of the Convention, the right to seek asylum and discrimination based on method of arrival. Various pieces of legislation are subsequently found to be discriminatory with provisions in other international human rights treaties to which Australia is party, such as ICCPR, CRC, CAT and CERD. The practice of mandatory detention and lack of protection to ensure non-refoulement are considered significant levels of breach. Australia defends its position using three justifications: the sovereign right to determine entry based on border control, national identity and security.

This research examined the violations of the Convention in a historical, legal and political context to better understand the dynamics and factors of compliance. An insight into the motivating factors of state compliance with international human rights instruments can not only improve legal protections for a vulnerable group of persons internationally, it can also provide a catalyst for ensuring an evolving rhetoric addresses the delicate balance of providing international protection to asylum seekers and refugees. Particularly because one of the most common challenges to implementation and compliance with any international instrument is that domestic legislation must comply with the instrument for the provisions to be carried out. Once these protections are implemented, enforcement needs to occur. Human rights protections through international instruments not only depend on the state for implementation, they must also become part of the dialogue of institutions and civil society worldwide.

Whilst the Convention affirms certain human rights standards, it also encourages the promotion of sound, equitable, humane and lawful conditions to be applied in good faith. Thus, when Australia amends domestic legislation essentially to get around obligations to the Convention and thus still be seen to comply in a strict sense, it does not uphold the philosophy of the treaty, which it has ratified.

While tenets of all of the compliance theories could be seen, not one of the theories is able to capture and adequately represent Australia's level of non-compliance on its own.

Elements of the theories discussed provide insight to a larger picture. Two highly influential drivers of compliance in the Australian case study can be explained through both constructivist and liberal theories of compliance. Civil society and non-state actors ensure that the state is held accountable to international obligations, while those obligations and level of compliance is influenced by Australia's constructed definition of national identity.

Whilst the Refugee Convention focuses on the normative discussion of advocating and protecting the fundamental rights of vulnerable individuals, it is competing with a deep political and social history of immigration policy based on the fears of an immigration invasion shaking up and altering Australian national identity. It is not just Australia where the fear of immigration invasion is perpetuated. Similar concerns are raised in Europe and the United States.

Non-compliance in the name of the Convention's inflexibility does not seem sufficient as it would be impossible for a state to comply only with a treaty that met every possible contingency since one cannot anticipate every possible circumstance. Whilst the prominent goal for human rights advocates is full enjoyment of human rights for all, the question remains as to whether the UN instruments are in fact improving the enjoyment of human rights.

As we have seen, absolute compliance in the grander scheme may be indicative of very little when discussing treaty impact on state behaviour as non-compliance can alter state behaviour. Therefore, the effectiveness of treaties may not be found in dissecting compliance theory but by focusing further study on measuring human rights on the ground, as this may paint a clearer, more accurate picture as to whether human rights are achieved and enjoyed.

Further research into compliance could include tracking the relationship of compliance with the Refugee Convention amongst states, particularly liberal democracies by looking at variables which affect compliance decision making. It may be that varying theories of compliance illustrate little more than that it is a complex world of vast differences and significant human rights inequalities.

Analysis of actual human rights enjoyment could be further studied, because as Hathaway notes, compliance is not necessarily indicative of protection. It is important to

understand a state's relationship with international human rights instruments. If one is to engage in the international human rights discussion, it is essential to understand if human rights are enjoyed in the state through human rights indicators that assess the effect that compliance has in relation to the Refugee Convention. Further recommendations could be made if it were determined that a desired level of compliance had not been met. As Hathaway has noted, statistical evidence shows that ratification does not automatically generate strong levels of actual compliance to human rights protections domestically. Such research would be significant not only in the context of globalisation and increased population displacement but also because of the incredible interrelatedness between the human rights regime and international relations. Indicators of compliance do not measure to what extent protections are enjoyed. Compliance indicators which reveal a state's violation against human rights will expose the true level of enjoyment of rights.

Human rights indicators could prove to take the thermometer of human rights out of the shade to give a more honest reading of human rights enjoyment in states, than sole examination of compliance to the Convention.

