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## The Problem with the 1951 Refugee Convention

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## The Problem with the 1951 Refugee Convention

Adrienne Millbank  
Social Policy Group  
5 September 2000

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## Glossary

Asylum seeker	A person who enters or remains in a country either legally, as a visitor or tourist or student, or illegally, with no or with fraudulent documentation, and then claims refugee status under the terms of the 1951 United Nations Convention Relating to the Status of Refugees. (Description at page 3).
Convention refugees	People who have been found to engage protection obligations, and are accorded refugee status, and thus the right to remain within a signatory country, under the terms of the 1951 Refugee Convention.
Country of first asylum	The first, usually neighbouring country to which a refugee flees. The world's refugee camps are in countries of first asylum.
Humanitarian migration program	Part of Australia's immigration program. Comprises people authorised to enter Australia for humanitarian reasons under an annual numerical planning level.
Illegal immigrant	A person who enters or remains in a country without a valid visa or travel authority, that is with no or with fraudulent documentation. According to Australian migration law, such people are 'unlawfully' or 'illegally' in Australia.
Immigrant	A person who moves to another country, having met work or business or family reunion criteria, and having been issued with a visa or residence permit which entitles them to reside in that country.
Off-shore visas	Where visas authorising entry into a country are issued to people in other countries, they are described as being issued 'off-shore'.
On-shore visas	Where visas authorising stay in Australia are issued to people after they have already arrived, legally or illegally, in Australia, they are described as being issued 'on-shore'.
Refugees	The Macquarie dictionary definition of a refugee is 'one who flees for refuge or safety, especially to a foreign country, as in time of political upheaval, war etc'. According to the United Nations High Commissioner for Refugees in its 1999 <i>Statistical Overview</i> , refugees are persons recognised under the 1951 Refugee Convention; persons recognised under the 1969 Organisation for African Unity Convention on Refugee Problems in Africa (see endnote 17); persons granted humanitarian or comparable status; and persons granted temporary protection.
Third country	Where refugees move from their countries of first asylum to another country, such as Australia, that country is described as a third country (the first being the home country, and the second being the country of first asylum).





## Major Issues

The 1951 United Nations Convention Relating to the Status of Refugees has created a system for providing protection to people at risk of persecution in their own countries. There are few countries willing to risk turning such people away. However it is unlikely that many governments would sign up to the Convention today. This paper aims to explain why. It argues that the problem with the Convention is that it was developed in and for a different era. Its focus is the resulting problems that have been identified since the late 1980s with the operation of the Convention in Western countries.

The recent wave of boat people has demonstrated how options for dealing with 'illegal' arrivals are constrained by Australia's obligations under the Convention. They have focussed attention on the nature of these obligations, and on how on-shore or 'Convention' refugees operate under a different system, legally and obligation-wise, from refugees selected from overseas under the off-shore humanitarian program, or from people provided temporary protection under safe haven or extended visa arrangements. The use by the boat people of people smugglers to circumvent visa and border controls has prompted Australia to join other countries in openly questioning the operation and continuing viability of the Convention itself.

The Convention defines as a refugee a person:

(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 or, owing to such fear, is unwilling to avail himself of the protection of that country.

Obligations come into effect after an asylum seeker has entered a signatory country, and fall squarely on that country. The core obligation is that of 'non-refoulement', not sending someone back into a situation of possible persecution. Another important obligation is not to penalise asylum seekers for entering a country 'illegally'.

The problem with the Convention is that it was designed in and for a different era. A number of resultant specific problems in its implementation in today's very different world have been identified by academics and researchers:

- the Convention definition of refugee is outdated, as is its notion of exile as a solution to refugee problems

- it confers no right of assistance on refugees unless and until they reach a signatory country, it imposes no obligation on countries not to persecute or expel their citizens, and it imposes no requirement for burden sharing between states
- the asylum channel is providing an avenue for irregular migration and is linked with people smuggling and criminality
- the Convention takes no account of the impact (political, financial, social) of large numbers of asylum seekers on receiving countries
- there is inequity of outcomes between 'camp' and 'Convention' refugees. Priority is given to those present, on the basis of their mobility, rather than to those with the greatest need
- there is a gross disparity between what Western countries spend on processing and supporting asylum seekers, and what they contribute to the United Nations High Commissioner for Refugees (UNHCR) for the world refugee effort
- asylum seekers do not elicit public sympathy in the way that 'obvious' (as seen on television) refugees do
- the Convention has fostered simplistic and unfortunate characterisations of asylum seekers as either political and thus 'genuine' and deserving, or economic and thus 'abusive' and undeserving.

While the Convention-based asylum system may have operated well enough until the end of the Cold War, it was not designed with today's mass refugee outflows or migratory movements in mind. At a time of intense migration pressure and limited opportunities, asylum systems in Western countries have come under increasing strain through their use as a migration channel. An estimated one million migrants were transported, worldwide, in illegal operations worth up to USD20 billion in 1999. Since 1985 the number of asylum seekers in Europe has outnumbered all legally admitted foreign workers.

Over the last decade, Australia's average intake under its humanitarian migration program has averaged about 12 000; the highest per capita off-shore intake of refugees in the world. The potential impact of 'Convention' refugees on this program became apparent in February 2000, when processing of off-shore humanitarian visas was suspended, following indications that up to half the program allocation could be taken up by successful on-shore asylum seekers.

The implementation of Convention obligations in Western countries is distorting the international refugee effort. By 1990 the European OECD states plus Canada were spending USD5 billion annually on the processing of refugee applications: ten times the UNHCR budget in that year. This year one country, the UK, is spending more on asylum seekers (BRP1.5 billion, equivalent to USD2.2 billion) than the UNHCR budget of

USD1.7 billion, which is supposed to protect the world's 22 million refugees. Australia spends as much each year (\$14 million) on the Refugee Review Tribunal (one level of the determination process) as it donates to the world refugee effort through the UNHCR.

Asylum seekers are drawn to particular countries by a range of obvious factors—proximity, family and ethnic community networks, employment opportunities and wage levels, generosity of welfare systems, levels of tolerance within existing societies, and the accessibility of determination systems. In Europe last year 70 per cent of asylum seekers sought protection in just four countries—Germany, Britain, Switzerland and the Netherlands. Acceptance rates are more revealing of a country's political priorities, or its attitude to migration, or the weight of numbers it has had to deal with, or its diplomatic relations with 'sending' countries, than the genuineness of refugee claims.

Australia is perhaps unique amongst Western countries in its capacity and willingness to remove failed asylum seekers; in other countries most failed asylum seekers simply remain. Australia has however joined other countries in attempting to discourage new applicants. The most minimal welfare payment, special benefit, is provided to illegally arrived asylum seekers even after they have been determined to be Convention refugees; they are provided with temporary visas with no family reunion entitlements; and they are denied access to settlement services tailored for and provided free to off-shore refugees.

The UNHCR and other asylum seeker supporters, while acknowledging that there are problems with the operation of the Convention, are concerned that opening it up to review could lead to restriction, rather than expansion, of refugee rights. They argue that avenues for legal migration should be opened up to insulate the Convention from migration pressures, and that governments should work with the UNHCR to supplement, not supplant the Convention, in response to the changed refugee context. Other commentators argue that proposing expanded obligations for governments on top of a Convention-based asylum system that is already if not 'broke' then loudly creaking, is fruitless as such proposals are politically impossible.

No country has a visa entry (and exit) control and management system comparable to Australia's and no country (Canada perhaps excepted) has invested as much in its managed migration and resettlement programs. Australia has been built on migration and there is concern amongst political leaders that illegal entry of asylum seekers could undermine public support for immigration and recent immigrants. It is likely that governments will take whatever measures are necessary to maintain control over who enters, including challenging the UNHCR and rethinking obligations under the Refugee Convention.

Reforming the on-shore asylum system to bring more transparency, equity and consistency into our refugee responses is likely to win the support of at least the general Australian public. If linked with a redirection of resources to assist countries of first asylum, and support for reform in international forums, it is likely also to win approval from the international community.



## Introduction

The 1951 United Nations Convention Relating to the Status of Refugees has created a system for providing protection to people at risk of persecution in their own countries. There are few countries willing to risk turning such people away. However it is unlikely that many governments would sign up to the Convention today. This paper aims to explain why. It argues that the problem with the Convention is that it was developed in and for a different era. Its focus is the resulting problems that have been identified since the late 1980s with the operation of the Convention in Western countries.

The recent wave of boat people has provided a very public demonstration of how options for dealing with 'illegal' arrivals are constrained by our obligations under the Convention. More than 3700 boat people arrived in 1999, up from 200 the year before. Last financial year nearly 4200 arrived. Source countries have shifted from China and countries in our region to Middle Eastern countries. The boat people are coming, often via neighbouring countries of first asylum, in boats via Indonesia. Over 90 per cent of those from the war torn countries of Iraq and Afghanistan have been granted refugee status. The latest wave of arrivals has thus focussed attention on Australia's obligations under the Refugee Convention, and on how the Convention fits in with our humanitarian migration program.

