



Australian Refugee Rights Alliance

"No Compromise on Human Rights"

Exporting the Australian Model

**THE HUMAN FACE
OF AUSTRALIA'S REFUGEE POLICY**



Australian Refugee Rights Alliance

Exporting the “Australian model” – Creating a new international norm on interception, *refoulement* and the prospects for effective protection

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“If a rich country like Australia could shut its doors to a few thousand asylum-seekers, why should a country like Pakistan – which already hosts about two million refugees – take more?” – Pakistan President Pervez Musharraf¹

Recent reforms to Australia’s onshore detention of asylum-seekers

Although maintaining its adherence to a policy of mandatory and potentially indefinite detention for asylum-seekers, Australia has attempted to implement new policies to ameliorate some of the worst aspects of onshore detention.² These reforms include the introduction of time limits on case processing, more comprehensive mental health services and independent oversight of the cases of people who have spent more than two years in immigration detention centres. The overriding principle guiding these reforms is to limit the number of people held within detention centres and reduce the time spent in detention.³

Prima facie, these reforms to Australia's processing system for asylum-seekers are a step in the right direction, with the potential to restore the state's obligations to address human rights concerns within the refugee status determination process. However, the more complex and concerning story relates to the means by which the Australian government is seeking to practically achieve its aim of limiting the total numbers of “unauthorised” people – including refugees – from accessing Australia's immigration system.

Concerns remain

There is growing evidence that the Australian government is seeking to sidestep its protection and *non-refoulement* obligations under the *Refugee Convention* and accompanying *Protocol* through interception, interdiction and disruption activities in Australian territorial waters, on the high seas, and in neighbouring Pacific nations; excision of Australian territory from its migration zone; and forcible transfer of refugees to offshore processing centres.

¹Christopher Kremmer (2001) “Deterrent is a Dirty Word in Geneva”, *The Sydney Morning Herald*, 5 December 2001.

² The bulk of these reforms were in response to the recommendations of two high-profile public inquiries into aspects of immigration detention, see: M.J. Palmer (2005) [Inquiry into the Circumstances of the Immigration Detention of Cornelia Rau: Report](#). Commonwealth of Australia, Canberra; Commonwealth Ombudsman (2005) [Inquiry into the circumstances of the Vivian Alvarez matter Report by the Commonwealth Ombudsman of an inquiry undertaken by Mr Neil Comrie, AO, APM](#) (Report no. 3 of 2005), Canberra.

³ Australian Government Department of Immigration and Multicultural Affairs (2006) *12 Months after Palmer: On the Move to Improve*, DIMA. Available: http://www.immi.gov.au/media/publications/department/_pdf/palmer-progress-a5-booklet-web.pdf

In doing so, it is arguable that Australia is ignoring the letter and the spirit of the Refugee Convention and its associated interpretive instruments, including the Conclusions of the UNHCR's Executive Committee, as well as international human rights law instruments more generally. Even more troubling are the efforts by Australia to effectively "contract out" of its *non-refoulement* and protection obligations by negotiating regional agreements, in the main with nations who are not parties to the Refugee Convention. Australian government ministers have also promoted the Australian approach to the Refugee Convention to other states attempting to negotiate substantially larger influxes of asylum-seekers, including the United Kingdom, Italy and Greece.⁴

Australia's interception policies

Border patrol

Since the late 1990s, patrol of Australia's maritime boundaries has become a primarily military task. Often couched in terms of promoting "border security", "counter-terrorism" and combat illegal fishing in Australia's waters, such military interventions nevertheless intercept vessels that may be carrying refugees on their way to secure protection in Australia.⁵ The aim of military exercises such as Operation Relex I and II is to prevent "unauthorised arrivals" from reaching Australia by:

- (a) keeping passengers on board vessels for as long as possible and encouraging the captain and/or crew of the vessels to desist from entering Australian territorial waters⁶;
- (b) armed naval personnel boarding vessels to ensure that a turnaround is effected and to avoid the potential for passengers sabotaging the vessel to create a safety of life at sea situation in which case Australian naval officers will be forced to rescue those endangered⁷;
- (c) towing vessels into international waters⁸;
- (d) forcing vessels to return to Indonesia or other neighbouring states⁹;
- (e) forcibly transferring asylum-seekers who reach Australian islands that have been excised from the migration zone to offshore detention and processing centres in Nauru and Papua New Guinea¹⁰; and
- (f) potentially detaining intercepted persons on prison hulks outside of Australian territorial waters.¹¹