## Bibliography

- Abbott, Tony. "Address to Australia Day Council." 22 January 2010. <http://www.tonyabbott.com.au/LatestNews/Speeches/tabid/88/articleType/ArticleView/articleId/7228/ADDRESS-TO-THE-AUSTRALIA-DAY-COUNCIL-VICTORIA-AUSTRALIA-DAY-DINNER-MELBOURNE.aspx> (accessed 11 December 2011).
- . "The Coalition's Real Action Plan for Restoring Integrity and Fairness to Refugee Decision Making." 6 July 2010. <http://www.liberal.org.au/Latest-News/2010/07/06/The-Coalitions-real-action-plan-for-restoring-integrity-and-fairness-to-refugee-decision-making.aspx> (accessed 20 December 2011).
- Arimatsu, Louise and Marika Giles Samson. "The UN Refugee Convention at 60: The Challenge for Europe." *Briefing Paper*. Chatham House. March 2011. [http://www.chathamhouse.org/sites/default/files/public/Research/International%20Law/0311bp\\_arimatsu\\_samson.pdf](http://www.chathamhouse.org/sites/default/files/public/Research/International%20Law/0311bp_arimatsu_samson.pdf) (accessed 20 December, 2011).
- Aslan, Alice. *Islamophobia in Australia*. Sydney: Agora Press Australia, 2009.
- Australian Associated Press. "Rudd Defends Ban on Sri Lankan, Afghan Asylum Seekers." *Sydney Morning Herald*, 11 April 2010.
- Australian Government Attorney-General's Department. "Australia's Human Rights Action Plan Exposure Draft." (Open for review until 29 February 2012). [http://www.ag.gov.au/www/agd/agd.nsf/Page/Humanrightsandanti-discrimination\\_AustraliasHumanRightsFramework\\_NationalHumanRightActionPlan](http://www.ag.gov.au/www/agd/agd.nsf/Page/Humanrightsandanti-discrimination_AustraliasHumanRightsFramework_NationalHumanRightActionPlan) (accessed 4 January 2012).
- . "Australia's Human Rights Framework." 21 April 2010. <http://www.ag.gov.au/humanrightsframework> (accessed 4 January 2012).
- Australian Government Department of Immigration and Citizenship. "Fact Sheet 8 – Abolition of the 'White Australia' Policy." 2009. <http://www.immi.gov.au/media/fact-sheets/08abolition.htm> (accessed 20 December 2011).
- . *Submission to the Joint Select Committee on Australia's Immigration Detention Network*. September 2011. <http://www.immi.gov.au/media/publications/pdf/2011/diac-jscaidn-submission-sept11.pdf> (accessed 4 November 2011).
- Bem, Kazimierz and Nina Field, Nic Maclellan, Sarah Meyer, Dr. Tony Morris. *A Price Too High: the Cost of Australia's Approach to Asylum Seekers*. Australia: a research project funded by A Just Australia, Oxfam Australia and Oxfam Novib, 2007.
- Blakeney, Michael. *Australia and the Jewish Refugees 1933-1948*. Sydney: Croom Helm, 1985.
- Boix, Carles and Susan C. Stokes, eds. *The Oxford Handbook of Comparative Politics*. New York: Oxford University Press, 2007.
- Border Protection (Validation and Enforcement Powers) Act 2001.

Burgstaller, Markus. *Theories of Compliance with International Law*. Leiden: Martinus Nijhoff Publishers, 2005.

Burke, Anthony. "Borderphobias: the politics of insecurity post 9/11." *Borderlands e-journal*. 1 November 2002. [http://www.borderlands.net.au/vol1no1\\_2002/burke\\_phobias.html](http://www.borderlands.net.au/vol1no1_2002/burke_phobias.html) (accessed 20 December 2011).

Carr, E.H. *The Twenty Years Crisis: 1919-1939*. New York: MacMillan & Co Ltd, 1958.

Casella, Alexander. "Humanitarian flows and the system of international protection; issues for developed asylum systems." *Paper presented at the Dept of Immigration and Multicultural and Indigenous Affairs Conference, Migration: benefiting Australia*. 2002.

Cassese, Antonio. *International Law*. Oxford: Oxford University Press, 2001.

