RILC Refugee & Immigration Legal Centre Inc

SUBMISSION CONC ERNING ARTICLE 31 OF THE REFUGEE CONVENTION – "NON-PENALISATION, DETEN TION AND PROTECTION"

1. Background to RILC

This submission is made by the Refugee and Immigration Legal Centre (RILC). RILC is a community legal centre based in Melbourne, Australia which specialises in the provision of legal representation to asylum seekers and disadvantaged migrants, including to those in Australia's detention centres.

RILC has over 12 years of experience in the refugee and immigration jurisdiction in Australia. During this time, RILC has provided comment and submissions on aspects of asylum law to a number of government and non-governmental bodies in Australia and internationally. RILC participated as an NGO in the Macau Regional Consultations held earlier this year as part of UNHCR's Global Consultations program. In addition to the provision of casework and legal comment, RILC is a provider of education and training in all aspects of Australia's refugee and immigration program for Migration Agents, students and community and ethnic groups.

On account of our experience with both authorised and unauthorised[1] asylum seekers and with the operation of Australia's detention centres, we believe we are well placed to offer comment on current Australian policy and practice towards refugees and asylum seekers.

2. Introduction

We welcome the opportunity to feed into the Global Consultation program and the discussions concerning the Refugee Convention in the year of its 50th anniversary. The changing dynamics of refugee crises and the global movement of refugees requires continual review of documents of international humanitarian protection such as the Refugees Convention. Discussions about the applicability and scope of provisions within the Convention such as Article 31 are timely considering the current focus by Contracting States on issues such as people smuggling and secondary movement.

Whilst we note with concern the increase in people smuggling and non-protection related movements of persons, we are equally concerned to ensure that measures taken to combat people smuggling and secondary movement are proportionate and humane and do not compromise minimum standards for asylum seekers and refugees contained within the Refugees Convention.

[1] 'Unauthorised' is used in this submission to refer to persons who arrive without valid travel documents and without a valid Australian entry visa. The Australian Migration Act refers to persons who are 'immigration cleared' ie those who have passed through official immigration and passport clearance at a port or an airport, Mig Act, s 3

In this submission we focus particularly on developments in Australian refugee policy and procedures. Australian refugee law and policy has undergone substantial and dramatic change within the last two years and most particularly within the last two months. The treatment of unauthorised asylum seekers has become a crucial issue in the upcoming Australian Federal elections[2], and current government policy has been developed in an ad hoc and reactive manner.

The introduction of current legislation which attempts to deter all unauthorised arrival to Australia indicates a desire to move away from obligations to onshore asylum seekers under the Refugee Convention towards a system whereby Australia can fully acquit its international obligations under its offshore resettlement program. RILC considers that Australia's current policy of transfer of unauthorised asylum seekers to underdeveloped Pacific states is less a 'regional protection strategy' than an attempt to prevent the arrival of unauthorised asylum seekers.[3] By designating countries such as Nauru and Papua New Guinea as 'safe third countries', and enshrining legislative measures to ship people from its territory prior to refugee status determination, the Australian government seeks to export its asylum seeker 'problem'.

We are concerned that Australia may also be attempting to market this strategy to other Contracting Parties to the Convention in the course of the Global Consultations as a means of asserting immigration control over unwanted and uncontrolled numbers of asylum seekers arriving onshore. The implications of such a policy for the global protection of refugees is far reaching and alarming. Were such an approach to be adopted by other Contracting States the effectiveness of the Refugee Convention as an instrument of global protection would be seriously undermined.

The Government has attempted to justify this policy as part of its campaign against people smuggling but also as a legitimate means of dealing with refugees involved in 'secondary movement' and who bypass or forsake existing protection. As such as policy clearly relies upon an interpretation of international obligations under Article 31 of the Convention, we are particularly interested in the outcomes of the 3rd Expert Roundtable.

3. **Submissions**

Our submissions are as follows:

a) Whilst increases in people smuggling activities and the global irregular movement of refugees from existing protection are legitimate concerns for Contracting States, measures to counter people smuggling must be targeted and proportionate. Minimal standards owed to asylum seekers and refugees should not be compromised in the process, or as part of the process, of targeting smuggling activities.

---

[2] To be held on 10 November 2001

[3] In her paper "Global Migration Trends and Asylum" Susan Martin points out that "UNHCR must continue to reiterate that prevention does not mean preventing people from seeking safety and protection abroad".[3]

b) States must acknowledge that increases in people smuggling and the irregular movement of refugees occurs in part because of the pressure on countries of first asylum. States should be required to take an equitable share of the global refugee burden, not divest themselves of international responsibilities.

c) Regional protection mechanisms can be an important means of providing protection whilst discouraging the need to resort to people smuggling. Any such mechanisms must be appropriate to the circumstances, be consistent with minium standards under the Refugees Convention and offer the meaningful prospect of a durable solution.

d) The concept of a 'safe third country' requires that a country guarantee the non-refoulment of a refugee, abide by the minimum standards set out in the Refugee Convention and have an acceptable human rights record. Generally a 'safe third country' should be a country where a refugee has resided, with which he or she has some connection, which has experience with respect to the reception of refugees or which is able to offer the refugee a form of durable protection. The artificial creation of 'safe third countries' as holding pens for asylum seekers or refugees who have entered Contracting States irregularly should be condemned unless some of the above requirements are present.

e) Article 31 of the Refugee Convention allows only the imposition of penalties on refugees who have not come directly from a territory where their life or freedom was threatened. States are not permitted to discriminate against refugees on the basis of the mode of arrival.

f) Article 31 remains an appropriate vehicle for considering the phenomena of secondary movement or mixed migration flows within the terms of the Refugee Convention. It is acknowledged that there are many overlapping causes and motivations for refugee and migrant flows. However the core issue in a determination of refugee status remains the prospect of Convention related persecution to the claimant and the existence and adequacy of effective protection for the claimant outside the country of origin. These issues should not be hijacked by an overemphasis on the difference between primary and secondary movement.

g) Any legislation that purports to penalise an asylum seeker or refugee who has not come directly from a territory where their life or freedom is threatened, must reflect the wording and intention of Article 31.

h) Refugees and asylum seekers should be provided with an opportunity to explain their circumstances and possible fears in the country they have 'directly' come from before the imposition of any penalty.

i) Refugees and asylum seekers should not be penalised on account of their movement from a country they have transited or where they have not found protection.

j) Administrative detention, denial of minimal standards under the Refugees Convention and restrictions on the ability to make an asylum application can all constitute penalties.

k) Legitimately imposed penalties must be proportionate and consistent with the terms of the Refugee Convention and must be based on objectively justifiable administrative policy.

l) Legislative and administrative policy and practice in Australia towards unauthorised arrivals breaches the intent and spirit of Article 31 of the Convention in many respects. Australia's current 'regional protection mechanism' involving Pacific countries should be viewed primarily as a mechanism to divert international responsibility, rather than as a meaningful attempt to provide effective protection.

A: COMMENTARY ON CURRENT AUSTRALIAN REFUGEE POLICY

4. Australia's preferred model – the offshore resettlement program

Current Australian policy towards asylum seekers must be viewed within the context of Australia's global refugee and special humanitarian program.

