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# A Just and Sustainable Solution to the Boat People Predicament in Australia?

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# A Just and Sustainable Solution to the Boat People Predicament in Australia?

## **Abstract**

*Since the year 2000, there have been close to two thousand deaths of asylum seekers at sea as a result of foiled attempts to travel to Australia in order to seek protection under the United Nations Convention and Protocol on the Status of Refugees.[1] Many thousands more have made it to shore. Growing numbers of irregular or unauthorized migrants attempting to reach the United States and the European Union has long been known as a contentious policy issue in these states, but perhaps less known is the situation on the other side of the Pacific. Australia is the eight-largest recipient of asylum seekers in the industrialized world, receiving around 4% of the global applications for asylum, a relatively minimal amount considering that the state has the capacity to take on a much greater burden of the international refugee crisis.[2] In addition, the policies that are currently in place are primarily seeking to deter the arrival of 'boat people' and associated people smuggling activity, rather than to constructively manage the flow while upholding the individual rights of those seeking refuge under international law. This paper deconstructs the restrictive policies of the Australian government and proposes a more sustainable solution, drawing widely from research literature, government publications and media reports that use both primary and secondary sources to build a strong case for an alternative program. The policy that I found best balances the costs and benefits for both the asylum seekers in question as well as the Australian government is a combination of short-term onshore detention and community-based processing and integration. There is a robust debate in Australia over refugees and asylum policy, but in order for such a bill to be feasible in the Australian context, a major transformation of the public's attitude is essential.*

[1] The study sponsored by Monash University has compiled a database of border deaths, and has found that 1911 deaths have occurred at sea since 2000, how the true numbers are not known as there is no official government database that has been published. See: Macleod, Kenneth. "Deadly Voyages: Border Related Deaths Associated with Australia." SBS News. April 23, 2015, and "Australian Border Deaths Database." Monash University: The Border Crossing Observatory. October, 2014 and Bullock, Chris. "Asylum Seekers: Drowning on Our Watch." ABC Radio National. September 1, 2013.

[2] "Australia Asylum: Why Is It Controversial? - BBC News." BBC News. December 5, 2014.

## **Keywords**

International Relations, Immigration, Refugees, Asylum Seekers, Australia, Foreign Policy

## **Subject Categories**

International Humanitarian Law

*A JUST AND SUSTAINABLE SOLUTION  
TO THE BOAT PEOPLE PREDICAMENT IN AUSTRALIA?*

*by*

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*Durham, New Hampshire*

*May 10, 2015*

## Abstract

*Since the year 2000, there have been close to two thousand deaths of asylum seekers at sea as a result of foiled attempts to travel to Australia in order to seek protection under the United Nations Convention and Protocol on the Status of Refugees.<sup>1</sup> Many thousands more have made it to shore. Growing numbers of irregular or unauthorized migrants attempting to reach the United States and the European Union has long been known as a contentious policy issue in these states, but perhaps less known is the situation on the other side of the Pacific. Australia is the eight-largest recipient of asylum seekers in the industrialized world, receiving around 4% of the global applications for asylum, a relatively minimal amount considering that the state has the capacity to take on a much greater burden of the international refugee crisis.<sup>2</sup> In addition, the policies that are currently in place are primarily seeking to deter the arrival of ‘boat people’ and associated people smuggling activity, rather than to constructively manage the flow while upholding the individual rights of those seeking refuge under international law. This paper deconstructs the restrictive policies of the Australian government and proposes a more sustainable solution, drawing widely from research literature, government publications and media reports that use both primary and secondary sources to build a strong case for an alternative program. The policy that I found best balances the costs and benefits for both the asylum seekers in question as well as the Australian government is a combination of short-term onshore detention and community-based processing and integration. There is a robust debate in Australia over refugees and asylum policy, but in order for such a bill to be feasible in the Australian context, a major transformation of the public’s attitude is essential.*

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<sup>2</sup> "Australia Asylum: Why Is It Controversial? - BBC News." BBC News. December 5, 2014.

*For those who've come across the seas,  
We've boundless plains to share,  
With courage let us all combine,  
To advance Australia fair.*<sup>3</sup>

## **Part I: Introduction**

Australia is a multicultural nation of immigrants; close to 50% of the population were born overseas or at least one of their parents was a migrant to Australia.<sup>4</sup> In addition, recent studies show that more than 80% of the general population believes that this multiculturalism has been beneficial for Australia.<sup>5</sup> Considering these statistics, it may seem paradoxical that the Australian government takes such a hard stance against ‘boat people:’ asylum seekers who make a life-risking decision to travel to Australia in the hope that they will be granted refugee status and protection. The purpose of my thesis is to critically analyze the current package of policies related to boat people, the Refugee Status Determination (RSD) procedures particular to them and their resettlement, and to propose an alternative plan that is more appropriate to the ideal goals of the Australian government, as well as being sustainable in the long-term. I will do this by determining concrete goals, defining a set of clear objectives, and establishing evaluation criteria that function as prerequisites for any policy that is to provide a counter offer to what is currently in place. It must be noted that I am approaching this issue with the inclination that Australia is both legally and morally obliged to ensure that the rights of all refugees, regardless of their origin or mode of arrival, are upheld.

First, I will define *the situation* by describing the contextual backdrop to the current political debate, including a brief history of developments concerning boat people in Australia, and the critical factors of causality that underpin the situation both within Australia and externally. For the purposes of this paper, I will be focusing on the deep causes (the extenuating circumstances that are forcing people to seek refuge outside of their home country), the intermediate causes and the precipitating causes. By taking a closer look at these levels of causality, I can present a policy that will be more credible than if I had not taken the time to investigate what is driving the Australian government’s adoption of this particular brand of refugee policy.

To put the current situation in perspective, it is important to understand the origins of the refugee debate. Following the conclusion of the Second World War, the young United Nations was faced with the rapidly expanding number of people displaced by the War, many fearing persecution if they returned to their place of birth. This unprecedented movement of people en masse saw the member states of the UN come together in an effort to both define

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<sup>3</sup> Peter D. McCormick, “Advance Australia Fair,” © 1878 by the Commonwealth of Australia.

<sup>4</sup> “Reflecting a Nation: Stories from the 2011 Census, 2012–2013.” Australian Bureau of Statistics. 2013

<sup>5</sup> Prof. Andrew Markus “Mapping Social Cohesion: The Scanlon Foundation Surveys 2014.” Monash University, 2014.

the issue and create an international framework for managing it. The result was the 1951 United Nations Refugee Convention, which outlines the definition of a refugee, as well as the responsibilities of host states regarding the treatment of asylum seekers and refugees. The Convention states that a refugee is someone who, *"owing to a 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 to, or owing to such fear, is unwilling to avail himself of the protection of that country."*<sup>6</sup> An Asylum Seeker, in contrast, is a person who claims to be a need protection under the Refugee Convention, but whose status has not yet been determined as meeting the criteria stated above.

The Convention is just one part of a large body of international law related to human rights in general, and the rights pertaining to asylum seekers and refugees in particular. Australia has ratified both the Convention and the 1967 Protocol that amended it; therefore, the obligations that are designed to constrain the government as a result of UN membership and ratification of these documents should be acknowledged when considering the debate over refugee policy. While Australia's approach to people seeking asylum has a diverse track record, the last several decades has witnessed a significant tightening of the measures in place, as well as a hardening attitude toward boat people in particular.<sup>7</sup> Since the early 1970s, when the White Australia Policy was abolished and Vietnamese refugees began arriving on Australia's shores, there has been a steady increase in the number of asylum seekers travelling by boat from South East Asia and Indonesia in order to claim protection under the Refugee Convention. Ideally, the Australian government would respond to these flows of people in a manner that is consistent with their reputation as a Western liberal democracy, by upholding the principles and laws that are fundamental to the legitimacy of the international system as it exists today.

The specific group with which I am concerned for the purpose of this thesis consists of the asylum seekers who arrive by boat, labeled Irregular Maritime Arrivals (IMAs) by the Australian government, who are generally found to be legitimate refugees but who, under the current provisions of the policy, are not being afforded due process nor are they being resettled within Australia. I will go into more detail regarding the specifics of the current policy in Part III, but in my opinion, it is essential that the government responsible for processing the claims of asylum seekers who arrive within its borders, regardless of the mode of transportation involved, are equally obliged to provide a fair assessment. This complies

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<sup>6</sup> "Convention Relating to the Status of Refugees." United Nations Human Rights. July 28, 1951.

<sup>7</sup> Australia's Migration Act 1958, instated just four years following the ratification of the refugee convention "requires people who are not Australian citizens and do not hold a valid visa to be detained. Unless they are given legal permission to remain in Australia by being granted a visa, such unlawful non-citizens must be removed from Australia as soon as reasonably practicable..." Then in 1989, the Hawke government sponsored the Migration Legislation Amendment Act which included mandatory deportation of "illegal entrants" and the recovery of funds from asylum seekers to pay for the costs of their detention and deportation. Detainees were also denied access to bail, and there was no limit to the length of their detention. When asylum was not granted, asylum seekers were removed. Other key legislation was introduced by the Keating government in the early 1990s, such as mandatory detention for "unlawful immigrants" and the 2001 Border Protection Bill initiated by PM Howard, which allowed the government to remove any ship in Australia's territorial waters.

with the requirements dictated by the Convention, as will be discussed further. In principle, those responsible for developing the policy in question would adhere to the directives of the Convention in full.

Before I continue, it is imperative that I lay out the specific policy goals I have devised, which will drive the following analysis and policy proposal. The primary goal of the Australian government should be as follows:

*Irregular Maritime Arrivals are processed in accordance with our obligations to international law regarding refugees and human rights, and those found to be legitimate refugees are permanently resettled in Australia.*

While I do believe that Australia has a moral obligation to ensure humane and just treatment of the asylum seekers that attempt to make Australia home, most compelling is the legal requirement for doing so. I have also established a secondary goal that is relevant to this paper, but will not be fully addressed by my policy initiative:

*A regionally-agreed approach combating illegal people smuggling activity is established, thus reducing the strain that thousands of boat arrivals place on the Australian government, as well as decreasing the human risk involved in treacherous boat journeys (see Deep Cause-2 below)<sup>8</sup>.*

The principle purpose of this paper is to raise the issues inherent to the refugee status determination procedure currently in place and put forward an alternative option that is better suited to meeting the primary goal as outlined above. However, the secondary goal must be addressed at some point in the near future in order for domestic policy changes to make a significant impact on the complex regional nature of the issue. Although governments are often compelled to prioritize particular goals over others for a number of reasons, I argue that the Australians are taking a short-term approach that is successful in securing their borders, yet is undermining political longevity and sustainability, their credibility as a responsible member of the international community, and the basic human rights of thousands of asylum seekers. Ultimately I believe like James Souter that “durable solutions can act as forms of reparation for the unjust harms of displacement,” but what composes a durable solution, and for whom are we repairing the unjust harms?<sup>9</sup>

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<sup>8</sup> For example, a “Regional Deterrence Framework was initially proposed as part of Operation Sovereign Borders, and was set to include a communications campaign, or “village watch,” a boat buy-back scheme, and an intelligence arm to intervene with the people smuggling operations in Indonesia. While there are certainly faults with the policy, this is a starting place for increased cooperation in the Asian-Pacific region.

From: Rosanna Ryan, "Tony Abbott, Scott Morrison Announce New 'Regional Deterrence Framework' to Stop Asylum Seekers." ABC News. August 23, 2013.

<sup>9</sup> James Souter, "Durable Solutions as Reparation for the Unjust Harms of Displacement: Who Owes What to Refugees?" *Journal of Refugee Studies* 27, no. 2 (2013): 171-90.

**Part II: The Problem – Levels of Causality**

Each year, the Australian government’s Department of Immigration and Border Protection (DIBP) accepts a predetermined number of asylum seekers who either apply for refugee status once they have arrived (with a valid visa) or apply from abroad as part of the Humanitarian Program. Individuals in the latter category have often been identified as being in need of resettlement by the UNHCR. While these numbers have increased somewhat in recent years,<sup>10</sup> the formulated annual quota is still well below meeting the need, considering that there are over 15 million refugees worldwide, but is in line with the relative intakes of the United States and Canada.<sup>11</sup> Europe, on the other hand, faces a dramatically more complicated situation. The geopolitical location of the European continent lends itself to a high rate of refugee applications and boat arrivals; the EU received close to a quarter of a million applications for resettlement in 2014 alone, and Italy was faced with upwards of 85,000 boat arrivals by August of that year.<sup>12</sup> The European Union cannot afford the luxury of being selective in their refugee policies, and while Australia has the advantage of being a relatively isolated continent with no land borders, it is not absolved of its responsibilities to the global refugee problem, including managing IMAs sufficiently.

Since 1976, the number of asylum seekers arriving by boat has regularly increased, with the most notable spikes being recorded between 1991-2001 and 2009-2013. These highs correlate to the period directly prior to the establishment of the Pacific Solution by Prime Minister John Howard, and following its dismantling upon the election of Kevin Rudd in 2007.

**Table 2.1: Number of Boats and People arriving in Australia 1989-2013<sup>13</sup>**

<i>Year</i>	<i>Number of Boats</i>	<i>Number of People (excludes crew)</i>
1989	1	26
1990	2	198

<sup>10</sup> Between 2008 and 2012, Australia accepted approximately 13,000 refugees as part of the Humanitarian Programme, which was increased significantly to 20,000 in 2013. 20% of those accepted were of Iraqi origin, with Afghanistan and Myanmar being the two countries with the next highest number of applicants. This increased intake may be a response to the similarly raised number of applications; in 2012–13, a total of 50 444 people lodged applications under the offshore programme component compared with 42 928 in 2011–12. From "Fact Sheet 60 – Australia’s Refugee and Humanitarian Programme." Australian Government: Department of Immigration and Border Protection. August 7, 2014.

<sup>11</sup> The United States accepts over 80,000 refugee and asylum applicants every year, an almost statistically insignificant number given the population of 318 million people, while Canada grants resettlement to approximately 10,000 refugees each year. Sources: Lara, Burt, and Batalova Jeanne. "Refugees and Asylees in the United States." Migration Policy Institute, February 3, 2014 and "The Refugee System in Canada," Government of Canada, Citizenship and Immigration Canada, Communications Branch. June 17, 2014.

<sup>12</sup> 2015 UNHCR Subregional Operations Profile - Northern, Western, Central and Southern Europe." UNHCR.

<sup>13</sup> Source: Phillips, Janet. "Boat Arrivals in Australia: A Quick Guide to the Statistics." *Parliamentary Library: Research Paper Series 2013-14*, 2014.



1991	6	214
1992	6	216
1993	3	81
1994	18	953
1995	7	237
1996	19	660
1997	11	339
1998	17	200
1999	86	3721
2000	51	2939
2001 <sup>14</sup>	43	5516
2002	1	1
2003	1	53
2004	1	15
2005	4	11
2006	6	60
2007	5	148
2008	7	161
2009 <sup>15</sup>	60	2276
2010	134	6555
2011	69	4565
2012	278	17204
2013	300	20587
2014 (to July 17) <sup>16</sup>	0	0

<sup>14</sup> This year marked the greatest number of boat arrivals thus far, and was also a political turning point due to the Tampa incident (See footnote 18).