The potential impact of 'Convention' refugees on the humanitarian program became apparent in February 2000, when the Immigration Minister indicated that processing of off-shore humanitarian visas would be suspended, following indications that up to half of the 12 000 overall program allocation could be taken up by on-shore asylum seekers. Deterrent measures (temporary visas with no family reunion rights in the first instance, minimal welfare assistance and no access to job network or language programs) have been controversial and are concerning, in that they represent a departure from established practice and ethos. Australia has hitherto portrayed itself as one of the world's most generous refugee-receiving countries, with highly developed settlement assistance programs aimed at getting people to participate in mainstream life as soon as possible.

There would be few parliamentarians unaware of the strength of public feeling directed against the recent boat arrivals, or of the extent to which opinions are polarised on the issue. The recent asylum seekers are either undeserving users of the system, who would not qualify for places under our immigration or refugee program criteria, or desperate refugees exercising their right under international law to seek asylum. Refugee advocates and commentators have blamed the Government, and the media, for the outpouring of public hostility, citing choice of 'demonising' labels such as 'queue jumpers' and 'illegals'.

Parliamentarians have in turn suggested that refugee advocates and non-government organisations (NGOs) are out of touch with mainstream public opinion.<sup>1</sup>

Some commentators have argued that the recent increase in boat people numbers heralds our entry into, and thus provides an opportunity to display our generosity and maturity within, the global club of (mainly European Union) seasoned asylum seeker receiving countries, which have been coping with greater numbers for longer.<sup>2</sup> It is however a club that Australian governments and most of the voting public might prefer not to join. Asylum seekers, along with those who enter via family reunion, have comprised the bulk of the sizeable immigrant intakes into Western European countries in recent years. Asylum-driven immigration ranks high among voter concerns, anti-foreigner sentiment is widespread, and right-wing anti-immigration parties are getting up to 30 per cent of voter support.<sup>3</sup>

Refugee advocates have also argued that the Government should 'educate' the public about our obligations as signatories to the Convention, and about the human rights situations in Iraq and Afghanistan. Educating people might make them more familiar with Australia's obligations under international law. However it is possible that the more people learn about the Convention-based asylum system, the more likely they are to conclude that it is neither a particularly effective or rational basis for guiding Australia's refugee priorities, nor for alleviating the plight of people displaced by conflict within Iraq or Afghanistan.

Nearly 50 years after its adoption, the Refugee Convention remains the only international instrument for the protection of refugees, and the United Nations High Commissioner for Refugees (UNHCR) is still exhorting Western governments to respect and uphold it as the 'cornerstone' and 'foundation' of the international refugee system. Doubt is increasingly being expressed however as to its adequacy to meet that role. The crux of criticism is that the Convention is obsolete and inappropriate to deal with contemporary challenges. As at end-1999 the UNHCR had identified 22.3 million people 'of concern', including 11.7 million 'refugees', and 4 million 'internally displaced' (people who are refugees in their own countries). (A statistical overview showing how the UNHCR currently categorises refugees is provided at Table 1 on page 27.) According to the United States Committee for Refugees (USCR), by the end of 1999 there were 14 million refugees ('people displaced by persecution and conflict across an international border'), and 21 million 'internally displaced' people.<sup>4</sup> Nearly all of these refugees and displaced people are in poor countries, compared with the 1.2 million asylum seekers (as at end-1999) who were seeking refugee status in wealthy countries.

The disparity between the costs and abuse of developed asylum systems, and the level of attention paid to refugee situations in poorer countries, has become increasingly apparent. Also apparent is that many hundreds of people desperate to enter Western countries are dying each year in the attempt to circumvent increasingly tough border controls. The traffic in illegal immigrants was graphically illustrated in June 2000 when 58 young Chinese people suffocated to death in the back of a tomato truck after travelling to the southern British port of Dover from Belgium.

While the international asylum system has been under obvious pressure for the last 10 years, neither governments nor refugee advocates have been willing to call for review. NGOs have feared governments would seize the opportunity to downsize their obligations, and governments have been reluctant to invite censure, and fearful of incurring even greater obligations. As well, most countries have invested heavily in their refugee determination systems. Sizeable sections of public service departments, entire organisations and careers at the national and international level have been devoted to implementing and promoting the Convention.

A resurgence in asylum seeker numbers in the late 1990s, after a mid-decade lull, linked with the rapid emergence of people smuggling as a global industry, would appear to be tipping a number of governments, or at least parliamentarians, over the edge. In 1998 the Austrian Presidency of the EU suggested replacing the Convention with an EU asylum law 'which meets today's requirements rather than those of a geopolitically outdated situation'.<sup>5</sup> In the same year the General Secretary of Germany's Liberal Party called in effect for default from the Convention on the grounds that it was 'an invitation to abuse and to unrestricted and unregulated migration'.<sup>6</sup> In April this year the UK Home Secretary, Jack Straw, criticised the Convention as 'too broad for conditions in the 21<sup>st</sup> Century', and as 'no longer an adequate guide to policy in the age of mass air travel and economic migration'.<sup>7</sup> Conservative Party leader William Hague described the asylum system as 'near collapse in today's utterly different world'.<sup>8</sup> In March this year the Australian Immigration Minister Philip Ruddock described the international asylum system as open to exploitation and manipulation by non-refugees, saying it should be toughened 'either administratively or by reviewing the actual treaty document itself'.<sup>9</sup> And in August he announced that the Government was reviewing the interpretation and implementation of the Refugee Convention in Australia.<sup>10</sup>

Tensions between governments of receiving countries and the UNHCR and other asylum-seeker advocacy groups are intensifying. UK writer Jeremy Harding, in his evocative description of people smuggling, has observed that 'for a growing list of governments the best interpretation of the Convention Relating to the Status of Refugees can only be to run it through the shredder'.<sup>11</sup> A recent UNHCR-commissioned analysis of responses of European governments to people smuggling describes people smugglers as 'the last resort of genuine refugees', and concludes that current policy risks 'ending the right of asylum in Europe', and that the 'current status quo is practically and ethically bankrupt from all positions'.<sup>12</sup>

As the 1951 Refugee Convention approaches its 50<sup>th</sup> anniversary, debate as to whether it has reached its use-by date will intensify. This Research Paper describes the problems with the operation of the Convention that have been identified by researchers and commentators over the last 10 years. It also looks briefly at options for reforming the international refugee regime, and suggests why Australia might take a lead in rethinking its obligations under the Refugee Convention.

## The Refugee Convention

The United Nations ('Geneva') Convention Relating to the Status of Refugees was adopted in December 1951, following a resolution of the UN General Assembly in 1950, and entered into effect in April 1954.

It defines as a refugee a person:

(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 or, owing to such fear, is unwilling to avail himself of the protection of that country.

The 'well-founded fear of persecution' had to arise from events associated with the Second World War, in Europe, until the 1967 Protocol extended coverage to refugees throughout the world.

Obligations under the Convention fall squarely onto the receiving state, and come into effect after the asylum seeker has entered its territory and made a claim for refugee status. The most basic principle, or core obligation, of signatory states is that of 'non-refoulement', i.e. not sending someone back to a situation where there they might face persecution.<sup>13</sup> Another important obligation (and source of increasing tension with the rise of people smuggling) is not to penalise asylum seekers for entering a signatory country 'illegally'.<sup>14</sup>

While not spelled out as a requirement in the Convention, Western signatory states have, under the guidance of the UNHCR, established refugee determination processes. While administrative and legal systems vary, the central features are the same. Claims are assessed, on an individual basis, according to whether there is a 'real' possibility the claimant would face persecution, on a Convention ground, if returned. Decisions are made on a credibility of story basis, assisted by 'country information' gleaned from such sources as foreign affairs officials, Amnesty International and the US Department of State. For obvious reasons, low burdens of proof are required in refugee decisions; attempts are not made to check stories with allegedly persecutory governments. Also for obvious reasons—the possibly life threatening consequences of getting it wrong—decisions are made on a benefit of the doubt basis. While granting permanent resident status is not required under the Convention, this has become standard practice.

## The UN Convention and the refugee 'burden'

Efforts of the UNHCR, to which Australia has contributed, have expanded the number of signatory states in recent years. Two thirds of all states, including all Western states, are party to the Convention and/or Protocol. (Signatory and non-signatory states are listed at



Table 2 on page 28.) While many poor and developing countries have become signatories, the flow of asylum seekers has remained to wealthy Western countries, and in its operation the Refugee Convention has developed, in the words of the Immigration Minister, as 'essentially a standard that is being imposed on developed countries'.<sup>15</sup> In fact, it is a standard 'imposed' on Western countries. Japan in 1999 received 260 asylum applications, of which it approved 13. South Korea acceded to the Convention in 1992. Since then it has received a total of 50 asylum applications, of which it has approved none.<sup>16</sup> Singapore is not a signatory to the Convention or the Protocol.

While a number of African countries (including Angola, Mozambique, Liberia, Zambia) are signatories, it has always been obvious that the Convention is of limited use for dealing with the refugee situation in Africa. In 1969 the Organisation for African Unity (OAU) adopted a Convention on Refugee Problems in Africa which encompasses a broader refugee concept. It includes people displaced from their countries by external aggression or occupation or 'events seriously disturbing public order'.<sup>17</sup> In 1984 Latin American countries adopted the 'Cartagena Declaration' which incorporates a similarly broad refugee definition. For countries like China or Cambodia being a signatory state amounts to permitting asylum applicants to remain in their countries while determinations regarding resettlement needs are made by the UNHCR.