⁴ Human Rights Watch (2002) *Not for Export: Why the International Community should Reject Australia's Refugee Policies*, Human Rights Watch Briefing Paper. Available from:

<http://www.hrw.org/press/2002/09/ausbrf0926.htm>. See also, Australian Government Minister for Immigration and Multicultural Affairs (2003) *UK Asylum Proposals Worth Consideration*. Media Release 3 April 2003. MPS 21/2003. Available:

http://www.minister.immi.gov.au/media_releases/ruddock_media03/r03021.htm

⁵ Four Corners (2002) *To Deter and Deny: The Inside Story of Operation Relex – the Defence Forces' [sic] Mission to Stop Asylum-Seekers Reaching Australia's Shores*. Aired 15 April 2002. Australian Broadcasting Corporation

⁶ Marian Wilkinson (2002) "Secret File: Operation Relex", *The Sydney Morning Herald*, 27 October 2002, available at: <http://www.smh.com.au/articles/2002/10/27/1035683303429.html>

⁷ As per Rear Admiral Geoffrey Smith, Maritime Commander Australia, Commonwealth Parliament Senate (2002) *Select Committee Inquiry Report into a Certain Maritime Incident*. Commonwealth of Australia, Canberra. p 19.

⁸ Jessica Howard (2003) "To Deter and Deny: Australia and the Interdiction of Asylum-Seekers", *Refuge* 21(4) pp 35-50 at 40.

⁹ Jessica Howard (2003) "To Deter and Deny: Australia and the Interdiction of Asylum-Seekers", *Refuge* 21(4) pp 35-50 at 39-40.

¹⁰ Andrew Brouwer and Judith Kumin (2003) "Interception and Asylum: When Migration Control and Human Rights Collide", *Refuge* 21(4) pp 6-24 at 12.

In addition, the Australian Federal Police and its local agents conduct operations to disrupt planned voyages of unauthorised individuals to Australia and/or provide intelligence to Australian military officers of vessels heading towards Australian territorial waters.¹²

The “Pacific Strategy” – establishing Australia as a secondary movement state

Australia’s naval interception of asylum-seekers has been coupled with a series of regional agreements with Australia’s neighbours that allow for Australia to transfer asylum-seekers who enter Australian territorial waters or land on excised islands to Nauru, Papua New Guinea and Indonesia. This policy has been labelled the “Pacific Strategy” and seeks to provide regional burden sharing for Australia’s refugee problem – as comparatively minor as it is.

Over 1500 asylum-seekers have been detained in Nauru and Papua New Guinea, in some instances for a number of years, before they are potentially resettled by other states. Detention of asylum-seekers in these countries is under domestic law, as opposed to Australian law, by way of the granting of “Special Purpose Visas”.¹³ This process also ensures that Australia becomes a secondary movement state for refugees.

The conditions of detention on Nauru and Papua New Guinea have been heavily criticised by human rights organisations, legal experts, medical professionals and welfare support groups, many of which have experienced significant difficulties accessing Nauru to provide much-needed services.¹⁴ Asylum-seekers detained in Australia’s offshore processing centres enjoy far fewer rights than those processed on the Australian mainland; in particular they do not have access to judicial review of unfavourable decisions about their protection needs.¹⁵

When Australia’s interception operations succeed in returning vessels to Indonesia, it is done with a view to asylum-seekers having the opportunity to access the refugee status determination process in the refugee camps in Lombok, Indonesia. However, Australia is aware that the transfer of asylum-seekers to Lombok does not necessarily guarantee refugees access to durable solutions. In fact, a number of people in Lombok who were intercepted by Australia and have since had their refugee claims verified, have been left to languish in the refugee camp for years,

¹¹ The Australian government is seeking tenders for the purchase of a second prison hulk to house intercepted people allegedly fishing illegally in northern Australian waters. The ship will be equipped with machine guns and house prisoners for up to one month as the ship travels in Australian territorial and international waters. However, there is no indication that asylum-seekers will not caught by this prison ship given that there is no provision for refugee status determination on this boat. Michael Perry (2006) *Australia Plans Asian Fishermen Prison Ship*. Reuters, 3 August 2006. Available: <http://www.alertnet.org/thenews/newsdesk/SP174000.htm>

