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22 May 2006

Dear Senate Committee,

I write to express my concerns about the proposed changes to the Migration Act 1958 (Cth) which the Migration Amendment (Designated Unauthorised Arrivals) Bill 2006 seeks to introduce. These concerns relate to the Bill's incompatibility with Australia's obligations under international human rights and refugee law, and whether Australia is fulfilling its obligations in 'good faith'.[1]

The Bill's policy is without precedent in Australia or any other State. It involves significant violations of obligations which Australia has *voluntarily* assumed under international law, and once again sets Australia apart from its North American and European counterparts in managing asylum flows.

While Australia has a sovereign right to determine who enters its territory, this right is not absolute. It is limited by certain obligations which Australia has voluntarily accepted under international treaty law, as well as under customary international law. These mandate that Australia must not return refugees (either directly or by virtue of deflection or interception policies) to territories in which they face—or risk removal to—persecution on account of race, religion, nationality, political opinion or membership of a political social group; torture; or cruel, inhuman or degrading treatment or punishment.[2] Refugee law places limits on the otherwise unfettered exercise of State sovereignty, both at the point of admission to the territory and in subsequent State action.

This submission canvasses a number of international law concerns relating to the proposed offshore processing regime. Those contained in the first section pertain to overarching issues regarding the proposed legislation's conformity with Australia's international obligations, while those in the second section deal with specific substantive provisions which may be breached by the new regime.

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[1] This submission relies in part upon the draft third edition of *The Refugee in International Law* (OUP Oxford forthcoming 2007), which the present author has co-authored with Guy S Goodwin-Gill.

[2] Convention relating to the Status of Refugees (adopted 28 July 1951, entered into force 22 April 1954) ('Convention' or 'Refugee Convention') art 33; Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (adopted 10 December 1984, entered into force 26 June 1987) 1465 UNTS 85 ('Convention against Torture' or 'CAT') art 3; International Covenant on Civil and Political Rights (adopted 16 Dec 1966, entered into force 23 March 1976) 999 UNTS 171 ('ICCPR') art 7.

EXECUTIVE SUMMARY

State responsibility

- Under international law, Australia retains responsibility for asylum seekers removed to offshore processing centres.

Asylum

- Under international law, individuals have a right to seek and enjoy asylum from persecution.
- Australia is seeking to pick and choose which refugees it wants in the Australian community. This is inconsistent with Australia's responsibility under international law to protect persons fleeing persecution, irrespective of their skills, education, or links to Australia.

Good faith

- Australia must carry out its international obligations in good faith. This will be breached if Australia seeks to avoid its international treaty obligations, or does indirectly what a treaty does not permit it to do directly.
- By designating the whole of Australia as off-limits to asylum seekers arriving by boat, even to those coming directly from countries in which they fear persecution, Australia is seeking to thwart the essence of the international protection regime.
- Diplomatic relations must not be a factor in determining protection claims.

Refugee warehousing and access to rights

- Transferring boat arrivals to offshore processing centres is not a durable solution.
- The separation of decisions on refugee status and decisions relating to the granting of protection visas mean that refugees may never be resettled in Australia or any other country, and may languish in offshore processing centres indefinitely.
- The proposed regime is likely to deny protection to people who would gain protection as refugees if processed within Australia.

Effective protection

- There is no guarantee that persons held offshore will receive effective protection in accordance with international human rights standards.
- Nauru and Papua New Guinea are not party to key human rights instruments, and Nauru is not party to the Refugee Convention.
- There is independent documentation of human rights abuses in Papua New Guinea and Nauru.

Non-refoulement

- Australia must not return refugees to territories in which they face—or risk removal to—persecution on account of race, religion, nationality, political opinion or membership of a political social group; torture; or cruel, inhuman or degrading treatment or punishment.
- Bilateral agreements between Australia and host States to respect the principle of *non-refoulement* do not have the same legal force as ratification of treaties containing that obligation.

Penalties

- Subjecting boat arrivals to a different processing regime, which is of inferior quality to the onshore regime, constitutes a penalty in violation of the Refugee Convention.
- The Refugee Convention recognizes that refugees may flee without proper documentation, but that they should not be penalized for such movement since this is inherent in the nature of flight.

Non-discrimination

- The differential treatment between onshore and offshore refugees amounts to discrimination in violation of international human rights law.

Procedures

- The offshore procedures do not comply with international standards.
- 'Model' UNHCR procedures are criticized internationally as failing to meet best practice.
- Asylum seekers should have access to independent merits and judicial review.

Public scrutiny

- The offshore processing centres should be open to scrutiny by lawyers, the media and bodies such as the United Nations, the Human Rights and Equal Opportunity Commission and the Ombudsman.

A OVERARCHING INTERNATIONAL LEGAL ISSUES

1 State responsibility

The effective 'excision' of the whole of Australia from the migration zone has no impact on Australia's obligations under international law.[3] Its international legal duties and liabilities remain unchanged.