The Australian government makes no secret of the fact that it campaigns strongly against unauthorised asylum seekers as part of its strategy against people smugglers and against what it sees as the secondary movement of refugees. As Australia's geopolitical situation makes it difficult for asylum seekers to come directly[4] from their country of origin to Australia, the Government contends that unauthorised asylum seekers are invariably the product of secondary or non-protection related movement. In particular, the government contends that the great majority of boat arrivals from Indonesia are persons who have bypassed or forsaken reasonable protection in Indonesia.[5]

The Government views the offshore resettlement program as the fairest and most efficient way to help address the global humanitarian crisis. Refugees and special humanitarian entrants are selected on the basis of designated criteria and in conjunction with UNHCR. The Government contends that this program allows Australia to select the 10-12,000 most deserving and needy refugees in designated countries of first asylum– persons who

[4] But not impossible. See later discussion of the definition of 'coming directly'

[5] See for example, DIMA Notice of Legislative Change, 27 September 2001, Amendments to Australia's Border Protection Arrangements, "This new visa regime is intended to deter further movement from, or the bypassing of, other safe countries.", also DIMA Ministerial Press Releases

do not have the means to engage people smugglers and who have not left situations of effective protection to try and secure a 'migration outcome' through secondary movement to Western countries. It is argued that secondary movement, or 'forum shopping' undermines the credibility of the system of international protection and encourages people smuggling and trafficking.

Since July 1999, increased numbers of unauthorised asylum seekers have been arriving off the northern coast of Australia and the areas of Christmas Island and Ashmore Reef.[6] The great majority of those asylum seekers have been from Afghanistan and Iraq and the great majority have been found to be refugees in Australia.[7] Thus far the Government has been unable to impose limits on the number of asylum seekers found to be refugees in Australia. This is consistent with international obligations under the Refugee Convention.

Because the Government links the onshore and offshore programs and caps the total number of refugees and special humanitarian entrants accepted at 12,000 per year, it reduces the available number of offshore resettlement places by the number of asylum seekers who are found to be refugees upon arrival onshore.[8] This policy has resulted in a much lower number of available offshore resettlement places within the last two years.

The Government contends that the many unauthorised refugees arriving by boat have 'taken places away' from more deserving refugees waiting in refugee camps overseas under the offshore resettlement program. Clearly, this argument is premised on linkage of onshore and offshore quotas for the annual intake. As a consequence the Government has recently passed a range of legislation that seeks to deter unauthorised arrivals of asylum seekers and restore the balance to the offshore program.

Legislation passed in Australia within the last two years (and most particularly since September 2001) which affects asylum seekers includes:

- The introduction of Temporary Protection Visas (TPVs) for refugees arriving in an unauthorised manner. There is no right to family reunion on these visas. After 3 years the TPV holder is reassessed under the Refugee Convention and considered for permanent residence if found still to be a refugee and if they are found not to have been the subject of 'secondary movement'

- The declaration (or 'excision') of certain parts of Australia (including Christmas Island and Ashmore Reef) as places where refugee applications cannot be lodged.

---

[6] In 1998 less than 1,000 unauthorised asylum seekers arrived by boat off the coast of Australia. During 1999 and 2000, over 4,000 asylum seekers per year arrived by boat. Similar numbers began to arrive in the first half of 2001 until the Government moved to prevent the landing of further asylum seekers in September 2001 through a combination of direct action by the Australian navy and by the introduction of legislation.

[7] According to statistics from the Department of Immigration, between 80-90% of Afghan and Iraqi asylum seekers are accepted as refugees in Australia.

[8] Although it appears from Immigration Department statistics that even this quota is not filled every year.

- Empowering Australian officials to intercept, turn-around, search and 'detain' asylum seekers who attempt to enter Australia in an unauthorised manner.

- Allowing Australian officials to send unauthorised asylum seekers who arrive in 'excised zones' to other countries (ie Nauru and Papua New Guinea) that are labelled as 'safe third countries by the Immigration Minister.

- Compelling these unauthorised asylum seekers to apply for resettlement under an offshore resettlement program, instead of being entitled to apply for asylum in Australia.

- The creation of a new 'successive temporary visa' regime for the above asylum seekers which means that temporary protection can be extended but can never result in permanent residence or the right to family reunion.

- Removal of the right to seek independent review of a decision refusing refugee status under the above visa class

- Prohibiting an unauthorised asylum who has arrived in an 'excised zone' from bringing legal proceedings challenging their entry, status, detention and transfer under the above arrangements.

- Legislation which extends by four years the period of temporary residence for Temporary Protection Visa holders who are convicted of minor crimes.

- Changes which restrict the definition of a refugee in Australia

- The effective abolition of the right to seek judicial review of a negative refugee status decision in Australia.

It is apparent that the last two years has seen a dramatic erosion of the rights of asylum seekers (particularly asylum seekers arriving by boat) in Australia.

5. Onshore v Offshore policy

Whilst the Government's commitment to the offshore program is in many respects very worthy, RILC is concerned that the focus on the offshore program has been used as a justification for the removal of minimum safeguards for asylum seekers arriving in Australia. The discussion paper by Professor Goodwin-Gill recognises that there are many persons who may be unable to apply under offshore refugee resettlement programs, or who have justification for undocumented onward travel such as threats or insecurity in the country of first refuge. [9]

[9] Goodwin-Gill, para 32

Because of the Government's emphasis on the offshore resettlement program, we consider it relevant to consider the efficacy of the offshore program as the key plank of Australia's strategy on global protection.

Having worked in the area for many years, RILC is aware of the many limitations of the offshore program. For example, traditionally 50% of Australia's entire refugee/special humanitarian intake has come from one country – namely the former Yugoslavia. Refugees/Special Humanitarian entrants from the rest of the world comprise the remainder of places. 50% of places under the program are allocated to Special Humanitarian entrants - persons who, whilst no doubt deserving, are not, by the Government's own standard refugees. This makes it misleading in the extreme for the Government to publicly contend that an onshore arrival takes away the place of a refugee under the offshore program.

These limitations reduce the available number of places for non-Yugoslav refugees to approximately 25% of the program or 2,500 in a full year. Refugees with medical conditions (or with immediate family members with medical conditions) are ineligible for re-settlement. There are a great many other practical and logistical reasons why the offshore program is inaccessible for many refugees and why a greater number or persons have chosen to access protection directly in Australia. The Government's focus on the offshore program is misleading. Australia ranks poorly in terms of global burden sharing by Western countries.[10] No serious consideration is ever given by the Government to increasing the numbers of refugees accepted in Australia per year. Since 1996, the onshore and offshore refugee and special humanitarian program has been capped at 12,000 places per year.

6. Australia's designation of Pacific 'safe third countries' as a regional protection mechanism

RILC recognises the role of regional protection mechanism in managing refugee flows and in global burden sharing. However for regional protection mechanisms to serve their purpose, the commitment of participating states (particularly wealthy, industrialised states) in providing meaningful protection as compared to preventing flows of unauthorised asylum seekers is critical.

Over the years Australia has been involved in regional protection mechanisms, most particularly the Comprehensive Plan of Action which provided an avenue for Vietnamese refugees in South-East Asian refugee camps to resettle in participating countries.

---

[10] A recent article in the Melbourne Age pointed out that whilst Australia is one of a small number of countries that has an offshore program, it ranks only 14th in the Western world per capita when combined numbers of onshore and offshore refugees are taken into account, see Mungo MacCallum, "Generous to genuine refugees? Not quite.", The Age, 3 October 2001. Australia's Immigration Minister makes much of the fact that Australia is the second most generous refugee resettlement country per capita after Canada, a fact which ignores the large number of onshore refugees accepted by other countries.

