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**BY EMAIL**

11 July 2012

Dear Expert Panel,

We are a group of Australian refugee law academics. We are concerned that the proposals put forward by the federal government, the Coalition and others for the transfer of asylum seekers to, variously, Malaysia, Nauru, any party to the Refugee Convention, or any 'Bali Process'<sup>1</sup> country risk breaching a number of Australia's international law obligations.

The 1951 Refugee Convention, to which Australia is a party, is premised on the understanding that States will protect refugees in their territories, or cooperate with other States to find durable solutions for them (local integration, voluntary repatriation, and resettlement). As stated repeatedly in conclusions of the Executive Committee of the United Nations High Commissioner for Refugees (of which Australia is a longstanding member), any transfer agreement must, at a minimum, 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.<sup>2</sup> Based on Australia's practice with respect to people found to be refugees within Australia, refugees should also be guaranteed a durable solution, such as resettlement within Australia.

**1 MALAYSIA**

In a submission made by a number of us in September 2011 to the Senate Standing Committee on Legal and Constitutional Affairs' Inquiry into the Agreement between Australia and Malaysia on the Transfer of Asylum Seekers, we provided a detailed

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<sup>1</sup> The Bali Process on People Smuggling, Trafficking in Persons and Related Transnational Crime. The 44 member countries of the Bali Process are listed here:

<http://www.baliprocess.net/index.asp?pageID=2145831409> (accessed 4 July 2012).

<sup>2</sup> See particularly Executive Committee Conclusions Nos 15, 58 and 85.

analysis of the lawfulness of regional responsibility sharing and issues relating specifically to child asylum seekers. Although the submission dealt specifically with Malaysia, much of the legal analysis there also applies to Nauru and would apply to any similar scheme entered into with other countries in the region. For this reason, we refer the Expert Panel to the submission (**attached**).

## 2 NAURU

In addition, we make the following comments about the proposed processing of asylum seekers on Nauru.

The previous arrangement between Australia and Nauru (under the Pacific Solution) raised many international human rights law concerns,<sup>3</sup> and it is not clear how any new transfer scheme could adequately rectify these. The Howard government systemically violated international refugee and human rights law through an asylum policy focused on deterrence, interdiction, and penalization, rather than the rights and needs of refugees and asylum seekers. The policy's intention was to shut down Australia as an asylum country for people fleeing by boat,<sup>4</sup> although it is now being recast as a policy designed to save lives at sea.

Asylum seekers sent to Nauru were prevented from applying for Australian protection visas, and were precluded from pursuing legal proceedings against the Australian government in relation to their status as 'unlawful non-citizens', the lawfulness of their detention or their transfer to Nauru. The policy was widely condemned as a violation of Australia's refugee and human rights law obligations, which resulted in refugee warehousing in remote locations and caused significant long-term psychological damage to many of those held there.<sup>5</sup>

The reintroduction of the Pacific Solution and related policies would once again raise serious human rights concerns and doubts about the extent to which Australia is implementing its treaty obligations in good faith.

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<sup>3</sup> See eg Penelope Mathew, 'Australian Refugee Protection in the Wake of the Tampa' (2002) 96 *American Journal of International Law* 661; Mary Crock, 'In the Wake of the Tampa: Conflicting Visions of International Refugee Law in the Management of Refugee Flows' (2003) 2 *Pacific Rim Journal of Law and Policy* 49; Savitri 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; Angus Francis, 'Bringing Protection Home: Healing the Schism between International Obligations and National Safeguards created by Extraterritorial Processing' (2008) 20 *International Journal of Refugee Law* 253; Jane McAdam and Kate Purcell, 'Refugee Protection in the Howard Years: Obstructing the Right to Seek Asylum' (2008) 27 *Australian Year Book of International Law* 87; and Mary Crock and Laurie Berg, *Immigration, Refugees and Forced Migration: Law, Policy and Practice in Australia* (The Federation Press, Sydney, 2011) chs 4.4, 6.1, 12.

<sup>4</sup> See submissions to the inquiry into the Migration Amendment (Designated Unauthorised Arrivals) Bill 2006 (Cth).

<sup>5</sup> See eg Louise K Newman, Michael Dudley and Zachary Steel, 'Asylum, Detention, and Mental Health in Australia' (2008) 27 *Refugee Survey Quarterly* 110; Derrick Silove, Patricia Austin and Zachary Steel, 'No Refuge from Terror: The Impact of Detention on the Mental Health of Trauma-Affected Refugees Seeking Asylum in Australia' (2007) 44 *Transcultural Psychiatry* 359; 'Nauru Camps "Psychiatrist's Nightmare": Doctor', *The 7.30 Report* (15 May 2003) <http://www.abc.net.au/7.30/content/2003/s855996.htm> (accessed 4 July 2012). See further Tamara Wood and Jane McAdam, 'Australian Asylum Policy All at Sea: An Analysis of *Plaintiff M70/2011 v Minister for Immigration and Citizenship* and the Malaysia–Australia Arrangement' (2012) 61 *International and Comparative Law Quarterly* 274.