Regardless of their Convention status, or whether the Convention even registers in their scheme of priorities, it is the poorer countries of the Middle East, Asia, Africa, and Eastern Europe that are carrying the bulk of the world's refugee burden. At the end of 1999, Iran was hosting 1.8 million refugees (including 1.3 Afghans and 500 000 Iraqis). There were 1.5 million refugees in Jordan, 1.2 million in Pakistan, and over 300 000 in India. There were 900 000 'internally displaced' people in Iraq, and a further 129 000 refugees. Closer to our region, at the end of 1999 there were 160 000 (mainly Burmese) refugees in Thailand, and 45 000 (Filipino Muslims) in Malaysia.<sup>18</sup> Sizeable displacements have and are occurring this year within and around Indonesia. None of these countries is a party to the Convention.

Likewise, Convention status, and the extent to which the Convention is utilised or is operational within a country, bears little relation to its financial contribution to the international refugee effort. The USA, which is not a signatory (although it acceded to the Protocol in 1968 which entails essentially the same obligations), and has largely pursued its own refugee agenda, was the top donor to the UNHCR in 1999 with USD283 million. The second largest donor was Japan, with USD119 million. South Korea donated USD900 000.<sup>19</sup>

## The United Nations High Commissioner for Refugees

The office of the UNHCR, the UN refugee agency mandated to 'lead and coordinate international action for the worldwide protection of refugees' was established in 1950,

following a UN General Assembly Resolution in 1949. It was originally established for two years, on the assumption that the post-War refugee situation would be quickly resolved. It is currently on a five year mandate.

The UNHCR's founding mandate defines refugees in terms virtually identical to the Convention as expanded by the Protocol. It describes its most important function as 'international protection—trying to ensure that no refugee is returned involuntarily to a country where he or she has reason to fear persecution'. It describes as 'other' its more recently developed functions:

Help during major emergencies involving the movement of large numbers of refugees; regular programs in such fields as education, health and shelter; assistance to promote self-sufficiency of refugees and their integration in host countries; voluntary repatriation; and resettlement in third countries for refugees who cannot return to their homes and who face protection problems in the country where they first sought asylum.<sup>20</sup>

The UNHCR has been concerned to preserve a link between the term 'refugee' and the Convention definition, thus reinforcing the notion of state obligations. The result has been some confusing official categorisations like 'people of concern', and 'people in refugee-like situations'. It now also, along with the rest of the world, uses the term 'refugee' in its broader and more commonly understood and obvious (as seen on television and defined in the dictionary) sense of being displaced, usually but not necessarily across a border. Thus the figure of 22 million is widely used to describe the number of refugees in the world.

While much of its rhetoric is directed at Western countries in the form of exhortations to honour their Convention obligations, the bulk of UNHCR activity, resources and material assistance is in fact directed to assisting with situations of mass refugee outflows. Its activities in recent years have increasingly involved groups for whom it actually has no mandate, the 'internally displaced', for example the Kurds or the Timorese. The solutions that have come to be accepted by the UNHCR and the international community to deal with mass displacements are: repatriation as soon as possible in conditions of safety and dignity; longer term settlement in the (usually neighbouring) country of first asylum; and resettlement where these are not possible in a third country. It is from this latter group, on the advice of the UNHCR, that Australia draws refugees for resettlement under its off-shore humanitarian migration program. Relatively small (compared to the world refugee population) numbers of refugees are identified by the UNHCR as in need of resettlement in third countries: in the mid-1990s, fewer than 60 000.

## **EXCOM**

The UNHCR is guided in its activities by an executive committee, currently comprising 57 countries. EXCOM countries are elected by the UN General Assembly's Economic and Social Committee on the basis of their involvement in refugee situations; they are not necessarily signatories of the Refugee Convention. India for example, an outspoken critic

of the operation of the Convention because it does not address situations of mass outflows, is a member. EXCOM produces its conclusions and decisions as 'notes on international protection'. These provide a description of the current state of international protection of refugees. While they are non-binding on states, they are also intended to provide a developing body of guidance to receiving states on the operation of the Convention.<sup>21</sup>

## Australia's refugee response

Australia's major contribution to the system of international protection has been the resettlement of refugees (people identified by the UNHCR as in need of resettlement in a third country) from refugee camps. Over the last 50 years, Australia has resettled about 600 000 refugees. Over the last decade, the annual intake has averaged about 12 000; the highest per capita off-shore intake in the world. Besides refugees selected under the advice of the UNHCR, the humanitarian program includes components for people in need who have connections in Australia. Australia's core contribution to the international refugee effort, on which its international reputation is based, thus has little to do with the operation of the Refugee Convention.

## The on-shore refugee determination system

Australia acceded to the Convention in 1954, and to the 1967 Protocol in 1973. The Convention has been incorporated but not interpreted in domestic legislation; section 36 of the *Migration Act* defines as a criterion for a protection visa that 'the applicant is a non-citizen in Australia to whom Australia has protection obligations under the Refugees Convention as amended by the Refugees Protocol'. The on-shore refugee determination system only began to be developed in Australia after the arrival of Indo-Chinese boat people from the late 1970s. (The 'defection' of the few people who sought asylum from communist countries in the 1950s and 1960s was arranged through foreign affairs, rather than immigration officials.) It was not until the numbers of asylum seekers grew rapidly in the 1990s that a comprehensive refugee determination system was developed within the immigration portfolio. This comprises initial decision-making by Department of Immigration officials, access to merits review by an independent Refugee Review Tribunal (RRT), and access on matters of law to the Federal Court.<sup>22</sup>

## The problems

The essence of criticism of the 1951 UN refugee Convention is that it is anachronistic. The treaty was developed in and for a different era. While Western countries' asylum systems might have coped well enough until the end of the Cold War, they were not designed with

today's mass refugee outflows and migratory movements in mind. This section summarises the resulting problems with the operation of the Convention that have been identified by researchers and commentators over the last 10 years.<sup>23</sup> Statistics, unless otherwise indicated, are from the UNHCR or the USCR.

## The definition

The 1951 Refugee Convention is a product of the Cold War environment, and it reflects both European experience of Nazi war-time persecutions and Western political interests as these were perceived at the time.<sup>24</sup> Immediate post-war European displacements had been dealt with on an ad hoc and group basis. Exit restrictions in communist countries meant numbers were low. The Convention criteria could be applied on a case-by-case basis, and ideological kudos gained by providing sanctuary to 'defectors' to the 'free world'. Most asylum seekers are now from the poorer countries of the Middle East, Asia, Africa, and Eastern Europe, rather than Western Europe. They are less welcome. There is no longer a need for unskilled labour in developed countries, and no longer any ideological or strategic advantage attached to conferring asylum. With rapidly increasing numbers of asylum seekers since the late 1980s, governments have therefore not been inclined towards expansion of the outdated Convention grounds and criteria.

The Convention definition of refugee has made less sense as the nature of refugee flows has changed and as numbers have risen. Since 1980, refugee movements have been more likely to be the result of civil wars, ethnic and communal conflicts and generalised violence, or natural disasters or famine—usually in combinations—than individually targeted persecution by an oppressive regime. The world refugee and internally displaced population has risen dramatically following the end of the Cold War: from 10 million in 1985, to 35 million now according to USCR estimates, and 22 million according to the UNHCR. The plight and need of these people is obvious. However only a minority could demonstrate a personal 'well-founded fear of persecution' on a Convention ground. Case-by-case assessments would in any event be pointless: humanitarian and group-directed assistance is obviously what is needed.

While the Convention's criteria are limited and outdated, as to be expected with an international treaty, its wording is vague. A common pattern in Western countries has been for 'creative interpretation and expansion' of Convention grounds by the judiciary, attempting to include modern day people and situations under its protection, alternating with governments (alarmed at potential expansion of numbers) legislating to enforce more restricted definitions. People unable to return home for serious but not Convention reasons are deemed not to be refugees and are reliant on government discretion to confer (usually inferior and temporary) humanitarian status. International refugee law has rapidly become both highly developed and highly contentious. However as a result of the changed refugee context, international refugee law does not mirror the responsibilities of the UNHCR and is arguably not based on refugee realities.

## Inconsistencies of interpretation and application

The Convention was not designed to be a burden-sharing mechanism. Asylum seekers are drawn to particular countries by a range of obvious factors—proximity, family and ethnic community networks, employment opportunities and wage levels, generosity of welfare systems, levels of tolerance within existing societies, and the accessibility of determination systems. In Europe last year 70 per cent of asylum seekers sought protection in just four countries—Germany, Britain, Switzerland and the Netherlands.

Western governments have invested heavily in their determination systems, and defend their processes as fair and just. However interpretation of the Convention's vaguely worded grounds and criteria varies widely. Governments are required to be agents or complicit in persecution in Germany and France, but not in the UK. People 'persecuted' under China's one child policy are taken to form a 'particular social group' for the purposes of the Convention in the USA and Canada, but not in Australia.