Australia is responsible for the actions of its officials both within and outside of Australian territory, including within the territory of other sovereign States, such as Nauru. The fact that any harm caused by State action may be inflicted outside the territory of the actor, or in an area identified by municipal law as an international zone, in no way diminishes the responsibility of the State.[4]

While the extent to which Nauru (and other host States) will continue to assert territorial sovereignty over asylum seekers remains unclear, it is important to note that as a matter of State responsibility, liability for breaches of international law can be both joint and several. Given Australia's assumption of control over the asylum seekers to be held in such places, Australia will remain responsible for any violations of international law relating to their treatment, under the Refugee Convention and its Protocol,[5] general international law, and human rights law in particular.

2 Asylum

Under international law, individuals have a right to seek and enjoy asylum from persecution. Every State has the sovereign right to grant asylum to refugees within its territory; the corresponding duty is respect for that asylum by all other States. Asylum is a peaceful, humanitarian and non-political act. Australia has a fundamental legal duty not to return people to persecution. This duty is based on a long-standing principle of international treaty law and custom, is entrenched in domestic law, and cannot simply be abandoned for political or diplomatic reasons.

By designating all boat arrivals as offshore applicants, Australia is seeking to divest itself of any *obligation* towards any particular refugees, by picking and choosing which refugees it wants to resettle. However, accepting a responsibility under international law to protect persons fleeing persecution and other forms of serious harm who arrive in State territory waives any right to impose (formally or informally) conditions to which other prospective immigrants might be exposed, such as skills, education, and existing links to the country. The

[3] Human Rights Committee 'General Comment 31 on Article 2 of the Covenant: The Nature of the General Legal Obligation Imposed on States Parties to the Covenant' (29 March 2004) UN Doc CCPR/C/21/ Rev.1/Add.13 (26 May 2004) para 10; Human Rights Committee 'Concluding Observations of the Human Rights Committee: Israel' UN Doc CCPR/C/79/Add.93 (18 August 1998) para 10; Human Rights Committee 'Concluding Observations of the Human Rights Committee: United States of America' UN Doc CCPR/C/79/Add.50 (6 April 1995) para 284. The *non-refoulement* obligation under article 33 of the Refugee Convention applies to actions taken 'in any manner whatsoever'; see further E Lauterpacht and D Bethlehem 'The Scope and Content of the Principle of *Non-Refoulement*: Opinion' in E Feller, V Türk and F Nicholson (eds) *Refugee Protection in International Law: UNHCR's Global Consultations on International Protection* (CUP Cambridge 2003) para 67.

[4] I Brownlie *System of the Law of Nations: State Responsibility, Part I* (OUP Oxford 1983) 135–37, 159–66.

[5] Protocol relating to the Status of Refugees (adopted 31 January 1967, entered into force 4 October 1967) ('Protocol').

policy seeks to transform asylum from a legal, humanitarian responsibility into another stream of migration.

3 Good faith

A basic principle of international law is that States have a responsibility to implement their treaty obligations in good faith.[6] This duty is breached if a combination of acts or omissions have the overall effect of rendering the fulfilment of treaty obligations obsolete, or defeat the object and purpose of a treaty. A lack of good faith is distinct from (although may also encompass) a violation of an express term of a treaty. The duty requires parties to a treaty 'not only to observe the letter of the law, but also to abstain from acts which would inevitably affect their ability to perform the treaty.'[7] Thus, a State lacks good faith 'when it seeks to avoid or to "divert" the obligation which it has accepted, or to do indirectly what it is not permitted to do directly.'[8] The test for good faith is an objective one; it looks to the practical effect of State action, not its intent or motivations.[9]

In the context of the right to seek asylum, measures which have the effect of blocking access to procedures or territory may not only breach express obligations under international human rights and refugee law, but may also constitute a breach of the principle of good faith. Although States do not have a duty to facilitate travel to their territories by asylum seekers, the options available to States wishing to frustrate the movement of asylum seekers are limited by specific rules of international law and by States' obligations to fulfil their international commitments in good faith. Even though immigration control per se may be a legitimate exercise of State sovereignty, it must nevertheless be pursued within the boundaries of international law.

In its Advisory Opinion on *Reservations to the Genocide Convention*, the International Court of Justice stated that in the area of human rights law, of which refugee law is an integral part, treaties have 'a purely humanitarian and civilizing purpose.' In such treaties,

> the contracting States do not have any interests of their own; they merely have, one and all, a common interest, namely, the accomplishment of those high purposes which are the *raison d=être* of the convention. Consequently, in … convention[s] of this