Australia's offshore resettlement program is another example of a positive resettlement avenue for refugees in the country of first asylum.

More recently Australia has proposed the Australian Regional Cooperation Model for interceptions by Indonesia of Australia-bound irregular migrants.[11] Whilst there are constructive and positive aspects to this model[12], it is flawed in many respects. It has not, thus far, been a success. Of the over 500 persons who have been intercepted in Indonesia and found to be refugees by UNHCR, only approximately 20 of those persons have actually been resettled to third countries.[13] Additionally, the full cooperation of Indonesian authorities has not been forthcoming in the Australia-Indonesia model. This may be in part on account of a perception that Australia is primarily interested in keeping refugees at bay in Indonesia as compared to attempting to broker solutions for them.[14]

As Martin points out in her paper, 'Global migration trends and asylum', "regional protection must be accompanied by mechanisms for broader responsibility sharing – in both the costs of maintaining regional protection as well as the resettlement or relocation of at least a portion of those requiring protection."[15]

Within the last two months, Australia has again developed a 'regional protection mechanism', this time focusing on the transfer of unauthorised asylum seekers to the designated 'safe third countries' of Nauru and Papua New Guinea. Whilst the Indonesian regional protection model at least attempts to address the issue of refugee movement in the country of last arrival, the current Pacific arrangements have no such nexus. Rather they are more obvious attempts at purchasing offshore refugee camps in cash-strapped countries with no involvement in the refugee movements and no real capacity to house the refugees.

The 'Pacific co-operation model' operates as follows:

Recent legislation in Australia has 'excised' certain parts of Australia from being places where refugee applications can be made by 'unauthorised arrivals'[16]. The 'excised places' include Christmas Island and Ashmore Reef, places where large numbers of

---

[11] Refugee Protection and Migration Control: Perspectives from UNHCR and IOM, 31 May 2001

[12] It attempts to discourage dangerous boat journeys to Australia, encourages refugees to access UNHCR protection and provides financial support for Indonesia and UNHCR to implement the program. Further aid is also provided to assist with the humanitarian crisis in Afghanistan.

[13] Interview with Margaret Piper, Director of the Refugee Council of Australia, on Radio Australia, Friday 2 November.

[14] See Article in The Age, 31 October 2001 quoting Indonesian naval sources who advise that they will assist boats of asylum seekers to leave their waters (including those travelling to Australia), but will 'turn-around' boats of asylum seekers who enter their waters unlawfully (in reference to comments by Australian officials that they will 'turn-around' boats of asylum seekers who arrive from Indonesian waters)

[15] Susan Martin, "Global migration trends and asylum", p 24

[16] The recently passed Border Protection Act further gives Australian officials wide powers to intercept asylum seekers if there is a reasonable suspicion that they intend to enter Australia without authorisation. Boats of asylum seekers may be turned back into international waters, even if they have entered Australian waters in order to apply for asylum. The recent tragedy in which 350 asylum seekers on the way to Australia drowned off the coast of Indonesia highlights the dangers of such a policy of 'turn-arounds'.

unauthorised boat arrivals from Indonesia have arrived in the last two years. Despite their presence on Australian soil, asylum seekers who arrive on Christmas Island or Ashmore Reef can no longer make valid refugee applications, unless the Minister for Immigration exercises his non-compellable discretion to allow such an application.

Instead the Australian Government has made arrangements with certain Pacific Island nations (primarily Nauru and Papua New Guinea, possibly also Kiribati) for these asylum seekers to be taken there for assessment.[17].

Nauru and Papua New Guinea have been declared to be 'safe third countries' for the reception of these asylum seekers. This is despite the fact that neither country has any experience with large scale refugee arrivals and no staff trained in refugee determination issues. RILC is concerned that the legislation authorising the removal of asylum seekers from Australian territory prior to the assessment of refugee status fails to provide sufficient guarantees of protection and safety. The legislative measures fail to articulate detail or criteria concerning the bases upon which a country is declared to be a 'safe third country'. For example, there is no explanation as to what will be considered to be effective procedures for refugee status determination, nor what kind of protection is required pending determination and finalisation of an asylum seeker's claims. In addition, there is no requirement that such a declared safe third country be party to the Refugees Convention, nor that Australia secure agreement with such a country as to reception of asylum seekers and the conditions and obligations that would apply in these circumstances. In this regard, we note with concern that there is no explanation or articulated criteria for the 'relevant human rights standards' required in providing protection to asylum seekers, and no requirement that a country be signatory to other relevant human rights Conventions such as the ICCPR, Convention Against Torture, or the CROC.

Further, the proposed legislation provides no mechanism for consideration that while a country may be deemed safe for most refugees, it may nevertheless be unsafe for a particular individual or class of individuals. In these circumstances, no provision exists for such individuals to have the basis of a unilateral Ministerial declaration challenged. In order to properly protect the human rights of individual asylum seekers, such provision needs to be made.

Asylum seekers who are transferred to Nauru or Papua New Guinea are eligible only for temporary Offshore Entry Visas (OEVs). Temporary Offshore Entry visas are based upon the criteria contained in Australia's offshore refugee and special humanitarian visas and contain health and public interest criteria extraneous and irrelevant to the question of whether or not a person is a refugee. This criteria includes:

[17] Details of the Government's Memorandum of Understanding with Nauru and Papua New Guinea have not yet been publicly disclosed partly because the arrangements and policy appear to be developing on an ad hoc basis.

- The extent of the applicant's connection with Australia
- The degree of persecution to which an applicant is subject
- Whether there is any suitable country available other than Australia that can provide for an applicant's stay and protection from persecution, discrimination, victimisation, harassment or serious abuse
- The capacity of the Australian community to provide for the temporary stay of persons such as the applicant
- Assessment of whether or not the applicant's temporary stay would be contrary to the interests of Australia
- A quota on the available number of places
- Health and public interest criteria

It is unclear what happens to those asylum seekers who are assessed as refuges but for whom there is no place under the Australian Offshore Entry Visa program. Presumably they will remain in Nauru or Papua New Guinea until a place becomes available in Australia or a resettlement place becomes available for them in a third country. As many countries may (legitimately) consider that these asylum seekers who should be assessed in Australia, we consider it unlikely that that many (if any) offshore places will be made available for them from third countries (particularly bearing in mind the experience under the Australia-Indonesia model).

John Howard, Australia's Prime Minister has made it clear, that 'under no circumstances will the asylum seekers previously on board the MV Tampa set foot on Australian soil' We are unclear as to whether the asylum seekers will remain in administrative detention for the duration of their stay in the 'safe third countries'. It seems inevitable that they will languish in Nauru or Papua New Guinea for a considerable time unless the Australian government intervenes to provide resettlement places for them.

At a time when Nauru and Papua New Guinea are faced with their own difficult social problems and challenges, Australia has given both countries new 'refugee problems' which will place an additional strain on the government. Both countries, previously with no need for 'immigration detention centres', have now joined this international club.