<sup>15</sup> We can see the marked difference that the dismantling of the Pacific Solution made on boat arrivals in 2008 had on the numbers of the subsequent years.

<sup>16</sup> This rapid decrease (or complete elimination) of boat arrivals suggests that Rudd’s reinstatement of the Pacific Solution has achieved its goal of “stopping the boats” yet the absence of any recorded arrivals does not

There have been several key turning points in the evolution of today’s policy, which encompasses a former policy under Howard known as the Pacific Solution and the Abbott-government invention called Operation Sovereign Borders (OSB). The Pacific Solution was a reaction to the rapidly increasing numbers of IMAs in the late 1990s, primarily from Iraq and Afghanistan. The key features of the Pacific Solution that survive today are as follows: the Australian government has the power to remove any ship in its territorial borders, with no asylum applications able to be made on board, the excision of several islands from Australia’s migration zone, and an agreement with Nauru to host a Regional Processing Center (RPC) in exchange for development aid.<sup>17</sup> A triggering event for the development of the measures in practice today was the Tampa incident of 2001.<sup>18</sup> Following this drawn-out debacle, John Howard stated “We decide who comes into this country and the circumstances in which they come,” echoing the sentiments of former Prime Minister Bob Hawke, who in passing the 1989 Migration Amendment Act that tightened the constraints on would-be refugees, said “Bob is not your uncle.”<sup>19</sup> This policy, although widely criticized by refugee advocates internal and external to Australia, remained in place until it was removed on an election promise of Labor Party candidate to the 2007 Australian Federal Election, Kevin Rudd. In an astonishing about-face, Rudd returned to the top job in 2013 only to reinstate the Pacific Solution in its entirety, in order to combat the increasing instances of boat arrivals that were verging on out of control (see Table 2.1).

If the policy alternative I propose to be deemed credible, it is necessary to confront the critical causes driving the pipeline of boat people as well as the Australian government’s restrictive response. To effectively deal with the various factors involved, a method of causality must be applied; in this case, I will categorize causes based on whether they are deep, intermediate or precipitating.<sup>20</sup>

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mean that there has not been any attempted sea voyages made by asylum seekers, especially as one of the key measures of Operation Sovereign Borders is interdiction-at-sea. See: "Asylum Seekers Still Trying to Reach Australia, Says Head of Operation Sovereign Borders." ABC News. January 28, 2015.

<sup>17</sup> Nathan Hancock, "Border Protection Bill 2001." Parliament of Australia. August 29, 2001 and various Migration Legislation Amendments 2001-2. See: "Bills Digests Alphabetical Index 2001-02." Parliament of Australia. 2002.

<sup>18</sup> In August 2001, MV Tampa, a Norwegian tanker ship came across a sinking fishing vessel, just outside Australian waters, that held over 400 asylum seekers from the Middle East, primarily Afghanistan. With the situation becoming desperate, the Captain brought the asylum seekers onboard. After a standoff lasting several days, the Australian government, under PM Howard, denied the ship entry to Australia, and those onboard were taken to camps in Papua New Guinea.

See Rebecca Hamlin, “Let Me Be a Refugee: Administrative Justice and the Politics of Asylum in United States, Canada, and Australia” New York: Oxford University Press, 2014, 55 and Peter D. Fox, “International Asylum and Boat People: The Tampa Affair and Australia’s “Pacific Solution”, 25 Md. J. Int’l L. 356 (2010).

<sup>19</sup> Hamlin, “Let Me Be a Refugee,” 53-55

<sup>20</sup> As cited by Ingram in “A Useful Way to Think about Causation” from Joseph Nye, Understanding International Conflict: An Introduction to Theory and History, (NY: Longman, 2000), p. 70.

Deep causes are those that are remote in time but necessary, intermediate are also necessary but recent in time and precipitating are causes that are directly linked to the event, and can be necessary or sufficient.

*Deep Causes – The Pipeline*

**1. The Instability of the Nation-State:**

Significant research has been conducted on the root causes for mass movements of people who leave their country in search of a new home, due to fear or persecution. One such study was done by Charles Keely, a Professor of International Migration, at Georgetown University, who arrived at three founding problems that compel citizens to flee the state. He states that refugee flows are created when there is multinational conflict, revolution, or state failure, none of which are mutually exclusive.<sup>21</sup> If we are to specifically look at the case of Australia and the sources of asylum seekers, multinational conflict and revolution was driving people out of Vietnam and Cambodia and into refugee channels to Australia during the latter part of the 20<sup>th</sup> Century. In the period of 1976-81 which Katherine Betts labels the first wave of boat people, over 2,000 Vietnamese asylum seekers arrived on the coast of Australia and refugee status and residency were granted almost immediately.<sup>22</sup> The second wave yielded much greater numbers; between 1991 and 2001, over 12,000 asylum seekers took a sea route, primarily originating from Iraq and Afghanistan.<sup>23</sup> State failure is the most relevant factor when considering what is pushing this particular stream of refugees; authoritarian rule, corruption, sectarian violence, and human rights abuses have become almost endemic in this region. Recently, intrastate conflict in Syria, and continued instability in Iraq, Afghanistan and parts of Africa such as Somalia and Sudan, is driving the high numbers of asylum seekers applying for protection.

From the perspective of the Australian government, this deep cause is a transnational issue that is largely beyond their control. The internal conditions of other states and their driving of people elsewhere are not within the jurisdiction of the Australians, however the effects of conflict and state failure can be somewhat mitigated by aid packages and collaboration within multilateral institutions such as the United Nations. It is unlikely that the worldwide refugee problem will be alleviated in the near future; in fact, it is growing exponentially dire in the current climate of international relations.<sup>24</sup> With this in mind, it is of utmost importance that Australia does not back away from its commitment to the global community, and take feasible actions within their control that contribute to a sustainable solution.

**2. International crime networks and people smugglers:**

As the numbers of people attempting to reach Australia by boat climbed into the thousands, it became clear that people smuggling – illegal under international law and defined by the United Nations as “the procurement, in order to obtain, directly or indirectly, a

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<sup>21</sup> Charles Keely, "How Nation-States Create and Respond to Refugee Flows." *International Migration Review* 30, no. 4 (2006): 1046-066. A state may fail due to war and its consequences, the removal of external supports, corruption, and natural disaster.

<sup>22</sup> Katharine Betts. "Boat People and Public Opinion in Australia." *People and Place* 9, no. 4

<sup>23</sup> Ibid

<sup>24</sup> "Global Issues at the United Nations: Refugees – the Numbers," UN News Center. 2015.

financial or other material benefit, of the illegal entry of a person into a State Party of which the person is not a national or a permanent resident” – was involved.<sup>25</sup> The Protocol asks that governments criminalize people smuggling and instate penalties for such activity, yet the definition quite clearly states that there must be a financial or material benefit involved in order to qualify assistance for illicit entry into a state as people smuggling. Thus if conduct that would otherwise fall into the category above is driven by humanitarian motivations, it does not fall under the criminal offense of people smuggling. This is important to note in the Australian context, which I will elaborate upon further. The Australian government passed the Anti-People Smuggling and Other Measures Act in 2010 which “makes it an offence for a person (the first person) to organize or facilitate the bringing or coming to Australia, or the entry or proposed entry into Australia, of another person (the second person), where that second person is a non-citizen of Australia, and where the second person had, or has, no lawful right to come to Australia,” a law that has had limited reach thus far.<sup>26</sup>

The primary departure point for boats to Australia that have been coordinated by people smugglers is Indonesia, due in part to its relatively lenient visa laws and frequent corruption amongst government officials, although Malaysia, Vietnam, Sri Lanka, and even China have been locations from which asylum seekers have traveled by sea in the past. Until 2011, people smuggling was not a criminal offense in Indonesia, yet with the passage of the Law on Immigration that year, penalties for people smuggling were put in place and dozens of convictions were handed down within the first year.<sup>27</sup> Despite this early apparent success, the effectiveness in the long-term of this approach is questionable, as Indonesian authorities are convicting people that are primarily involved with the lower levels of the “business,” usually opportunistic fishermen who can be easily replaced. This brings me to an important part of the people smuggling discussion; the idea that there is a structure to the network of illicit activity that can be targeted and broken down.

In recent years, especially in the context of the renewed Pacific Solution, Australian politicians have repeatedly referred to the “business model” of the people smugglers, yet what this entails precisely has been sparsely articulated. A report on the subject, conducted by the Australian Parliament in 2013, has found that there is in fact, no one single model for people smuggling. Drawing on both international and Australian research, the report found that far from a highly structured or hierarchical international criminal network, people smuggling is a decentralized and flexible system, comprised of many smaller units that have no clear relation to one another, aside from occasional collaboration on an individual basis.<sup>28</sup> The paper notes that this loose network could perhaps be labeled an ‘enterprise model,’ which has the advantage of being highly flexible and adaptable in the face of change and difficult to eradicate because each ‘unit’ is so replaceable.

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<sup>25</sup> The United Nations “Protocol against the Smuggling of Migrants by Land, Sea and Air” November 15, 2000, as cited in Barker, Cat, “The People Smugglers' Business Model.” *Parliament of Australia: Foreign Affairs, Defence and Security Section*, no. Research Paper No. 2 2012-13 (2013).

<sup>26</sup> “People Smuggling Legislation.” Australian Government: Attorney General's Department. 2010.

<sup>27</sup> Missbach, Antje. “Prosecuting People Smugglers in Indonesia.” *The Conversation*. September 17, 2013.

<sup>28</sup> Barker, Cat. “The People Smugglers' Business Model,” 2013.

The larger point here is that due to the diversity in location, methodology (air as well as sea routes), the level of structure, in addition to the key motivations behind the “business,” there is no single identifiable model which can be combated by any given policy. Furthermore, despite the emphasis placed on people smuggling in the debate on boat people, there has been very limited research conducted on the topic in the Australian context. Since the protocol came into effect in 2004, there have been relatively few convictions of people involved in people smuggling in Australia and of those convicted, most were noted as filling a ‘transporter’ role; assisting the physical travel of the asylum seekers concerned, rather than holding broader organizational roles. Important to take into consideration is that several convictions have actually been overturned on the grounds that the “people smugglers” in question, were not acting for material gain. Rather, in some specific cases, those involved were actually asylum seekers themselves, or were attempting to facilitate the arrival of their families to Australia.<sup>29</sup> The case of one man has even led to him being labeled the “Schindler of Asia.”<sup>30</sup>

However, there are quite clearly many individuals and groups profiting from their people smuggling operations. Prices vary greatly, but the Australian Parliament found that IMAs paid between \$4,900 and \$15,700 for their journey to Australia in 2009-10.<sup>31</sup> As already mentioned, people smuggling occurs via airplanes in addition to sea voyages, and taking the air route is drastically more costly as travel documents need to be forged that grant entry into Australia. This is where a clear distinction can be made between the methodologies of people smuggling and asylum seeking; taking a boat with a large number of others to Australia is quite clearly an overt act, with little or no intention of entering the country unnoticed, whereas traveling alone and perhaps blending in with fellow airline passengers is a covert attempt to bypass Australia’s borders. Interestingly, this distinction has been seemingly ignored by Australian government officials and media outlets.

Moreover, as Table 2.2 and 2.3 demonstrate below, the vast majority of boat people are in fact assessed to be legitimate refugees under the UN Convention, while the refugee status grant rate for plane arrivals is generally less than fifty percent.<sup>32</sup> These statistics beg the question; why is there an emphasis on criminal people smuggling in the context of boat people when those enlisting the services of people smugglers have genuine claims to protection?

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<sup>29</sup> One of the examples cited in the Australian Parliament report: “Mr. Al-Hashimy (a facilitator) became involved in people smuggling in Malaysia while en route to Australia from Iran—he and his family came to Australia on the boat to which his conviction relates and the rest of his family were granted protection visas.”

<sup>30</sup> Haigh, Bruce. "People Smuggler or the Schindler of Asia?" ABC News: The Drum. May 6, 2012.

<sup>31</sup> Barker, Cat. "The People Smugglers' Business Model," 2013.

<sup>32</sup> Statistics on Asylum Seekers Arriving in Australia." Refugee Council of Australia. February, 2014.

**Table 2.2: Final grant rate (plane arrivals) 2006-07 to 2012-13<sup>33</sup>**

<i>Year</i>	<i>Grants</i>	<i>Refusals</i>	<i>Total decisions</i>	<i>Grant rate</i>
2006-07	1,692	2,651	4,343	39.0%
2007-08	1,898	2,107	4,005	47.4%
2008-09	2,173	2,616	4,789	45.4%
2009-10	2,364	2,266	4,630	51.1%
2010-11	2,099	2,737	4,836	43.4%
2011-12	2,272	2,826	5,100	44.6%
2012-13	2,555	2,719	5,274	48.4%

**Table 2.3: Final grant rate (boat arrivals) 2008-09 to 2012-13**

<i>Year</i>	<i>Grants</i>	<i>Refusals</i>	<i>Total decisions</i>	<i>Grant rate</i>
2008-09	209	0	209	100%
2009-10	2,152	26	2,178	98.8%
2010-11	2,721	134	2,855	95.3%
2011-12	4,766	454	5,220	91.3%
2012-13	4,949	675	5,624	88.0%

This question will be best answered when I discuss the role of the media and Australian public opinion in the policymaking process. This brief discussion of people smuggling does, however, highlight a number of complexities for managing the pipeline of asylum seekers arriving by boat. Due to the tangle of variables, there is no clear-cut solution to managing this issue. While I agree with the Australian Parliament when they argue that “striking an appropriate balance between meeting the needs of people seeking protection and maintaining control of national borders is...a challenging proposition,” I do not concur that threatening legitimate refugees with offshore resettlement and turning back boats in Australian waters is sustainable, nor does it fulfill our obligations under international law.<sup>34</sup>

<sup>33</sup> Statistics on Asylum Seekers Arriving in Australia." Refugee Council of Australia. February, 2014.

<sup>34</sup> Cat Barker, “The People Smugglers' Business Model,” 2013.