[6] Vienna Convention on the Law of Treaties (adopted 23 May 1969, entered into force 27 January 1980) 1155 UNTS 331 arts 26, 31; Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations, UNGA Res 2625 (XXV) (24 October 1970) para 3. See GS Goodwin-Gill 'State Responsibility and the "Good Faith" Obligation in International Law' in M Fitzmaurice and D Sarooshi (eds) *Issues of State Responsibility before International Judicial Institutions* (Hart Publishing Oxford 2004) esp 85–88; arguments presented by UNHCR as intervener in *R (European Roma Rights Centre) v Sect'y of State for the Home Dept* [2003] EWCA Civ 785: UNHCR Skeleton Argument for the Court of Appeal, paras 48–108, 140–63 (on the asylum question specifically); UNHCR Written Case for the House of Lords, paras 24–38. The House of Lords rejected the issue of good faith there solely on the basis that the Refugee Convention was considered to be inapplicable to the case because the individuals concerned had not yet left their country of origin: *R v Immigration Officer at Prague Airport, ex p European Roma Rights Centre* [2004] UKHL 55 para 64 (Lord Hope).

[7] Yearbook of the International Law Commission, 1964, vol I (Summary Records of the 16th Session), 727th Meeting (20 May 1964) 70.

[8] UNHCR Skeleton Argument (n6) para 18; UNHCR Written Case (n6) para 32.

[9] I Brownlie *Principles of Public International Law* (6th edn OUP Oxford 2003) 400, 423, 426–27, 444; J Crawford *The International Law Commission's Articles on State Responsibility: Introduction, Text and Commentaries* (CUP Cambridge 2002) 84.

> type one cannot speak of individual advantages or disadvantages to States, or of the maintenance of a perfect contractual balance between rights and duties.[10]

While there is no provision that expressly mandates States to process asylum seekers within their borders, a combination of provisions in the Refugee Convention (no penalties for illegal entry, non-discrimination, *non-refoulement*, access to courts and the status which contracting States owe to refugees) reinforce the object and purpose of the Refugee Convention as assuring to refugees 'the widest possible exercise of … fundamental rights and freedoms'.[11] States are responsible for refugees in their territory, as well as those whom they subject to enforcement action beyond their territorial jurisdiction. This responsibility entails ensuring that refugees are not returned in any manner to territories in which they face—or risk return to—persecution, torture, or other cruel, inhuman or degrading treatment or punishment; *and*, if sent elsewhere, have access to protection and durable solutions.

By designating the whole of Australia as off-limits to asylum seekers arriving by boat, even to those coming directly from countries in which they fear persecution, Australia is seeking to thwart the essence of the international protection regime. Australia is trying to contract out those obligations to other States in exchange for significant financial assistance.[12] A lack of good faith is judged on the basis of fact rather than intention. It would appear that Australia's proposed actions with respect to offshore processing for all boat arrivals evidence a lack of good faith in implementing Australia's obligations under international law. That the Minister retains a discretion to admit certain asylum seekers to processes on the mainland is insufficient to overcome this breach.

Furthermore, for States to seek to avoid their obligations by contracting them out to other States makes a nonsense of the multilateral treaty regime and is incompatible with the Refugee Convention's object and purpose. As UNHCR has powerfully observed:

> such an agreement would create disparities between different parts of the world with regard to respect for international obligations and matters for which a common and coherent international practice is required. Such disparities have the effect of distorting the burden-sharing rationale underlying the 1951 Convention, by shifting the responsibility for examining certain types of asylum claims to other countries. The 1951 Convention, together with the 1967 Protocol, is framed to apply without geographic restrictions or discrimination. Its efficacy depends on it being global in scope and adherence, and if *inter se* agreements were permitted, the treaty regime as a whole would be rendered meaningless.[13]

The principle of good faith requires States to 'consider the use of reasonable alternatives proportionate to its policy objectives in international affairs, which are least likely to violate its international obligations.'[14] The government does not appear to have taken this into account. For a start, the millions of dollars given to Nauru for holding asylum seekers would be better spent on humanitarian aid to refugee-producing countries to seek to address the root causes of flight.

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[10] *Reservations to the Genocide Convention* (Advisory Opinion) (1951) ICJ Reports 15, 23.
[11] Refugee Convention Preamble.
[12] The Australian government paid the Nauru government AUD $30 million to host asylum seekers following the *Tampa* incident. The 2006 Federal Budget estimates that annual offshore processing costs will exceed $10 million by 2009–10.
[13] UNHCR Skeleton Argument (n6) para 102.
[14] ibid para. 24.

The proposed Bill seems to be a kneejerk reaction to the Indonesian response to the granting of asylum to 42 West Papuans, and, of particular concern, taking foreign policy considerations into account. Allowing the politics of diplomatic relations to play any role in the determination of protection claims completely undermines the international institution of asylum and goes against the very humanitarian principles on which it is based. Australia's duty not to return people to persecution is part of international *and* domestic law, and cannot simply be abandoned for diplomatic reasons.