The Australian Government's desire to stem the flow of unauthorised boat arrivals to Australia is understandable. Australia's 'Pacific regional protection model' however is not appropriate to the circumstances and does little to address the causes for refugee flight by proving a realistic avenue for effective protection. Martin states that, '…policies that make it harder for asylum seekers to exit their countries or to reach their destination merely shifts responsibility from one State to another , or to the broader international community without solving the basic problem of refugee protection"[18]

Australia's 'Pacific arrangements' fall short of the principles espoused at the Regional Consultations in Ottawa that resettlement will often be the most appropriate solution for intercepted persons in need of international protection and this will only be fully realised

[18] Martin, ""Global migration trends and asylum", p 20

if resettlement is approached as a means of responsibility-sharing amongst involved States including those who set up the interception mechanisms.[19] Temporary visas which can never be made permanent do not qualify as any form of resettlement.

7. Good-faith interpretation of the Refugee Convention

Perhaps the most important requirement by signatories to the Refugee Convention is that they interpret the Convention in good faith.

Australia stands in the position of having no direct borders with any country and of being removed from most refugee conflicts. Australia is thus able to exercise a considerably higher degree of immigration control than most Western countries. In our view, this situation demands a proportionately higher degree of generosity and compassion when compared with countries with a higher inflow of asylum seekers. Yet the Australian government has, in part, used Article 31 of the Refugees Convention as a platform from which to characterise unauthorised asylum seekers as persons who are undeserving of sanctuary as persons who are fleeing for non-protection related motivations.

In our view the following developments are indicative of a lack of good faith on Australia in interpreting its obligations under the Refugee Convention:

- Australia's continued policy of indefinite mandatory detention of all unauthorised asylum seekers including children and unaccompanied minors, disabled persons, persons with psychological conditions and other categories of vulnerable persons

- The imposition of 3 year Temporary Protection Visas to unauthorised refugees which restrict family re-union and other social benefits.

- The government's vigorous campaign against people smugglers which deliberatively targets and vilifies asylum seekers who are smuggled.

- The Government's actions in preventing the landing of 433 asylum seekers aboard the MV Tampa and their subsequent transfer to Nauru and New Zealand

- The Government's interception and turn-around of other boats of asylum seekers.

- The Government's actions in firing live ammunition across the bows of an unarmed boat of asylum seekers and subsequent public campaign to condemn asylum seekers who are alleged to have thrown their children

[19] Refugee Protection and Migration Control: Perspectives from UNHCR

overboard as undeserving of protection, without countenancing an alternative perspective[20]

- The passage of legislation preventing asylum seekers from making refugee applications in certain parts of Australia.

- Arrangements made by the Australian government with Pacific Island nations to transfer its responsibilities under the Refugees Convention. These arrangements do not contain adequate minimum standards with respect to which countries may be declared to be 'safe third countries'

- The passage of a wide range of legislation through the Australian parliament which creates temporary underclasses of refugee visas, narrows the definition of a refugee, and effectively removes the right to judicial review

IOM stress that in order to maintain the credibility of any message targeting the practices of 'people smuggling', it is critical that the content of any mass information campaign be a balanced one.[21] In the Australian context, this should include provision of information on the refugee situations in Afghanistan and Iraq and of the fact that persons found to be refugees have been found not to have 'effective protection' outside Australia.

Good faith interpretation of the Refugee Convention is not just a matter for individual states, but for the international community. Lack of good faith where comparatively small numbers of asylum seekers are concerned has a deterrent effect on states which shoulder a disproportionate percentage of the global refugee burden [22] This undermines the system of global protection as a whole.

B: DOES AUSTRALIAN LAW COMPLY WITH ARTICLE 31?

7. A distinction between 'primary' and 'secondary' movement?

The Government's Convention-related justification for the recent legislation targeting unauthorised boat arrivals rests upon Article 31 which provides scope for differentiation between primary and secondary movement. As legislation has recently been introduced in Australia which attempts to codify Article 31 and distinguish between 'primary' and

[20] See article in The Australian dated 6 November 2001 which suggested that the episode and allegations may in fact have been false

[21] Refugee Protection and Migration Control, Perspectives from UNHCR and IOM, 31 May 2001, para 25

[22] For instance recent see comments by General Mussharaf of Pakistan who criticised countries such as Australia for refusing to accept small numbers of refugees when Pakistan was faced with a massive Afghan refugee influx.

'secondary' movement, it is relevant to look at whether or not recent amendments comply with the wording and intent of Article 31.[23]

The purported codification of Article 31 in Australian domestic law is contained in Reg 866.215 of the Migration Regulations. This is the provision which determines whether or not a Temporary Protection Visa holder is eligible for a Permanent Protection Visa. A TPV holder is not eligible for permanent residence if:

- Since leaving his of her home country have resided for a continuous period of at least 7 days in a country in which they could have sought and obtained effective protection of the country or through the offices of UNHCR located in that country

However this provision applies only to persons who hold Temporary Protection Visas in Australia. It does not apply to an unauthorised arrival who arrives in an 'excised zone'. These are by far the majority of recent asylum seeker arrivals to Australia. Persons who arrive in an excised zone will be transferred to a 'safe third country' and be eligible only to apply for an Offshore Entry Visa regardless of whether they have come by way of primary or secondary movement.

The Explanatory Memorandum to the recently introduced Border Protection (Excision from Migration) (Consequential Provisions) Bill states that:

> Unauthorised arrivals who reach Australia *other than those directly fleeing persecution within their country of origin*, would only be eligible to be granted successive temporary protection visas. There will be no access to permanent residence unless the Minister exercises a non-compellable discretion to lift the bar.[24]

However this is not reflected in the legislation, particularly the provisions of Migration Regulation 447 which create the Offshore Entry Visa or Migration Regulation 866, which governs eligibility for Permanent Protection Visas. Not only is the Government's statement to the Parliament legally incorrect, it is misleading. It suggests that the Government has attempted to draw a distinction between the primary and secondary movement of unauthorised arrivals when no such distinction has been made. The only way a primary unauthorised arrival in an 'excised place' can be treated differently from a

[23] Whilst there has been no prior attempt to define primary and secondary movement in Australia, there has been a lively judicial debate about whether or not an asylum seeker can be taken to have 'effective protection' in a third country. One line of authority contends that a finding of 'effective protection' requires a legally enforceable right of return. Another line of authority focuses on whether or not a person can return to a country as a matter of practical fact and reality. Clearly if a person has 'effective protection' in a third country, no protection obligations are owed to them.

[24] Explanatory Memorandum, Migration Amendment (Excision from Migration Zone) (Consequential Provisions) Bill 2001

'secondary mover' is if the Minister exercises his non-compellable discretion to allow such treatment.[25]

8. Discrimination against 'unauthorised arrivals' on account of mode of arrival

Article 31 of the Convention allows for the imposition of penalties only on persons who have not directly fled from a territory where their life or freedom was threatened. Direct or secondary movement from threats to life or freedom are the differentiating elements – not mode of arrival.

In Australia, mode of arrival dictates the type of residence visa a refugee will be entitled to. An unauthorised arrival outside of an 'excised place' will be eligible initially only for a three year Temporary Protection Visa (785). After three years they may become eligible for a Permanent Protection Visa (866) if they are assessed as still being a refugee and if they have come by way of primary as compared to secondary movement as defined by Regulation 866.215 (above). Any authorised arrival will automatically be eligible for a Permanent Protection Visa. (866).

An unauthorised arrival in an 'excised zone' regardless of whether or not they have come by way of primary or secondary movement will be eligible only for an Offshore Entry Visa and be automatically subject to the successive temporary visa regime.