Chayes, Abram and Antonia Handler Chayes. "On Compliance." In *International Law and International Relations*, by Beth A. Simmons and Richard H. Steinberg, 65-91. Cambridge University Press, 2006.

Chayes, Abram and Antonia Handler Chayes. "On Compliance." *International Organisation* 47, no. 2 (1993): 175-205.

—. *The New Sovereignty: Compliance with International Regulatory Agreements*. Cambridge: Harvard University Press, 1995.

Commonwealth of Australia. "National Human Rights Consultation Report." September 2009. [http://www.humanrightsconsultation.gov.au/www/nhrcc/nhrcc.nsf/Page/Report\\_NationalHumanRightsConsultationReportDownloads](http://www.humanrightsconsultation.gov.au/www/nhrcc/nhrcc.nsf/Page/Report_NationalHumanRightsConsultationReportDownloads) (accessed 18 December 2011).

Corder, Mike. "Racial Violence Shocks Australian City." *Associated Press*. 11 December 2005.

Crock, Mary and Ben Saul. *Future Seekers: Refugees and the Law in Australia*. Federation Press, 2002.

Davies, Mathew. "Rhetorical Inaction? Compliance and the Human Rights Council of the United Nations." *Alternatives* 35, no. 4 (2010): 449-468.

de Beco, Gauthier. "Human Rights Indicators for Assessing State Compliance with International Human Rights." *Nordic Journal of International Law* 77 (2008): 23-49.

Donnelly, Jack. *Universal Human Rights in Theory and Practice*. 2nd ed. Cornell University Press, 2003.

Downs, George W. and Michael A. Jones. "Reputation, Compliance, and International Law." *The Journal of Legal Studies* 31, no. S1 (2002): S95-S114.

Downs, George W., David M. Rock, and Peter N. Barsoom. "Is the Good News About Compliance Good News About Cooperation?" In *International Law and International Relations*, by Beth A. Simmons and Richard H. Steinberg, 92-114. Cambridge University Press, 2006.

Evans, Chris. "New Directions in Detention - Restoring Integrity to Australia's Immigration System." 29 July 2008. <http://www.minister.immi.gov.au/media/speeches/2008/ce080729.htm> (accessed 20 December, 2011).

- Finnemore, Martha and Kathryn Sikkink. "International Norm Dynamics and Political Change." *International Organization* 52, no. 4 (1998): 887-917.
- Franck, Thomas. *The Power of Legitimacy Among Nations*. New York: Oxford University Press, 1990.
- Gillard, Julia. "Moving Australia Forward." *Lowy Institute speech*. 6 July 2010.  
<http://www.lowyinstitute.org/Publication.asp?pid=1328> (accessed 20 December 2011).
- Goldsmith, Jack L. and Eric A. Posner. "A Theory of Customary International Law." *The University of Chicago Law Review* 66, no. 4 (1999): 1113-1117.
- Governments of Indonesia and Australia. "The Bali Process."  
<http://www.baliprocess.net/index.asp?pageID=2145831400> (accessed 4 December 2011).
- Grugel, Jean and Nicola Piper. *Critical Perspectives on Global Governance: Rights and regulation in governing regimes*. London: Routledge, 2007.
- Guzman, Andrew T. "A Compliance-Based Theory of International Law." *California Law Review* 90 (2002): 1826-1887.
- Guzman, Andrew T. and Timothy L. Meyer. "International Soft Law." *Journal of Legal Analysis* 2 (2010): 171-225.
- Guzman, Andrew T. "International Tribunals: A Rational Choice Analysis." *University of Pennsylvania Law Review* 157, no. 1 (2008): 171-236.
- Guzman, Andrew T. "Reputation and International Law." *Georgia Journal of International and Comparative Law* 34, no. 2 (2006): 379-392.
- Guzman, Andrew T. "Saving Customary International Law." *Michigan Journal of International Law* 27, no. 1 (2005): 115-176.
- Guzman, Andrew T. "The Design of International Agreements." *The European Journal of International Law* 16, no. 2 (2005): 579-612.
- Habermas, Jürgen. *Theory of Communicative Action*. Cambridge: Polity, 1984.
- Hanson, Pauline. *Australian House of Representatives Maiden Speech*. 10 September 1996.
- Hathaway, James C. and Colin J. Harvey. "Framing Refugee Protection in the New World Disorder." *Cornell International Law Journal* 34, no. 2 (2001): 257-320.
- Hathaway, James C. "Labelling the Boat People: The Failure of the Human Rights Mandate of the Comprehensive Plan of Action for Indochinese Refugees." *Human Rights Quarterly* 15, no. 4 (1993): 686-702.
- . *The Law of Refugee Status*. Vancouver: Butterworths Ltd., 1991.
- Hathaway, Oona A. and Philip Levitz, Elizabeth Nielsen, Aileen Nowlan. "Human Rights Abroad: When Do Human Rights Treaty Obligations Apply Extraterritorially." *Arizona State Law Journal* 43, no. 2 (2011): 389-426.