¹² Tony Kevin (2004) *A Certain Maritime Incident: The Sinking of the SIEV X*. Scribe, Canberra

¹³ Australian Government Department of Immigration and Multicultural Affairs (2005), *Fact Sheet 76: Offshore Processing Arrangements*. DIMA. Available: <http://www.immi.gov.au/media/fact-sheets/76offshore.htm>

¹⁴ Peter Mares (2004) *Refugees Feature: Australia’s Sledgehammer Approach to Asylum-Seekers*, Amnesty International. Available: <http://news.amnesty.org/index/ENGASA1224042004>

¹⁵ Australian Government Department of Immigration and Multicultural Affairs (2005), *Fact Sheet 76: Offshore Processing Arrangements*. DIMA. Available: <http://www.immi.gov.au/media/fact-sheets/76offshore.htm>; Australian Human Rights and Equal Opportunity Commission (2006) *Submission of the Human Rights and Equal Opportunity Commission to the Senate Legal and Constitutional Committee on the Migration Amendment (Designated Unauthorised Arrivals) Bill 2006*. HREOC. Available: <http://www.hreoc.gov.au/legal/submissions/migration20060522.html>

their protection needs ignored by both Indonesia and Australia.¹⁶

No guaranteed resettlement for refugees

Australia does not guarantee resettlement in Australia for refugees that initially sought protection in Australia and whose protection needs have been subsequently verified in its offshore detention and processing centres. This policy cements Australia's position as a secondary movement country and compromises its capacity to provide effective protection as per its obligations under the Refugee Convention. Under proposals to expand the "Pacific Strategy" raised earlier this year, Australia sought to not only excise the entirety of its territory from the migration zone, but to also refuse to settle *any* asylum-seeker it had sent to Nauru even after those people were determined to be refugees.¹⁷

Problems for chain *refoulement*, orbit situations, effective protection and durable solutions

The International Council of Voluntary Agencies (ICVA) is among the many domestic and international organisations that have expressed concern that Australia's interception policies are inconsistent with its human rights and international legal obligations.¹⁸ In its Conclusions of the fifty-sixth session in 2003, the Executive Committee of the UNHCR also paid special attention to the question of interception, providing a series of guidelines for countries engaging in interception activities.¹⁹

Despite interception comprising a key platform of Australia's refugee policy, it is arguable that Australia has not given appropriate weight to the incorporation of these Excom guidelines in formulating its approach. This is because until a vessel succeeds in making it to an Australian island or the mainland, interception agents do not make an assessment about the presence or otherwise of asylum-seekers on the vessels intercepted, let alone consider the possible protection needs of these individuals.²⁰ Thus, in every instance in which a vessel carrying "unauthorised arrivals" is refused entry at the frontier, turned around, towed into international waters or returned to Indonesia, there is potential for *refoulement* to occur.

Refusing entry of vessels that may be carrying refugees or forcibly transferring asylum-seekers to other states not only renders Australia a secondary movement country, but has the potential to create orbit situations where refugees are shifted around the globe in a quest to find a country willing to process their claims and provide them with durable solutions. It is arguable that this

¹⁶ This analysis does not include those people who have lodged successful protection applications on the Australian mainland and who have subsequently granted three-year temporary protection visas (TPVs). It is arguable that the temporary protection regime is also not a durable solution for refugees requiring protection.

¹⁷ Explanatory Memorandum, Migration Amendment (Designated Unauthorised Arrivals) Bill 2006. This legislation was shelved in August 2006 after it became apparent that the Australian government did not have the numbers to secure its passage through Parliament. However, there is no indication that the proposal has been dropped from government's refugee policy.

¹⁸ Australian Refugee Rights Alliance (2003) *Report of Pre-Excom and Excom Meetings at the United Nations High Commissioner for Refugees, Geneva, September/October 2003*. ARRA, p.141.

¹⁹ UNHCR Executive Committee Conclusions No. 97 (LIV) 2003 – *Conclusions on Protection Safeguards in Interception Measures*. UNHCR, Geneva.