The broader international protection regime, comprising refugee law, human rights law and more generally applicable rules informed by the principle of good faith, provide a normative and institutional framework for solutions. The very nature of the international protection regime is premised on States *not* acting unilaterally and in their own self-interest. Kneejerk reactions may satisfy short-term political purposes, but ultimately contribute to undermining international cooperation and solutions. As Goodwin-Gill has observed, 'By sending out a message of unilateral disregard of the principles of international co-operation, they inevitably lead to a disinclination on the part of others to contribute to solutions.'[15] International disdain at Australia's unilateral response to the *Tampa* and its creation of the Pacific Strategy led to other countries viewing Australian concerns as Australia's (self-created) problem.[16] UNHCR's reluctance to involve itself in the proposed offshore processing regime is a sign of repudiation of Australian unilateralism in this area of law.

4 Refugee warehousing and access to rights

The Refugee Convention is premised on the understanding that States will protect refugees in their territories, or cooperate with other States to find durable solutions (local integration, voluntary repatriation and resettlement) for them.

Transferring boat arrivals to offshore processing centres is not a durable solution, and the processing mechanism envisaged by the Bill means that no durable solutions will be forthcoming for recognized refugees. The new offshore processing regime is likely to deny assistance to people who would be protected as refugees if they were processed *within* Australia. Under the onshore system, people who arrive in Australia with a visa can lodge a refugee claim and have full access to tribunal and court review. Those recognized as refugees are granted protection visas entitling them to live in Australia. By contrast, the new offshore system will separate the process for *recognizing* Convention refugees from the actual *granting* of visas. This means that a person declared offshore to be a refugee will not necessarily *ever* receive a visa to settle in Australia, nor anywhere else.

This could result in recognized refugees languishing in processing centres (and in some cases indefinite detention) for years, waiting to be resettled by Australia or another country. Without having sought guarantees for international responsibility-sharing and durable solutions, Australia has made a unilateral decision to offload refugees for which it is responsible on to the international community. There are over six million refugees worldwide

[15] GS Goodwin-Gill 'International Refugee Protection: A Work in Progress: Sovereignty and Cooperation' (Kenneth Rivett Oration No 2 Sydney 24 November 2005) 20 http://www.refugeecouncil.org.au/docs/resources/orations2005_1-3.pdf.

[16] The international community's lack of support for the Australian response was perhaps best reflected in the award by UNHCR of the 2002 Nansen refugee medal to the captain and crew of the *Tampa*. No other State formally supported the Australian position, with all acquiescing in UNHCR's condemnation of it.

who have been confined to camps for at least five years and are still awaiting resettlement.[17] On current figures, less than one per cent of these will be resettled.[18] Thus, there is absolutely no guarantee that refugees on Nauru or Manus Island will ever be able to leave.

As a wealthy, industrialized nation with the economic and environmental capacity to host refugees, Australia's policy in this respect is grossly irresponsible. If its aim is to deter asylum seekers, then clearly there are considerable misunderstandings about the nature of flight (sudden, and often covert for fear of retribution) and the methods by which flight must occur given that States do not generally provide visas for individuals seeking to flee persecution. The offshore processing regime risks contributing to the significant problem of refugee 'warehousing', the practice by which refugees are kept 'in protracted situations of restricted mobility, enforced idleness, and dependency—their lives on indefinite hold—in violation of their basic rights under the 1951 UN Refugee Convention.'[19] This typically occurs in poor African and Asian countries which host millions of refugees but lack the economic and environmental capacity to support them within the local community. Australia's decision to contribute to this global problem illustrates its contempt for the protection regime and again highlights its lack of good faith in implementing its international obligations.

Under the Refugee Convention, refugees are entitled to a status, which includes the right to employment, social security, education and freedom of movement. Clearly, Australia will breach these obligations if it recognizes individuals as refugees but fails to accord them a legal status recognized in domestic law.

5 Effective protection

Although the transfer of asylum seekers to a third country may be permissible under international refugee law, this will only be the case where appropriate 'effective protection' safeguards are met.[20] Any transfer agreement must at least ensure that the asylum seeker will be admitted; enjoy effective protection against *refoulement*; have access to a fair and effective asylum procedure; and be treated in accordance with international refugee and human rights law and standards.

In considering the issue of 'effective protection' in the context of transfer to safe third countries, safe countries of asylum and safe countries of origin, the Lisbon Expert Roundtable defined its critical elements as including 'respect for fundamental human rights ... in accordance with applicable international standards, including ... no real risk that the person would be subjected to torture or to cruel, inhuman or degrading treatment or punishment'.[21] Furthermore, protection is only 'effective' if the asylum seeker does not fear persecution in

