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The “Pacific Solution”: Refugees Unwelcome in Australia

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*by Alexander J. Wood**

"For those who've come across the seas
We've boundless plains to share
With courage let us all combine
To advance Australia fair."
The Australian national anthem, *Advance Australia Fair.*

In recent years Australia has instituted a series of laws and policies requiring the mandatory detention of certain refugees and asylum seekers and, in some instances, their forcible relocation to other countries. These measures place Australia in probable violation of its obligations under international law including, inter alia, the Convention relating to the Status of Refugees, and in the case of child asylum seekers, the Convention on the Rights of the Child. Conditions of detention in Australia, which have sparked protests by refugees, also place Australia in violation of these same international instruments.

Hunger strikers sheltering under bedding around the internal perimeter fence of the Main Compound.

Credit: Australian Human Rights and Equal Opportunity Commission

Australia acceded to the Convention relating to the Status of Refugees (Refugee Convention) on January 22, 1954, and to the 1967 Protocol relating to the Status of Refugees on December 13, 1973. The 1967 Protocol applies the Refugee Convention to refugees since 1951. Article 1 of the Refugee Convention defines refugees as people with a "well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion" in their countries of origin. The UN High Commissioner for Refugees (UNHCR), in Revised Guidelines on Applicable Criteria and Standards Relating to the Detention of Asylum Seekers, notes as a general principle that there should not be mandatory or excessively lengthy detention of asylum seekers. These UNHCR guidelines, although not binding on Australia as a matter of law, provide that alternatives to detention should be implemented unless detention is found to be necessary.

Australia ratified the Convention on the Rights of the Child (CRC) on December 17, 1990. Ratified by 191 countries, the CRC's guiding principles mandate that determination of the child's best interests (Article 3) and the survival and development of the child (Article 6(2)) should constitute the standards for evaluating all actions concerning children. Each right set forth in the CRC is applicable to children seeking refugee or asylum status (Article 22(1)).

The "Pacific Solution"

On August 26, 2001, near Christmas Island off the northern Australian coast, 434 primarily Afghan refugees were rescued from their sinking boat by a Norwegian freighter, the Tampa. The Australian Navy intercepted the Tampa, and after a standoff lasting several days, relocated the refugees to New Zealand, Papua New Guinea (PNG), and the pacific island nation of Nauru. In October 2001, another Australian patrol ship picked up 216 refugees, mainly Iraqis, from Ashmore Reef, an Australian island, and deposited them on Manus, an island belonging to PNG. These two incidents represent the "Pacific Solution," an initiative of the recently re-elected conservative government of Prime Minister John Howard, whereby refugees, including those who are asylum seekers, are either removed from Australian territory or prevented from reaching Australia. In return for agreeing to take the refugees for processing, Australia has committed to paying PNG and Nauru millions of Australian dollars. Since the Tampa incident, Australia has relocated more than 1,500 refugees in this manner.

Australian Legislative Amendments

On September 26, 2001, Australia passed several amendments to its Migration Act 1958, which further curtail refugee rights and seek to deter continued refugee migration to Australia. The Migration Amendment (Excision from Migration Zone) Act 2001 provides that some of Australia's outlying islands do not constitute part of Australia for the purposes of migration. The result is that refugees who land on these islands are not allowed to submit visa applications, including requests for asylum. Refugees' only chance for remaining on Australian territory relies upon the discretionary power of the immigration minister, whose decision is not reviewable.

Although the amendment includes several provisions designed to protect refugees, including a requirement that the relocation destinations have "effective" asylum procedures in place, there are no requirements for what those procedures should be, nor any means to evaluate whether the procedures are met. Moreover, Nauru is not a signatory to the Refugee Convention, and Papua New Guinea has made numerous significant reservations to the Convention. It is unclear where the refugees will go once their claims have been processed, as Australia has committed to taking no more than its "fair share" of those determined to be refugees, and neither Nauru nor PNG has indicated that it will continue to host them. Because there are no guarantees that people relocated to Nauru and PNG will be settled, even if they are legitimately found to be refugees, the "Pacific Solution" places them in jeopardy of being returned or sent to countries where they may face persecution. Thus, by creating a territorial fiction that exempts parts of Australia from

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Australia, continued from previous page

Australian migration laws, Australia is in danger of violating the preemptory norm of *nonrefoulement*—or non-return—of refugees to countries where they may be subject to persecution. This prohibition of return is enshrined in Article 33 of the Refugee Convention.