Although Nauru is now a party to the Refugee Convention and Protocol, which it was not at the time of the Pacific Solution, this does not automatically render it a safe third country. Legal obligations are necessary, but not on their own sufficient, for a country to be considered as a ‘safe third country’ for refugees or asylum seekers. While the legal framework in any given country is an important consideration when determining whether or not it is ‘safe’, it is also essential to assess how it treats people in practice.<sup>6</sup> The concurring judgments of French CJ and Kiefel J in *M70* noted the importance of having regard to the facts on the ground.<sup>7</sup> As French CJ noted, ‘[c]onstitutional guarantees, protective domestic laws and international obligations are not always reflected in the practice of states’.<sup>8</sup>

In order for Australia to rely on another country’s refugee protection mechanisms, that country must respect the rights of refugees and asylum seekers in practice. As stated by the legal scholars who adopted the Michigan Guidelines on Protection Elsewhere,

Reliance on a protection elsewhere policy must be preceded by a good faith empirical assessment by the state which proposes to effect the transfer (‘sending state’) that refugees defined by Art. 1 will in practice enjoy the rights set by Arts. 2–34 of the Convention in the receiving state. Formal agreements and assurances are relevant to this inquiry, but do not amount to a sufficient basis for a lawful transfer under a protection elsewhere policy. A sending state must rather inform itself of all facts and decisions relevant to the availability of protection in the receiving state.<sup>9</sup>

As prior experience shows, processing on Nauru is unlikely to result in any offers of resettlement by third States, since Australia found it almost impossible to get other countries to agree to resettle refugees from Nauru. The reason why the Opposition claims that Nauru ‘worked’ in reducing boat arrivals is because asylum seekers were told that they would never be granted protection in Australia.<sup>10</sup> This was manifestly incorrect. Even if the Howard government thought this were true at the time, it could not be implemented in practice. This was because other countries regarded asylum seekers whom Australia sent to Nauru as Australia’s responsibility, and were unwilling to resettle them elsewhere.

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<sup>6</sup> See Guy S Goodwin-Gill and Jane McAdam, *The Refugee in International Law* (3rd edn, Oxford University Press, Oxford, 2007) 394; *MSS v Belgium and Greece*, App No 30696/09 (21 January 2011) paras 353–54.

<sup>7</sup> *Plaintiff M70/2011 v Minister for Immigration and Citizenship; Plaintiff M106 of 2011 v Minister for Immigration and Citizenship* [2011] HCA 32 (31 August 2011) para 67 per French CJ; para 245 per Kiefel J.

<sup>8</sup> *Ibid*, para 67, citing Michelle Foster, ‘Protection Elsewhere: The Legal Implications of Requiring Refugees to Seek Protection in Another State’ (2007) *Michigan Journal of International Law* 223, 243. See also Michelle Foster, ‘The Implications of the Failed “Malaysian Solution”: The Australian High Court and Refugee Responsibility Sharing at International Law’ (2012) 13 *Melbourne Journal of International Law* 1.

<sup>9</sup> ‘The Michigan Guidelines on Protection Elsewhere’ (2007) 28 *Michigan Journal of International Law* 207, para 3. See also Lisbon Expert Roundtable, ‘Summary Conclusions on the Concept of “Effective Protection” in the Context of Secondary Movements of Refugees and Asylum Seekers’ (December 2002).

<sup>10</sup> See Commonwealth, *Parliamentary Debates*, Senate Legal and Constitutional Affairs Committee (19 February 2008) 124 (Chris Evans, Minister for Immigration and Citizenship).

As the Secretary of the Department of Immigration, Andrew Metcalfe, has observed:

There were of course some people—largely that group from the *Tampa*—who were resettled in New Zealand. But following that 2001 resettlement, there was very limited resettlement elsewhere. A number of people went to Scandinavia but the vast majority came to Australia. It is the department’s assessment that resettlement of people in other places is extremely unlikely. That is essentially for the reason that those folks are seen as Australia’s responsibility and Australia is a country with sufficient resources to deal with the issue.<sup>11</sup>

Having sought no guarantees for international responsibility sharing or durable solutions, Australia effectively made a unilateral decision to offload refugees for whom it was responsible on to the international community. This does not comport with the object and purpose of the Refugee Convention, nor is it a good faith application of the Convention’s obligations.<sup>12</sup> If Australia wished to avoid this situation again, it would need to undertake to grant protection visas to all those determined to be refugees on Nauru and to ensure that they were treated in accordance with international human rights and refugee law while held there. To our knowledge, this is not currently being contemplated, and it would be an unnecessarily costly way of Australia meeting its obligations under international law.