- Hathaway, Oona A. "Do Human Rights Treaties Make a Difference." *Yale Law Journal* 111, no. 8 (June 2002): 1935-2042.
- Hathaway, Oona A. "The Cost of Commitment." *Stanford Law Review* 55, no. 5 (2003): 1821-1862.
- Helper, Laurence R. "Overlegalizing Human Rights: International Relations Theory and the Commonwealth Caribbean Backlash against Human Rights Regimes." *Columbia Law Review* 102, no. 7 (November 2002): 1832-1911.
- Henkin, Louis. *How Nations Behave*. 2nd Edition. New York: Colombia University Press, 1979.
- Howard, John. "Federal election campaign policy launch speech." 28 October 2001.  
<http://www.australianpolitics.com/news/2001/01-10-28.shtml> (accessed 30 October 2011).
- Human Rights Watch. *A Crossroads for Human Rights? Human Rights Watch's Key Concerns on Turkey for 2005*. 2004. [http://www.hrw.org/legacy/english/docs/2004/12/15/turkey9865\\_txt.htm](http://www.hrw.org/legacy/english/docs/2004/12/15/turkey9865_txt.htm) (accessed 28 December 2011).
- . "Australia, Malaysia: Refugee Swap Fails Protection Standards." 26 July 2011.  
<http://www.unhcr.org/refworld/docid/4e37ac632.html> (accessed November 19, 2011).
- . "Malaysia: Reject Refugee Swap Deal." 13 June 2011.  
<http://www.unhcr.org/refworld/docid/4dfb04fd2.html> (accessed December 2, 2011).
- . "Not for Export: Why the International Community Should Reject Australia's Refugee Policies." *A Human Rights Watch Briefing Paper*. September 2002.  
<http://www.hrw.org/news/2002/09/25/australian-refugee-policy-not-export> (accessed 10 December 2011).
- Jupp, James. *Immigration*. Second Edition. Melbourne: Oxford University Press, 1998.
- Keohane, Robert O. "Accountability in World Politics." *Scandinavian Political Studies* 29, no. 2 (2006): 75-87.
- Keohane, Robert O. *International Institutions and State Power: Essays in International Relations Theory*. Boulder: Westview, 1989.
- Keohane, Robert O. "International Institutions: Two Approaches." *International Studies Quarterly* 32 (1988): 379-396.
- Keohane, Robert O. "When Does International Law Come Home?" *Houston Law Review* 35, no. 3 (1998): 699-713.
- Koh, Harold H. "Internalization Through Socialization." *Duke Law Journal* 54 (2005): 975-982.
- Koh, Harold H. "Transnational Legal Process." *Nebraska Law Review* 75 (1996): 181-208.
- Koh, Harold H. "Why Do Nations Obey International Law." *Yale Law Journal* 106 (1997): 2598-2659.
- Krasner, Stephen D. "Structural Causes and Regime Consequences: Regimes as Intervening Variables." In *International Law and International Relations*, by Beth A. Simmons and Richard H. Steinberg, 3-17. Cambridge University Press, 2006.