Acceptance rates are more revealing of a country's political priorities, or its attitude to migration, or the weight of numbers it has had to deal with, or its diplomatic relations with 'sending' countries, than the 'genuineness' of refugee claims. In the mid-1990s Canada accepted 70 per cent of on-shore asylum claims, compared with Finland's 0.2 per cent. In 1996 Canada accepted 81 per cent of Somalis and 82 per cent of Sri Lankans as refugees; the UK accepted 0.4 per cent of Somalis and 0.2 per cent of claims from Sri Lankans. Overall acceptance rates in EU countries in the 1990s have been in the order of 10–15 per cent, compared with Australia's 30 per cent. The rate of acceptance of Afghani asylum seekers in August 2000 was about 90 per cent in Australia, and 30 per cent in the UK.<sup>25</sup>

Acceptance rates have in any event become largely irrelevant to outcomes in a number of countries. While most asylum seekers are deemed not to meet Convention criteria, the humanitarian needs of many are obvious, and increasing numbers have been given alternative, usually temporary, resident status. The number of asylum claims in Europe resulting in Convention status has actually been overtaken since 1992 by the number given some sort of resident status on a discretionary basis, e.g. in the UK 'exceptional leave to remain', or in Germany 'tolerated' status.

## The migration channel

Since the late 1980s, asylum systems in Western (and particularly Western European) countries have come under increasing—perhaps terminal—strain through their use as a migration channel. Migration pressures are acute at a time when opportunities, except for the highly skilled, business investors, or close family members, even in traditional immigration countries like Australia, are virtually non-existent. The UN has estimated that 125 million people are, at any given time, outside their homeland in search of a more secure political environment or better economic future.<sup>26</sup> Increasing disparities in wealth

and life opportunities (income differentials between the richest and poorest countries are currently in the order of 70:1<sup>27</sup>) provide compelling motivation to migrate; the spread of information, information technology, the accessibility of air travel and the services of people smugglers provide the means. And asylum channels provide an avenue. Since 1985 the number of asylum seekers in Europe has outnumbered all legally admitted foreign workers.<sup>28</sup>

The Convention gives people the right to arrive by whatever means and request refugee status. Even where claims are clearly 'abusive', receiving states are required to go through determination of status procedures.<sup>29</sup> Consideration of requests takes time. Telling refugees and migrants apart is difficult: both use people smugglers, have fraudulent or no documents, and have similar stories. And even though only a small minority of asylum seekers gain recognition in Western European countries (the rate of recognition in EU countries in the 1990s was in the order of 10–15 per cent), only a minority of failed asylum seekers ever actually leave.

The UNHCR has acknowledged the need for restrictive measures and speeded up determination processes, while simultaneously criticising governments for blocking access to possibly genuine refugees. The UK Government in a White Paper tabled in 1998 promised 'fairer, faster, and firmer' determination of refugee status.<sup>30</sup> The backlog of asylum seekers in the UK in July 2000 was over 100 000, and the system was being described in the British press as in crisis. Supporters of the asylum system in Australia have advocated putting more resources into refugee determination, especially the Refugee Review Tribunal, in order to enhance capacity to detect increasingly sophisticated fraudulent claims.<sup>31</sup> Australia already spends as much each year on the RRT (\$14 million) as it donates to the international refugee effort through the UNHCR. Solving the problem of irregular migration may be incompatible with upholding Convention obligations as they currently stand.

An Austrian EU Presidency paper on immigration and asylum in 1998 bluntly acknowledged that decade-long objectives of 'tightening up' and 'speeding up' procedures sufficiently to prevent asylum systems being a draw for migrants have never been managed anywhere in Europe. It concluded that a revision of the Convention was in order.<sup>32</sup>

An estimated one million migrants were transported, worldwide, in illegal operations worth up to USD20 billion in 1999.<sup>33</sup>

## **Non-departure**

The length of stay involved in the refugee determination process makes removal of people at the end of it difficult. (The average processing time within the UK's 'fairer, faster,

firmer' system in July 2000 was 13 months.<sup>34</sup>) During this time asylum seekers establish themselves in the country.

Australia is perhaps unique amongst Western countries in its capacity and willingness to remove failed asylum seekers (although they comprise a growing proportion of our illegal visa 'overstayer' population). Mandatory detention of illegal arrivals has made routine, if sometimes difficult and controversial, the removal of boat people (the most high profile asylum seekers) refused refugee status. In other countries, only a minority of failed asylum seekers actually ever leave, voluntarily or otherwise. The UK Home Office has acknowledged that up to two-thirds of those refused asylum simply 'vanish'. In 1999 the UK received 71 160 applications; in 1999 fewer than 8000 failed applicants were either deported or known to have left voluntarily.<sup>35</sup> Large-scale removals may simply not be possible under liberal democracies.<sup>36</sup> Without the possibility of such deportations, however, the entire process of asylum determination is, while costly, somewhat pointless.

## The exile basis

It is the principle of non-refoulement rather than a general obligation to refugees, wherever they are, that is at the core of the Refugee Convention. Rather than asserting the right of individuals to stay home or to return home and enjoy basic human rights, the Convention has thus institutionalised the notion of exile as a solution to refugee problems. Exile is an inappropriate solution to modern refugee problems and in an age of globalisation and regionalisation. The UNHCR advocates resettlement in third countries such as Australia only in those cases where people cannot be repatriated, or cannot be settled in their (usually neighbouring) country of first asylum.

The fact that the only solution envisaged for refugees under the Convention is exile is attributed to its judgemental and polemic Cold War origins, and the notion of irredeemably oppressive regimes. The perspective of the international community today is very different. It is more interested in restoring the preparedness and capacity of countries of origin to protect their citizens, and in stabilising these countries politically, than scoring ideological points. The depiction under the Convention of governments as persecutors, or as complicit bystanders in the persecution of their citizens, can make the return of refugees difficult, even when conditions have changed. The fact that refugees are a source of political embarrassment, and its exile basis, are reasons why Asian countries, whether or not they are signatories, have kept their distance from the operation of the Convention.

Rapid return of rejected asylum seekers is the most—perhaps only—effective counter to people smuggling. China has openly criticised Canada and the USA for granting refugee status to Chinese boat people it describes as 'economic migrants', and has been unwilling to accept incomplete batches of returnees. It claims that it is their granting of permanent residence status, as comparatively wealthy countries, rather than its persecution of its citizens, that is encouraging irregular migration and people smuggling.<sup>37</sup>

## Government concerns and government hypocrisy

The core 'non-refoulement' obligation of the Convention takes no account of potential impact (financial, social, political) on receiving countries. Full legal responsibility is assigned to whatever state asylum seekers are able to reach, and no cap or limit can be set on the number of people who can apply or who must be accepted. Refugee settlement is expensive.<sup>38</sup> (In the case of Australia's off-shore humanitarian program, the costs of refugees are offset by revenue-generating skilled and business migration intakes.)

Setting a price on refugees is anathema to asylum seeker advocates and NGOs, as is treating asylum seekers as numbers in an annual migration control regime. They view the Convention's empowerment of individual asylum seekers over states as its chief strength. According to other commentators the failure of the Convention to take account of state needs is a serious problem: what a state can do is shaped, ultimately, by the possibilities afforded by its domestic political environment, not by international treaties.

If countries believed in the Convention, they would assist, or at least not impede people most likely to need its protection from reaching their determination systems. Rather, Western governments have been squeezed, between the pressures of a largely hostile public on the one hand, and their Convention obligations on the other, into awkward positions. Lip service is paid to honouring Convention obligations and the right to seek asylum, while increasingly large amounts of money are spent on keeping asylum seekers out. In response to increased boat arrivals in Australia last year, virtually all of whom have been given Convention refugee status, the Government allocated an extra \$124 million to border protection.

The best example of what has been described as government hypocrisy in this area is provided by Canada.<sup>39</sup> Canada has maintained the highest 'Convention' refugee recognition rate in the world (currently in the order of 40–50 per cent,<sup>40</sup> down from 70 per cent in the mid-1990s and 85 per cent in the early 1990s). In a reverse of the situation that has pertained in Australia, Canada's humanitarian program has for some years comprised three times as many on-shore refugees as refugees from UNHCR camps. 'Maintaining our refugee determination system' is at the top of Canada's refugee strategy, compared with Australia's working with the UNHCR. Canada, along with Australia and other Western countries has also:

- placed visa controls on refugee producing countries
- pressured sending countries to impose exit controls
- enacted safe third country legislation
- imposed hefty sanctions on airlines carrying unauthorised passengers
- posted immigration officers at high risk airports overseas to detect fraudulent documents



- extended its use of detention for illegally arrived asylum seekers.

Considerable resources have also been spent by Western governments—especially in the EU in recent years—on promoting the economic and social integration of their growing ethnic communities. At the same time, anxious not to appear more attractive than each other, welfare for asylum seekers has been reduced. Germany and the UK now provide support to destitute asylum seekers in the form of food vouchers, rather than cash. The temporary humanitarian status increasingly provided instead of Convention status excludes family reunion provisions. Australia provides the most minimal welfare payment, special benefit, to illegally arrived asylum seekers even after they have been determined to be Convention refugees, and they are denied access to settlement services (English tuition and initial accommodation) tailored for and provided free to off-shore refugees.