A related amendment is the Migration Amendment (Excision from Migration Zone) (Consequential Provisions) Act 2001, which requires that asylum seekers have not resided "for a continuous period of at least 7 days, in a country of which the applicant could have sought and obtained effective protection…." Many refugees come to Australia by boat, and they are often transferred from one boat to another, particularly in Indonesia, where they may stay several days. The effect of this amendment is to prevent those refugees who stop for more than seven days from continuing on to Australia. UNHCR guidelines, however, specify that Article 31(1) of the Refugee Convention, which stipulates that governments shall not punish refugees on the basis of illegal entry into the country, should be understood to include persons who have transited through an intermediate country without applying for asylum there. The guidelines also note that no "strict time limit" should be applied to any part of the migration. These guidelines, although not binding on Australia, make it clear that this amendment is in violation of the intended meaning of Article 31(1) of the Refugee Convention.

Refugee protests against these conditions have included hunger strikes, setting fire to buildings, swallowing poisonous substances, and breaking windows. Refugees, including children, have sewed their lips shut in protest, cut themselves, and threatened to otherwise harm or even kill themselves.

Definition of Refugees and Judicial Review

In addition to the two amendments above, the government simultaneously passed several other amendments of importance to refugees. The Migration Legislation Amendment Act (No. 6) 2001 (MLA No. 6) to the Migration Act 1958, adds three requirements that must be met in order for an individual to be recognized by the Australian government as a refugee. The amendment may violate the intent of the Refugee Convention in several ways, including by narrowing the definition of what constitutes persecution. For example, in addition to a "well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion," the legislation requires that the reason for persecution must also be "the essential and significant reason . . . for the persecution." The Australian government has not made clear what criteria would satisfy the additional "essential and significant" elements, nor has it indicated why they are necessary. The second requirement of the amendment is that "the persecution involves serious harm to the person." The third requirement is that "the persecution involves systematic and discriminatory conduct." These three requirements will add to the evidentiary burden refugee and asylum applicants face in Australia. Human rights organizations such as Human Rights Watch and the U.S. Committee for Refugees argue that this narrow definition of "refugee" brings Australia out of compliance with its treaty obligations.

The Australian government also passed legislation limiting the availability of judicial review in several areas. The Border Protection Legislation Amendment Act 1999 eliminates legal challenges to forced removal from excised offshore places. The Migration Legislation Amendment (Judicial Review) Act 2001 eliminates judicial review of asylum determinations made by government agencies that process asylum applications. Decisions of the Department of Immigration and Multicultural Affairs (DIMA), the government agency responsible for reviewing applications for asylum, can be appealed to the Refugee Review Tribunal or the Administrative Appeals Tribunal, depending on the status of the asylum applicant. The immigration minister may intervene on a discretionary basis if either of these bodies denies the appeal. Before the passage of this amendment, administrative decisions were reviewable by Australian courts. The increasing number of refugees making these appeals created a significant burden on the courts. Article 16(2) of the Refugee Convention provides that refugees should have the same access to courts as the state party provides to nationals. Substituting judicial review of questions of law with ministerial discretion represents a deviation from Australia's obligation under Article 16(2) of the Refugee Convention.

Other amendments affecting judicial review include the Migration Legislation Amendment Act (No. 1) 2001, which prevents class actions, raises requirements for standing, and reduces time limits for filing appeals. Viewed together, the judicial amendments, although arguably designed to make the process more efficient, may make determination proceedings much more difficult for refugees.

Mandatory Detention

Since 1994, Australia has enforced mandatory detention of refugees arriving illegally in Australia, including children, whether accompanied by parents, or not. Australia allows a total of twelve thousand refugees per year and has a bifurcated policy for refugees applying for asylum depending on where the application is filed. "Offshore" applicants are people who apply for refugee status while they are overseas. Once granted asylum, these people are eligible for Australian citizenship and other benefits. "Onshore" applicants are those who apply for asylum only once they arrive in Australia. Those "onshore" applicants arriving with invalid travel documents, or no documents at all, are deemed "unlawful non-citizens" under Australia's Migration Act 1958. As such, "onshore" applicants face indefinite detention while their applications are reviewed and, if necessary, appealed. Even if granted asylum, these applicants receive only a temporary protection visa, which is valid for three years. Unlike "offshore" applicants, "onshore" applicants are generally ineligible for permanent residence or citizenship and are not provided with access to education or the right to leave and return to Australia. The effect of the

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Australia, continued from previous page

Migration Amendment (Excision from Migration Zone) Act 2001 is that for refugees to be detained and processed in Australia, they either must arrive by air or, if by boat, they must avoid Australian navy patrols and set foot on the continent, rather than any of the excised outlying islands.