Australian law leads to the following results, which are clearly inconsistent with the provisions of Article 31:

> A refugee who arrives in an *unauthorised manner* but has come *directly from a situation of persecution* is eligible only for a three year Temporary Protection Visa (785) or an Offshore Entry Visa (447), depending on whether or not they have arrived in the 'excised zone' A refugee who arrives in an *authorised manner* but has come *indirectly from a situation of persecution* will be entitled to a Permanent Protection visa (866).
>
> An asylum seeker who arrives in an *unauthorised manner in an excised zone of Australian territor*y will be eligible only for an Offshore Entry Visa (447), whilst an asylum seeker who arrives in an *authorised manner in an excised zone* will be entitled to a Permanent Protection Visa (866).

Again, mode of arrival, not level of protection in the country of last residence, is the determining factor. We note that a recent statement by Australian Immigration authorities advises that the new visa regime intentionally 'discriminates' against classes of asylum seekers. The release appears to proceed on the misunderstanding that the legislation discriminates between primary and secondary movement for unauthorised arrivals in excised zones.

---

[25] By lifting the bar preventing an unauthorised arrival in an 'excised zone' from making a valid visa application in Australia, see s 46A of the Migration Act. An applicant would then be eligible for a Temporary Protection Visa.

RILC considers that Contracting States should be obliged to amend all provisions in domestic refugee law which allow for differential treatment of asylum seekers on the basis of mode of arrival, (with the permissible exception of a period of preliminary immigration detention for unauthorised asylum seekers arrivals consistent with UNHCR Guidelines).[26]

9. Interpretations of Article 31

The wording of Article 31 as well as the discussions prior to the adoption of Article 31 make it clear that a range of considerations are to be taken into account in determining whether someone has come by way of primary or secondary movement. These considerations include: actual or potential threats to life or freedom in territories passed through, the refusal of other countries to grant protection or asylum or the imposition of exclusionary provisions such as those on safe third country, safe country of origin or time limits. For Temporary Protection Visa holders, Australian legislation purports to take into account this variety of circumstances through an assessment as to whether a person has been in a country where they could have 'sought and obtained effective protection'.[27]

Professor Goodwin-Gill suggests that Article 31 was never intended to allow the imposition of penalties on persons who had merely transited other countries, but was designed for those who had settled either permanently or temporarily in other countries. This interpretation appears to be supported by the comments of participants at the 1951 conference (including by the English and Belgians)[28], and the discussions leading to the final version of Article 31. Goodwin-Gill argues that 'directly *should not be strictly or literally construed,* but depends rather on the facts of the case, *including the question of risk at various stages of the journey*"[29] EXCOM Conclusion No 58 refers to persons who have 'already found protection' in another country.

UNHCR advise that "the expression 'coming directly' in Article 31(1) covers the situation of a person who enters the country in which asylum is sought directly from the country of origin, *or from another country where his protection, safety and security could not be assured.* It is understood that this term also covers a person who transits an intermediate country for a short period of time without having applied for, or received asylum there. *No strict time limit can be applied to the concept of 'coming directly' and each case must be judged on its merits*."[30]

The imposition of a fixed definition of 'transit' at 7 days under Australian law does not provide any degree of flexibility for individual situations and is inconsistent with the above interpretations of Article 31. The imposition of this onus on refugees is far

[26] see RILC conclusions on immigration detention
[27] see Migration Regulation 866.215
[28] Goodwin-Gill, para 19
[29] Goodwin-Gill, para 98
[30] UNHCR Guidelines and Applicable Criteria and Standards relating to the Detention of Asylum Seekers., para 4

removed from the reality in most countries of first asylum. There are a multitude of factors that may reasonably impede a refugee in approaching authorities within this space of time.

We submit that a short term presence in a country should not be used to invoke the penalty provisions of Article 31. Only when there is no objectively reasonable element or nexus of 'protection motivation' in the movement of a person should Article 31 provisions operate. A person who relocates for 'reasons of mere personal convenience' might be considered an immigrant and should be excluded from the benefit of Article 31[31], but a person who has a reasonable 'protection motivation' (because they have not yet found protection or an adequate level of protection) should not be penalised. The concept of temporary or permanent 'settlement' in a country may well be the most appropriate term to reflect this situation.

Current provisions in Australian legislation are arguably not consistent with Article 31. Firstly, the period of transit is exclusively defined as no more than 7 days. Secondly, a person's physical presence in a country of so-called 'effective protection' is at odds with the intentions of the drafters of the Convention, and the interpretation of Goodwin-Gill that an element of 'settlement' is required. Thirdly, Australian legislation discriminates on the basis of mode of arrival at the outset, not primary or secondary movement. Fourthly, the penalties imposed on temporary protection visas are disproportionate and breach minimum standards required under the Refugee Convention.

We consider that a wide interpretation should be given to the phrase 'threats to life or freedom in the sense of Article 1'. It should be made clear that penalties may not be imposed on asylum seekers who have transited or not found protection in the country they have directly come from.

10. Practical impediments for offshore asylum seekers – Indonesia as a country of 'effective protection'

Professor Goodwin-Gill notes that without legislative provisions implementing the obligations under Article 31, compliance is to be left to the (hopefully) judicious use of executive discretion. Another danger is when a State passes legislation which misapplies aspects of Article 31.

As discussed above, Australian legislation makes no provision for determining 'primary' and 'secondary' movement of unauthorised arrivals in 'excised zones'. All unauthorised arrivals from 'excised zones' will be taken offshore and considered under criteria extraneous to the definition of a refugee, linkages to Australia and 'the capacity of the Australian community to provide for the temporary stay of persons such as the applicant'.[32] An applicant's likelihood of receiving an Offshore Entry Visa depends entirely upon the numbers of visas allocated at the government's discretion. As we

[31] Goodwin-Gill, para 19, comments from UK representative to 1951 Conference
[32] see criteria for grant of 447 visas contained in Regulation 447.222 of the Migration Regulations

understand it, an offshore asylum seeker has no access whatsoever to legal counsel to assist with the preparation of their claims.

A policy decision appears to have been taken by the Australian government that Indonesia *cannot* be considered to be a country where an asylum seeker's life or freedom is threatened in the sense of Article 1.[33] This is because all unauthorised asylum seekers arriving in an 'excised' part of Australia are prevented from applying for asylum in Australia and are automatically considered for successive temporary visas (which we consider to be a penalty). Almost all unauthorised arrivals in 'excised' zones have come by boat from Indonesia (although we have acted for clients who have come 'directly' by boat from Sri Lanka).