*Intermediate Causes*

**1. Lack in bureaucratic consistency or administrative justice:**

The system that oversees applications for refugee status is made up of two bodies – the Refugee Review Tribunal (RRT) and the Migration Review Tribunal (MRT) – the first of which is responsible for protection visas which have otherwise been relevant to Irregular Maritime Arrivals. The procedure prior to the changes brought about by the Parliament in 2013 and 2014 was as follows; the applicant had their claim assessed by the Department of Immigration and Border Protection, and if rejected, would have the right to appeal the decision at the RRT; submitting the appropriate documents and having the case heard in a formal interview, with or without a lawyer, with the help of an interpreter if necessary. While the RRT is an independent statutory body whose goal is to ensure that the review process is “independent, fair, just, economical, informal and quick” on paper, issues have been raised regarding the relationship between the Department – the first port of call for applications – and the RRT.<sup>35</sup> Rebecca Hamlin contends that the RSD system is characterized “by a politically charged, high-profile interbranch dispute,” as a result of the conflict between a government agency led by the Minister for Immigration who has clear political objectives, and an affiliate body concerned primarily with determining the legal status of asylum seekers.<sup>36</sup> Whether or not there is a significant conflict of interest at hand requires more investigation, but in terms of ensuring due process as mandated under the Refugee Convention (Chapter II, Article 16), it is particularly concerning that most cases were not given a hearing and decisions were made in what could be labeled a subjective manner.

The changes brought in by the Maritime Powers Legislation Amendment (Resolving the Asylum Legacy Caseload Bill) in 2014 only further constrain due process for boat arrivals. The Bill was intended to expedite the assessment of a backlog of some 30,000 boat arrivals that date from August 2012 to December 2013, prior to the reinstatement of the Pacific Solution.<sup>37</sup> As before, DIBP is responsible for the initial assessment of refugee status, with rejections being “fast tracked” for review by an Independent Assessment Authority (IAA), whose decision will be made without any further information or an interview unless called for by “exceptional circumstances.”<sup>38</sup> There are several issues with conducting RSD in this manner; the first is that the applicant is placed at a severe disadvantage if their documents do not represent their claim adequately due to difficulties with English, a misunderstanding of the requirements, a lack of access to legal aid or advice, or a mental or physical illness prevents the applicant from completing the application fully. Second, the asylum seeker is deprived of an opportunity to tell their story in a formal interview setting at the RRT, and third, this process does not allow a thorough investigation into the applicant’s claim, with potentially serious repercussions if the asylum seeker is returned to their country.

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<sup>35</sup> "Our Role and Services." Australian Government: Migration Review Tribunal – Refugee Review Tribunal, 2014.

<sup>36</sup> Hamlin, “Let Me Be a Refugee,” 102

<sup>37</sup> Kenny, Mary Anne. "'Fast Track' Asylum Processing Risks Fairness for Efficiency." *The Conversation*. December 7, 2014.

<sup>38</sup> Ibid

Since midway through 2013, all arrivals of people “circumventing regular migration arrangements” anywhere in Australia are transferred to Offshore Processing Centers in Nauru and Papua New Guinea, as per Regional Resettlement Arrangements and Memorandums of Understandings with the respective countries.<sup>39</sup> The only exception is if the Minister for Immigration decides to use his or her discretionary power to allow an individual to remain in Australia to undergo processing. Therefore, the administrative procedure for assessing refugee status for IMAs is currently governed by the laws of these third-party states. The sole condition that the Australian government asked of Nauru and PNG is that those determined to be refugees will ultimately be settled in the third country and treated in accordance to the obligations of the Refugee Convention.<sup>40</sup> Whether or not this is being upheld is contestable, as will be discussed in Part III, yet in a bureaucratic sense there is a clear disunion of what is expected of Australia regarding the administrative processing of refugees and the practical nature of the issue. Concerning boat people, the question must be raised as to whether justice is a driving objective of the RSD system, yet one thing is certain; these regulatory policies are undermining the development of a program for determining refugee status and protecting those found to meet the requirements, as called for by international law.

## **2. The Media and Public Opinion:**

The heated public debate regarding boat people in Australia is multifaceted in that there are several intertwining factors contributing to a tough general perception of refugees and IMAs in particular. First, xenophobic attitudes are characterizing perceptions regarding this particular group of asylum seekers. As already mentioned, the vast majority of boat people that arrived by boat since the late 1990s have been of Middle Eastern origin. In a 2014 report by the Scanlon Foundation on social cohesion, 25% of those polled had a negative feeling towards Muslims (compared to less than 5% polled who had negative sentiments towards people of Christian or Buddhist faith).<sup>41</sup> Some observers even go as far as to say that when Iraqis and Afghans began arriving, “the idea of the refugee began to be transformed in Australian public consciousness from a human being worthy of compassion into a human being deserving only our contempt.”<sup>42</sup> To the extent that xenophobic or racist attitudes are consciously driving the harshening of political objectives is unclear, yet is certainly an underlying trend that should be accounted for.

Second, but along similar lines is the fear for the loss of Australian identity. What exactly defines the Australian identity is contestable considering the distinctly multicultural essence of Australian society, yet the Scanlon report found that in the space of a few months from June to October 2014, the percentage that agreed that “maintaining the Australian way

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<sup>39</sup> “Memorandum of Understanding between the Government of the Independent State of Papua New Guinea and the Government of Australia, Relating to the Transfer To, and Assessment and Settlement In, Papua New Guinea of Certain Persons, and Related Issues.” Australian Government: Department of Foreign Affairs and Trade. September 6, 2013.

<sup>40</sup> Ibid

<sup>41</sup> Andrew Markus, "Continuity and Change: Australian Opinion in a Time of Stress and Fear." The Conversation. October 28, 2014.

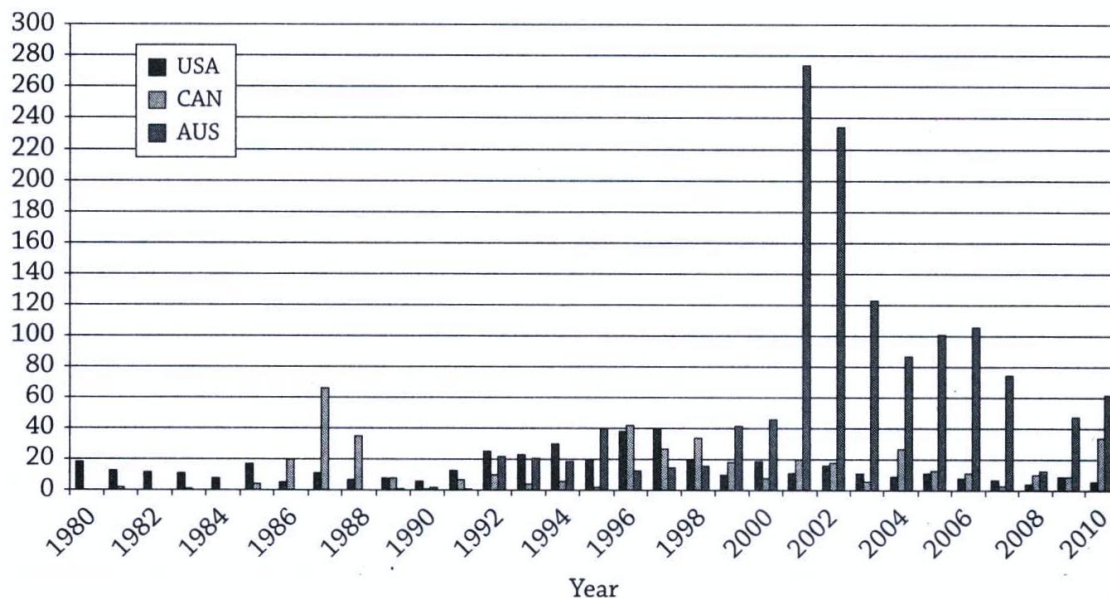
<sup>42</sup> Katharine Betts, "Boat People and Public Opinion in Australia." *People and Place* 9, no. 4 (2001): 44.



of life is important” jumped from 49% to 71%<sup>43</sup> There is a noted concern that the influx of “outsiders” will disrupt the Australian “way of life,” and I believe this has much to do with the portrayal of boat people by the media. A study conducted by the University of Melbourne and Oxford University agrees with this notion, suggesting that “national anxiety drives the populist backlash against boat people.”<sup>44</sup>

A distinctive feature of the Australian political landscape that sets it apart from other states in relation to this particular issue is the high frequency of media coverage on boat people. The figure below is a representation of the relative coverage of Australian, American and Canadian media outlets on asylum policy, between 1980 and 2010.

**Figure 2.1: Media Coverage of Asylum Policy in the United States, Australia, and Canada (by Articles per Year).<sup>45</sup>**



Note: This graph was borrowed from Rebecca Hamlin, “Let Me Be a Refugee: Administrative Justice and the Politics of Asylum in United States, Canada, and Australia” New York: Oxford University Press, 2014, 36. The data used to compile this graph was collected from various sources by the author.

The exorbitant level of media attention that is placed on this phenomenon – seen between 2001 and 2007 in particular – relative to other political issues is heightening the sense of invasion felt by the average Australian, a sentiment that may not be well-founded. Some of the news coverage that is given to IMAs has created various misconceptions, even myths about the issue, related to the number of applications Australia receives, the quantity of

<sup>43</sup> Markus, "Mapping Social Cohesion: The Scanlon Foundation Surveys 2014," Monash University.

There is a likely correlation with the emergence of ISIS and the Australian media’s critical portrayal of Islamic extremism.

<sup>44</sup> McKenzie, Jaffa, and Reza Hasmath. "Deterring the ‘Boat People’: Explaining the Australian Government’s People Swap Response to Asylum Seekers." *Australian Journal of Political Science* 48, no. 4 (2013): 417-30.

<sup>45</sup> Hamlin, “Let Me Be a Refugee,” 36.

boat arrivals, and the supposed illegality of their actions.<sup>46</sup> The Scanlon report found that most Australians are unaware of the actual numbers of arrivals but like Hamlin argues, the media provides a “striking visual representation of a loss of border control.”<sup>47</sup>

Firmly related to both media saturation and domestic politics, the trend in public opinion toward boat people has shown a steady hardening since the first arrivals in the 1970s, when approximately sixty percent of those polled said that a ‘limited number’ of boat arrivals should be allowed to stay, while close to a quarter wanted to ‘stop them from staying here,’ according to Betts.<sup>48</sup> In both the research conducted in the 1970s and more recently, it is noted that people who have attained higher education, especially those who have graduated from university, are more receptive to an approach that allows asylum seekers to be resettled in Australia. On the other hand, those who had achieved a secondary level of education or lower were more restrictive in their opinions. Yet the overall attitude began to evolve and when polling was conducted following the Tampa affair in 2001, the vast majority of people not only approved of the Government’s actions but supported mandatory detention for all boat arrivals.<sup>49</sup> More recently, a poll conducted by UMR research found that sixty percent of Australians were in support of harsher treatment for boat arrivals, and 59 percent of people stated that boat people are not refugees, despite the evidence proving otherwise (see Table 2.3 above).<sup>50</sup> This vast contrast between the general opinion of the Australian public, and the veritable facts about boat people, seem to suggest that there is a cycle of misinformation in the Australian media that is penetrating the Australian Government and their political choices.

Boatloads of people arriving on Australian shores, unannounced, are indeed a very visible breach of Australian border security and by extension the nation’s sovereignty, much more so than the individuals slipping in unnoticed through airport gates. The Australian media has coupled images of desperate asylum seekers arriving on often dilapidated vessels in large groups with news coverage of a “war” against people smuggling activity and the “illegal entry” of asylum seekers or “economic migrants.”<sup>51</sup> The government has in turn used the narrative of criminality and aggressive language to justify their policy objectives such as excluding Christmas Island and other Australian territories from the migration zone, turning

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<sup>46</sup>Sutton, Candace. "Ten Myths around Asylum Seekers Arriving on Boats in Australian Waters." News.com.au. July 8, 2013.

<sup>47</sup> Hamlin, “Let Me Be a Refugee,” 36

<sup>48</sup> Betts, "Boat People and Public Opinion in Australia," 40

<sup>49</sup> Ibid 41-42

<sup>50</sup> Dorsing, Philip. "Australians Want Boat Arrivals Treated More Harshly: Poll." The Sydney Morning Herald. January 8, 2014. In fact, 99 percent of those arriving from Afghanistan during Kevin Rudd’s leadership were assessed as legitimate and granted protection visas.

<sup>51</sup> For example, "Editorial: Asylum Should Save Lives – Not Lifestyles." The Courier Mail. July 29, 2014 uses terminology such as “queue-jumpers,” “economic migration” and suggests that the current groups of asylum seekers are not legitimate, and that they are wasting Australia’s resources. In addition, the following column, which is widely-read by Australians – Andrew Bolt, "Never Mind the Drowned Boat People. Would Have Died Anyway" The Herald Sun. February 15, 2015 – not only claims that boat people do not have credible claims to refugee status, but that they could “go to Europe instead,” demonstrating the lack of understanding in the general media and public about the complexities of the issue.

the boats around, instituting mandatory detention for all boat arrivals regardless of their claims, and installing the Immigration Minister with the executive power to make the final decision on asylum applications.<sup>52</sup>

Professor Sharon Pickering of Monash University stated the underlying issue well when she said:

“There are a whole host of interlacing factors that have led us to believe this problem is unique to Australia...Being a geographically isolated island nation and the idea we are being invaded certainly feeds it. As does the fact that we have no strong human-rights discourse. We fill that void with law-and-order politics that frames the debate around illegal refugees and a helpless sovereign state.”<sup>53</sup>

### *Precipitating Causes*

#### **1. Domestic and electoral politics:**

The representative parliamentary nature of Australian politics lends politicians to be judged by their ability to deal with an issue effectively, in this case an extremely polarizing one. Despite the concerns of humanitarian advocacy agencies and intergovernmental organizations like the UN, the Australian government has in recent years proven to be more responsive to the border security rhetoric and anti-immigration fears of certain parts of the Australian socio-economic strata than the welfare of asylum seekers, international law, or their reputation abroad. This behavior is not going unnoticed: 78% of those surveyed in a July 2012 poll said that the politicians were “just playing politics” and were not genuinely concerned about the welfare of asylum seekers.<sup>54</sup> Yet recent public opinion polls indicate that there is nevertheless considerable public support for the policy of turning back the boats, with a 61% approval rating being measured by one poll.<sup>55</sup> Nonetheless, the issue of boat people has been decisive in the last several years; the last four Prime Ministers – John Howard, Kevin Rudd, Julia Gillard, and Tony Abbott – have all incorporated boat people policy into their election platforms and have equally been criticized for their handling of the issue. Considering that there are federal elections every three years, it has been a constant talking point in Australian politics, with every new development being hailed as the latest “scandal” by the Australian media in the continued saga surrounding boat people.

#### **2. Recent Events**

The Terrorist attacks that occurred on September 11, 2001 increased fear, racism and xenophobia toward Muslims not just in Australia but around the world. With the Tampa

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<sup>52</sup> Jaffa and Hasmath, "Deterring the 'Boat People,'" 417-30. The Gillard government's press releases defined people smuggling as an “evil” business and boat people as “irregular” while those waiting offshore for resettlement were “genuine.”

<sup>53</sup> Neubauer, Ian L. "Australia's Plan to Outsource Refugees Won't Work." Time. September 29, 2014.

<sup>54</sup> Andrew Markus, "What Does the Australian Public Really Think about Asylum Seekers?" The Conversation. July 30, 2012.