Australia's mandatory detention policy and recent legal amendments violate Article 31(2) of the Refugee Convention. Article 31(2) provides that states parties may impose such restrictions on refugee movement only as "necessary." The UNHCR has stated that, in relation to the necessary restrictions in Article 31(2), detention should only be resorted to for the following reasons: (1) to verify identity; (2) to establish elements of a refugee status or asylum claim; (3) to deal with cases where asylum seekers have destroyed or falsified documents; or (4) to protect national security or public order. The UN Commission on Human Rights has determined that a "maximum period [of detention] should be set by law and the custody may in no case be unlimited or of excessive length."

Philip Ruddock, Australia's Minister for Immigration and Multicultural and Indigenous Affairs has invoked several of these bases in an attempt to justify Australia's policy. Ruddock claims, for example, that it may take several months to verify identity, especially in instances where documents have been falsified or destroyed. Although Australia may, in theory, detain asylum applicants on the basis of verifying identity, Ruddock admits that the average processing time is eighteen weeks. Reports indicate, however, that some refugees and asylum applicants have been held in detention for more than a year.

Perhaps in justification of why refugees should continue to be detained after their identity has been verified, Ruddock has also invoked the specter of national security by warning of a flood of illegal immigrants disappearing into the country if they are not detained. An Associated Press report indicated that Prime Minister Howard stated that conditions at detention facilities, such as Woomera, a former missile base in a remote area of the state of South Australia, are intentionally harsh to deter other refugees from coming to Australia. The UNHCR guidelines, however, warn that national security concerns should be invoked only "where there is evidence to show that the asylum seeker has criminal antecedents" and cautions against using detention "as part of a policy to deter future asylum-seekers." Criminal records have not been invoked by Australia in relation to national security concerns, and even if they had been, they would only justify continued detention of those individuals who had criminal records, and not of refugees as a whole.

Australia detains asylum seekers through the entire asylum application process, including any appeals. UNHCR guidelines on detention state that detention for the purpose of establishing the elements of an asylum claim should be limited to no more than a "preliminary interview to identify the basis of the asylum claim." Australia has therefore failed to successfully invoke any of the four UNHCR approved bases for detention.

The UNHCR recommends several alternatives to detention, including instituting reporting or residency requirements and release on bail. Ruddock rejects these alternatives with hyperbole, warning of "130,000 failed asylum seekers [not subject to detention who] have vanished into the British community. Unofficial estimates put the figure at twice that level." Yet the government's own calculations show that approximately eighty percent of illegal immigrants arriving in Australia by boat receive refugee status. Finally, in cases of mandatory detention, the UNHCR recommends that the detention be subject to automatic review by an independent judicial or administrative body. Detention is not subject to review in Australia.

Credit: Australian Human Rights and Equal Opportunity Commission

Interior of accommodation available in the Main Compound to sleep up to four family members.

Convention on the Rights of the Child

Several provisions of the CRC are applicable to Australia's detention of child refugees and asylum seekers. Two important standards enshrined by the CRC are that decisions impacting children be made in the child's best interest and that these decisions should further the development of the child. Detention of children (particularly those without parents) is not in their best interests, as articulated in Article 3. Additionally, it is difficult to see how detention furthers the development of a child, as called for by Article 6(2). Moreover, the UNHCR notes that child asylum seekers should not as a general principle be detained. The Australian government has not attempted to justify its policy in reference to these two principles.

Article 37(b) provides that children must not be arbitrarily deprived of their freedom, and detention "shall be used only as a measure of last resort and for the shortest appropriate period of time." Although it is not clear what the "shortest appropriate period of time" is, nine children have been detained at the Woomera detention facility for more than a year. Furthermore, Australia's policy of mandatory detention may be arbitrary within the meaning of Article 37. The UN Human Rights Committee has indicated that factors to be considered when defining arbitrary include whether the detention is reasonable under the circumstances and the length of the detention. Given alternatives to detention recommended by the UN and the failure of

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Australia, continued from previous page

Australia to cite any compelling reason for the lengthy detention of children, especially unaccompanied children, its mandatory detention should be considered arbitrary.