Considerable resources are also being spent on countering people smuggling, including through information campaigns warning potential 'victims' against using 'criminal' organisers. Such campaigns might be effective in discouraging movements such as those from China to Australia, where people can be informed that if they survive the boat trip in all likelihood they will be quickly sent home. In the case of recent boat arrivals from the Middle East, few are able to be returned, the large majority are being granted refugee status, and the people smugglers are providing a demonstrably effective service. Information campaigns based on the 'harsh' conditions asylum seekers from the Middle East (most of whom have been living for years in refugee camps in countries like Iran or Jordan) may have to endure before they get resident status in Australia, are more likely to be counterproductive than effective. Such initiatives have been described as political posturing on the part of liberal democratic governments unwilling to challenge the Convention regime, unable to adopt the (perhaps impossibly) harsh measures required to stop asylum seeker inflows, but needing to placate public anxiety and expectations.<sup>41</sup>

## Inequities

The discrepancy between what Western countries spend on their asylum systems, and what is spent on refugees in camps, has reached the point where it is raising fundamental questions about the West's responsibilities. What is spent on the world's 1.2 million asylum seekers is clearly many times the UNHCR budget, which is supposed to meet the needs of its identified (as at end-1999) 22.3 million people of concern. By 1990 the European OECD states plus Canada were spending USD5 billion annually on the processing of refugee applications: ten times the UNHCR budget in that year.<sup>42</sup> The budget of the UNHCR this year is USD1.7 billion, including extra funding for Kosovo. This year the UK alone is spending BRP1.5 billion (following an injection of a further BRP600 million in July to process its backlog) on processing and providing social support to asylum seekers. The UK's contribution to the UNHCR is BRP15 million. Canada currently spends CAD500 million on asylum seekers, and donates CAD14 million to the UNHCR. In 1999-2000 the cost of illegal arrivals alone in Australia was in the order of

\$200 million.<sup>43</sup> A rough estimate of the cost of processing and supporting asylum seekers puts this at about \$370 million.<sup>44</sup> Australia's core contribution to the UNHCR was \$14 million.

In principle, refugees should receive equal protection, wherever they are, from the international community. The reality is that there are very different expectations and outcomes for 'camp' and 'Convention' refugees. Australia's Iraqi and Afghani asylum seekers, if they had not taken matters into their own hands, would have had a greater chance of being returned home than being resettled in another country. The focus of the UNHCR in refugee camps in neighbouring countries is on repatriation; less than 30 per cent of people are assessed as requiring resettlement in a third country. The acceptance rate for Iraqis and Afghanis in Australia has been over 90 per cent. According to the Department of Immigration, this is because Australia is too far from the Middle East for risks to the individuals involved to be reliably assessed. Any returns following individuals' claims for political asylum would unavoidably be more 'high profile' than the UNHCR's group returns, and would bring the returned person to the attention of supposedly persecutory (and further incensed) authorities.<sup>45</sup> Besides which Australia has yet to establish return agreements with current sending or transit countries.

The Convention-based system, as it currently operates, gives priority to those present, on the basis of their mobility (and capacity to pay), not to those with the greatest need. Women and children predominate in refugee camp populations, suffer most human rights abuses, and are most vulnerable in refugee situations. Men, mostly young, predominated amongst asylum seekers (75–80 per cent of Australia's current boat people are male). This is partly the result of husbands leaving their families to follow later, in safety. It is also the result of the datedness of the Convention, couched in terms that still fit the male experience (as individual political activists) in many refugee-producing countries. As well, women, especially those caring for children, are less mobile and less able to organise international travel in many refugee producing countries. Once in a signatory country, Convention-based asylum systems give priority to people who are able to access legal assistance. In the USA, 80 per cent of applicants assisted by lawyers are successful, compared with only about 20 per cent who are not assisted by lawyers.<sup>46</sup>

James Hathaway has advocated replacing the Convention with a more equitable model of international refugee law, which:

... would allow more good to be done for more refugees than is possible under the present regime. The small minority of refugees who presently find solid protection in developed states may see a reduction of its relative privileges under such a system, but a reduction in the Cadillacs of the few could, I believe, provide bicycles for the many.<sup>47</sup>

## Public reaction

The majority of refugees are fleeing to equally poor countries and the media is full of images of people who have obviously been driven from their homes and who are clearly in need of assistance. When asylum seekers journey to Western countries, people become suspicious of their motives. In Australia, asylum seekers with resources to pay smugglers have not elicited public sympathy in the way that more obvious refugees, for example the Kosovars who were accorded temporary protection, have done.<sup>48</sup> When, as in Europe, acceptance rates are low (11 per cent of refugee applications were recognised in EU countries last year), the public concludes that most people seeking asylum are doing so for economic and social reasons. Even where acceptance rates are high, as in Canada or in the case of recent boat arrivals in Australia, use of the Convention would appear to elicit as much cynicism as public support.

The fact that countries deal with asylum seekers as an issue of migration control, and of domestic politics, is anathema to many people who sympathise with their situations. That racism and xenophobia are now commonly described as 'rampant' in European countries supporters of asylum seekers attribute to unreasonably high rejection rates, and 'human deterrence' measures of detention, and reduced welfare and other measures of social exclusion. Other commentators focus on the fact that public hostility to asylum driven migration has weakened the capacity of Western European governments to develop managed migration programs at a time when these are needed to fill skills shortages. This is particularly a problem in 'heroically overextended' Germany, which now needs to attract information technology workers from overseas. German Interior Minister Otto Schily has said recently that abuse of asylum rules is 'limiting the scope for an active immigration policy'.<sup>49</sup> Polls in EU countries consistently reveal a majority opinion in favour of curtailing asylum seeker rights and against further immigration.<sup>50</sup>

## Economic refugees

The Convention-based asylum regime has fostered characterisations of asylum seekers as either political and thus 'genuine' and 'legitimate' and 'deserving', or economic and thus 'abusive' and 'illegitimate' and 'undeserving'. Public debates on asylum seekers are often based on the assumption that such clear-cut distinctions actually exist. Most asylum seekers however come from countries where economic failure and political instability and persecution and poverty are inextricably mixed. And despite the either/or nature of determinations, distinctions between individual asylum seekers can rarely be established with any degree of certainty. There is rarely documentary evidence of persecution. It is well established in the literature that, with the advent of people smuggling, credible stories are purchased along with the journey.

Public debates are also often based on the assumption that such distinctions are right and proper. Commentators have however begun to question the morality of distinguishing

between people impelled to flee from persecution, and people impelled to flee from poverty and lack of opportunity. In the words of Jeremy Harding 'the order of difficulty that prevails in some parts of the world is akin to persecution. It is the political predicament of those migrating away from misery and grinding attrition, not their opinions, that puts them in danger'. The fact that asylum seekers are generally not the poorest but the younger and more enterprising from their home countries does not necessarily negate this perspective. In 1989 the International Monetary Fund estimated that USD65 billion was transferred out of host countries by migrants in remittances; this figure exceeded by about USD20 billion all official donor assistance. Harding thus describes 'economic refugees' in Western countries as the 'ferryman' of development for their countries, and their use of asylum systems to access much higher earnings as rational and intelligent as well as predictable.<sup>51</sup>

Defenders of the Convention are arguing that migration restrictions in Western countries must be lifted in order to ease the pressure on and thus maintain the 'integrity' of the asylum system. The EU has concluded that asylum-driven migration can only be controlled through development, and through forging agreements with governments of sending countries on aid and trade and training and temporary (and controlled) migration opportunities. While Australia is targeting some of its aid to preventing refugee movements, its immigration programs have been developed with domestic (if arguably sometimes sectoral) interests firmly in mind. The notion of immigration (as distinct from our humanitarian intake) being linked with our regional aid and other objectives, or linked in with the relations we are building with refugee sending or transit countries, has not been considered in recent decades.

## In summary

The problem with the 1951 'Geneva' refugee Convention, the basic instrument of refugee protection, is that it offers neither a comprehensive nor a flexible response to the diversity and complexity of forced population movements that are occurring today. It is distorting the responses, and diverting the resources of Western countries from developing coherent and ethical responses to these movements.

The problem with the Convention can also be summarised in simpler terms, of what it doesn't include. It doesn't confer any right of assistance on refugees unless and until they reach a signatory country. It confers no right of assistance on the 'internally displaced' at all. It imposes no obligation on governments not to persecute their citizens, or to guarantee their safe return. It imposes no mechanism for preventing mass outflows, for burden sharing between states, for ensuring speedy assistance for those most in need, or for maximising the effectiveness of international resources. And it takes no account of the capacity of receiving states.

The problem with reforming the international refugee regime is in what the Convention does provide: a system for providing protection to people at risk of persecution in their own countries. No matter how lost they may become amongst mass claims and backlogs, there are few countries willing to risk turning such people away.