<sup>55</sup> Prof. Andrew Markus "Mapping Social Cohesion: The Scanlon Foundation Surveys 2014." Monash University, 2014.

affair occurring in the weeks prior, public opinion regarding Muslims was already harshening, and these attitudes later manifested themselves in Australian policy in the form of the Pacific Solution.<sup>56</sup> Similarly, the emergence of the Islamic State organization in 2014 sent shockwaves of fear all over the world, and Australia was not exempt, with the “Terror Alert” being lifted to high, and the Australian Prime Minister stating “We do know that people coming back from the Middle East, militarized and brutalized...do pose a significant threat to our community.”<sup>57</sup> Furthermore, with the media’s tendency to sensationalize the connection between terrorism and radical Islam, the public has grown to see the “war” against boat people and people smugglers as directly related to “Security against jihadist violence from a small but dangerous minority.”<sup>58</sup> Thus politicians and media figures are capitalizing on existing xenophobia and border insecurity to further their political goals, and demonizing asylum seekers along the way.

### **3. Regional foreign policy**

Australia’s relationship with its neighbors is necessarily a precipitating cause for the current policy, given that it involves several partnerships, with Nauru, Papua New Guinea, and Indonesia in particular. As the political and economic powerhouse in the immediate region, Australia has sufficient political leverage and influence to allow the Government to export the processing of asylum seekers in exchange for aid, and work with the Indonesian government on strengthening the border protection of both states. However, these relationships are not seamless, as will be discussed in more detail in the analysis below.

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By breaking down what I believe to be the most critical causal factors in the development of the present-day policy regarding boat people, it becomes clear that very few of them are practically manageable for the Government. Namely, regulatory policy and regional relationships are within the scope of active decision making, whereas people smuggling networks, the link between media and public opinion, and the often fickle nature of domestic politics is more difficult to grasp. Finally, the conditions that predispose refugee flows, and formative events such as 9/11 are completely out of the control of policymakers. By making these distinctions, I am suggesting that the Australians should focus on the elements of the boat people phenomenon that are indeed manageable. Before I lay out my policy proposal, I will first conduct a critical analysis of the policy that is in place today.

## **PART III: Critical Analysis of the Current Policy**

In order to analyze the current policy in the most effective way possible, I will deconstruct it into its component parts; Operation Sovereign Borders and Offshore

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<sup>56</sup> Betts, “Boat People and Public Opinion in Australia,”45.

<sup>57</sup> Ryall, Jenni. “Why the Threat of ISIS Suddenly Feels Very Real in Australia.” Mashable. September 26, 2014.

<sup>58</sup> Sheridan, Greg. “Policy Failure Creating a Monstrous Problem.” The Australian, June 8, 2013, Opinion sec.

Processing, previously known as the Pacific Solution, describing the key features of each policy, identifying the specific violations of international law implicit in these measures, the primary concerns of the international community, and conducting a cost-benefit analysis in order to assess whether this course of action is indeed the most likely to be effective and sustainable in the long term.

First introduced by the Howard Government in 2001, and then again in 2013 by the Labor Party after a brief absence, the Pacific Solution is the policy that mandates the offshore processing of boat arrivals, initially on the island of Nauru and then from 2013, on the Papua New Guinean territory of Manus Island. A fumbled arrangement was proposed that would have seen the extension of offshore processing to Malaysia, before the High Court ruled the agreement unconstitutional.<sup>59</sup> There are two major facets to this policy; the excision of various ‘Migration Zones’ that lie off the Australian mainland, and the transfer of boat people to a third party (the Nauruan and PNG governments), thus abdicating Australian jurisdiction over the asylum seekers in question.<sup>60</sup> The bilateral agreements are supported by aforementioned Regional Resettlement Arrangements and Memorandums of Understanding, and backed up by a promise that Australia will “bear all costs incurred” and make a substantial increase in financial aid.<sup>61</sup> The specific costs involved will be discussed in greater detail in the cost-benefit analysis below. Most recently, an agreement to resettle refugees currently living on Nauru in Cambodia has been signed, but its implementation appears to be in jeopardy.<sup>62</sup> Nevertheless, the Australian government is on a trajectory of widening the span of its Pacific Solution to involve an increasing number of states in the region.

Operation Sovereign Borders, implemented in 2013 upon an election promise of the Abbott campaign, initiated a significant reorganization of the departmental structures involved in “stopping the boats,” the slogan often used by the Coalition in reference to their policy objectives. Described as “a military-led, border security operation supported and assisted by a wide range of federal government agencies,” OSB is headed by the Minister for Immigration and the Lieutenant General (currently Angus Houston), who is also the Commander of the Joint Agency Task Force (JATF).<sup>63</sup> There are three key task groups

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<sup>59</sup> "Australia Court Rules Out Refugee 'Swap' with Malaysia." BBC News. August 31, 2011.

<sup>60</sup> There are currently (as of January 31 2015), a total of 1023 people in Manus Island RPC and 802 people in Nauru RPC. "Operation Sovereign Borders Monthly Update: January 2015." Australian Government: Australian Customs and Border Protection Service Newsroom. February 12, 2015.

<sup>61</sup> Quoted from “Memorandum of Understanding, Australian Government Department of Foreign Affairs and Trade, 2012. Development aid to PNG is budgeted at \$577 million for the 2014-15 financial year according to "Overview of Australia's Aid Program to Papua New Guinea," Australian Government: Department of Foreign Affairs and Trade, 2014. In addition, the RRA signed with Papua New Guinea on July 19, 2013, implies an additional \$420 million in aid to be distributed over four years. See: Dr. Ravi Tomar, "Official Development Assistance: Australia's Aid Program." Parliament of Australia. 2013

<sup>62</sup> The plan purported to resettle 1,000 refugees, but according to the latest reports, just 3 have accepted the offer, and it is unclear whether it will be followed through at all. See: Ben Doherty and Lauren Crothers, "Australia's Refugee Deal with Cambodia Uncertain as Almost All Refuse Offer." *The Guardian*, January 22, 2015.

<sup>63</sup> "Operation Sovereign Borders." Australian Government: Australian Customs and Border Protection Service. 2015.

involved in OSB, which engages several government departments and agencies including the Australian Federal Police, the Australian Customs and Border Protection Service, the Defence Force – whose border protection role is one part of the broader “Operation Resolute” – and the Department of Immigration and Border Protection.<sup>64</sup> Numerous affiliates are also named as supporting agencies, such as the Department of Foreign Affairs and Trade and the Australian Security Intelligence Organization. It has been reported that since the commencement of OSB, numerous boats have been intercepted, and upwards of a dozen have been turned back.<sup>65</sup>

Despite the perceived successes of the joint policies of offshore detention and strict border protection activities in preventing and deterring the arrival of asylum seekers by boat in Australia, many individuals and groups have raised concerns over the direction taken by the Australian government in recent years. These complaints are sometimes made by refugee advocates based on humanitarian concern for the welfare for asylum seekers, but the most widespread outcry both within Australia and from the international relations community is derived from the violations of international law that have been identified. The most pertinent deviations from refugee norms found in the United Nations and Protocol Relating to the Status of Refugees (1951, 1967) are as follows:

- One of the core principles of the UN Refugee Convention is *non-penalization* which bars arbitrary detainment “purely on the basis of seeking asylum” a provision that the Australian government has seemingly disregarded in its policy of universally detaining all asylum seekers who arrive by boat, regardless of their refugee status.<sup>66</sup>
- By discriminating specifically against boat people because they have “illegally entered” Australia’s sovereign borders and do not hold a valid visa, the Australian government is violating the Convention’s Chapter V, Article 31 which states that there should be no penalty for asylum seekers who have entered the state unlawfully (as mandated by immigration law).<sup>67</sup>
- Australia’s compliance with the Convention is questionable regarding Fair Access to Courts (Chapter II, Article 16), especially in light of the recent Bill passed in December 2014 that only allows access to a hearing regarding refugee status in exceptional circumstances.
- Chapter V, Article 32 states “The expulsion of such a refugee shall only be in pursuance of a decision reached in accordance with due process of law.” Outside of the RSD process that has already been described as perhaps inadequate in this regard,

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<sup>64</sup> The specific task forces are the Disruption and Deterrence Task Group (DDTG), the Detection, Interception and Transfer Task Group (DITTG) and the Offshore Detention and Returns Task Group (ODRTG). The interdepartmental structure of OSB can be found at “OSB Organisational Chart,” Australian Government: Australian Customs and Border Protection Service. January, 2015

<sup>65</sup> Between October 2013-July 2014, there were 23 boats intercepted: “Illegal Entry Vessel Arrivals – 18 September to 17 October 2014,” Australian Government: Australian Customs and Border Protection Service, 2014 and 15 boats were turned around: Medora, Shalailah, and Ben Doherty. “Australia Confirms 15 Boats Carrying 429 Asylum Seekers Have Been Turned Back.” *The Guardian*, January 28, 2015.

<sup>66</sup> “Convention and Protocol Relating to the Status of Refugees.” UNHCR. December 1, 2010. 3

<sup>67</sup> *Ibid* 29

recent instances where the discretionary decision powers granted to the Minister for Immigration have clearly undermined due process only further support the claim that Australia is not complying with international law.<sup>68</sup>

- Article 33 of the same chapter concerns non-refoulement, considered the cornerstone of international refugee law, and states that “No Contracting State shall expel or return (“refouler”) a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion.”<sup>69</sup> The latest Bill gives the Minister for Immigration unchecked powers that potentially sabotage this principle.
- Chapter V, Article 35 requests the cooperation of the national authorities with the office of the United Nations High Commissioner for Refugees (UNHCR) in ensuring that the articles of the Convention are being carried out. The UNHCR is not a signatory to the bilateral agreements with Nauru and PNG, and through numerous reports, the agency has made clear their concerns regarding Australia’s compliance with international law. One such report states: “In both Nauru and PNG the current policies, operational approaches and harsh physical conditions at the centers...do not meet international standards.”<sup>70</sup>

The International Bill of Human Rights, originating in 1948, also includes several articles that apply to the current policy direction taken by the Australian government towards boat people. More specifically, Article 5 states that “No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment,” a precept that is elaborated upon by the separate Convention on Torture and which a recent report from the United Nations itself has questioned in regards to the conditions in Australia’s offshore detention centers.<sup>71</sup> Also under scrutiny is Australia’s adherence to Articles 7, 9, 10 and 14.<sup>72</sup> The UN Convention on the Rights of the Child is another important consideration in this situation as it is not uncommon for minors to accompany their parents on the arduous boat journey, and subsequently join them for long stays in detention. A specific article in the Convention on the

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<sup>68</sup> For example, Minister for Immigration Scott Morrison denied protection to a Pakistani asylum seeker who arrived by boat in 2012 on the basis of the national interest. This decision has recently been overturned by the High Court, and the man has been granted a permanent protection visa. See: Sarah Whyte, “Scott Morrison Loses High Court Case against a Refugee.” *The Sydney Morning Herald*, February 11, 2015, Federal Politics.

<sup>69</sup> Convention and Protocol Relating to the Status of Refugees.” UNHCR. December 1, 2010. 30

<sup>70</sup> “UNHCR Reports Harsh Conditions and Legal Shortcomings.” UNHCR. November 26, 2013.

<sup>71</sup> “Resolution adopted by the General Assembly 217 (III). International Bill of Human Rights.” (Presented for the United Nations General Assembly, Signed 10 December 1948). UN Documents: A/Res/3/217. A recent report published by the UN has declared that Australia’s policy of third country processing violates the UN Convention on torture due to the use of detention and the conditions on Manus Island in particular: “UN Report to State Australia Is in Breach of International Torture Convention.” *The Age*, March 9, 2015, Federal Politics.

<sup>72</sup> Article 7 states that “All are equal before the law and are entitled without any discrimination to equal protection of the law.” The legal distinction being made between asylum seekers based on their mode of arrival in Australia suggests that legal discrimination is occurring. Article 9 refers to freedom from arbitrary arrest, detention, or exile, 10 describes the right to a “fair and public hearing” for criminal charges and perhaps the most fundamental in this case, number 14 expresses the right to “seek and enjoy in other countries asylum from persecution.”

Rights of the Child addresses the (arbitrary) detention of children, and several others relating to rights to proper treatment and protection.<sup>73</sup> The UNHCR, among other advocacy groups, has raised questions over the treatment of children under the Pacific Solution, which will be examined in greater depth in a moment.

Another area of international law that has become increasingly significant recently is maritime law, with revelations surfacing that the Australian Navy is not only physically turning boats full of would-be asylum seekers back to Indonesia, but crossing into Indonesian waters several times in the process.<sup>74</sup> These “incursions” have damaged Indo-Australian relations and hints that the two governments are not necessarily on the same page as for how to best manage illegal people smuggling and immigration activities taking place in the region.

Criticisms and concerns are being raised by an array of agencies and groups in respect to numerous issues associated with the Australian government’s dealings with boat people, from interceptions and turn-backs to the conditions in the processing centers. The three major concerns voiced by the UNHCR are the use of offshore processing centers that effectively impose arbitrary detention on boat people, the physical and psychological harm being endured by asylum seekers in these centers, and the more recent practice of “pushing asylum-seeker boats back at sea without a proper consideration of individual needs for protection.”<sup>75</sup> Manus Island, the Papua New Guinean site for processing Australia-bound asylum seekers has been at the center of the debate since its opening for an assortment of reasons, not the least of which was the death of a detainee in February 2014 following several days of violent protests.<sup>76</sup> Moreover, the UNHCR is not a signatory to the bilateral agreement between Australia and Papua New Guinea and would prefer that RSD take place on the mainland, and the agency takes serious issue with “the combination of a tough physical environment, restricted legal regime, and slow processing” which does not meet the required standards.<sup>77</sup> Recent discussions for a prospective relocation deal with Cambodia have alarmed the UNHCR, with the High Commissioner for Refugees arguing that “Refugees are persons who

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<sup>73</sup> “Convention on the Rights of the Child.” United Nations Human Rights. November 20, 1989.

<sup>74</sup> McPhedran, Ian. "Angry Indonesia Demands Federal Government Suspends Turn Back Boats Policy." News.com.au. January 17, 2014

<sup>75</sup> Adrian Edwards “UNHCR Seeking Details on Reports of Boats Forced Back from Australia” (Notes from the press briefing, on 10 January 2014, at the Palais des Nations in Geneva) UNHCR. Other concerns about government policy noted in taken from Babar Baloch “UNHCR concerned about the Manus Island Disturbance” (press briefing, on 18 February 2014, at the Palais des Nations in Geneva) UNHCR and "UNHCR Reports Harsh Conditions and Legal Shortcomings." UNHCR. November 26, 2013

<sup>76</sup> In February, 2014 riots broke out over two days at the Manus Island detention center in response to mounting frustrations about unresolved refugee claims that were aggravated by overcrowding and an insecure facility. In the midst of the rioting, Reza Barati was murdered by two staff members working at the center. A senate sub-committee report that investigated the incident found that the events were “eminently foreseeable and may have been prevented. It is clear from evidence presented to the committee that the Australian government failed in its duty to protect asylum seekers including Reza Barati from harm.” See: Doherty, Ben. "Manus Violence That Killed Reza Barati 'Eminently Foreseeable', Parliamentary Inquiry Finds." The Guardian. December 10, 2014 and Penny, Wright. "Incident at the Manus Island Detention Centre from 16 February to 18 February 2014." Legal and Constitutional Affairs References Committee, 2014.