Such an assessment takes no account of an asylum seeker's individual circumstances or any restrictions on their ability to access protection in Indonesia. This situation involves an exercise of state jurisdiction before an individual's claims to refugee status are examined.[34]

Indonesia has never formally been regarded as a 'safe third country' by Australia. This is presumably on account of the fluid political and human rights situations in Indonesia, the fact that Indonesia is not a party to the Refugees Convention, the fact that Indonesia has a large number of internally displaced persons from various conflicts and the fact that Indonesia (already under intense population and financial pressure) has a limited capacity to protect additional refugees and asylum seekers. We are concerned that Australian law places unnecessary faith in Indonesia as a country in which a person can apply for and receive 'effective protection'.[35]

Whilst noting with concern the irregular movement of some refugees 'in the absence of compelling reasons which endanger the physical safety or freedom of refugees', UNHCR point out that 'there may be considerable doubts as to whether "effective protection" has actually been found for many refugees.[36]

Australian legislation permits no account to be taken of circumstances which may have impeded the ability of an unauthorised arrival in an 'excised zone' to seek and obtain 'effective protection' in Indonesia. Similarly, unauthorised arrivals who do not arrive in an excised zone (eg who arrive by plane in Sydney or Melbourne) are automatically considered for a Temporary Protection Visa. Only after three years does the question of

---

[33] Or that Indonesia is a country where an applicant could have sought and obtained effective protection, if Reg 866.215 were to apply

[34] Goodwin-Gill, para 4

[35] The UNHCR Regional Representative has recently advised that since 1999, the UNHCR had identified 535 Afghans, Iraqis and Iranians as refugees, but only 18 had been resettled. We understand that Australia had not agreed to take any of them until a more recent suggestion that Australia may take some 40 or so. This followed the tragedy in which over 350 asylum seekers drowned off the coast of Indonesia on route to Australia. On Australia's ABC TV's Lateline Program the UNHCR representative said that at least 30 of those who drowned had been mandated refugees. There was a strong inference that Australia's failure to take any of these people had contributed to other countries failing to do so.

[36] Refugee Protection and Migration Control: Perspectives from UNHCR and IOM, para 37-38

their primary or secondary movement become relevant when they are able to apply for a Permanent Protection Visa.

RILC contends that asylum seekers must be provided an opportunity to fully detail their reasons for not having accessed protection prior to the imposition of a penalty, such as a particular visa class.

10. **Recent Afghan and Iraqi arrivals**

The demographic of recent Afghan and Iraqi arrivals to Australia provide two relevant examples of the lack of adequacy of protection in host and transit countries. It is these two categories of arrivals that recent Australian legislation is designed to target.

Over the years, RILC has acted for many hundreds of Afghan and Iraqi asylum seekers in detention centres in Australia. In our submission, many of them have had legitimate reasons for their inability to access 'effective protection' in host or transit countries.

(ii) **Hazara asylum seekers in Australia**

The vast majority of Afghan asylum seekers arriving in Australia are young males of the Hazara ethnic group. The Hazara are an ethnically recognisable minority and are Shia. Many thousands of Hazaras have been massacred in Afghanistan before and after the fall of Mazar-I-Sharif. Young male Hazaras are particularly vulnerable to execution and abduction at the hands of the Taliban and have good reasons for fleeing Afghanistan. It seems to be widely accepted by Australian decision makers that Hazara asylum seekers have a well founded fear of persecution for a Convention reason.

Many of our clients advise that the money for the 'smuggling arrangements' to leave Afghanistan was collected through the sale of family possessions to local Pashtoons, including land, livestock, carpets and jewellery. Most advise that they spent between 1 and 3 months in Pakistan before being flown to Indonesia where they remained for between 1 and 3 months. Country information indicates that Pakistan has re-fouled Hazara asylum seekers. In our submission Pakistan cannot be considered a country of 'effective protection' for many categories of Afghan refugees.

Almost all of our clients have advised that once they were in the hands of the smugglers, they felt they had no real control over their destinies. These feeling were compounded by their young age and complete lack of world-experience. Many of our clients have described to us the experience of being on a plane for the first time, of having a document in their hands that many of them were unable to read, and of being kept in 'safe houses' in Pakistan or later Indonesia and being told they were not allowed to leave until the smuggler advised them otherwise. Periods of stay in Pakistan or Indonesia were brief and there was no contact with UNHCR.

Bearing in mind their brief and transitory presence in Pakistan and Indonesia, and the circumstances of their travel, it is arguable that these asylum seekers have come effectively 'directly' from Afghanistan.[37]

(iii) **Iraqi asylum seekers in Australia**

On the other hand, many of the recent Iraqi arrivals to Australia have lived in Iran for many years since being forced to flee Iraq during the Iran/Iraq War or following the intifada in 1991. Many of our clients advise that they were relatively happy and comfortable in Iran despite some discrimination, harassment and the uncertain nature of their status there. It was only when Iranian government policy towards 'illegal residents' moved to one of expulsion that they made the decision to flee to safety in another country. Many of our clients advise that they were apprehensive about remaining in Indonesia as their experiences in another host country overburdened by refugees (Iran) led them to fear that they may again face deportation. Ongoing violent conflicts in various parts of Indonesia are not conducive to a climate of 'effective protection'. Again, their stay in Indonesia has on the whole been transitory.

The circumstances of the above categories of asylum seekers indicate that they have merely transited Indonesia, despite having been physically present there for over 7 days. In our submission both categories of asylum seekers have had legitimate concerns with respect to their life and freedom in Pakistan in Iran. They have remained in Indonesia for only brief periods of time. Indonesia is not well placed to be able to offer 'effective protection' to such categories. In these circumstances, we submit that the penalty provisions of Article 31 for 'secondary migration' should not apply to them.

11. Penalties

In his discussion paper Professor Goodwin-Gill comments on the nature of permissible penalties under Article 31. The Australian government contends that administrative measures applied to 'unauthorised' asylum seekers (which include immigration detention, different visa classes and processing destinations) are no more than different levels of permissible preferential treatment and do not constitute a penalty. If these measures are not considered to be penalties, it is conceded that Article 31 has no practical application in Australia.

RILC accepts that the Australian government does not generally charge asylum seekers with the criminal offence of entering Australia without authorisation, as may be the case in some other countries. If an asylum seeker is found to be a refugee, they are taken to have had 'good cause' for their entry. If they are not found to be a refugee, removal mechanisms are instituted. There is clearly little utility in charging unsuccessful asylum seekers with criminal offences (particularly when they are generally already in detention). The Government does of course institute criminal proceedings against any person suspected of being involved in people smuggling and has recently introduced laws which impose mandatory sentencing on persons convicted of people smuggling.

[37] see Goodwin-Gill, para 98

Alternatively, if an asylum seeker has not come directly from a territory where their life or freedom is threatened, it is conceded that they may be subject to the imposition of a penalty. A related question is then whether the penalty imposed is proportionate and directed to a legitimate object.

RILC is of the view that two types of treatment of unauthorised asylum seekers in Australia in particular constitute a penalty.

'Unauthorised' asylum seekers arriving in Australia are penalised by:

(1) being denied the ability to apply for asylum in Australia and being transferred outside of Australia for processing in other countries
(2) by being eligible for only temporary visas with limited rights and

(a) Inability to apply for asylum and transfer outside Australia

Goodwin-Gill notes that 'any treatment that was less favourable than that accorded to others and was imposed on account of illegal entry was a penalty within Art 31 unless objectively justifiable on administrative grounds.'[38] Earlier in this submission, we have argued that arrangements made by Australia to transfer unauthorised arrivals in 'excised areas' to 'safe third countries' for processing is discriminatory because it is predicated on the basis of 'mode of arrival[39]', not for valid reasons of 'secondary movement' pursuant to Article 31. We further submit that there is no objective justification for this arrangement on administrative grounds. As such the Australian government's policies constitute a penalty.