## Options

### Refugee advocates and NGOs

The UK Commissioner for Racial Equality recently declared, perhaps somewhat surprisingly given acceptance rates and press reports to the contrary, that 'the vast majority' of asylum seekers in the UK are genuine.<sup>52</sup> As have church and other support groups in Australia, he describes as 'unfortunate' the way that asylum seekers have been publicly vilified as 'spongers', bogus or even criminal, and used in the domestic political arena. The Convention and the asylum system are as relevant today as ever. The weaknesses and problems evident with the system are political, the fault of governments, not conceptual. Standards for determining refugee status should be set by international law, not by a reactive public or parliament. Courts need to be 'bold' in upholding human rights.<sup>53</sup> Pressure must be applied on governments to respond with generosity and compassion.<sup>54</sup>

Other NGOs and refugee advocates acknowledge that there are problems arising from the datedness of the Convention, notably its inadequacy from a protection perspective. Most, however, are under no illusion that, in the current climate, governments would not seize the opportunity afforded by wholesale review to restrict rather than expand their obligations, or to exchange an obligatory for a discretionary regime.<sup>55</sup> The Convention provides the sole legal basis for the protection of refugees worldwide. It codifies as a fundamental human right the right to seek asylum from persecution. Nothing, certainly not irregular migration, or processing or settlement costs, is more important than the lives of people fleeing persecution. Reforms put forward by advocates are therefore based on preserving while broadening the Convention grounds and criteria, to include modern day types of persecution, and on insulating the Convention from migration pressures by requiring governments to provide opportunities for legal migration.

In the case of Australia, refugee determination should be removed from the Department of Immigration with its 'control mentality' to Foreign Affairs, or Attorney-General's. The fact that no cap or limit can be placed on Convention refugees is no excuse for capping humanitarian program entrants; the two streams operate under different systems and the integrity of each must be maintained. Illegal arrivals and people smuggling should be addressed by posting more migration officers to process more people overseas, including

from refugee camps in the Middle East, so that refugees can enter legally under the (presumably much expanded) off-shore humanitarian program.<sup>56</sup>

Other academics and commentators argue that proposing expanded obligations for governments on top of a Convention-based asylum system that is already creaking, is fruitless. Such proposals are unrealistic in the current climate because they are politically impossible. To refuse to balance the claims of refugees with those of receiving states is simply to invite continuation of an already degraded system, whereby access is blocked to an increasing number of people, and asylum seekers are treated with increasing harshness.

## The UNHCR

The UNHCR's position that the 1951 Refugee Convention remains as relevant as ever as the foundation and cornerstone of refugee protection has become increasingly strained as criticism of the asylum system and pressure for review have mounted. At the European Commission 'Lisbon' conference 15–16 June 2000 the UNHCR declared that the Convention provides 'a truly universal framework within which States can cooperate and share the burden resulting from forced displacement'. It is 'ethical' in that 'it is a unique declaration by the 139 States Parties of their commitment to uphold and protect the rights of some of the world's most vulnerable and disadvantaged'. It is 'the one truly universal instrument setting out the baseline principles on which the international protection of refugees has to be built'. Elsewhere the UNHCR acknowledges that the Convention does not cover contemporary refugee situations:

The main international instrument of refugee law is a 45-year-old treaty whose only protocol came into force nearly three decades ago. During that time, the causes of many refugee movements have shifted; in recent years, the primary causes have been civil wars and ethnic, tribal and religious violence.<sup>57</sup>

The UNHCR acknowledges the pressure that Western governments are under through the use of the asylum channel for migration, while simultaneously berating them for blaming the Convention for their 'inability' to manage their migration inflows and for adopting restrictive measures such as safe third country provisions and carrier sanctions. It exhorts governments to be generous and flexible in its interpretation of the Convention and in granting refugee status and family reunion rights, while the focus of its own activities in refugee camps is on repatriation.<sup>58</sup>

Obviously at the forefront of UNHCR perspective is that the 1951 Refugee Convention is the only universal refugee instrument. It places responsibility for protecting refugees squarely on host states. However obvious their problems and however loudly creaking the asylum system, like other supporters the UNHCR sees challenging the Convention as a threat to the international protection framework that it has built up over the last 50 years. 'Governments should work, together with the UNHCR, to supplement—and not

supplant—the Convention so that the protection of refugees and asylum seekers can be strengthened on the basis of already existing and widely recognised Convention principles'.<sup>59</sup>

It is perhaps politically naïve to think that money not required for asylum seeker processing and support would be redirected to help the world's refugees. Australian politicians for example might have other priorities for the estimated \$370 million that might (theoretically) be freed up by redefining or disengaging from Convention obligations.

Pressures on the UNHCR would however appear to be increasing, with governments openly critical of it for taking on an advocacy cum prosecuting judge role, rather than assisting states to cope with the changed refugee context. Some countries are looking for a change in UNHCR leadership.<sup>60</sup> The developing countries that are protecting the bulk of the world's refugees remain apparently uninterested in, or, in the case of India, openly dismissive of, the Convention.<sup>61</sup> Those supporting large refugee populations, like Iran, have however become increasingly critical and vocal over the lack of progress through the UNHCR on burden sharing. Academics and commentators are arguing that it is time for a new international refugee organisation, or at least time for a new mandate for the UNHCR.

### A new international refugee regime

It is unlikely that many governments would sign up to the 1951 Refugee Convention today. It is also fairly obvious what a refugee regime designed for the 21<sup>st</sup> century would comprise. It would redefine the notion of refugee to encompass contemporary displacements. It would formalise commitment to and strengthen the world response (which has far exceeded the non-refoulement obligations of the Convention) that has developed over the last 20 years to refugee situations, namely emergency assistance in safe havens, temporary protection, repatriation, local integration and resettlement. It would focus on groups, not individuals, and on the provision of humanitarian assistance rather than on definition of the quality of persecution. It would hold countries responsible and accountable for displacements and impose sanctions as well as provide support for reconstruction and reintegration. It would guarantee rights for displaced persons and direct resources to where they are most needed. It would oblige states to contribute and particularly to assist countries of first asylum, while allowing for flexibility of approach to different situations and from different countries. (Canada and Australia might resettle refugees while Japan might contribute more in direct funds.)

## **Models**

A number of models (listed at page 32) have been developed in recent years with a common set of objectives. Firstly, to exchange Convention obligations with a new set of obligations that populations will accept and governments will be able and willing to implement in a more principled manner, thereby freeing up resources. Secondly, to direct resources to improve the quality of protection especially in countries and regions of first asylum. Thirdly, to untie the refugee regime from migration, thus allowing states to insulate their refugee protection policies from migration pressures, and to ease public concern over asylum-driven migration and people smuggling. These models are based on notions of safe havens, temporary protection, international, regional and bilateral cooperation in accordance with established principles, and burden sharing. They are based also on the notion that the needs of people and the facts of their cases can best be determined close to where they live.

The UNHCR and other supporters of the existing system claim that disengagement from the Convention would undermine the international framework for protecting and assisting refugees worldwide. The producers of alternative models argue that disengagement from the Convention is a necessary part of developing a better international refugee framework. They see the issue as not whether asylum provides an adequate response to modern day refugee situations—it clearly does not—but whether the political will exists to move outside the scope of the Convention.

People smuggling represents a particularly challenging affront to notions of state sovereignty, and may be providing the extra pressure that pushes governments towards reform of the Convention-based system. UK Home Secretary Jack Straw has proposed strengthening protection in the refugee producing region and the lodging of asylum applications from abroad to stop asylum seekers from purchasing organised illegal entry into European countries. He has also proposed the notion of quotas of refugees from high-risk regions, in order to share the burden more equitably, and to enable planned intakes and settlement.<sup>62</sup> Australian Immigration Minister Philip Ruddock has suggested that receiving countries have a collective interest in lightening the burden of care in countries such as Iran, and in making it easier for refugees to stay in those countries pending resolution of their situations.<sup>63</sup>

## **Conclusion: Implications for Australia**

Australia's on-shore refugee determination system is operating within a totally different world from the one in which the UN Refugee Convention was designed in 1951.

Those opposed to review (leading to possible restriction) of the Convention system have described Australia's asylum seeker problem as 'trivial' compared with numbers that have been received over a sustained period in countries like Germany. However per capita



comparisons suggest otherwise. In calendar year 1999 Australia received 9525 claims; on a per capita basis fewer than Germany or the UK or Canada, but roughly as many as France and Italy, and over three times as many as the USA.<sup>64</sup> In 1999–2000 Australia received 12 713 asylum claims. In any event, as a *Sydney Morning Herald* editorial has argued, the fact that pressure may be less than on some destinations does not disentitle Australia from acting to maintain the 'integrity' of its migration programs.<sup>65</sup> Indeed, the scale of the problem in other countries provides an impetus.

No country has a visa entry (and exit) control and management system comparable to Australia's, and no country (Canada perhaps excepted) has invested as much in its managed migration and resettlement programs. The off-shore refugee (humanitarian) migration program has always received widespread public support. On-shore asylum seekers have not. While opinion on the boat people is polarised, the weight of public opinion would appear to remain unconvinced that different laws and entitlements should apply for people who arrive illegally, and unconvinced that they should be given the benefit of the doubt. There would also appear to be a high level of public expectation that the Government should and will control illegal entry.

It is perhaps politically unrealistic to argue that refugee numbers should be increased simply because more people are able to reach Australia and make a claim for refugee status. There is concern in both major political parties that asylum seekers could undermine support for migration programs. Australian political leadership has always been sensitive to the potential for anti-immigration and anti-immigrant movements. More than any country in the world (Israel perhaps excluded) Australia has been built on immigration. Twenty three per cent of the population were born overseas, and 42 per cent were either born overseas or have at least one parent born overseas. It seems likely that Australian governments will take whatever measures are necessary to curtail illegal entry and rising numbers of asylum seekers, including challenging the UNHCR and rethinking our obligations under the Refugee Convention.