<sup>77</sup> "Problems Persist at Manus Island Processing Centre: UNHCR Australia Report." UNHCR News. July 12, 2013.



are fleeing persecution or the life-threatening effects of armed conflict. They are entitled to better treatment than being shipped from one country to the next.”<sup>78</sup>

Organizations within Australia have also taken issue with some elements of third country processing. The Australian Human Rights Commission, an independent statutory body which regularly reports to the Australian Parliament, has named various causes for concern, but the matter for which it has drawn the most attention is its stance on children in detention. The recent report titled “The Forgotten Children: National Inquiry into Children in Immigration Detention 2014” drew a storm of controversy with its findings that children who are detained awaiting processing in Nauru are experiencing extremely high rates of psychological disorders, exposure to sexual assault and violence, and engagement in self harm.<sup>79</sup> Other groups, like Amnesty International, the Refugee Action Coalition, and Human Rights Watch, have all raised serious concerns over the mental wellbeing of detainees, with anxiety, depression, and trauma common among the young male population at the Manus Island center.<sup>80</sup>

Moreover, the legal community has asserted disapproval of the Government’s actions. One such challenge concerns a group of Tamil asylum seekers whose boats were intercepted in July 2014, with those on board being held on a customs vessel at sea for several weeks while it was debated whether the asylum seekers would be handed over to Sri Lanka, transferred to India, or brought onshore. As is the practice under the “enhanced screening process,” Department of Immigration officials conducted a very brief on-board assessment of refugee status without access to legal representation, which lawyers specializing in the area have declared illegal.<sup>81</sup> Fifty-three legal scholars signed a statement criticizing the absence of any legal justification for the government’s actions.<sup>82</sup> This is just one of a growing number of legal challenges mounting in front of the government, as current and former detainees sue over claims of mistreatment and wrongful imprisonment.<sup>83</sup>

The various humanitarian and legal problems surrounding Operation Sovereign Borders are certainly troublesome, but a closer look at the relative costs and benefits of this policy reveals that “stopping the boats” has come at an extraordinarily high price. Before assessing the costs, both direct and indirect, I will discuss the assortment of benefits that the Australian government under Abbott has reported since the rolling out of OSB. In terms of

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<sup>78</sup> “UNHCR Statement on Australia-Cambodia Agreement on Refugee Relocation.” UNHCR - Regional Office. September 26, 2014.

<sup>79</sup> “‘Locking up Children Taints Us All’, Says Commission President.” Australian Human Rights Commission. February 12, 2015. According to “The Forgotten Children” report, the majority of the 1138 children that were detained in February 2014 have been either released into the community or community detention, yet 119 children remain in Nauru (and another 211 on Christmas Island). These children have had an average stay in detention of 17 months.

<sup>80</sup> “The Truth about Manus Island: 2013 Report.” Amnesty Australia. December 11, 2013.

<sup>81</sup> Wardell, Jane. “All at Sea: Is Australia’s Fast-Tracked Asylum Screening Policy Fair?” Reuters. July 9, 2014.

<sup>82</sup> Bourke, Latika. “Statement by Legal Scholars Regarding the Situation Concerning Sri Lankan Asylum Seekers.” Scribd. July 7, 2014.

<sup>83</sup> Vedelago, Chris. “Legal Challenge for Offshore Detention Centres on Manus Island and Nauru.” *The Age*, March 1, 2015, Federal Politics sec.

actual arrivals, there was a 90% reduction in the number of people who arrived in November 2012 compared to November 2013, and there has been just one boat arrival since the turn-back policy was implemented in December 2013.<sup>84</sup> That single instance, which occurred in July 2014, was a noticeable blip, however; the case of the aforementioned Tamil asylum seekers was taken to the High Court of Australia.<sup>85</sup> Despite the hiccup, current Immigration Minister Peter Dutton declared that “OSB and our turnback policy has restored the integrity of our borders.”<sup>86</sup> There are also indications that the message has been communicated to the beginning of the pipeline, with the volume of asylum seekers travelling to Indonesia in order to seek assistance in their journey onwards falling, and many of those that remain accepting that Australia has “closed the way, that you won’t take us if we come by boat.”<sup>87</sup> The number of people registering with the UNHCR in Indonesia has dropped dramatically, and the vast majority of those who do are attending their second interview, an indication that the asylum seekers are not attempting to take the illegal route via boat to Australia.<sup>88</sup> The people smuggling network has also had to adjust their approach in response to the tightening of the borders to boat people, lowering the price for a spot on a boat and seeking alternative routes to Australia; New Zealand is now being advertised as a more viable destination.<sup>89</sup> Furthermore, the number of asylum seekers waiting to be processed is in decline; without hope for resettlement in Australia, some are opting to return home voluntarily, for a price.<sup>90</sup>

One line of rhetoric used by the Australian government is that by physically and politically stopping the boats, this policy is also saving lives. Between 2000 and 2014, there were at least 1969 deaths of asylum seekers, with all but 59 of them occurring at sea as a result of vessel related trouble.<sup>91</sup> There has been a marked decrease in capsizing and drowning

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<sup>84</sup> This rapid decrease the frequency of boat arrivals is likely a combination of Rudd’s announcement in July 2013 that no asylum seeker arriving via boat would be eligible for resettlement in Australia, and the commencement of OSB in September 2013 upon Abbott’s election. See: “Operation Sovereign Borders: Log of Boat Arrivals and Other Asylum Seeker Incidents.” ABC News. Updated February 4, 2015

<sup>85</sup> On the 27th of July, 2014, 157 Tamil asylum seekers who had previously been held at sea on a customs vessel were taken onto the mainland and into DIBP custody before being transferred to the processing center at Nauru. The legality of their month-long detainment at sea was brought to question at the High Court, where a 4-3 decision declared the government’s actions as legal. See: Whyte, Sarah. “Asylum Seekers Legally Detained on Customs Vessel, High Court Rules.” *The Age*, January 29, 2015, Federal Politics sec.

<sup>86</sup> Medora and Doherty, “Australia Confirms 15 Boats Carrying 429 Asylum Seekers Have Been Turned Back,” 2015.

<sup>87</sup> Java, Paul T. “First Close-Up Look at a Lifeboat the Abbott Government Is Using to Stop Asylum Seeker Boats.” *News.com.au*, February 1, 2014, National sec.

<sup>88</sup> Doyle, Julie. “Morrison Suggests Coalition Is Reducing Asylum Seeker Arrivals in Indonesia.” ABC News. February 4, 2014.

<sup>89</sup> Leslie, Tim, and Mark Corcoran. “Operation Sovereign Borders: The First Six Months.” ABC News, March 26, 2014, and Bachelard, Michael. “People Smugglers in Indonesia Selling Spots on Boat to New Zealand.” *Sydney Morning Herald*, April 10, 2014, World sec.

<sup>90</sup> Between \$4,000 and \$10,000 according to this report. Opponents to the “pay-out” scheme have declared the policy “morally bankrupt.” “Paying Asylum Seekers to Return Home ‘standard Practice’” ABC News. June 20, 2014.

<sup>91</sup> The other 59 deaths were related to medical issues, self-harm or suicide related to their refugee claim, and even murder in the case of one man, while detained at Manus Island. See: “Australian Border Deaths Database.” Monash University: The Border Crossing Observatory. October, 2014.

incidents since Operation Sovereign Borders was implemented, however I argue that the claim of “saving lives,” may be oversimplifying the complexities of the broader asylum seeker and refugee problem. Finally, the policy has been politically advantageous for the Government, specifically the Coalition who were at the helm of OSB’s enactment. While approval of Prime Minister Tony Abbott’s performance has been mixed since he took office in September 2013, polling has shown consistent support for the restrictive stance on boat people with 48% approval of Operation Sovereign Borders in December 2013.<sup>92</sup> A Lowy Institute Poll published in June 2014 makes clear that the present policy has a solid backing from the Australian public; 71% surveyed stated that they supported turning boats around when safe and 59% agree with offshore processing.<sup>93</sup> Having the apparent support of the public is certainly politically beneficial for the proponents of Operation Sovereign Borders and the Pacific Solution.

From several angles, it therefore appears that the combination of at-sea interdiction and turn around, third-country processing, and the removal of any chance for resettlement in Australia by the last two Prime Ministers has had a drastic influence; effectively halting boat arrivals (bar one) in the last fifteen months. Although I do not agree that the fundamental goal of the policy regarding boat people should be as simple as stopping the boats, the Australian government has made a strong statement with a “visible deterrent to people smugglers,” but at what cost?<sup>94</sup>

Costs can be broken down into two categories; those pertaining to the financial burden of a policy, and those incurred by other interests and values, such as Australian ideals and democracy. I will begin the analysis by discussing the non-monetary or indirect costs of the Government’s boat people policy. First, there is a *political* cost inherent in some of the mechanics of this program, both domestically and internationally. The Australian political landscape has been severely polarized by the boat people issue, with a wide and ever-growing separation between the major parties and their mission to effectively “stop the boats” and the dissenting calls of a small but strong opposition who believe in a more compassionate approach.

Australia’s regional relationships have also been somewhat marred by the Pacific Solution. Despite acting as co-partners in their efforts to dismantle people smuggling operations, Australian-Indonesian relations have been hurt by several instances where the Australians have overstepped their bounds. On the back of phone-tapping revelations in late 2013, it became apparent in 2014 that Australian naval forces had “inadvertently” crossed into Indonesian waters in order to turn boats carrying asylum seekers around.<sup>95</sup> Not only was

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<sup>92</sup> "Approval of Tony Abbott." Essential Vision. March 10, 2015, and Doering Curtis, Katherine. "A Tale of Two Countries: Comparing Recent Developments in Australian and American Immigration Policy." Campbell Law Observer, March 11, 2014.

<sup>93</sup> Oliver, Alex. "Lowy Institute Poll 2014." Lowy Institute for International Policy. June 2, 2014.

<sup>94</sup> "Memorandum of Understanding between the Government of the Independent State of Papua New Guinea and the Government of Australia," 2013.

<sup>95</sup> Bachelard, Michael. "Tony Abbott's Asylum Seeker Policies 'Offensive', Says Senior Indonesian Politician." The Sydney Morning Herald, September 19, 2013, Federal Politics sec.

this interpreted by Indonesia as a violation of sovereignty, but an insult to the efforts being made for a cooperative relationship between the two countries. Indonesian foreign minister Marty Natalegawa has stated that “Indonesia rejects Australia's policy to turn back the boats because such a policy is not actually conducive to a comprehensive solution.”<sup>96</sup> While the Australian government has apologized for the accidental crossings, it is clear that Indonesia has not taken this situation lightly, putting additional strain on an already shaky alliance. Recent events unrelated to the people smuggling and boat people issue seem to be further corroding relations, yet the extent to which tensions will cripple cooperative efforts in this policy area is unclear.<sup>97</sup>

Aside from Indonesia, there are political and social costs for the states recruited to be the sites of third-country processing; Nauru and Papua New Guinea. In exchange for aid packages, these relatively small states have agreed to process the claims of boat people and ultimately resettle those found to be genuine refugees. This is not a flawless transition however, and some reports claim that infrastructure and services are inadequate in Nauru, and there are fears of violence from the Papua New Guinean community upon the release of detained refugees.<sup>98</sup> By taking this particular policy track, the Australian government is not only expanding the reach of this boat people predicament, but creating costs for several other states in the region, something that would be unnecessary if the process was kept onshore.

At the root of refugee politics is a humanitarian issue. The United Nations devised the Convention on the Status of Refugees as a result of an international concern for people who have been displaced by war, political instability, and persecution. Yet the effects of the current policy on those whose interests are supposedly at the forefront of the relevant international law are being ignored. The *human costs* of offshore processing and OSB include abandoning those that are turned around at sea, hence leaving them with no resolution of their claim or rights in Indonesia, with those who are detained often suffering through indeterminate lengths of time in conditions that have been abhorred by the UN. The most serious concerns are those relating to the mental health of children who are detained; 85% reported being negatively affected in some way.<sup>99</sup> While waiting for their claim to be processed, many asylum seekers experience the deterioration of their physical and mental health, and for those who are rejected, these people may face persecution or torture upon their

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<sup>96</sup> “Indonesia Condemns Australian Navy Waters Violations.” BBC News - Asia. January 17, 2014.

<sup>97</sup> On April 29, 2015, two Australians who had been part of the “Bali 9,” a group who had attempted to import 8 kilograms of Heroin from Bali to Australia in 2005, were executed by firing squad in Indonesia, despite extensive diplomatic and legal efforts for reprieve. In response to the executions, the Australian government recalled its ambassador to Indonesia for consultations. See: Whiteman, Hilary, Mariano Castillo, and Kathy Quiano. “Australia Recalls Ambassador after Indonesia Executes Prisoners.” CNN. April 29, 2015.

<sup>98</sup> See: Michael Gordon and Sarah Whyte, “Frustration Grows among Asylum Seekers as PNG Yet to Offer Resettlement.” The Sydney Morning Herald, September 1, 2014, Federal Politics sec. and Iyengar, Rishi. “Gay Asylum Seekers Could Be Resettled in Papua New Guinea, Which Outlaws Homosexuality.” Time, September 24, 2014 and Ben Doherty. “Manus Violence That Killed Reza Barati 'Eminently Foreseeable,' 2014

<sup>99</sup> Triggs, Gillian et al. “The Forgotten Children: National Inquiry into Children in Immigration Detention.” Australian Human Rights Commission, November 2014.

return. In some cases returnees have even been murdered, a testament to the blatant shortfalls of the current processing system.<sup>100</sup>

Although probably the most difficult to assess, the harsh political maneuvers made by this government have potential (and real) consequences for Australia’s international standing. The extensive breaches of international law are widely known by foreign governments and may affect Australia’s ability to be influential in its partnerships and in the multilateral forums. The UN High Commissioner for Refugees publicly criticized Australia’s boat people policy at the UNHCR-NGO consultations in Geneva in June 2014, with one observer stating that “Australia is being seen for what it is – a country that has manufactured a border protection crisis to justify turning its back on people seeking its help.”<sup>101</sup> In addition, some political commentators have claimed that there is a cost to democracy in that the specifics of the policy, such as the precise numbers of asylum seekers or incidents at sea, and the internal conditions at the offshore centers are censored by the Australian government. This lack of transparency encourages ignorance in the general public, and undermines the government’s accountability.<sup>102</sup> The Australian Prime Minister has stated that "We are in a fierce contest with these people smugglers [and] if we were at war, we wouldn't be giving out information that is of use to the enemy” in response to criticism regarding the secrecy of Operation Sovereign Borders.<sup>103</sup> Nonetheless, there are numerous costs – political, human, and social – that are brought about by the policy and must be accounted for in the analysis.