[17] At the end of 2003, there were some 6.2 million refugees in protracted situations: UNHCR 'Protracted Refugee Situations' UN Doc EC/54/SC/CRP.14 (10 June 2004) para 5.
[18] UNHCR *The State of the World's Refugees: Human Displacement in the New Millenium* (OUP Oxford 2006) 146.
[19] M Smith 'Warehousing Refugees: A Denial of Rights, A Waste of Humanity' in US Committee for Refugees *World Refugee Survey 2004* 38; see also G Chen 'A Global Campaign to End Refugee Warehousing' in US Committee for Refugees *World Refugee Survey 2004* 21.
[20] Executive Committee Conclusion No 85 (1998), Executive Committee Conclusion No 87 (1999). Conclusion No 85 provides that the host country must treat the asylum seeker in accordance with accepted international standards, ensure protection against *refoulement* and provide the asylum seeker with the possibility to seek and enjoy asylum.
[21] Lisbon Expert Roundtable 'Summary Conclusions on the Concept of "Effective Protection" in the Context of Secondary Movements of Refugees and Asylum-Seekers' (9–10 December 2002) para 15(b).

the host State, is not at risk of being sent to another State in which effective protection would not be forthcoming, has access to means of subsistence sufficient to maintain an adequate standard of living, and has his or her fundamental human rights respected in accordance with international standards. The State must comply with international refugee and human rights law in practice (not just in theory),[22] grant access to fair and efficient determination procedures which include protection grounds that would be recognized in the State in which asylum was originally sought, take into account any special vulnerabilities of the individual, and maintain the privacy interests of the individual and his or her family.[23]

More recently, UNHCR's Director of the Department of International Protection stated that a country could only be considered as offering 'effective protection' 'if there was no actual risk to a person's life; if a genuinely accessible and durable solution was in prospect; if a person was not exposed to arbitrary expulsion and deprivation of liberty, and had an adequate means of subsistence; if family unity and integrity was preserved; and if specific protection needs (such as those arising from age or gender) were recognized and respected.'[24]

While the legal framework in a particular State is very important in determining whether or not it is 'safe', even more significant is what it does in practice. It is essential that asylum seekers are treated in accordance with accepted international standards.[25] Mere ratification of human rights and refugee instruments does not equate to compliance with their standards, and an absence of ratification raises particular concerns about what level of protection might realistically be expected.

Under section 198A(3) of the Migration Act 1958 (Cth), the Immigration Minister may designate certain countries as providing effective protection for 'designated unauthorized arrivals' transferred there. The declaration requires that the country:

- provides access, for persons seeking asylum, to effective procedures for assessing their need for protection;
- provides protection for persons seeking asylum, pending determination of their refugee status;
- provides protection to persons who are given refugee status, pending their voluntary repatriation to their country of origin or resettlement in another country; and
- meets relevant human rights standards in providing that protection.

The Immigration Minister has designated Nauru and Papua New Guinea as places in which effective protection is forthcoming, but has not explained (according to the above-mentioned elements) why this is so. As a matter of both law and fact, this designation is highly questionable.

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[22] In particular, the third State must be a signatory to the 1951 Convention and/or 1967 Protocol and comply with those instruments, or at least demonstrate that it has developed a practice akin to what those instruments require: ibid para 15(e).

[23] ibid para 15. See also Legomsky's seven elements of 'effective protection': SH Legomsky 'Secondary Refugee Movements and the Return of Asylum Seekers to Third Countries: The Meaning of Effective Protection' (UNHCR Legal and Protection Policy Research Series, Geneva, February 2003) PPLA/2003/01, 52–81.

[24] Erika Feller (DIP): UN Doc A/AC.96/SR.585 (2004) para 28. UNHCR has documented cases of *refoulement* as the result of applying the 'safe third country' mechanism: UNHCR 'Note on International Protection' UN Doc A/AC.96/898 (3 July 1998) para 14.

[25] UNHCR 'Note on International Protection' UN Doc. A/AC.96/914 (7 July 1999) para 19.

Nauru is not a party to the Refugee Convention or Protocol. Papua New Guinea is a party to those instruments, but has imposed reservations that reject Convention rights relating to employment, housing, education, freedom of movement, penalties, expulsion and naturalization. Neither Nauru nor Papua New Guinea is party to the International Covenant on Economic, Social and Cultural Rights.[26] Papua New Guinea is not a party to key human rights instruments such as the ICCPR and the Convention against Torture. Nauru has signed but not ratified those treaties, and hence has not agreed to be bound by them under international law.

For States that have not yet ratified those instruments, there is an even greater risk of inadequate treatment and *refoulement*, for which Australia must ultimately take responsibility. Undertakings by host countries to respect the principle of *non-refoulement* are political agreements only, and are not binding as a matter of international law.[27] They cannot exculpate Australia should acts of *refoulement* in fact occur.

Human rights abuses in Papua New Guinea have been well-documented,[28] including the use of torture (against adults and children) by police. It has been noted that although that country is formally a party to the Refugee Convention, 'it has not enacted enabling legislation and has not established a system for providing protection to refugees.'[29] Nauru has been criticized for holding asylum seekers in 'isolated, Spartan living conditions in a refugee processing center', providing limited access to the centre, and for judicial delays.[30] Even if host States are able to provide protection from *refoulement*, 'effective protection' requires more than that alone.