## Withdraw

There are no practical obstacles to withdrawing from the Convention. Article 44 (2) states that any contracting state can denounce or withdraw, with one year's notice. Such a move would be unprecedented—no state has ever withdrawn. The threat of instant international pariah status is however less compelling at a time when the asylum system is widely seen as 'broke'. Australia's credentials on refugees and managed migration are unsurpassed, and it has played above its demographic weight in international forums on migration and refugee issues. Australia could stay within EXCOM. In theory, withdrawal from the Convention would free up a considerable amount of money which could be redirected to countries of first asylum. It would also enable Australia to recommit to a sizeable offshore refugee resettlement program. While Australia is obviously not a large enough player to lead the world, it could thus provide an impetus for reform.

Withdrawal might not however provide an immediate practical solution. Asylum from political persecution and the principle of non-refoulement have become part of international customary law; the government and the judiciary would still have to process and deal with claims. As well, Australia is party to other treaties which prevent people being sent back into situations of danger, or gross violation of their civil rights, namely the International Covenant on Civil and Political Rights (ICCPR) and the Convention Against Torture and Other Degrading and Inhuman Treatment (CAT).

Withdrawal from the Refugee Convention would however enable Australia to develop and regularise, on its own terms, more transparent and understandable criteria and provisions for dealing with on-shore asylum seekers.

## Reform

Withdrawal from the Convention could be portrayed as Australia rejecting international standards, and as inconsiderately directing the asylum seeker burden elsewhere. Staying in the system could arguably make it easier for Australia to retain its influence in international forums and to play a role in reshaping the international protection framework.

A logical first step towards reform would be to interpret the Convention in legislation for Australia's purposes. Importantly, permanent residence and subsequent family reunion are not required under the Convention: Article 1(c) provides that refugee status can cease where circumstances in connection with refugee status have ceased to exist.

At present, people seeking asylum under the terms of the Convention are treated as a different group legally and obligation wise from people provided protection in Australia under 'safe haven' legislation, and people granted temporary extensions of stay because it is dangerous to return home. Reforming the on-shore asylum system to bring more transparency, equity and consistency into our refugee responses is likely to win the support of at least the general Australian public. If linked with a redirection of resources to assist countries of first asylum, and support for reform in international forums, it is likely also to win approval from the international community.

## Endnotes

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1. See discussion in Joint Committee on Treaties, Reference: Convention on the Status of Refugees, *Debates*, Hearing Monday 10 April 2000, pp. 22–23.
2. For example Mary Crock in *Immigration and Refugee Law in Australia*, Federation Press, Sydney, 1998.
3. Political parties in France, Switzerland, Belgium and Austria in particular have mobilised the anti-immigration vote.
4. USCR, *7 million people forced to flee last year; refugee total rises for first time in 7 years*, [http://www.refugees.org/news/press\\_releases/2000/061300a.htm](http://www.refugees.org/news/press_releases/2000/061300a.htm).
5. EU Presidency, *Strategy paper on immigration and asylum*, Brussels, 1 July 1998. [www.proasyl.de/texte/europe/eu-a-o.htm](http://www.proasyl.de/texte/europe/eu-a-o.htm).
6. Quoted in Jeremy Harding, 'The Uninvited', *London Review of Books*, 3 February 2000.
7. Quoted in 'UN Convention on asylum seekers is weak, says Straw', *The Telegraph* (UK), 12 March 2000.
8. William Hague, 'Common Sense on Asylum Seekers', *Guardian Unlimited* (UK), 18 April 2000.
9. 'Toughen UN Convention: Ruddock', *Sydney Morning Herald*, 22 March 2000.
10. Hon. Philip Ruddock MP, MPS 088/2000, 29 August 2000.
11. Jeremy Harding, op. cit, and in book form *The Uninvited: Refugees at the Rich Man's Gate*, Profile Books, London, 2000.
12. John Morrison, *The trafficking and smuggling of refugees: the end game in European asylum policy?* UNHCR, Geneva, July 2000, <http://www.unhcr.ch/evaluate/reports/traffick.pdf>.
13. Article 33 states that 'No Contracting State shall expel or return a refugee in any manner whatsoever to the frontiers of territories where this life or freedom would be threatened on account of his race, nationality, political opinion or membership of a particular social group'.
14. Article 31 states that 'The Contracting State shall not impose penalties, on account of their illegal entry or presence, on refugees...provided they present themselves without delay to the authorities'.
15. Quoted in Shaun Anthony, 'Plan to alter refugee law', *The West Australian Online*, 15 June 2000.
16. USCR figures, South Korea [http://www.refugees.org/world/countryrpt/easia\\_pacific/south\\_korea.htm](http://www.refugees.org/world/countryrpt/easia_pacific/south_korea.htm) and Japan [http://www.refugees.org/world/countryrpt/easia\\_pacific/japan.htm](http://www.refugees.org/world/countryrpt/easia_pacific/japan.htm).
17. The OAU defines as a refugee 'every person who, owing to external aggression, occupation, foreign domination or events seriously disturbing public order in either part or the whole of his country of origin or nationality, is compelled to leave his place of habitual residence in

order to seek refuge in another place outside his country of origin or nationality'. See [http://www.unhcr.ch/refworld/refworld/legal/instrume/asylum/ref\\_afre.htm](http://www.unhcr.ch/refworld/refworld/legal/instrume/asylum/ref_afre.htm).

18. Statistics from USCR web-site.  
*Country Report: Iran* <http://www.refugees.org/world/countryrpt/mideast/iran.htm>;  
*Country Report: Jordan* <http://www.refugees.org/world/countryrpt/mideast/jordan.htm>;  
*Country Report: Pakistan* <http://www.refugees.org/world/countryrpt/scasia/pakistan.htm>;  
*Country Report: India* <http://www.refugees.org/world/countryrpt/scasia/india.htm>;  
*Country Report: Iraq* <http://www.refugees.org/world/countryrpt/mideast/iraq.htm>;  
*Country Report: Thailand* [http://www.refugees.org/world/countryrpt/easia\\_pacific/thailand.htm](http://www.refugees.org/world/countryrpt/easia_pacific/thailand.htm);  
*Country Report: Malaysia* [http://www.refugees.org/world/countryrpt/easia\\_pacific/malaysia.htm](http://www.refugees.org/world/countryrpt/easia_pacific/malaysia.htm);  
*Country Report: Indonesia* [http://www.refugees.org/world/countryrpt/easia\\_pacific/indonesia.htm](http://www.refugees.org/world/countryrpt/easia_pacific/indonesia.htm).
19. UNHCR web-site, <http://www.unhcr.ch>.
20. UNHCR, *UNHCR by numbers*, <http://www.unhcr.ch/un&ref/numbers/table2.htm>.
21. EXCOM *Notes on international protection* are on the UNHCR web-site at <http://www.unhcr.ch/refworld/refworld/unhcr/excom/menu.htm>.
22. Australia's on-shore refugee determination processes are critically examined in the report of the Senate Legal and Constitutional References Committee, *A Sanctuary under Review*, June 2000.
23. It has drawn particularly from the work of James Hathaway, Osgood Law School and Centre for Refugee Studies, York University, Toronto; Matthew Gibney, Refugees Studies Program, Oxford; Sarah Collinson, Royal Institute of International Affairs, UK; Jeremy Harding, UK author; Jonas Widgren, International Centre for Migration Policy Development, Vienna; and Mary Crock, School of Law, Sydney University. It is also drawn from meetings and discussions on migration and asylum issues with government officials and with international organisations including the Inter Governmental Consultations on Asylum, Refugee and Migration Policies in Europe, North America and Australia (IGC), the International Organisation for Migration (IOM), and the UNHCR, in the UK, Europe and North America May-August 1999.
24. A good description of the background to the Convention and its early years of operation is in Sarah Collinson, *Beyond Borders: West European Migration Policy Towards the 21<sup>st</sup> Century*, Royal Institute of International Affairs, London, 1993.
25. BBC *World News*, National Radio PNN, 27 July 2000.
26. Marion Jimenez, *National Post*, 31 March 2000.
27. Christopher DeMuth, speaking at CIS conference 18 May 2000, <http://www.cis.org.au/main%20pages/DeMuth%20EDIT.htm>.
28. Gil Loescher, *The Asylum Dilemma in the West*, Pennsylvania State University Press, Pennsylvania, 1992.
29. Enactment of safe third country legislation has speeded up applications in and from some countries but has been criticised by the UNHCR.