²⁰ Sea Power Centre Australia (2005) *Database of Royal Australian Naval Operations 1990-2005*. Working Paper No. 18. Sea Power Centre Australia, Commonwealth of Australia Department of Defence, Canberra; Jessica Howard (2003) "To Deter and Deny: Australia and the Interdiction of Asylum-Seekers", *Refugee* 21(4) pp 35-50.

amounts to an effective undermining of one of the foundation stones of the Refugee Convention which was established precisely to prevent refugees being turned away at states' doors.

Refusal to engage Australia's protection obligations amounts to contraventions of the Excom conclusions on *non-refoulement* detailed as recently as 2005.²¹ Lauterpacht and Bethlehem have also argued that the scope of the principle of *refoulement* voids Australia's claims that its interception policies do not amount to *refoulement*.²²

Further, even if Australia does not return refugees directly to the countries from which they have initially fled, they may be engaging in "chain *refoulement*". Such interception policies which have the potential to result in chain *refoulement* have been criticised by the UNCHR Regional Office in Canberra, Australia, which has highlighted various Excom conclusions requiring that "authorities of the sending country [in this case, Australia] should ensure that the [asylum] applicant will be (re)admitted to the third state and to the asylum procedure where a full and fair assessment of the case will be made, will be treated in accordance with accepted international standards, and will receive effective protection from *refoulement*".²³

In addition, the flawed nature of the refugee status determination processes confronting asylum-seekers who are forced onto Nauru or Papua New Guinea means that there is a greater likelihood that an incorrect decision about their protection needs will be made, increasing the chance that refugees will not be appropriately recognised and refouled.

Exporting the Australian model

In addition to promoting the Australia's peculiar interpretation of its obligations under the Refugee Convention in bilateral and international fora, the Pacific Strategy can be characterised as an attempt to create a new international norm for refugee policy. It is of note that the regional agreements Australia has negotiated with neighbouring states to accept its asylum-seekers have been concluded with states that are not parties to the Refugee Convention. It is in fact arguable that had states such as Indonesia or Nauru been signatories to the Convention, it would be difficult for them to justify aiding and abetting regional policies that exacerbate the potential for *refoulement*. For Australia to be seen to be exploiting the lack of public adherence by these states to international norms of refugee protection sends a disturbing message to other nations – many of whom bear much larger numbers of asylum-seekers – to similarly shirk their responsibilities, thereby undermining the global effectiveness of the refugee protection regime.

Recommendations

1. With the principle aim of securing effective protection, UNHCR clarify the responsibilities of secondary movement countries, as well as those states who receive asylum-seekers from secondary movement countries.

²¹ UNHCR EXCOM (2005) (LVI) *Conclusions* (j) *Recalls* its Conclusions No 6 (XXVII) and 7 (XXVIII), as well as numerous subsequent references made in its other Conclusions to the principle of *non-refoulement*; *expresses* deep concern that refugee protection is seriously jeopardised by expulsion of refugees leading to *refoulement*; and *calls on* states to refrain from taking such measures and in particular from returning or expelling refugees contrary to the principle of *non-refoulement*...

²² Sir E. Lauterpacht and D. Bethlehem (2003) "The Scope and Content of the Principle of Non-Refoulement: Opinion" in E. Feller, V. Turk and F. Nicholson (eds) *Refugee Protection in International Law*. Cambridge University Press, UK. p 107.

²³ UNHCR Regional Office Canberra (2004) "Australia's Protection Obligations: Only a Last Resort?" in UNHCR *Discussion Paper: The Principle of Effective Protection Elsewhere*, 1/2004, p. 3

2. States affirm the right of refugees to seek protection in the country of their choice and not be penalised for their decision not to seek protection elsewhere.
3. That asylum-seekers entering a state's territory from states which are not parties to the Refugee Convention not be intercepted, except for the purposes of providing these individuals with access to sound refugee status determination by the intercepting state.
4. UNHRC ensure that counter-terrorism activities, border protection and international crime prevention do not absolve states of their primary international protection and human rights responsibilities.
5. UNHCR ensure that state parties to the Refugee Convention do not "contract out" of their protection and refugee status determination responsibilities with states that are not parties to the Convention. Any bilateral or multilateral agreements on refugee processing and protection must comply with both the letter and the spirit of the Refugee Convention.