Whilst the visa regime clearly attempts to target unauthorised boat arrivals who are considered to be the subject of 'secondary migration', it does not comply with the provisions or intent of the Refugee Convention and most particularly does not comply with Article 31 of the Convention. The regime goes well beyond any legitimate administrative strategy of targeting people smugglers as it targets bona fide refugees without prior protection elsewhere. The number of arrivals cannot be considered to be a 'mass influx' situation. Similar numbers of asylum seekers arrived during 1999 and 2000 in Australia. Australia has the capacity to accommodate and process large numbers of asylum seekers. The Government has in fact made a considerable investment in processing asylum seekers arriving in Australia (primarily through commissioning additional detention centres).

---

[38] We also note the opinion referred to in the discussion paper by the Department of International Protection that "Any punitive measure, that is, any unnecessary limitation to the full enjoyment of rights granted to refugees under international refugee law, applied by States against refugees who would fall under the protective clause of Article 31(1) could, arguably, be interpreted as a penalty.", footnote 15 of discussion paper

[39] Whilst 'place of arrival' is the key distinguishing factor in the new regime, it is clear that the new legislation is designed to address 'mode of arrival'. The 'excised areas' are the zones where 95% of unauthorised boats arrivals have landed within the last 2 years.

(b) Temporary protection as a penalty

'Unauthorised' asylum seekers are no longer eligible for permanent residence in Australia. Rather they are eligible only for three year Temporary Protection Visas or Offshore Entry Visas. Whilst Australia is under no obligation to provide refugees with permanent residence in Australia, the conditions on Temporary Protection Visas and Offshore Entry Visas fall short of the minimum standards required under the Refugees Convention.

We concur with the comments of Goodwin-Gill[40] that the conditions attached to Temporary Protection Visas (and also now the Offshore Entry Visas) amount to a penalty. The single most debilitating restriction on the temporary visas are the absolute prohibition on family re-unification (including of the 'nuclear family') for the duration of the visa. This restriction cannot be justified on objective administrative reasons as it breaches the principle of family unity. This issue is addressed in further detail in our submission on the Principle of Family Unity.

One of the great ironies, not lost on those working within the jurisdiction, is that Iraqi and Afghan refugees come from countries with long term and seemingly intractable humanitarian crises. Many of those refugees are clearly in need of a durable solution such as resettlement. In Australia they are now provided only with temporary refuge.

RILC encourages the formulation by UNHCR of guidelines on the types of penalties that may legitimately be imposed pursuant to Article 31. Such guidelines should specify minimum standards under the Refugee Convention which are not negotiable and detail measures that may be justified by States on administrative grounds.

12. Proportionality in imposition of penalties

Thus far it has been argued that Australian legislation does not reflect the wording or intention of Article 31. It has been argued that many 'unauthorised' asylum seekers who come to Australia in fact may arguably have come 'directly from a territory where their life or freedom was threatened'. However even if unauthorised asylum seekers have come by way of secondary movement, there is an implicit requirement of proportionality in any penalties imposed.

Whilst penalties may be imposed on refugees, the penalties must be reasonably necessary to meet a legitimate administrative objective. Any penalties imposed (which may include the penalties of less favourable treatment) cannot fall short of minimum standards under the Refugee Convention.

Participants in the Ottawa Regional Workshops recommended that the following specific needs be built into any interception arrangements:

---

[40] Goodwin-Gill, para 64

- Safe and humane treatment of intercepted persons in accordance with applicable human rights standards
- Particular measures to take into account the special needs of refugee women and children
- Respect for the principle of non-refoulment and the right to seek and enjoy asylum in other countries
- Identifying durable solutions for intercepted persons in the context of burden or responsibility-sharing and capacity-building[41]

Transfer of asylum seekers to third countries where they are considered for visas for which they may not be eligible is not a proportionate response to a minor influx of refugees. There are insufficient safeguards in Australian legislation to prevent the potential re-foulment of asylum seekers who are transferred to the 'safe third countries' of Nauru and Papua New Guinea.

Prohibiting asylum seekers who arrive in Australia from applying for refugee status onshore, negates the most basic right of a refugee, namely the right to seek asylum and to be assessed in accordance with the definition contained in Article 1 of the Refugee Convention. Such provisions effectively remove an asylum seekers from the scope and protection of the Refugee Convention and subjects them to 'overseas resettlement selection, [which] for example depends on factors additional to refugee status, including quotas, priorities and links.'[42]

UNHCR advise that "States that [offer the possibility of direct departure mechanisms] continue, in parallel, to receive claims on their territory from spontaneous arrivals. If this were to cease to be a possibility, the right to seek asylum and opportunities to access protection would be seriously undermined."[43]

Comments from Australian authorities that unauthorised asylum seekers who arrive in Australia will not 'set foot on Australian soil' or be resettled in Australia indicates that no attempt is being made to identify durable solutions for intercepted persons in the context of 'burden and responsibility sharing'.

Current Australian policy attempts to place refugees who are assessed as having a 'secondary movement motivation' back in an offshore queue. This is a de-facto attempt to try and limit the number of refugees accepted in Australia every year, a strategy which is not permissible under the Refugee Convention which requires the provision of protection for anyone who arrives in the territory of a country and satisfies the definition of a refugee.

The Government's successive temporary visa regime is a wholly disproportionate and mis-directed attempt to counter people smuggling and the phenomena of secondary migration. It is particularly disturbing that the most serious restrictions on the rights of

[41] Refugee Protection and Migration Control: Perspectives from UNHCR and IOM, 31 May 2001, para 36
[42] Goodwin-Gill, para 32
[43] Refugee Perspectives and Migration Control: Perspectives from UNHCR and IOM

asylum seekers in Australia's recent history have been formulated in a pre-election period where both major parties have sought to capitalise on a domestic agenda of being 'tough on 'illegals'.

RILC welcomes the development of guidelines by UNHCR on the protection of intercepted asylum-seekers and refugees which will incorporate protection safeguards into the programs. RILC maintains that interception measures designed to prevent people smuggling and secondary movement must contain the fundamental safeguard that asylum seekers be entitled to apply for asylum in the territory where they arrive.

13. Immigration Detention as an impermissible restriction on movement pursuant to Article 31(2)

A considerable amount has already been written about Australia's policy of immigration detention.[44] We defer to other expert commentaries on this issue but consider it relevant to provide a practical perspective as an agency that has considerable experience of working in Australia's detention centres. It has always been RILC's position that immigration detention as practiced in Australia breaches international human rights law and the UNHCR Guidelines on Applicable Criteria and Standards Relating to the Detention of Asylum Seekers.

(a) Rationale for detention

EXCOM has recognised that detention should be resorted to only to verify identity, to determine the elements on which a claim to refugee status is based; to deal with cases where refugees or asylum seekers have destroyed their travel and/or identity documents or have used fraudulent documents in order to mislead the authorities of the State in which they intend to claim asylum; or to protect national security or public order.[45]

In Australia all asylum seekers who arrive without authorisation are detained.[46] The Australian government maintains that detention is conducted in accordance with the EXCOM rationale. In particular Australian authorities contend that the actions of

---

[44] See for example, Amnesty International report on Australia's practice of mandatory detention, 1999, Human Rights and Equal Opportunities Commission report, "For Those Who've Come Across the Seas", Human Rights Committee, A v Australia, 1997, Communication No 560/1993

[45] EXCOM Conclusion No 44, 1986

[46] Although see recent legislation which declares that asylum seekers arriving in 'excised zones' and who are subsequently transferred to 'safe third countries' for processing are not 'detained'. Australia has recently completed Memorandums of Understanding with Nauru and Papua New Guinea concerning the reception of these asylum seekers which appears to require their detention, although the MOA's have not been made public. In early September 2001, Australian media reported that Nauruan authorities were reluctant to detain the asylum seekers they were to receive as it was considered excessive and unnecessary. In this submission we do not consider the detention of asylum seekers taken to Nauru or Papua New Guinea as it presumably takes place in accordance with the laws of those countries.

unauthorised asylum seekers in destroying their identity documents necessitate extensive identity checking and verification.