Finally, in this context, it should be recalled that the practice of transferring asylum seekers to other States for processing has typically (and not uncontroversially) been limited to refugees who have passed through other countries on their way to the State in which asylum is ultimately claimed. The new policy targets individuals for whom Australia may be the first country in which asylum could be claimed—in other words, they have come directly to Australia. It is clear that the policy shuts down Australia as an asylum country for persons fleeing by boat, which contravenes the very foundation of the international protection regime.

B SPECIFIC CONCERNS

1 *Non-refoulement* (Art 33 Refugee Convention; Art 3 CAT; Art 7 ICCPR)

The principle of *non-refoulement* is the cornerstone of international refugee law. States have a duty under the Refugee Convention, the Convention against Torture and the ICCPR,[31] as well as under customary international law, not to return individuals (either directly or by virtue of deflection or interception policies) to territories where their lives or freedom are

[26] International Covenant on Economic, Social and Cultural Rights (adopted 16 December 1966, entered into force 3 January 1976) 993 UNTS 3.
[27] See discussion about the agreements Australia has undertaken with Nauru and Papua New Guinea in S Taylor 'The Pacific Solution or a Pacific Nightmare? The Difference between Burden Shifting and Responsibility Sharing' (2005) 6 Asian-Pacific Law and Policy Journal 1, 8–9.
[28] See eg US Dept of State *Country Reports on Human Rights Practices 2005* 'Papua New Guinea' (8 March 2006) http://www.state.gov/g/drl/rls/hrrpt/2005/61623.htm; Human Rights Watch *World Report 2006* 'Papua New Guinea' http://hrw.org/english/docs/2006/01/18/png12253.htm; Amnesty International *Amnesty International Report 2005* 'Papua New Guinea' http://web.amnesty.org/report2005/png-summary-eng.
[29] US Dept of State *Country Reports on Human Rights Practices 2005* 'Papua New Guinea' (8 March 2006) http://www.state.gov/g/drl/rls/hrrpt/2005/61623.htm.
[30] US Dept of State *Country Reports on Human Rights Practices 2005* 'Nauru' (8 March 2006) http://www.state.gov/g/drl/rls/hrrpt/2005/61620.htm.
[31] Refugee Convention, art 33; CAT, art 3; ICCPR, art 7.

threatened by virtue of their race, religion, nationality, political opinion or membership of a particular social group, or where they are at substantial risk of being subjected to torture or inhuman or degrading treatment or punishment. This obligation also prohibits States from sending refugees to other territories from which they risk removal to such harm (known as chain *refoulement*).

Nauru is not a party to the Refugee Convention, and has not ratified key human rights instruments. Despite any contractual agreements with Australia, Nauru's status as a sovereign State means that it could force the expulsion of asylum seekers and refugees. This would, in turn, place Australia in breach of its *non-refoulement* obligations, since a State that sends refugees to a country which in turn expels that person to persecution or other forms of serious harm will be liable under international law for *refoulement*. This principle applies regardless of whether it occurs 'beyond the national territory of the State in question, at border posts or other points of entry, in international zones, at transit points, etc'.[32]

The obligation to respect the principle of *non-refoulement* extends to any actions that Australia may take to intercept asylum seekers travelling by boat before they reach Australia. State responsibility under international law is not tied to territory. Thus, States intercepting boats, whether on the high seas or in territorial waters, bear responsibility for the outcome of their actions. They must ensure that asylum seekers are not deflected to territories in which they risk, or risk return to, persecution, torture, or cruel, inhuman or degrading treatment or punishment.

2 Penalties (Art 31 Refugee Convention)

Article 31(1) of the Refugee Convention provides that States must not impose penalties on refugees for illegal entry or presence, provided that they have come directly from a territory where their life or freedom was threatened, present themselves without delay to the authorities, and show good cause for their illegal entry or presence. Having a well-founded fear of persecution is generally recognized in itself as constituting 'good cause'.[33] This protection applies not only to persons ultimately accorded refugee status, but also to persons claiming asylum in good faith, including those travelling on false documents.[34]

This is a fundamental aspect of the Refugee Convention because it underscores the right of people in distress to seek protection, even if their actions constitute a breach of the domestic laws of a country of asylum. It recognizes that the circumstances compelling flight commonly force refugees to travel without passports, visas or other documentation, coupled with the fact that restrictive immigration policies mean that most refugees are likely to be ineligible for visas sought through official migration channels.