- Law and Justice Foundation of New South Wales. "Australian Lawyers for Human Rights." 2004. <http://www.alhr.asn.au/refugeeekit/> (accessed 4 January 2012).
- Lipson, Charles. "Why Are Some Agreements Informal." *International Organization* 45, no. 4 (1991): 495-538.
- Manne, Robert. "The Nation Review: Comment: Asylum Seekers." *The Monthly*, 2010: 8-14.
- McAdam, Jane. "Asylum Seekers: Australia and Europe - Worlds Apart." *Alternative Law Journal* 193 (2003): 193-194.
- McDonald, Matt. "Deliberation and Resecuritization: Australia, Asylum-Seekers and the Normative Limits of the Copenhagen School." *Australian Journal of Political Science* 46, no. 2 (2011): 281-295.
- McMaster, Don. *Asylum Seekers: Australia's Response to Refugees*. Melbourne: Melbourne University Press, 2001.
- McMaster, Don. "Asylum-Seekers and the Insecurity of a Nation." *Australian Journal of International Affairs* 56, no. 2 (2002): 279-290.
- Migration Amendment Act (No 6) 2001.
- Migration Legislation Amendment (Judicial Review) Act 1998.
- Migration Legislation Amendment Act (No 1) 2001.
- Migration Legislation Amendment Act (No 5) 2001.
- Millbank, Adrienne. "The Problem with the 1951 Refugee Convention." Vers. Research Paper 5. *Parliament of Australia, Parliament Library website*. 5 September 2000. <http://www.aph.gov.au/library/pubs/rp/2000-01/01RP05.htm> (accessed October 9, 2011).
- Minister for Immigration and Citizenship (Australia). "Arrangement between the Government of Australia and the Government of Malaysia on transfer and resettlement ." 25 July 2011. [http://www.minister.immi.gov.au/media/media-releases/\\_pdf/20110725-arrangement-malaysia-aust.pdf](http://www.minister.immi.gov.au/media/media-releases/_pdf/20110725-arrangement-malaysia-aust.pdf) (accessed 21 December 2011).
- Mitchell, Andrew and Jennifer Beard. *International Law in Principle*. Thomson Reuters Australia: Lawbook Co, 2009.
- Moore, David H. "A Signaling Theory of Human Rights Compliance." *Northwestern University Law Review* 97, no. 2 (Winter 2003): 879-910.
- Moravcsik, Andrew. "The Origins of Human Rights Regimes: Democratic Delegation in Postwar Europe." In *International Law and International Relations*, by Beth A. Simmons and Richard H. Steinberg, 622-652. Cambridge University Press, 2006.
- Morgenthau, Hans J. *Politics Among Nations: The Struggle for Power and Peace*. 5th Edition. New York: Alfred A Knopf, 1973.
- Naturalization Act 1903. *Australia*.

Neumayer, Eric. "Do International Human Rights Treaties Improve Respect for Human Rights?" *Journal of Conflict Resolution* 49, no. 6 (2005): 925-953.

O'Connell, Mary Ellen. *The Power and Purpose of International Law: Insights from the Theory and Practice of Enforcement*. New York: Oxford University Press, 2008.

O'Kane, Mary. *Refugee and Asylum Seeker Issues in Australia*. Melbourne: Brotherhood of St Laurence, 2003.

Parker, Jill. "West Meets East: A Discussion of European Union Enlargement and Human Rights." *Tulsa Journal of Comparative and International Law* 11 (2004): 603-639.

Parliament of Australia. "Legislative attempts to reduce challenges to decisions under the Migration Act 1958." *Research Note no. 15 2004–05*. 26 August 2004.  
<http://www.aph.gov.au/library/pubs/rn/2004-05/05rn15.htm> (accessed 4 January 2012).

—. "Migration Legislation Amendment (Offshore Processing and Other Measures) Bill 2011." *Bills Digest no. 53*. 22 September 2011. <http://www.aph.gov.au/library/pubs/bd/2011-12/12bd053.htm> (accessed December 10, 2011).

—. "Report of Independent Assessor to Senate Select Committee on a Certain Maritime Incident." 21 August 2002.  
[http://www.aph.gov.au/senate/committee/maritime\\_incident\\_ctte/report/odgers.pdf](http://www.aph.gov.au/senate/committee/maritime_incident_ctte/report/odgers.pdf) (accessed December 20, 2011).

Pittaway, Eileen. "A brief history of refugee policy in Australia." *Centre for Refugee Research, University of New South Wales*. May 2002.  
[http://motspluriels.arts.uwa.edu.au/MP2102edito1\\_1.html](http://motspluriels.arts.uwa.edu.au/MP2102edito1_1.html) (accessed 18 December 2011).