In Australia, unauthorised asylum seekers are detained for the entire course of the refugee determination process. If they are found to be refugees, they are granted a temporary visa. If they are not found to be refugees, they are kept in detention until they are removed from Australia. Australian authorities contend that the process of verifying identity occurs concurrently with, and as part of, the refugee determination process.

It is accepted that the majority of unauthorized asylum seekers who arrive in Australia do so with either no or minimal documentation. We concede that lack of identity documents and document fraud are a legitimate problem for refugee determination authorities.[47] However in the Australian context we point out that:

- The amount of documentation an unauthorised arrival brings has no bearing on the length of their stay in detention. The crucial issue is that the asylum seeker does not have an Australian entry visa. We have acted for asylum seekers who have brought a considerable amount of documentation with them to Australia. The rationale for detention of arrivals with documents is that this documentation must be verified. This rationale allows a State to detain a person for as long as it choses regardless of the existence of documentation.

- It is worth re-emphasising that many asylum seekers are unable to obtain identity documents. Particular examples are Afghan and Somali refugees. Many of our younger Afghan clients advise that they have never been issued with Tashkeras[48] on account of the State's inability or unwillingness to issue such identity documents. There are no authorities authorised to issue valid Somali documentation. Indeed the presentation of any Somali documentation would be viewed with suspicion by authorities. Asylum seekers in these situations are discriminated against on account of their refugee backgrounds.

- Many asylum seekers we have acted for in detention advise that the fraudulent documentation they were provided with to travel from Pakistan or Iran to Indonesia was subsequently taken by the people smugglers. As they have had no control over this documentation it is unfair to suggest that they have 'intended to mislead authorities' by not presenting it upon their arrival. In any case fraudulent passports organised by people smugglers would presumably be of little value in verifying a person's identity.

- It is our experience that immigration authorities conduct 'boat interviews' (the preliminary interviews in which asylum seekers are questioned about the basis of their refugee claims) within a matter of days of arrival. Australian authorities

[47] See notes from UNHCR's June Third Track meeting on "Protection of Refugees in the Context of Individual Asylum Systems"
[48] Afghan Identity Cards

continue detention for the entire status determination procedure, in clear violation of UNHCR Guidelines.[49]

Immigration detention of asylum seekers in Australia continues well beyond those 'restrictions which are necessary' pursuant to Article 31(2) of the Convention.

(c) Mechanisms for review of 'immigration detention'

In order for detention not to be arbitrary, 'every detention decision should be open to periodic review so that the justifying grounds can be assessed'.[50] This is not the case in Australia. Immigration detention is mandatory and non-reviewable. There are five rarely used mechanisms for the release of certain categories of 'vulnerable persons'. These persons include; minors for whom the Immigration Department considers adequate arrangements for care have been made in the community, persons over the age of 75 and persons whom a medical specialist appointed by the Immigration Department has advised should be released from detention on account of their torture or trauma experiences.

From our experience it is very rare that an asylum seeker is released from detention on any of these 'Bridging Visas'. Whilst we have had a small number of clients released from the Maribyrnong Detention Centre in Melbourne over the years, none of the many hundreds of asylum seekers we have acted for in remote detention centres have been released on Bridging Visas during the status determination process. We consider this to be on account of concerns by the Department of Immigration that the release of some asylum seekers from remote detention centres would result in pressure for the release of many if not 'vulnerable' most asylum seekers.

With reference to the categories of 'vulnerable persons' listed in Guideline 7 of the UNHCR Guidelines, we provide the following case studies of asylum seekers who were not released from detention during the determination process:

- A Somali asylum seeker who arrived in Australia whilst 9 months pregnant and was immediately detained. Our client went into labour within days of her arrival. Her newly born son 'Abdi' was later diagnosed as a haemophiliac. Immigration authorities were advised to immediately take him to a hospital if he presented with any medical symptoms (which occurred on a weekly basis). His mother considered that she could have cared for her child considerably better outside out of a detention centre environment. Abdi was 18 months old when he and his mother were finally released from detention as refugees.

- A 16 year old unaccompanied minor from Afghanistan. Even after 18 months in the Port Hedland detention centre, the relevant child care authorities have still not formally accepted guardianship for 'Faroq'. The Australian Department of Health and Human Services do not see it as within their mandate to make appropriate

[49] see UNHCR Guidelines on Applicable Criteria and Standards of Detention of Asylum Seekers, February 1999.
[50] A v Australia, Human Rights Committee, 3 April 1997

arrangements for 'Faroq's' care within the community, nor do immigration authorities. Faroq remains in detention at present.

- An Iranian asylum seeker who burnt off his fingertips in a toaster in detention to avoid his fingerprints being given to Iranian authorities to facilitate his removal to Iran. He was diagnosed as having a post traumatic stress condition and a serious depressive disorder. He remained in detention for over 3 years before being accepted as a refugee.

'Bridging Visas' should be viewed in their proper context. From a practical perspective they do not often facilitate the release of 'vulnerable persons' (as defined in the UNHCR Guidelines) from detention.

(c) **Conditions in detention centres**

Perhaps our greatest concern about Australia's practice of immigration detention relates to persons who are held in 'separation detention' within detention centres.[51] Generally they are persons who have been interviewed by immigration authorities and been assessed to have 'not invoked Australia's protection obligations' (ie that they do not have an arguable case for refugee status).

These persons are not advised of their right to access legal assistance or provided with the means to make a refugee application. It is generally self evident that these persons have travelled to Australia to apply for asylum. We emphasise that it is not the role of the 'preliminary interview' to make an assessment of a person's refugee claims. This is a matter for the refugee determination process itself. We have recently acted for a large number of Afghan Hazara asylum seekers who were initially 'screened out' of the refugee determination process. The majority of these asylum seekers were subsequently found to be refugees.

The Australian practice of 'screening out' asylum seekers breaches a number of fundamental procedural safeguards under the UNHCR Guidelines.[52]

Conclusion

RILC contends that Article 31 is being used in the Australian context as a means of immigration control and deterrence of asylum seekers, rather than for its intended purpose of distinguishing between the primary and secondary movement of persons who have moved from situations of 'effective protection'.

RILC believes that many unauthorised asylum seekers who are currently considered to be 'secondary movers' or persons who have bypassed or forsaken overseas refugee protection by Australian authorities are in fact 'persons who have come *directly* from a

[51] see Report of the Human Rights and Equal Opportunities Commission, 'For Those Who've Come Across the Seas", 1998, concerning this practice
[52] UNHCR Guidelines…Guideline 5(ii) and (v)

territory in which their life and freedom is threatened'. In accordance with Article 31, these persons should not be subject to the above-mentioned penalties which have recently underpinned Australia's policy, legislation and practice in Australia.

RILC submits that domestic legislation in Australia that purports to codify Article 31 requires substantial amendment before it can be said to be consistent with the intent and purpose of Article 31.