The total direct monetary cost of this policy is difficult to ascertain due to the complexity of its implementation. As already mentioned, several government departments and agencies are involved, there are distinct naval activities known collectively as Operation Resolute that must be accounted for, as well as bipartisan agreements with Nauru and Papua New Guinea that designate compensation. In order to make the various subdivisions and their costs more clear, I have constructed the following table, which can be interpreted as a firm estimate of the economic burden of the policy, but is by no means the full picture.

<i>Department or Agency / Purpose</i>	<i>Description</i>	<i>Cost</i>
Offshore Processing Centre in Papua New	<ul style="list-style-type: none"> <li>Operating Costs: center construction and maintenance</li> </ul>	\$1.1 billion over 4 years (2013-17)

<sup>100</sup> As already noted above, there have been several instances of suicide or attempted suicide, and detainees frequently go on hunger strikes and self-harm.

See: "Australian Border Deaths Database," 2014 and Gordon and Whyte, "Frustration Grows among Asylum Seekers as PNG Yet to Offer Resettlement," 2014

<sup>101</sup> "UN Criticises Australia's 'Strange Obsession with Boats'" Pro Bono Australia. June 18, 2014.

<sup>102</sup> Reilly, Alex. “The Boats May Have Stopped, but at What Cost to Australia?” The Conversation. August 27, 2014. For example, when the 157 Tamil asylum seekers were intercepted and placed on a customs vessel for several weeks, the government did not make the situation known to the public until they were pressed to by some members of the media.

<sup>103</sup> Davies, Sarah, and Phil Orchard. "Halting Migrant Boats: Lessons from Australia - CNN.com." CNN. April 24, 2014.

Guinea (Manus Island) <sup>104</sup>	<ul style="list-style-type: none"> <li>● Centre Service Provider Contracts</li> <li>● Refugee Status Determination</li> <li>● Community Assistance Support (CAS)</li> <li>● Additional Aid</li> </ul>	\$420 million (2014-15)
Offshore Processing Centre in Nauru <sup>105</sup>	<ul style="list-style-type: none"> <li>● Operational Costs</li> <li>● Centre Service Provider Contracts</li> <li>● Refugee Status Determination</li> <li>● Support for community-based arrangements</li> <li>● Aid</li> </ul>	\$1.9 billion over 4 years (2012-16) \$27 million (2014-15)
<b>Offshore Processing Total 2014-15</b>	As indicated by the 2014-15 Budget	<b>\$826.1 million</b> <sup>106</sup>
Relocation Agreement with Cambodia <sup>107</sup>	Australia promised Cambodia \$40 million over four years in additional aid as a condition of a bilateral agreement between the two governments for the proposed relocation of up to 1,000 refugees from Nauru.	\$40 million over 4 years (2014-18)
Operation Resolute <sup>108</sup> (Dept. of Defence)	Dealing with IMAs is just one part of this Operation that encompasses a number of objectives, thus the specific cost of intercepting boats and the actions that follow is difficult to pinpoint.	\$9.9 - 262 million (per year) <sup>109</sup>
Australian Customs	The activities conducted by this agency are	\$265.8 million

<sup>104</sup> Bowen, MP Chris, and Sen. Penny Wong. "Economic Statement." Budget 2014-15, Commonwealth of Australia, 2013.

<sup>105</sup> "Development Assistance in Nauru: Overview of Australia's Aid Program to Nauru." Australian Government: Department of Foreign Affairs and Trade, 2014 and "Infrastructure Report on Nauru." Australian Government: Department of Immigration and Citizenship. January 25, 2012.

<sup>106</sup> "2014-15 Federal Budget in Brief: What It Means for Refugees and People Seeking Humanitarian Protection." Refugee Council of Australia, 2014.

<sup>107</sup> "Australia's Refugee Deal with Cambodia Uncertain as Almost All Refuse Offer." *The Guardian*, January 22, 2015.

<sup>108</sup> "Resolute." Royal Australian Navy, 2015

<sup>109</sup> This large range is due to the discrepancy that exists between the Defence budget and estimates made by Lowy institute fellow James Brown based on additional one-off costs not allowed for in the budget. The parliamentary paper suggests that even this estimate may be too conservative.

See Spinks, Harriet, Cat Barker, and David Watt. "Australian Government Spending on Irregular Maritime Arrivals and Counter-People Smuggling Activity." Parliament of Australia. September 4, 2013, and Brown, James. "Asylum Seekers: The Cost to Defence." *The Interpreter*. July 30, 2013.

An example of an additional cost that was not factored into the budget was the purchase of 12 lifeboats for \$500,000 for the purpose of sending asylum seekers back to Indonesia if their boat is unlikely to withstand the voyage, and the government has ordered 10 additional boats to be used for the same purpose in a “multi-million dollar deal.” See: Doherty, Ben, and Helen Davidson. "Orange Lifeboats Used to Return Asylum Seekers to Be Replaced by 'Fishing Boats'" *The Guardian*, March 5, 2015, Australian Immigration and Asylum sec.

and Border Protection Service <sup>110</sup>	diverse but spokespeople for Customs have acknowledged that IMAs are the responsible for the majority of agency assets, and \$3.7 million has been specifically allocated for preventing and disrupting maritime people smuggling, with posts in Indonesia, Malaysia, and Sri Lanka. <sup>111</sup>	(2014-15 budget estimate)
Dept. of Immigration and Border Protection	<ul style="list-style-type: none"> <li>● Regional Cooperation Program<sup>112</sup></li> <li>● Christmas Island: Rapid transfer to OPCs<sup>113</sup></li> <li>● Education for school-aged children</li> <li>● Compliance, removal and network management reforms for “legacy caseload”<sup>114</sup></li> <li>● Detention and Status Resolution<sup>115</sup></li> </ul>	<p>\$94 million (2014-15)</p> <p>\$217.6 million over 5 years</p> <p>\$2.6 million</p> <p>\$149.9 million</p> <p>\$638 million (2014-15)</p>
Dept. of Social Services	Support services for boat people found to be owed protection (in the form of a Temporary Protection or Bridging Visa)	\$85.2 million (2014-15) <sup>116</sup>
Dept. of Foreign Affairs and Trade	Anti-people smuggling operations	\$6.4 million over 2 years <sup>117</sup>
<b>Approximate Total for 2014-15</b>	Offshore processing for Irregular Maritime Arrivals and Operation Sovereign Borders	<b>\$2.82 billion</b>

Important to note is that in order to offset the additional aid to Papua New Guinea as indicated in the Memorandum of Understanding, and to secure their cooperation in processing the claims of boat people, the Australian government has reduced the overall international aid contribution to \$5 billion for 2014-15, representing 0.32% of Australia’s GNI (gross national income), significantly lower than the 0.7% recommended by the United

<sup>110</sup> Spinks et al, "Australian Government Spending on Irregular Maritime Arrivals and Counter-People Smuggling Activity," 2013

<sup>111</sup> "2014-15 Federal Budget in Brief," Refugee Council of Australia.

<sup>112</sup> "2014-15 Federal Budget in Brief," Refugee Council of Australia: “Regional cooperation and capacity building activities to ‘strengthen the migration and border management capabilities of partner governments.’”

<sup>113</sup> For an in-depth examination of the complex situation on Christmas Island see: Laughland, Oliver. "Trauma, Segregation, Isolation: Christmas Island, the Tropical Outpost Where Asylum Seekers Are Held against Their Will." The Guardian, October 12, 2014, Australia sec. and for the breakdown of projected costs: "2014-15 Federal Budget in Brief," Refugee Council of Australia.

<sup>114</sup> "2014-15 Federal Budget in Brief," Refugee Council of Australia: The ‘legacy caseload’ refers to the 30,000 boat people that arrived prior to July 2013

<sup>115</sup> Ibid

<sup>116</sup> Ibid

<sup>117</sup> Ibid

Nations.<sup>118</sup> Finally, these cost projections do not include some of the expenses (particularly administrative) that are associated with refugee and humanitarian assistance as there is no clear distinction between services provided for refugees who have been given placements under the Humanitarian Programme or those arriving without a valid visa on a boat. There are also miscellaneous costs associated with OSB that are not budgeted for, including a supposed 12 million dollar price tag for the holding of a large group of Tamil asylum seekers on a Customs vessel in Australian waters for four weeks in July 2014.<sup>119</sup>

Before moving onto my development of an alternative policy, I will use the following three questions to evaluate the appropriateness of offshore processing (the Pacific Solution) and Operation Sovereign Borders: Is it legitimate? Is it feasible? Is it effective? To address the first question, I have discussed in some detail the numerous issues that have been raised surrounding the legitimacy of this approach in terms of international law and human rights. Yet it must be stated that in relation to Australian domestic politics, the policy itself is legitimate in that it was approved by the Parliament and has the backing of the majority of the Australian public. However, whether it is truly legitimate in the context of Australian values, such as multiculturalism and giving people “a fair go” is questionable. As for feasibility, OSB has been in place for close to 18 months so it is clearly feasible in the current context. Notwithstanding, my analysis of the costs of the policy raise the question as to whether it is a long-term solution for the pipeline of asylum seekers who will continue to try to gain protection in Australia. While it may be feasible in the current circumstances, the situation external to Australia may change, and by extension, so will the degree of feasibility. There is no doubt that the combination of offshore processing, third-country resettlement for boat arrivals, and at-sea interdiction has been effective as a deterrent for people smuggling in the region and halting the arrival of boats since its implementation. Nevertheless, it is my argument that the narrow goal of the Australian government concerning boat people is not in fact the appropriate objective, and the following section shall demonstrate that an alternative plan may reap more benefits at a substantially lower cost to both the asylum seekers and the Australian government.

#### **PART IV: Toward a more sustainable solution**

Having deconstructed the issue of boat people and both the advantages and difficulties associated with the ongoing use of offshore processing coupled with maritime intervention, I hope to arrive at a strong alternative policy in the conclusion of this section. To do so, I will reestablish my fundamental goal, provide evaluation criteria for an appropriate policy, explore the alternative, and ultimately come to a conclusion about the likelihood of it being an effective and sustainable policy in the current Australian social, economic, and political climate.

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<sup>118</sup> "2014-15 Federal Budget in Brief," Refugee Council of Australia

<sup>119</sup> Whyte, Sarah, and Fergus Hunter. "\$12 Million: The High Cost of Not Stopping the Boat." *The Age*, August 30, 2014, Federal Politics sec.



First, I must reiterate the principle goal with which I am working:

*Irregular Maritime Arrivals are processed in accordance with our obligations to international law regarding refugees and human rights, and those found to be legitimate refugees are permanently resettled in Australia.*

This goal can be broken down into several clear policy objectives that will drive the policymaking process and are within the scope of the Australian government (See Part II – Levels of Causality above).

1. Boat arrivals are transferred to *onshore* processing centers
2. The Refugee Status Determination Procedure adheres to relevant international law, including the right to a fair and timely trial, without discrimination for method of arrival
3. The conditions at the processing centers comply with human rights law
4. Those determined to be legitimate refugees as per the Refugee Convention are granted *permanent* protection visas and resettled in Australia
5. The Australian government fully cooperates with the United Nations High Commissioner for Refugees and makes available all relevant information.

With the policy goal and objectives in mind, it is possible to develop a set of evaluation criteria that can be used to assess a policy alternative. Taking from Bardach, I will use four general criteria to assess the potential of the proposed policy: *technical feasibility*, *political viability*, *financial possibility*, and *administrative operability*.<sup>120</sup> Note that these criteria are more specific than the three questions asked of the existing policy; this is due to the circumspective nature of a policy proposal compared with the analysis of a policy that is already in place. Simply put, if this alternative solution is to be truly viable, more questions need to be asked.

I will now elaborate on what each of these specifically signify in the case of asylum seeker policy in Australia. Technical feasibility is relatively straightforward as it asks the basic question of effectiveness. To what extent will the policy achieve the purpose outlined in the goal? In this case, will the policy ensure that Australia meets its obligations in a general sense, as well as achieving the five objectives listed above? However, as I will be assessing the effectiveness of a policy that has not yet been implemented, it will be a prediction that may or may not be fully accurate in particular circumstances. Political viability is more complex; not only does the policy need to be broadly acceptable to the political parties in order for legislation to be successful in Parliament, but there must be general support from the Australian public, with the cost/benefit balance being favorable for the key groups most impacted by the decisions made. For this criterion to be met, concessions may need to be considered to gain the required political backing, yet without sacrificing the core mission of the policy. Again, this will be a speculative assessment, but with adequate information and understanding, I will be able to make an educated guess. Financial possibility is related to the

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<sup>120</sup> Patton, Carl V., David S. Sawicki, and Jennifer J. Clark. “Basic Methods of Policy Analysis and Planning.” 3rd ed. Upper Saddle River, New Jersey: Pearson Education, 2013. 194-204.

cost/benefit analysis, yet in this case I will make a general estimate of the economic costs involved, keeping in mind the approximate expenditures resulting from offshore processing and OSB noted above as a reference. I will also briefly summarize the anticipated benefits for the Government, the asylum seekers in question, and the Australian public. Finally, administrative operability concerns whether the policy can be implemented in the given context; are the institutional features available to carry out the policy? All four of these evaluation criteria, and the preceding objectives, will be utilized in the following discussion of an alternative practice to the handling of boat people and their claims for refugee status in Australia.

My proposal draws from both the existing framework in Australia and practices utilized by other states in similar contexts. I will first provide an overview of the plan, discussing how each component relates to the goal and objectives, conduct a cost benefit analysis and assess the policy against the aforementioned evaluation criteria. With that in mind, a policy that is both viable and sustainable would consist of three fundamental tenets: short-term onshore processing, community processing, and a transformed RSD regime. For the purpose of initial assessment, the current onshore processing centers can be expanded, and in some cases reopened, to act as ‘reception centers’ for asylum seekers regardless of their mode of travel, or whether they applied for refugee status from within Australia or externally.<sup>121</sup> As currently seen in several countries, the reception centers would function as a temporary residence of transition for refugee applicants with a clear end date (potentially mandated by law), after which a decision on refugee status must be made or the applicant must be transferred to a community-based facility; I will go into more detail regarding the specific requirements of RSD shortly. An independent monitory body would be charged with ensuring that conditions meet international standards, and the Australian government would fully cooperate with the UNHCR, allowing access and assessment of the facilities when upon request.