### **3 SUMMARY OF KEY CONCERNS**

The following summarizes our legal concerns about regional processing generally.

#### **A Regional Responsibility Sharing**

- Australia cannot use arrangements such as the Malaysia Arrangement or the Pacific Solution to ‘contract out’ of its international legal obligations.
- In order to lawfully transfer a refugee or asylum seeker to another country, Australia must ensure that the other country respects international refugee and human rights law.
- Accession to the Refugee Convention is important. It represents a binding commitment to respect and implement the provisions of that treaty.
- The destination country must also respect the rights of refugees and asylum seekers in practice.
- The fact that a country is a participant in the Bali Process is not a reliable indicator of its willingness or ability to respect the rights of refugees and asylum seekers in practice.<sup>13</sup>
- Malaysia is not a party to the Refugee Convention or its Protocol, nor does it have any provision in domestic law for the protection of refugees.

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<sup>11</sup> *Ibid* (Andrew Metcalfe).

<sup>12</sup> See further Jane McAdam and Kate Purcell, ‘Refugee Protection in the Howard Years’ (2008) 27 *Australian Year Book of International Law* 87.

<sup>13</sup> See further Savitri Taylor, ‘Regional Cooperation and the Malaysian Solution’, *Inside Story* (9 May 2011) <http://inside.org.au/regional-cooperation-and-the-malaysian-solution/> (accessed 4 July 2012).

- Although there is some evidence of improvement in the quality of protection in Malaysia, which should be acknowledged, there is still extensive evidence that Malaysia does not observe the rights of refugees and asylum seekers in practice.
- Although Nauru is now a party to the Refugee Convention and Protocol, there are considerable doubts about whether it abides by its obligations in practice. We understand that implementing legislation is still being drafted.
- In order to be acceptable, any responsibility sharing arrangement needs to provide durable solutions for the refugees affected.
- If a refugee or asylum seeker is to be transferred to another country:
  - Australia should ensure that the other country respects the international refugee and human rights law standards by which Australia is bound.
  - Australia should receive back asylum seekers so transferred in the event of non-compliance with those standards.
  - Transfer should be provided for in a legislative framework and should include providing enforceable access to meaningful remedies in the event of a breach of the legislative requirements. Transfer in any other circumstances is unacceptable.

## **B Constraints on Lawful Responsibility Sharing – Australia’s Obligations**

### *(a) Non-refoulement*

- Australia has undertaken to respect the principle of *non-refoulement* under the Refugee Convention and numerous other human rights instruments.
- The principle of *non-refoulement* requires countries to protect individuals from both direct and indirect *refoulement*. This includes ensuring that persons are not removed to countries in which they could be at risk of *refoulement*.
- Unless Australia individually assesses whether an asylum seeker is at risk of persecution or other ill-treatment in a third country prior to transfer there, it risks breaching its *non-refoulement* obligations.
- There is no guarantee under the Malaysia Arrangement or Malaysian domestic law that asylum seekers or refugees will be protected from *refoulement* from Malaysia.
- Reliance on the UNHCR to conduct refugee status determination in Malaysia is not sufficient to guard against *refoulement* given UNHCR’s insufficient resources and inability to provide a durable solution.
- The previous arrangements in Nauru under the Pacific Solution led to documented cases of *refoulement* as a result of low quality refugee status determinations, as well as prolonged detention resulting in significant psychological harm.<sup>14</sup>

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<sup>14</sup> There is evidence concerning death and human rights violations upon return of some asylum seekers: see Edmund Rice Centre, *Deported to Danger II: The Continuing Study of Australia’s Treatment of Rejected Asylum Seekers* (September 2006). For a full account of problems such as lack of independent legal advice, poor attitudes on the part of decision-makers, and the impact of detention, see Susan Metcalfe, *The Pacific Solution* (Australian Scholarly Publishing, 2010).