The term 'penalties' is not defined in article 31, prompting the question whether it encompasses only criminal sanctions, or whether it also extends to administrative penalties (such as administrative detention). Following the Human Rights Committee's reasoning that the term 'penalty' in article 15(1) of the ICCPR must be interpreted in light of that provision's

[32] E Lauterpacht and D Bethlehem 'The Scope and Content of the Principle of *Non-Refoulement*: Opinion' in Feller, Türk and Nicholson (eds) (n3) para 67.
[33] GS Goodwin-Gill 'Article 31 of the 1951 Convention relating to the Status of Refugees: Non-Penalization, Detention, and Protection' 196, and Expert Roundtable 'Summary Conclusions: Article 31 of the 1951 Convention' (Geneva, 8–9 November 2001) para 10(e), in Feller, Türk and Nicholson (eds) (n3).
[34] *R v Uxbridge Magistrates' Court; ex p Adimi* [1999] Imm AR 560.

object and purpose,[35] article 31 warrants a broad interpretation reflective of its aim to proscribe sanctions on account of illegal entry or presence. An overly formal or restrictive approach is inappropriate, since it may circumvent the fundamental protection intended.[36] Thus, measures such as arbitrary detention[37] or procedural bars on applying for asylum may constitute 'penalties'.[38] This is supported by Executive Committee Conclusion No 22 (1981), stating that asylum seekers should 'not be penalised or exposed to any unfavourable treatment solely on the ground that their presence in the country is considered unlawful'.

Irregular or 'unlawful' movement does not reveal anything about the credibility of a protection claim. Yet, asylum seekers who arrive in Australia by boat will have access to a markedly inferior determination regime which lacks the procedural safeguards of the onshore system. By contrast to the onshore system, it imposes a harsher procedure on boat arrivals, denies access to independent merits review and judicial review, institutes detention of children and their families, and does not lead to a durable solution for recognized refugees.[39] This may be regarded as a 'penalty' for unlawful arrival, which is in flagrant violation of the terms of the Refugee Convention which Australia has freely accepted.

3 Non-discrimination (Art 3 Refugee Convention; Art 2 ICCPR)

Article 3 of the Refugee Convention prohibits countries from discriminating between refugees on the basis of race, religion or country of origin. The fact that the proposed changes appear to target refugees coming from countries in Australia's immediate vicinity may violate this principle. Even if the Bill on its face appears to treat all boat arrivals equally, if its practical effect is to target particular groups of asylum seekers, then it is discriminatory contrary to article 3.

Perhaps more significantly, the proposed legislation will implement different processes and standards of treatment which discriminate between onshore and offshore refugees. This is contrary to Australia's obligations with respect to non-discrimination under a number of human rights treaties, such as the ICCPR.[40]

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[35] *Van Duzen v Canada* Comm No 50/1979, UN Doc CCPR/C/15/D/50/1979 (7 April 1982) para 10.2; see also T Opsahl and A de Zayas 'The Uncertain Scope of Article 15(1) of the International Covenant on Civil and Political Rights' (1983) Canadian Human Rights Yearbook 237.

[36] eg Decision of the Social Security Commissioner (UK) in Case No CIS 4439/98 (25 November 1999) para 16, where Commissioner Rowland found that *treatment* less favourable than that accorded to others, which is imposed on account of illegal entry, constitutes a penalty under article 31, unless it is objectively justifiable on administrative grounds.

[37] See Expert Roundtable (n33) para 11(a): 'For the purposes of Article 31(2), there is not distinction between restrictions on movement ordered or applied *administratively*, and those ordered or applied *judicially*. The power of the State to impose a restriction must be related to a recognized object or purpose, and there must be a reasonable relationship of proportionality between the end and the means. Restrictions on movement must not be imposed unlawfully and arbitrarily.' (emphasis added).

[38] Note Executive Committee Conclusion No 15 (1979) para (i): 'While asylum-seekers may be required to submit their asylum request within a certain time limit, failure to do so, or the non-fulfilment of other formal requirements, should not lead to an asylum request being excluded from consideration'.

[39] Note that the Immigration Minister has made clear that the differing procedures and entitlements are intended to deter arrivals: 'These changes send a strong message to people who want to risk their lives by travelling to Australia illegally': 'Minister Seeks To Strengthen Border Measures' (11 May 2006) http://www.minister.immi.gov.au/media_releases/media06/v06113.htm.

[40] ICCPR, art 2.

International law permits distinctions between aliens who are in materially different circumstances, but prohibits unequal treatment of those similarly placed.[41] In general, differential treatment between non-citizens is allowed where the distinction pursues a legitimate aim, has an objective justification,[42] and there is reasonable proportionality between the means used and the aims sought to be realized.[43]

While Australia may seek to invoke immigration control as a 'legitimate aim' in this context, it is much more difficult to establish that the means by which that aim is sought to be realized are *proportionate* to the aim itself. In this context, the difference in treatment is based solely on mode of arrival. Asylum seekers, whether onshore or offshore, are otherwise in materially identical circumstances—they are seeking protection from persecution and other forms of serious harm and have an equal need for fair procedures and humane conditions in which to have their protection claims determined. Justifying differential treatment by mode of arrival is an arbitrary distinction contrary to international law. This is emphasized by article 31 of the Refugee Convention, which prohibits States from imposing penalties on asylum seekers who arrive without passports or visas.