Following a screening for underlying issues that may forgo their placement, those found to meet the base criteria for protection under the Refugee Convention will have their claims expedited and moved into community processing on a ‘Bridging Visa,’ of which the purpose is to facilitate the successful integration of the refugees into Australian life, through community engagement programs, employment placement, education in English and vocational training and access to health and basic services; an all-round more comprehensive approach than is currently provided for those who have been placed in community processing/detention at the discretion of the immigration minister.<sup>122</sup> Each individual/family would be provided an allowance for living expenses and assigned a case officer responsible for managing the refugee application, easing the transition into life in Australia, and ultimately helping the refugees gain independence and become contributing members of

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<sup>121</sup> Emphasis on improving the capacity of the Maribyrnong (VIC), Villawood (NSW), Perth (WA), Darwin (NT) and Curtin (WA) centres, and potentially opening an additional centre to manage overflow.

<sup>122</sup> The current system allows for community processing for maritime arrivals at the consideration of the Immigration Minister, and while work is allowed in some cases, those who have been transferred to ‘community detention’ – often families with children – are not allowed to seek paid work. There are conditions in both circumstances, such as curfew and travel restrictions and reporting requirements.

society. There would necessarily be compliance requirements for community processing and this system would require an expansion of the supporting infrastructure, but as the cost-benefit analysis below will demonstrate, the long-term benefits of this approach that have been observed in several states will override any initial costs incurred for creating the means to carry out the policy.

The third component acts as an umbrella policy governing both of the processing contexts. It is imperative that a durable and legitimate solution incorporates a Refugee Status Determination regime that is compliant with international law, emphasizes procedural justice, and is sufficiently transparent to ensure the integrity of the system. Key requirements would include a completely independent body that investigates and hears the applicant’s claim, with universal access to legal assistance and translation services, and the right to appeal, a significant move away from the limited assessment that is afforded to boat people currently.<sup>123</sup> There would also be automatic and periodic judicial review of the decision to guarantee transparency and accountability on the part of the Government and the courts.

The following analysis is a broad overview of the costs and benefits of this alternative policy, as they relate to three key areas: financial or Government budgetary costs, human costs and considerations, and other notable factors that may amount either directly or indirectly from this policy. I will also note the key advantages and drawbacks of community-centric RSD as compared with the offshore processing system described in Part III. In order to serve the needs of Irregular Maritime Arrivals, the existing onshore detention and processing infrastructure must be expanded. There are currently five core Immigration Detention Centers (IDCs) on the Mainland and Christmas Island, but there is potential for reopening the recently closed Curtin IDC if necessary.<sup>124</sup> In addition, the current infrastructure that may be utilized included three Immigration Transit Accommodation (ITA) facilities that may be used as temporary housing until a Bridging visa is granted and a placement in independent community accommodation becomes available, and two sites allocated for Immigration Residential Housing (IRH), as well as various rental accommodations made available to those who have been cleared to live in the community.<sup>125</sup> Based on the current statistics, it is highly likely that the ITA and IRH framework would require extension, but by working with community, not-for-profit, and church organizations who are strong advocates of community processing, the costs could be kept modest.<sup>126</sup>

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<sup>123</sup> As already described in Section III, the current RSD provisions for boat people are severely restricted, usually consisting of a brief interview while in the custody of immigration officials, before the asylum seekers are turned over to Papua New Guinea or Nauru, and there have been cases where boats have been turned around with no interview whatsoever. See: Aly, Waleed. "Tony Abbott's Harsh Treatment of Asylum Seekers Is the Same Old Story." *The Sydney Morning Herald*, July 11, 2014, Comment sec.

<sup>124</sup> Christmas Island, Maribyrnong, Perth, Villawood and Yongah Hill.  
See: "Immigration Detention and Community Statistics Summary." Australian Government: Department of Immigration and Border Protection. March 31, 2015.

<sup>125</sup> "Immigration Detention Facilities." Australian Government: Department of Immigration and Border Protection, April 30, 2015.

<sup>126</sup> As of March, 2015, there were 1556 people being detained in onshore processing centers, with an additional 2512 in “residence determination” accommodation, and 292 in community housing (ITA) and a further 27,216

Additional costs that come under the financial or budgetary category include programs such as the Asylum Seeker Assistance Scheme, Community Assistance Support, the Application Assistance Scheme, compliance resolution, support systems for unaccompanied minors, and contracts with organizations that provide services including health care.<sup>127</sup> Overall, the budget for the onshore management of Irregular Maritime Arrivals in 2014-15 was estimated at totaling \$1.85 billion, with significant reductions projected for the next several years.<sup>128</sup> This represents close to a decrease of one billion dollars, or 35% of the projected costs of offshore processing and its related policies for 2014-15. However, if this policy were to be implemented and hence replace offshore processing for boat arrivals, a portion of the newly freed-up capital could be reallocated to developing and strengthening the community processing infrastructure and programs and providing training for the employees that are charged with carrying out the elements of the program. To further demonstrate the fiscal benefits of an onshore/community processing scheme, the Australian Human Rights Commission has estimated that the Community Assistance Scheme costs \$38 per day for asylum seekers living in the community, but \$125 for those in immigration detention, and on a larger scale, community detention is cited as costing just \$100,000 per annum, 25% of the total cost that offshore detention incurs for every asylum seeker.<sup>129</sup> Thus, there are fewer costs for both onshore and community processing options, and the economic contribution that refugees can make by working and spending in the community, as well as the jobs created by moving the industry within Australia is good news for the national economy. In sum, reducing time in detention, or avoiding it altogether, will inherently lead to financial savings.

As with most policy discussions, there is a human factor to be considered; how will the policy impact those individuals whose interests are directly related to the decision? As I detailed in Part III, prolonged detention of asylum seekers often induces negative effects for their health, particular psychological. I argue that moving the processing onshore, and shortening the average stay to six months or less – as opposed to the current average of 394 days – would bring marked improvements for the welfare of asylum seekers and refugees.<sup>130</sup>

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living independently in the community on a Bridging Visa.

See: "Immigration Detention and Community Statistics Summary." Australian Government 2015.

For example, the Australian Red Cross has been a leader of rolling out additional community placement options for children and families and conducts the government-funded Asylum Seeker Assistance Scheme, and Jesuit Refugee Services is one of many organizations that works with the Government to provide services to those in Community detention.

See: Batchelor, Kim. "Community Detention a More Humane Option." Australian Red Cross. June 29, 2011, "Asylum Seeker Assistance Scheme." Australian Red Cross and Marshall, Catherine, Suma Pillai, and Louise Stack. "Australia: Community Detention, a Humane Option." Jesuit Refugee Services. September 26, 2013.

<sup>127</sup> "Fact Sheet 82 - Immigration Detention." Australian Government: Department of Immigration and Border Protection. April 30, 2015.

<sup>128</sup> "2014-15 Federal Budget in Brief," Refugee Council of Australia

<sup>129</sup> It is recorded as costing \$239,000 per year for one asylum seeker in be detained onshore, but \$400,000, \$100,000 and \$50,000 for offshore, community, and bridging visa accommodation respectively.

See: "Community Arrangements for Asylum Seekers, Refugees and Stateless Persons." Australian Human Rights Commission. 2012 and Laughland, Oliver. "Immigration Detention Centre Services Should Be Reduced, Audit Report Says." The Guardian, May 1, 2014, US Edition.

<sup>130</sup> "Immigration Detention and Community Statistics Summary." Australian Government, 2015

There is compelling testimonial evidence to support this claim, as asylum seekers moved to a community setting expressed feelings of relief, lowered anxiety regarding the status of their claim, and a return to normalcy.<sup>131</sup> Community setups impose fewer restrictions on the liberty of the individual, provides community engagement and a strong support network, and for some, the opportunity to attain paid employment. A report published by the International Detention Coalition argues that the use of community management means that “Damaging experiences particular to detention, including confinement, a sense of gross injustice, broken relationships and isolation from society” are likely to be avoided.<sup>132</sup> However, the Human Rights Commission noted that the transition was smoother for those who had only experienced detention for several months or less, while those who had been in a situation of indefinite detention for an extended period complained of continued trauma associated with their detainment.<sup>133</sup> The asylum seekers interviewed by the Commission stressed the importance of having a routine, and their desire of making a contribution to Australia (i.e. through work), to learn English and to develop community relationships. The current parameters for community detention do not allow paid employment, a privilege reserved for those holding Bridging Visas. In my opinion, it is essential that an alternative policy allows all those transferred out of onshore to detention, who possess the skills and adequate language training to gain paid employment, to do so.<sup>134</sup> Fundamental to the policy is the recognition that the vast majority of boat arrivals are in fact, legitimate refugees who are entitled to a supported transition to life in Australia.

Other considerations that should be noted are prospective costs and benefits that may arise from this alternative policy, but do not fall into the categories of financial or human factors. These include impacts on Australia’s reputation and core values including democracy, fairness, and diversity. Instituting a policy consisting of the elements described above would comply with international law and standards regarding the treatment and processing of asylum seekers and refugees, and reaffirm Australia as a nation that values human rights and justice. In addition, Australia would be seen as making a responsible contribution to the global refugee problem that shows no signs of abating. Furthermore, by moving the RSD process for boat people onshore, the system is rendered more transparent which supports a stronger Australian democracy, and the removal of constraints and punishments specific to IMAs secures an approach that is in line with international law, justice and quite simply, the Australian notion of ‘a fair go.’ Another important Australian value as mentioned in the introduction is multiculturalism and diversity. Asylum seekers and refugees are seeking to contribute to and integrate with Australian society, and subsequently everyone benefits from the increased richness in the social fabric of the country. One foreseeable drawback of a more inclusive and compassionate policy may be an increase in the number of people attempting to reach Australia by boat, but by strengthening the efforts to

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<sup>131</sup> “Community Arrangements for Asylum Seekers” Australian Human Rights Commission, 2012

<sup>132</sup> Sampson, R., Mitchell, G. and Bowring, L. “There are Alternatives: A Handbook for Preventing Unnecessary Immigration Detention.” Melbourne: The International Detention Coalition. 2011. 52

<sup>133</sup> “Community Arrangements for Asylum Seekers” Australian Human Rights Commission, 2012

<sup>134</sup> For a full breakdown of the current system of Community Assistance Support and Community detention, see: “AMES Asylum Seeker Programs.” AMES.

eradicate the people smuggling industry in Indonesia, by offering more places annually for the Humanitarian Program (asylum applications from outside Australia) and by continuing to monitor the waters between South-East Asia and Australia in order to prevent tragedy, I argue that the blowback of the policy change can be mitigated.

There is considerable support for a community-based refugee processing arrangement in Australia, from community and church organizations, human rights advocates, policy experts and not-for-profits specializing in a number of fields. The Australian Council for Social Services states: “It is misguided to be looking at off-shore solutions when the most effective, economical, and humane method for processing asylum seekers is right here on our doorstep.”<sup>135</sup> Amnesty International echoed this by agreeing that “Community processing initiatives...are much cheaper than detention, and much more humane, giving asylum seekers the chance to start contributing to Australian society while they wait for their refugee status to be assessed.”<sup>136</sup> An article published in the *Forced Migration Review* similarly found that “community arrangements...comprise a far a more human and effective model than closed detention,” and the United Nations has been a consistent proponent of an RSD process based on the Australian mainland, and one that adheres to international law.<sup>137</sup>

While an assessment of community processing may be premature or speculative in the Australian context, there are several prominent case studies that demonstrate that a similar system has not only worked but been highly successful in transforming the phenomenon of asylum seeking from an issue of illegal entry to a positive story of integration and contribution. A report entitled “There are Alternatives” published by the International Detention Coalition and the La Trobe Refugee Research Center, both based in Melbourne, Australia conducts an in-depth analysis of methods used in numerous states around the world and presents a decision-making model for asylum policy.<sup>138</sup> Four pertinent case studies from which we borrow elements that are appropriate to the Australian context are New Zealand, Spain, Sweden and Canada.

New Zealand takes an approach that focuses on the individual circumstances of each person, with a tiered detention and monitoring system that emphasizes the use of reporting and other requirements rather than opting for secure detention. The asylum seeker is expected to report to an immigration officer and/or appear at a refugee tribunal, and failure to do so may result in arrest and detention.<sup>139</sup> This could be applied in Australia using the existing

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<sup>135</sup> Catherine Marshall et al, "Australia: Community Detention, a Humane Option." Jesuit Refugee Services, 2013.

<sup>136</sup> Dr Graham Thom, Amnesty International's refugee spokesperson, quoted in "New Refugee Community Processing: Humane and Economical Says Amnesty International." Amnesty Australia. May 2, 2012.

<sup>137</sup> See: Catherine Marshall et al, "Australia: Community Detention, a Humane Option." Jesuit Refugee Services, 2013 and "Problems Persist at Manus Island Processing Centre," UNHCR News, 2013.

<sup>138</sup> Sampson et al, "There are Alternatives: A Handbook for Preventing Unnecessary Immigration Detention," The International Detention Coalition, 2011.

The Community Assessment and Placement Model (CAP) incorporates five core components; 1. Assume detention is not necessary 2. Screen and assess the individual case 3. Assess the community setting 4. Apply conditions in the community if necessary and 5. Detain only as a result in exceptional cases. 8.

<sup>139</sup> Ibid 21

infrastructure, and by identifying vulnerable individuals and others who are suitable for community processing early on, not only are costs lowered but the welfare of the asylum seekers is prioritized. Spain is an example of a country that places critical importance on the treatment of asylum seekers and their rights; reception centers operated by both the government and affiliated organizations accommodate asylum seekers for up to six months, with an assigned social worker and assistance to gain employment and housing, access to the same level of health care as Spanish citizens, mandatory Spanish language and culture classes, and legal assistance. Those housed in the reception centers are given a basic allowance and allowed to come and go, and if a decision has not been made regarding their claim within six months, there is the ability to apply for a further six months.<sup>140</sup> I do not anticipate Australia’s processing centers advancing to this extent in the near future, but the Immigration Transit Accommodation (ITA) centers, currently used to house people before they are granted a Bridging Visa, could be molded to this framework that promotes integration of refugees and asylum seekers, and has been commended by the UNHCR. As a country that receives a large influx of asylum seekers through various mechanisms including by boat, Spain serves as a model for the value of an inclusive and supportive RSD process.

Like Spain, Sweden has a ‘reception program,’ lasting one week primarily for the purpose of required government checks, before placement in an open community housing setting. Basic needs in terms of food, health care, and legal advice are provided and asylum seekers are given the right to work and contribute to their living costs while a case worker helps them to navigate their case for protection.<sup>141</sup> The ability to work was previously touched on as an essential element of a policy that values the desire of refugees to make a livelihood as well as contribute to their country of asylum in a meaningful way. Finally, if the outcome is negative, Sweden offers the applicant two months to leave voluntarily, leading to higher rates of wilful return and a less costly result for the government. As the CAP model suggests (see footnote 130), detention is used only in a situation of last resort, when an individual is preparing to be deported from the country. This is an underrated but important aspect of asylum policy where Australia should aim to eventually succeed in the future. In addition to a relatively high intake of refugees through their humanitarian program, a notable feature of Canada’s internal system is its use of negative financial consequences for encouraging compliance with the conditions of community processing. For example, bail may be used as a condition for release from detention awaiting a hearing, and a bond may be enforced as a mechanism for compelling cooperation with the conditions of release, a method that is relatively inexpensive when compared to detention, and has proved successful with a 96% compliance rate.<sup>142</sup>

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<sup>140</sup> Sampson et al, “There are Alternatives,” The International Detention Coalition, 2011: 34

<sup>141</sup> Ibid 35

<sup>142</sup> Ibid 44 and "The Refugee System in Canada." Government of Canada, Citizenship and Immigration Canada, Communications Branch. March 4, 2015. Canada’s humanitarian resettlement program should be commended for its effort to resettle high numbers of refugees from regions of high application rates, such as Bhutan and Iraq, with a commitment to resettle more than 6,000 and 20,000 refugees from these countries respectively (as of late 2014).