(b) *Other rights*

- The Refugee Convention contains a wide range of other rights, some of which are applicable as soon as a refugee or asylum seeker is physically within Australia's territory. These include inter alia the right to religious freedom, the right to access the courts, and the right not to be penalized for unlawful entry. (See the **attachment** for further discussion).
- Australia has additional human rights obligations under a number of international human rights treaties and customary international law. (See the **attachment** for further discussion).
- Human rights organizations have documented the extensive ill-treatment of asylum seekers in Malaysia, including their uncertain legal status and lack of access to basic services.
- There are insufficient safeguards in the Malaysia Arrangement to exclude the possibility of such ill-treatment, especially over the longer term.
- The assistance to be provided to persons transferred to Malaysia under the Arrangement falls considerably short of Australia's human rights obligations.
- Nauru is not a party to the International Covenant on Economic, Social and Cultural Rights, International Covenant on Civil and Political Rights or the Convention against Torture. While it is bound by the customary international law prohibition on torture and related ill-treatment, what matters is practice on the ground.
- There is extensive evidence of human rights abuses that occurred in Nauru under the Pacific Solution, in particular in relation to the treatment of unaccompanied children and prolonged detention.<sup>15</sup>

#### 4 CONCLUSION

It is self-evident that saving lives at sea is of utmost importance. However, a liberal human rights approach recognizes that this cannot be done at the expense of blocking refugees' access to international protection.<sup>16</sup> The government is presenting its Malaysia Arrangement and the Coalition is presenting its Pacific Solution as the answer to saving asylum seekers' lives, when, in fact, both are policies designed simply to 'stop the boats'. While the emotional sentiments expressed in recent weeks by MPs from all sides of politics are no doubt heartfelt, we are concerned that the political debate has lost sight of the underlying human rights violations that prompt asylum seekers to make dangerous sea journeys in the first place, as well as the other factors that prompt people to engage the services of people smugglers. As one of us has noted recently,

All that deterrence strategies can achieve is to divert asylum seekers into equally irregular, equally risky routes to other countries in which protection may be found or to trap them in places where they receive little or no

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<sup>15</sup> See the references above at n 3; see also Mary Crock, *Seeking Asylum Alone: A Study of Australian Law, Policy and Practice regarding Unaccompanied and Separated Children* (Themis Press, Sydney, 2006) ch 13.

<sup>16</sup> Savitri Taylor and Brynna Rafferty-Brown, 'Liberalism's Asylum Dilemma', *Inside Story* (28 October 2009) <http://inside.org.au/liberalisms-asylum-dilemma/> (accessed 4 July 2012).

protection. We are unlikely through such means to spare asylum seekers from unnecessary suffering and premature death. We will simply spare ourselves from having to witness that suffering and death.<sup>17</sup>

If Australia is serious about doing more than simply sparing itself the discomfort of being witness to, or even complicit in, the suffering and death of those who seek our protection – whether at sea or more generally – then it needs to consider a multi-dimensional response that positions the asylum seeker at the centre of its sphere of concern. This calls not only for a significant expansion of Australia’s resettlement intake, but also for an approach that strengthens the quality of protection in regions/countries of asylum or transit other than as a self-interested *quid pro quo* for receiving transferred asylum seekers. It also calls for a meaningful review of the practical and legislative impediments to asylum seekers travelling to Australia safely, including carrier sanctions and the refusal of visas to people regarded as an ‘asylum risk’. Australia is not being flooded by asylum seekers – the numbers on any comparative analysis are very small.

This Expert Panel review represents an opportunity creatively to find ways of ensuring that adequate and effective protection is available to as many people as possible who are entitled to it, whether or not they seek to engage Australia’s protection obligations directly. It cannot and should not be expected to devise ‘solutions’ for a fundamentally intractable human reality: that people will seek protection by whatever means. Rather, its task should be to find approaches that minimize the risks and the human rights violations for which Australia carries some responsibility, whether directly or indirectly. For example, one option might be to facilitate (and expedite) lawful entry for asylum seekers who have pre-existing ties within the Australian community, thereby reducing the reliance on people smugglers.<sup>18</sup>

This letter and attachment represents an overview of what we, as a group, regard as the key issues and standards relevant to the Expert Panel’s review. In making this submission, we do not intend to preclude the possibility of individuals among us addressing the Panel on further issues within our particular spheres of interest and expertise.

Please do not hesitate to contact those of us who have provided our email addresses if we can be of further assistance with any aspect of the Panel’s terms of reference.

Yours sincerely,

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<sup>17</sup> Savitri Taylor, ‘What Has the Bali Process Got to Do with It?’, *Inside Story* (2 July 2012) <http://inside.org.au/what-has-the-bali-process-got-to-do-with-it/> (accessed 4 July 2012).