*PLAINTIFF M70/2011 v MINISTER FOR IMMIGRATION AND CITIZENSHIP*. [2011] HCA 32 (High Court of Australia, 31 August 2011).

*Plaintiff M70/2011 v. Minister for Immigration and Citizenship; and Plaintiff M106 of 2011 v. Minister for Immigration and Citizenship*. HCA 32 (Australia High Court, 31 August 2011).

Raustiala, Kal and Anne-Marie Slaughter. "International Law, International Relations and Compliance." Chap. 28 in *The Handbook of International Relations*, edited by Walter Carlsnaes and Thomas Risse and Beth Simmons, 538-558. London: Sage Publications, 2002.

Reservations and Declarations to the 1967 Protocol Relating to the Status of Refugees. *United Nations Treaty Series. UNHCR. Vol.606. p.267*. (as of 1 April 2011).  
<http://www.unhcr.org/pages/49da0e466.html> (accessed 18 December 2011).

Risse, Thomas. "International Norms and Domestic Change: Arguing and Communicative Behaviour in the Human Rights Arena." *Politics and Society* 27, no. 4 (1999): 530.

Risse, Thomas. "Let's Argue: Communicative Action in World Politics." *International Organization* 54, no. 1 (2000): 1-39.

Rudd, Kevin. "Hard Heads, Soft Hearts: A Future Reform Agenda for the New Australian Government." *Progressive Governance Conference speech*, 4 April 2008: London.

Schloenhardt, Andreas. "Deterrence, Detention and Denial: Asylum Seekers in Australia." *University of Queensland Law Journal* 22 (2003): 54-73.

Shelton, Dinah, ed. *Commitment and Compliance: The Role of Non-Binding Norms in the International Legal System*. Oxford: Oxford University Press, 2000.

Simmons, Beth A. and Richard H. Steinberg, eds. *International Law and International Relations*. Cambridge University Press, 2006.

Simmons, Beth. *Mobilizing for Human Rights*. New York: Cambridge University Press, 2009.

Skulan, Catherine. "Australia's Mandatory Detention of "Unauthorized" Asylum Seekers: History, Politics and Analysis Under International Law." *Georgetown Immigration Law Journal* 21 (2006): 61-110.

Slaughter, Anne-Marie. "International Law in a World of Liberal States." *European Journal of International Law* 6, no. 4 (1995): 503-538.

Slaughter, Anne-Marie, Andrew S. Tulumello and Stephen Wood. "International Law and International Relations Theory: A New Generation of Interdisciplinary Scholarship." *American Journal of International Law* 92, no. 3 (1998): 367-397.

Taylor, Savitri. "From Border Control to Migration Management: The Case for a Paradigm Change in the Western Response to Transborder Population Movement." *Social Policy and Administration* 39, no. 6 (2005): 563-586.

The Migration Amendment (Excision from Migration Zone) (Consequential Provisions) Bill 2001.

The Migration Amendment (Excision from Migration Zone) Bill 2001. (Australia).

UN Committee on the Rights of the Child (CRC) . "List of issues concerning additional and updated information related to the consideration of the fourth periodic report of Australia (CRC/C/AUS/4)." 16 November 2011. <http://www.unhcr.org/refworld/docid/4ef1d7972.html> (accessed December 18, 2011).

UN High Commissioner for Refugees. *Note on Accession to International Instruments and the Detention of Refugees and Asylum-Seekers. Doc EC/SCP/44*. 19 August 1986.

—. *Note on International Protection (submitted by the High Commissioner). Doc. A/AC.96/713*. 15 August 1988.

—. *Note on International Protection (submitted by the High Commissioner). Doc. A/AC.96/1066*. 26 June 2009.

—. "Memorandum of Understanding between the Government of Australia, the Government of the Islamic Republic of Afghanistan and the United Nations High Commissioner for Refugees (UNHCR) on migration and humanitarian cooperation." 17 January 2011. <http://www.unhcr.org/refworld/docid/4d47db752.html> (accessed 23 November 2011).