Australia’s existing intensive case resolution system for onshore asylum seekers has been praised for its thorough approach, especially concerning highly vulnerable individuals, for whom a specific program has been created (Community Assistance Support Program). If this framework could be broadened to include all asylum seekers, including boat arrivals, and the Government could make the necessary changes to render the policy overall more supportive and inclusive, while remaining legitimate and effective as other countries have done, Australia would be much closer to achieving the goal I outlined earlier.<sup>143</sup> Lastly, it should be reaffirmed that community processing of asylum seekers boasts a consistently high compliance rate, whether financial or other such consequences are used to encourage cooperation or not. The study conducted by the International Detention Coalition found that compliance rates range from 80% to 99.9% in some cases, thus demonstrating an intrinsic benefit of this approach; asylum seekers and refugees are more likely to cooperate with the government when their rights as asylum seekers or refugees have been secured.<sup>144</sup>

Having described the key tenets of the policy, broken down some of the more pertinent costs and benefits, and summarized the successes of similar community-centric policy approaches in other countries, I will now broadly assess this policy proposal against the four evaluation criteria mentioned at the beginning of this section. The criterion of *technical feasibility* relates to the broad question of ‘is it effective?’ and when this policy is measured against the goal and specific objectives outlined above, it can be defined as an effective policy in principle; the process meets Australia’s obligations under international human rights and refugee law, as concerning onshore processing – with active monitoring to certify that the conditions meet UNHCR requirements – an RSD regime that prioritizes the individual circumstances of each applicant, with regular judicial review, the use of temporary community processing that assures the wellbeing of asylum seekers, and eventual resettlement on the Australian mainland for those whose claims are established to be sufficient for refugee status and permanent protection. In theory, these fundamental elements combine to offer a policy that effectively achieves the underlying goal. *Political viability* is more difficult to predict, but seeing as there is already considerable support in Australia for community processing, spearheaded by the Greens Party and numerous other organizations, I argue that the core requirement for making the policy viable to both the major parties and the Australian public is to emphasize the considerable economic benefits associated with this alternative as compared to the significant burden imposed by offshore processing and Operation Sovereign Borders.<sup>145</sup> There is a possibility that some concessions may need to be granted, such as removing the legally mandated time limit for processing in the onshore detention centers from the policy draft, but I contend that by changing the narrative of asylum seekers and refugees, especially boat people, the Australian government can initiate a policy similar to this one that is outlined on these pages.

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<sup>143</sup> Sampson et al, “There are Alternatives” The International Detention Coalition, 2011: 40.

<sup>144</sup> Sampson et al, “There are Alternatives” The International Detention Coalition, 2011: 51: This statistic is derived from the compliance rates from all thirteen programs that were a part of the study.

<sup>145</sup> For the core principles and aims of the Australian Greens Party on the issue of refugees and immigration, see: Penny Allman-Payne, "Immigration and Refugees," The Greens. 2015.



Also speculative to an extent, *financial possibility* is one component of the cost-benefit analysis conducted earlier. Based on estimates taken from other countries and made by Australian commentators, it can be assumed with a degree of certainty that a policy that incorporates minimizing time in detention and maximizing the use of community processing is much less expensive than the extensive costs associated with offshore processing and OSB that is pushing \$3 billion, some of which are not on public record. Given that upon implementation of this policy, offshore processing could be dismantled, and an onshore system would both utilize existing infrastructure and provide economic stimulus, there is clear and abundant financial possibility for this program. The final criterion is *administrative operability*, and recognizing that while the current onshore detention centers may need to be expanded or upgraded, and additional housing located for community processing, the core features such as trained staff and an RSD review board are already in place and active. With some reorganizing, hiring of supplemental staff, and changes made to make the Refugee Review Tribunal more independent and focused on procedural justice, the policy could be begin to roll out in the very near future, although there would need to be an allowance for a transition phase. All things considered, I consider the biggest challenge for the implementation of this policy to be making it politically viable in the eyes of the major parties and the Australian public.

## **Part V: Conclusion**

Australia, like the United States, is fundamentally a nation of immigrants, more specifically, of ‘boat people.’ From the arrival of the First Fleet in 1788, to the mass migrations spurred by the Second World War, people have been arriving in Australia via a naval route for over two centuries. Evidently, the boat people I am talking about here are of a slightly different origin, in that the vast majority of them are fleeing persecution or the horrors of state breakdown and war, not migrating out of choice or for some economic incentive. The underlying question I am presenting is why treat these asylum seekers any differently to those who apply for protection from outside Australia, or those who travel by air and subsequently apply from within the country? Boat people are owed the same human rights as all of us, in addition to specific rights that are granted to refugees under the UN Refugee Convention.

In spite of this inequality and discrimination, the current policy combination of active boat interception and turn-around, offshore processing, and third-country resettlement is in blatant violation of a number of international laws pertaining to refugees, including arbitrary detention, non-penalization, and due process of law (See Part III). The conditions within the offshore processing centers have been widely condemned as being well below the standard and the United Nations High Commissioner for Refugees António Guterres, has repeatedly expressed his concern about the restrictive policies; “Refugees are persons who are fleeing persecution or the life-threatening effects of armed conflict. They are entitled to better

treatment than being shipped from one country to the next.”<sup>146</sup> Despite these criticisms, the Australian government remained resolute in their conviction that offshore processing among the other measures was within their lawful mandate when Operation Sovereign Borders went into effect in late 2013. The policy has been hailed a success by the leadership as since its implementation, there has just been just one incident of a boat breaching Australian borders. Success, however, is relative to the stated goal. The only goal that has been publicized by the Australian government in regards to boat people is simply “stopping the boats,” with the single commendable justification being that inhibiting the people smuggling trade and the passage of unseaworthy vessels between Indonesia and Australia has saved lives.<sup>147</sup>

I have argued throughout this paper that this narrow goal is not a sufficient response to a complex issue that spans the entire region. It must be reiterated however that the current refugee crisis is a global phenomenon: since the UNHCR was established to address the predicament of one million refugees and displaced people following the Second World War, there is now over 42 million people that are noted as being of concern to the United Nations, of which upwards of 11 million are determined to be refugees.<sup>148</sup> Recent events in the Mediterranean which saw over 700 asylum seekers drown when attempting to reach Italy from Libya, have also brought into focus the extent of the boat people problem in Europe, and some have questioned whether the “Australian Solution” could be a viable response. At closer inspection, the Australian government’s means of stopping the boats is not feasible in the European context.<sup>149</sup> Consequently, I argue that a policy that seemingly ignores the global scope of the issue and its implications abroad is not a sustainable approach to solving a problem that does in fact, extend beyond Australia’s borders.

The Australian boat people predicament is just one instance in a larger conflict between domestic government policies and the more recent institution of international law that almost all states continue to grapple with across a number of issues. Yet as a nation with the capacity to respond to the flow of asylum seekers in a way that respects both international law and our prominent political and economic influence in the region, I argue that the Australian government should move away from a policy of deterrence to one that focuses on establishing a Refugee Status Determination procedure that fulfills our obligations and brings integrity to the Government, rather than being a source of national shame. Developed nations need to remove the burden from the shoulders of less developed states that lack the means and infrastructure to manage the overwhelming numbers of refugees on their doorsteps.

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<sup>146</sup> “UNHCR Statement on Australia-Cambodia Agreement on Refugee Relocation.” UNHCR - Regional Office. September 26, 2014.

<sup>147</sup> Dearden, Lizzie. “Tony Abbott Tells Europe to 'Stop the Boats' like Australia as Migrant Crisis Continues.” *The Independent*, April 21, 2015, Europe sec.

<sup>148</sup> “UNHCR Global Appeal 2015 Update - Populations of Concern to UNHCR.” UNHCR News.

<sup>149</sup> Due to the much higher numbers of people, and that for the most part, they are directly fleeing persecution (rather than via a transit state like Indonesia) and thus turning back the boats would be putting people in direct danger, as well as regional European Union laws that prohibit the return asylum seekers intercepted at sea under the European Convention on Human Rights.

See: Farrell, Paul. “Could Australia's 'stop the Boats' Policy Solve Europe's Migrant Crisis.” *The Guardian*, April 22, 2015, Migration sec. and Davies, Sarah, and Phil Orchard. “Halting Migrant Boats: Lessons from Australia.” *CNN*. April 24, 2015.

Australia could also make some active and positive progress within the scope of its regional relationships. I went into some detail regarding the current state of Australia’s regional partnerships, with Indonesia, Papua New Guinea, and Nauru in particular in Parts II and III, but the policy goal and outline that I put forward does not include an answer to what I outlined as a secondary goal; a regionally-agreed approach combating illegal people smuggling activity. This is an area where I strongly suggest further research be conducted, as domestic policy alone cannot manage the pipeline of asylum seekers that is continuing to grow, regardless of whether or not boats are being turned back by the Government. An additional avenue to the same end includes research into mechanisms by which the government can help manage the tide of asylum seekers at the source, whether it is through aid, work with local UNHCR efforts, or bilateral programs with the major countries of origin for refugees that find themselves in Australia, such as efforts to reduce the number of displaced persons or facilitate their applications for asylum in-country.

My proposal is by no means comprehensive; rather, with the time and resources that were available to me, I sought to conduct a general overview of the situation, critically analyze the policy that is in place today, review the known goals of the Government, and suggest an alternative that is not only more in line with the international expectations and obligations, but economically and politically sustainable in the long term. I fully recognize that a substantial amount of research and investigation remains to be done on the technical details of the policy, the specifics of implementation, and further implications of the program that I have perhaps overlooked.

One particular question that I did not answer in the outline of my policy concerns what is to be done for the asylum seekers whose applications fail. Currently, some of those who have been detained for long periods and are willing to depart yet their country of origin will not grant them a visa, are approved for a “Removal Pending Bridging Visa” and allowed to live in the community.<sup>150</sup> Other arrivals who are members of the ‘legacy caseload’ of 2012 and 2013 have the right to a review of their application, and upon a second negative outcome, must make arrangements to return home.<sup>151</sup> This process does not apply to boat arrivals since the Government made its commitment in mid-2013 that no one who arrived by boat would be allowed on the mainland. For those who make it past the “advanced screening” process and are transferred to an Offshore Processing Center rather than simply being sent back to Indonesia in a life boat, the outcome of a failed application is not clear; one drawback of a system that eschews transparency and accountability. Regardless, I do not agree with returning boat people to Indonesia, a country where asylum seekers have no rights, or deporting people to their country of origin without an extensive investigation that ensures that there is no risk to their safety upon their return. While this question was beyond the confines of this paper, it is certainly one aspect of a policy alternative that must be addressed.

What I have endeavored to make clear is that the current framework for managing the boat people predicament is not a long-term solution, while it may be serving a short-term

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<sup>150</sup> Sampson et al, “There are Alternatives” The International Detention Coalition, 2011: 47

<sup>151</sup> "Refusal of a Temporary Protection Visa Application." Australian Government: Department of Immigration and Border Protection. April 1, 2015.

purpose of reducing the number of boat arrivals, and subsequently the occasional loss of life at sea. The costs of the Pacific Solution and Operation Sovereign Borders are exorbitant nonetheless, and there are serious and negative consequences for the individuals who have been shown to have almost universally legitimate claims to protection. What I am proposing on the other hand, is a step closer to a solution that is sustainable, and more importantly, places the rights of asylum seekers and refugees under international law at the forefront. The recommendation of brief onshore processing followed by community processing that I have outlined within these pages is both suitable for the Australian context, and entails lower economic and human costs. In fact, by bringing the RSD infrastructure back to the Australian mainland, the costs incurred such as expanding facilities and training staff, will eventually develop into beneficial outcomes related to a boost for employment rates and the national economy as a whole. Thus the alternative that I am advancing is not only more cost-efficient but handles boat arrivals in a way that does not sacrifice their rights nor their mental and physical health and wellbeing.

The policy option that I am advising the Australian government implement is also backed up by the precedents of several states that I discussed in Part IV, including our neighboring New Zealand, where similar programs have had a high degree of success. Universally high compliance rates for community-based asylum policies in numerous countries around the world suggest that for the majority of asylum seekers and refugees, they are more than willing to cooperate with the authorities of the country in which they apply for protection. Therefore the biggest question is not whether the proposed policy would be effective or legitimate, but whether it can be made feasible in the minds of Australian politicians and the general public.

This brings me to what I believe to be the biggest challenge facing refugee advocates and policymakers in Australia; changing the harsh narrative that has developed over the past decade with respect to asylum seekers, boat people in particular, and their status as refugees. Public opinion will not change overnight, and doing so will take a concerted public education campaign, building on the efforts of organizations like Amnesty International Australia and the Australian Greens. A key necessity is shifting the debate from one of “us versus them”, the outsiders, to one about how best we, as a developed industrialized nation, can fulfill our international responsibilities and best support these people who are exercising their legal right to seek protection from persecution at home. It is imperative that Australia sets an example for other developed states that have similar capabilities, because as prominent human rights lawyer David Manne has said, “If all of the other 147 signatory countries were to embark upon a similar plan, the international protection framework would collapse.”<sup>152</sup> Manne draws attention to a larger point here; when we deconstruct and untangle all of the factors that contribute to the harsh anti-refugee attitudes and policies that Australia has been unveiling

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<sup>152</sup> Siegel, Matt. "Australia Adopts Tough Measures to Curb Asylum Seekers." *The New York Times*, July 19, 2013, Asia Pacific sec.

since the 1970s, the underlying problem is the oversight that this is not an issue isolated to Australia, but part of a global phenomenon.

There are several paths that I would have liked to pursue when conducting research for this work, had time or resources allowed. These include field work methods such as interviewing asylum seekers and refugees that have first-hand experiences within the offshore detention facilities, or have had their vessel turned back by the Australian Navy. Having access to government documents that detail the specifics costs involved with the current policy and the numbers of people that have been turned back (with or without proper processing) since Operation Sovereign Borders has been in place would also have increased the credibility of the claims that I have presented here. However, as with any work of this nature, there will always be more that we hope to achieve than it possible, and as an undergraduate paper for the purpose of an Honors Thesis, I have presented a policy overview and proposal that can be used as a starting point for further research.

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