Article 2 requires states parties to "respect and ensure" rights set forth in the CRC without discrimination based on the child's status. The Human Rights and Equal Opportunity Commission (HREOC) is an Australian government body that oversees Australia's compliance with, *inter alia*, the CRC. The HREOC has determined that Article 2 is meant to protect against discrimination based on the child's immigration status. Australia may be in violation of Article 2 in two ways: first, "offshore" asylum applicants are not detained although "onshore" applicants are; second, "onshore" applicants are only eligible for temporary protection visas, although "offshore" applicants may apply for citizenship. The HREOC has stated that the different immigration status of these two categories may translate into discriminatory treatment within the meaning of Article 2.

Detention Conditions

There are six detention facilities around Australia, which hold approximately three to four thousand detainees at any given time. Conditions at these facilities have been widely criticized, particularly as they apply to children. Refugees have protested detention conditions in several facilities, perhaps nowhere more strikingly than in Woomera. Accommodating up to 1,700 people, Woomera has only 40 showers and 40 toilets. In summer, temperatures routinely exceed 100 degrees, and have been known to reach over 120 degrees. Detainees have reported waiting in line outside for two to three hours for food. Visits by relatives, the media, NGOs, attorneys, and others, are generally prohibited.

Refugee protests against these conditions have included hunger strikes, setting fire to buildings, swallowing poisonous substances, and breaking windows. Refugees, including children, have sewed their lips shut in protest, cut themselves, and threatened to otherwise harm or even kill themselves.

As of February 2002, there were approximately 750 refugees at the Woomera facility. In November 2001, there were 582 children in detention around Australia. An estimated 331 of the Woomera refugees are children. Of those 331, 58 are without either parent. Human Rights Watch has called for the immediate release of these children to foster care. The government has placed some unaccompanied children in foster care, but on an ad hoc, discretionary basis.

The Convention on the Rights of the Child

Detention conditions of child asylum applicants violate several provisions of the CRC. As part of a yearlong National Inquiry into Children in Immigration Detention, the HREOC has also questioned whether detention conditions at Woomera meet the requirements of several CRC articles.

Article 19 stipulates that states parties should "take all appropriate . . . measures to protect the child from all forms of physical or mental violence, injury or abuse, neglect or negligent treatment." Incidents of lip sewing, slashing, attempted suicide, and threats of self-inflicted injury at Woomera are evidence of both mental and physical violence and neglect. Eyewitness statements and reports document an incident of a refugee hunger striker and his three-year-old son being locked up for twenty-three hours a day. The HREOC has found that Australia is in violation of its obligations under Article 19. Amnesty International and other NGOs have expressed concern that the detention conditions are particularly harmful to the mental state of children.

Article 28 calls for states parties to provide educational opportunities to all children within their jurisdiction, including compulsory and free primary education (Article 28(1)(a)) and optional secondary education (Article 28(1(b)). The HREOC noted that only children under twelve at Woomera were given any schooling, and then only for a two hours a day, four days a week.

UNHCR guidelines stipulate that detained asylum seekers should have the opportunity "to make regular contact and receive visits from friends, relatives, religious, social and legal counsel," as well as access to education or vocational training. Australia has failed to meet these guidelines by isolating refugees in facilities such as Woomera.

Finally, news reports indicate that detention conditions at the camps outside Australia where refugees are being relocated may be just as poor or even worse than the conditions at Australian camps. As many as fifteen refugees held on PNG, for example, reportedly suffer from malaria; other refugees may have typhoid and tuberculosis. These refugees have also engaged in protests and hunger strikes, but remain largely out of the public eye.

Conclusion

The legality of Australia's various amendments to its migration laws will be tested in Australian courts under existing domestic law. Regardless of the outcome of these challenges, however, these amendments contravene Australia's duties under international law.

International bodies such as the UN Human Rights Committee, as well as numerous governments and nongovernmental organizations, have criticized Australia for both its detention facilities and detention policy. In addition, Australians have staged an increasing number of rallies to protest the government's refugee policies. Australia's opposition political party, after months of agreeing with the Howard government's position on refugees, has argued that unaccompanied children and mothers and their children should be released from detention centers. The Howard government has responded by agreeing to let a Special Representative of the UN High Commissioner for Human Rights visit the Woomera center in May 2002. The government has also indicated that it plans to close Woomera eventually. The government has refused to relent on refugee policy generally, however, insisting that Australia has a "sovereign right to determine who is allowed entry." Yet Australia's sovereignty does not inherently conflict with its moral and legal obligation to protect refugees and asylum seekers. Only when Australia reforms its "Pacific Solution," amends its policy of mandatory detention, and improves detention conditions will it be in compliance with international law.

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