30. The UK Government's *Fairer, Faster and Firmer* White Paper was tabled in the House of Commons 27 July 1998.
31. Discussion with Dr Gary Klintworth, former RRT Member, July 2000.
32. EU Presidency, 1998, op. cit.
33. UN report cited by Nick Hopkins in *The Guardian* (UK), 6 July 2000.
34. Alan Travis, '600 million to end asylum backlog', *The Guardian* (UK), 24 July 2000.
35. Staff and agencies, 'More asylum seekers to be deported', *Guardian Unlimited* (UK), 7 June 2000.
36. Professor Georges Tapinos, Institut d'etudes politiques de Paris, & OECD consultant, in OECD, *Trends in International Migration* OECD, Paris, 1999.
37. 'Criminals win if repatriation of illegal Chinese isn't hastened', *CISNEWS*, 26 April 2000.
38. See costings given by the Hon. Philip Ruddock, House of Representatives, *Debates*, 7 March 2000. See also *Longitudinal Survey of Immigrants to Australia* (LSIA) data.
39. Margaret Young, *Canada's refugee status determination system*, Library of Parliament, Research Branch, Canada, 1997.
40. Depending on whether drop-outs are counted.
41. Jeremy Harding, op.cit.
42. Jonas Widgren, 'International migration and regional stability', *International Affairs*, vol. 66, no. 4, October 1990.
43. Andrew Metcalf, DIMA, in hearing of Joint Committee on Treaties, Hansard, op. cit., p. 48.
44. According to the Immigration Department, the average cost of a non-detained asylum seeker, up until they are either granted refugee status or removed from the country, is \$20 000. The ANAO has estimated the average cost of a boat person who enters the refugee system to be \$50 000.
45. Advice provided by Refugee and Humanitarian Division, DIMA, June 2000.
46. Molly McDonough, 'A Web Site for Asylum Seekers', *CISNEWS*, March 2000.
47. James Hathaway, *Can international Refugee Law Be Made Relevant Again?* USCR article, [http://www.refugees.org/world/articles/intl\\_law\\_wrs96.htm](http://www.refugees.org/world/articles/intl_law_wrs96.htm).
48. The External Reference Group set up in Australia last year to advise on boat people measures advised that asylum seekers with resources to pay smugglers do not elicit public sympathy in the way that refugees, for example the Kosovars who were accorded temporary protection, do.
49. Ralph Atkins, 'Panel launched to plan overhaul of German immigration and asylum rules', *Financial Times* (London), 13 July 2000.
50. In a *Forsa* poll published July 2000 the majority of Germans indicated that they wanted rights to asylum limited, and that they considered there were 'too many foreigners' in the country. In a Eurobarometer survey commissioned by the EU several years ago one third of respondents openly described themselves as 'racist', and only a minority considered immigration would

bring their country any real benefits. Described in Jeffrey Smith, 'Europe Bids Immigrants Unwelcome', *Washington Post Foreign Service*, 23 July 2000.

51. Jeremy Harding, op. cit.
52. Gurbux Singh, quoted in Philip Webster, 'Most refugees are genuine, says race watchdog', *The Times* (UK), 11 May 2000.
53. Catholic Commission for Justice and Peace, *Hordes or human beings?*, The Commission, Melbourne, 2000.
54. Erica Feller, UNHCR, *Asylum and protection: The Convention under scrutiny*, presentation to European Conference on Asylum, 15–16 June 2000, Lisbon.  
<http://www.unhcr.ch/issues/asylum/lisbon.htm>.
55. Des Hogan, Amnesty International, at hearing of Joint Committee on Treaties, 10 April 2000.
56. William Maley, Associate Professor Politics, ADFA, speaking at a Racial Respect forum on *Boat People, Smuggled People, Queue Jumpers or Refugees?*, Canberra, 16 March 2000.
57. UNHCR, *Who is a refugee?*, <http://www.unhcr.ch/un&ref/who/whois.htm>.
58. UNHCR EXCOM *Note on International Protection*, 7 July 1999,  
<http://www.unhcr.ch/refworld/unhcr/excom/reports/914e.htm>.
59. UNHCR, *The 1951 Convention: Lasting Cornerstone of Refugee Protection*,  
<http://www.unhcr.ch/issues/asylum/qa000615.htm>.
60. Immigration Minister the Hon. Philip Ruddock, at Paris conference on people smuggling, July 2000.
61. USCR, *Country Report: India*, <http://www.refugees.org/world/countryrpt/scasia/india.htm>.  
See also Nirupama Subramanian, 'An Insightful Study', *Frontline*, September 1, 2000.
62. Jack Straw, UK Home Secretary, *Towards a common asylum procedure*, Speech to European Conference on Asylum, Lisbon, 16 June 2000.
63. The Hon. Philip Ruddock, *An international approach to combating people smuggling and the illegal movement of people*, Speech delivered at Paris conference on people smuggling, 20 July 2000.
64. USCR statistics.
65. 22 November 1999.

**Table 1: Refugees and Others of Concern to UNHCR, 1999 Statistical Overview**

Region of asylum/ residence	Refugees <sup>1</sup>	Asylum seekers <sup>2</sup>	Returned refugees <sup>3</sup>	Others of Concern			Total population of concern
				Internally displaced <sup>4</sup>	Returned IDPs <sup>5</sup>	Various <sup>6</sup>	
Africa	3 523 250	61 110	933 890	640 600	1 054 700	36 990	6 250 540
Asia	4 781 750	24 750	617 620	1 724 800	10 590	149 350	7 308 860
Europe	2 608 380	473 060	952 060	1 603 300	370 000	1 279 000	7 285 800
Latin America and Caribbean	61 200	1 510	6 260	-	-	21 200	90 170
Northern America	636 300	605 630	-	-	-	-	1 241 930
Oceania	64 500	15 540	-	-	-	-	80 040
Total	11 675 380	1 181 600	2 509 830	3 968 700	1 435 290	1 486 540	22 257 340

Notes:

1. Persons recognised as refugees under the 1951 Convention, the 1969 OAU Convention, in accordance with the UNHCR Statute, persons granted a humanitarian or comparable status and those granted temporary protection.
2. Persons whose application for refugee status is pending in the asylum procedure or who are otherwise registered as asylum-seekers.
3. Refugees who have returned to their place of origin during the past two years.
4. Persons who are displaced within their country and to whom the UNHCR extends protection and/or assistance in pursuance to a special request by a competent organ of the United Nations.
5. IDPs who have returned to their place of origin during the past two years.
6. Other groups of concern to UNHCR.

Source: UNHCR

**Table 2: UN Member States: Signatories and Non-signatories to the UN Convention and Protocol Relating to the Status of Refugees**

Signatories		
Albania	Finland	Nigeria
Algeria	France	Norway
Angola	Gabon	Panama
Antigua and Barbuda	Gambia	Papua New Guinea
Argentina	Georgia	Paraguay
Armenia	Germany	Peru
Australia	Ghana	Philippines
Austria	Greece	Poland
Azerbaijan	Guatemala	Portugal
Bahamas	Guinea	Romania
Belgium	Guinea-Bissau	Russian Federation
Belize	Haiti	Rwanda
Benin	Honduras	St Vincent and the Grenadines (C)
Bolivia	Hungary	Samoa
Bosnia and Hercegovina	Iceland	Sao Tome and Principe
Botswana	Iran	Senegal
Brazil	Ireland	Seychelles
Bulgaria	Israel	Sierra Leone
Burkina Faso	Italy	Slovak Republic
Burundi	Jamaica	Slovenia
Cambodia	Japan	Solomon Islands
Cameroon	Kazakhstan	Somalia
Canada	Kenya	South Africa
Cape Verde (P)	Korea (South)	Spain
Central African Republic	Kyrgyzstan	Sudan
Chad	Latvia	Suriname
Chile	Lesotho	Swaziland (P)
China	Liberia	Sweden
Colombia	Liechtenstein	Tajikistan
Congo	Lithuania	Tanzania
Costa Rica	Luxembourg	Togo
Côte d'Ivoire	Macedonia	Tunisia
Croatia	Madagascar (C)	Turkey
Cyprus	Malawi	Turkmenistan



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<b>Signatories</b>		
Czech Republic	Mali	Uganda
Denmark	Malta	United Kingdom
Djibouti	Mauritania	United States (P)
Dominica	Mexico	Uruguay
Dominican Republic	Monaco (C)	Venezuela (P)
Ecuador	Morocco	Yemen
Egypt	Mozambique	Yugoslavia
El Salvador	Namibia (C)	Zaire
Equatorial Guinea	Netherlands	Zambia
Estonia	New Zealand	Zimbabwe
Ethiopia	Nicaragua	
Fiji	Niger	

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<b>Nonsignatories</b>		
Afghanistan	Jordan	Qatar
Andorra	Korea (North)	St. Kitts & Nevis
Bahrain	Kuwait	St. Lucia
Bangladesh	Laos	San Marino
Barbados	Lebanon	Saudi Arabia
Belarus	Libya	Singapore
Bhutan	Malaysia	Sri Lanka
Brunei	Maldives	Syria
Burma (Myanmar)	Marshall Islands	Thailand
Comoros	Mauritius	Trinidad and Tobago
Cuba	Micronesia	Ukraine
Eritrea	Moldova	United Arab Emirates
Grenada	Mongolia	Uzbekistan
Guyana	Nepal	Vanuatu
India	Oman	Vietnam
Indonesia	Pakistan	
Iraq	Palau	

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Note: Non-UN members Switzerland, Tuvalu, and the Holy See have also signed the Refugee Convention and Protocol.

Source: USCR, [http://refugees.org/world/statistics/wrs97\\_unmembers.htm](http://refugees.org/world/statistics/wrs97_unmembers.htm) and UNHCR, <http://www.unhcr.ch/refworld/refworld/legal/instrume/asylum/51engsp.htm>.



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### **Models**

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