—. "UNHCR Resettlement Handbook." July 2011. <http://www.unhcr.org/refworld/docid/4ecb973c2.html> (accessed 19 November 2011).

—. "UNHCR Resettlement Handbook, Country Chapter - Australia." July 2011.

<http://www.unhcr.org/refworld/docid/4ecb9bfc6.html> (accessed 28 November 2011).

UN Human Rights Council. "Compilation : [Universal Periodic Review] : Australia / prepared by the Office of the High Commissioner for Human Rights in accordance with paragraph 15 (b) of the annex to Human Rights Council resolution 5/1." *A/HRC/WG.6/10/AUS/2*. 15 November 2010.

<http://www.unhcr.org/refworld/docid/4d53bf772.html> (accessed 24 September 2011).

UN World Conference on Human Rights. "Vienna Declaration and Programme of Action." *A/Conf.157/23, Part I*, para.5. 1993.

UNHCR. "World Refugee Day: UNHCR report finds 80 per cent of world's refugees in developing countries." 20 June 2011. <http://www.unhcr.org/4dfb66ef9.html> (accessed December 10, 2011).

United Nations General Assembly. "Measures to Eliminate International Terrorism." *Resolution A/RES/49/60*. 16 January 1997.

—. "Convention Relating to the Status of Refugees." 28 July 1951.

<http://www2.ohchr.org/english/law/refugees.htm> (accessed September 10, 2011).

—. "National report submitted in accordance with paragraph 15 (a) of the annex to Human Rights Council resolution 5/1 Australia." *A/HRC/WG.6/10/AUS/1*. 5 November 2010.

—. "Report of the Working Group on the Universal Periodic Australia." *A/HRC/17/10/Add.1*. 31 May 2011.

—. "Report of the Working Group on the Universal Periodic Review Australia." *A/HRC/17/10*. 24 March 2011.

United Nations Office of the High Commissioner for Human Rights. "Universal Periodic Review." <http://www.ohchr.org/EN/HRBodies/UPR/Pages/UPRMain.aspx> (accessed 4 January 2012).

United Nations. "Vienna Convention on the Law of Treaties." 23 May 1969.

<http://www.unhcr.org/refworld/docid/3ae6b3a10.html> (accessed 19 November 2011).

United States Department of State. "2010 Country Reports on Human Rights Practices - Australia." April 8 2011. <http://www.unhcr.org/refworld/docid/4da56deac.html> (accessed November 23, 2001).

Universal Declaration of Human Rights. *United Nations Document A/RES/217*. 10 December 1948.

Vernon, Alan, interview by Zoe Daniel. "United Nations High Commission for Refugees." *Transcript*. PM - Australian Broadcasting Corporation. Sydney. 9 May 2011.

Wendt, Alexander. "Anarchy is What States Make of it: The Social Construction of Power Politics." *International Organisation* 46 (1993): 391-425.

Wendt, Alexander. "Constructing International Politics." *International Security* 20, no. 1 (1995): 71-81.

Wilkinson, Marian. "Whatever it Takes." *ABC Four Corners Program*. 16 August 2010.

[http://www.abc.net.au/4corners/special\\_ed/20100816/election/](http://www.abc.net.au/4corners/special_ed/20100816/election/) (accessed 20 December 2011).

Willard, Myra. *History of the White Australia Policy to 1920*. London: Frank Cass & Co, 1967.

Withana, Radhika. *Power, Politics, Law: International Law and State Behaviour During International Crises*. Leiden: Martinus Nijhoff Publishers, 2008.

York, Barry. "Australia and Refugees, 1901-2002: An Annotated Chronology Based on Official Sources." *Parliament of Australia*. 23 June 2003.

[http://www.aph.gov.au/library/pubs/online/Refugees\\_contents.htm](http://www.aph.gov.au/library/pubs/online/Refugees_contents.htm) (accessed 10 December 2011).

Young, Oran R. *Compliance and Public Authority: A Theory with International Applications*. Baltimore: John Hopkins University Press, 1979.

Zartner, Dana and Jennifer Ramos. "Human Rights as Reputation Builder: Compliance with the Convention Against Torture." *Human Rights Review* 12, no. 1 (2011): 71-92.