4 Procedures

Apart from the discriminatory aspects of the lower level of procedures to be implemented under the proposed new regime, there are concerns about whether such procedures could conflict with Australia's international obligations. At a minimum, procedures should conform with standards set down by various Executive Committee Conclusions. For example, Conclusion No 93 (2002) requires *inter alia* that asylum seekers have access to assistance for basic support needs, such as food, clothing, accommodation, medical care and respect for privacy; that reception arrangements are sensitive to gender and age, in particular the educational, psychological, recreational and other special needs of children, and the specific needs of victims of sexual abuse and exploitation, of trauma and torture; and that family groups be housed together. Executive Committee Conclusion No 8 (1977) stipulates *inter alia* that recognized refugees be issued with documentation certifying that status (which may not be met here because of the separation between recognition of status and the issuance of a visa), and persons not recognized as refugees have a reasonable time to appeal. Numerous conclusions emphasize that UNHCR should be given access to asylum seekers, and asylum seekers should be entitled to have access to UNHCR.[44] Above all, treatment must not be inhuman or degrading.[45]

One of the government's arguments is that it will process offshore refugees according to UNHCR-like practices. UNHCR has detailed procedural guidelines about processing, but the government's guidelines have not been made public. 'Designated unauthorized arrivals' will

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[41] N Blake and R Husain *Immigration, Asylum and Human Rights* (OUP Oxford 2003) para 6.16; see also *Minister for Immigration and Multicultural Affairs v Ibrahim* [2000] HCA 55 paras 29–34 (Gaudron J); *Lithgow v UK* (1986) 8 EHRR 329.

[42] CERD 'General Recommendation XIV: Definition of Discrimination' (22 March 1993) para 2; Human Rights Committee 'General Comment 18: Non-Discrimination' (10 November 1989) para 13; *Abdulaziz v UK* (1985) 7 EHRR 471 para 78.

[43] J Fitzpatrick 'The Human Rights of Migrants' Conference on International Legal Norms and Migration (Geneva 23–25 May 2002) http://heiwww.unige.ch/conf/psio_230502/files/fitzpatrick.doc 4; Human Rights Committee (n42) para 13; ECOSOC Commission on Human Rights 'Prevention of Discrimination: The Rights of Non-Citizens' (26 May 2003) E/CN.4/Sub.2/2003/23 para 24; *Belilos v Switzerland* (1988) 10 EHRR 466.

[44] Executive Committee Conclusions Nos 33 (1984), 44 (1986), 48 (1987), 75 (1994), 82 (1997), 93 (2002), 101 (2004).

[45] ICCPR, art 7; CAT.

not have access to merits review by an independent decision-maker, unlike onshore applicants who may appeal to the Refugee Review Tribunal. Again, the government has not made clear how this will operate. Furthermore, UNHCR's decision-making processes have been criticized as inadequate and an inappropriate model for best practice.[46] Best practice requires that individuals have access to legal advice and representation; access to up-to-date, authoritative and public country of origin information; written reasons for decisions; and an opportunity for appeal on matters of fact and law. Decisions that have been made according to such practices are defensible and can withstand public scrutiny and questioning, whereas decisions that have (or which appear to have) been made without proper regard to due process and impartiality remain open to criticism.

As UNHCR has observed, a key procedural safeguard which is essential to the concept of an effective remedy is that the appeal is considered by 'an authority different from and independent of that making the initial decision.'[47] This safeguard is not met by the review procedure proposed in the Bill. Other important safeguards include assurances that asylum seekers will have prompt access to legal advice, interpreters, and information about procedures. Furthermore, appeals should be conducted in person rather than 'on the papers', in order that the review body gain a personal impression of the applicant. This is especially important if the original decision presumed the asylum claim to be manifestly unfounded, or doubted the applicant's credibility. Appeals must have suspensive effect until a final decision has been made.[48]

Public scrutiny

The extent to which the offshore processing centres will be open to public scrutiny remains unclear. It is a matter of serious concern if lawyers, international bodies such as UNHCR and other UN agencies, independent domestic bodies such as the Human Rights and Equal Opportunity Commission and the Ombudsman, and the media are unable to access and report on the centres.

Please do not hesitate to contact me if you require further information on or clarification of the above issues.

Yours sincerely,

Jane McAdam

[46] See esp M Kagan 'The Beleaguered Gatekeeper: Protection Challenges Posed by UNHCR Refugee Status Determination' (2006) 18 International Journal of Refugee Law 1, 9–12. See also Joint NGO 'Comments on Procedural Standards for RSD under UNHCR's Mandate' (7 October 2005); M Alexander 'Refugee Status Determination Conducted by UNHCR' (1999) 11 International Journal of Refugee Law 251; Human Rights Watch '50 Years On: What Future for Refugee Protection?' (2001).
[47] UNHCR (Global Consultations on International Protection) 'Asylum Processes (Fair and Efficient Asylum Procedures' UN Doc EC/GC/01/12 (31 May 2001) para 43.
[48] ibid.