<sup>18</sup> On the effects of deterrent policies, see Mary Crock and Daniel Ghezelbash, ‘Do Loose Lips Bring Ships? The Role of Policy, Politics and Human Rights in Managing Unauthorised Boat Arrivals’ (2010) 19 *Griffith Law Review* 238.

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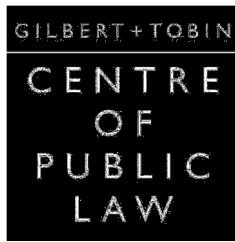
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## ATTACHMENT



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### BY ELECTRONIC SUBMISSION

15 September 2011

Dear Committee Secretary,

#### **Inquiry into the agreement between Australia and Malaysia on the transfer of asylum seekers to Malaysia**

We are a group of academics working in the field of refugee law. We welcome the opportunity to provide a joint submission to this inquiry. Our submission focuses on the following two terms of reference:

- (a) the consistency of the agreement to transfer asylum seekers to Malaysia with Australia's international obligations; and
- (b) the extent to which the above agreement complies with Australian human rights standards, as defined by law.

We are available to provide oral evidence to the Committee if this would be helpful. We are able to address additional matters in the Committee's terms of reference which have not been covered in this written submission.

Yours sincerely,

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## EXECUTIVE SUMMARY

### Regional Responsibility Sharing

- Australia cannot use responsibility sharing arrangements such as the proposed Arrangement with Malaysia to ‘contract out’ of its international legal obligations.
- In order to lawfully transfer a refugee or asylum seeker to another country, Australia must ensure that its obligations under the Refugee Convention will be fulfilled in that country.
- Accession to the Refugee Convention is important. It represents a binding commitment to respect and implement the provisions of that treaty.
- The destination country must also respect the rights of refugees in practice.
- Malaysia is not a party to the Refugee Convention or its Protocol, nor does it have any provision in domestic law for the protection of refugees.
- There is extensive evidence that Malaysia does not observe the rights of refugees and asylum seekers in practice.

### Constraints on Lawful Responsibility Sharing – Australia’s Obligations

#### *Non-refoulement*

- Australia has undertaken to respect the principle of *non-refoulement* under the Refugee Convention and numerous other human rights instruments.
- The principle of *non-refoulement* requires countries to protect individuals from both direct and indirect *refoulement*. This includes ensuring that persons are not removed to countries in which they are at risk of *refoulement*.
- The lack of assessment by Australia of individuals’ protection claims prior to transfer means that Australia risks breaching its *non-refoulement* obligations by removing individuals who may be at risk of harm in Malaysia.
- There is no guarantee under the Arrangement or Malaysian domestic law that asylum seekers or refugees will be protected from *refoulement* from Malaysia.
- Reliance on the UNHCR to conduct refugee status determination in Malaysia is not sufficient to guard against *refoulement* given the UNHCR’s lack of jurisdiction, insufficient resources and inability to grant a durable solution.

#### *Other rights*

- The Refugee Convention contains a wide range of other rights, some of which are applicable as soon as a refugee or asylum seeker is physically within Australia’s territory.
- Australia has additional human rights obligations under a number of international human rights treaties and customary international law.
- Human rights organizations have documented the extensive ill-treatment of asylum seekers in Malaysia, including their uncertain legal status and lack of access to basic services.
- There are insufficient safeguards in the Arrangement to exclude the possibility of such ill-treatment, especially over the longer term.
- The assistance to be provided to persons transferred to Malaysia under the Arrangement falls considerably short of Australia’s human rights obligations.

### **Additional Considerations in relation to Children**

- Under the Convention on the Rights of the Child, Australia has undertaken to give primacy to the best of interests of the child in all actions concerning children and to ensure that children receive appropriate protection and humanitarian assistance.
- The stipulation in the Arrangement that special procedures for vulnerable cases ‘will be developed’ is an insufficient guarantee that Australia will meet its protection and human rights obligations towards unaccompanied minors.

## 1. Background: The Concept of Regional Responsibility Sharing

The current terms of section 198A of the *Migration Act 1958* (Cth) reflect international law enunciated in the Refugee Convention and Protocol<sup>1</sup> and confirmed by Conclusions of the Executive Committee of the programme of the United Nations High Commissioner for Refugees (UNHCR).<sup>2</sup> Under section 198A(3), as interpreted by the High Court, any country declared by Australia as one to which asylum seekers may be sent for processing must be legally bound by international law or its own domestic law to: provide access for asylum seekers to effective procedures for assessing their need for protection; provide protection for asylum seekers pending determination of their refugee status; and provide protection for persons given refugee status pending their voluntary return to their country of origin or their resettlement in another country. In addition to these criteria, the *Migration Act* requires that the country meet certain human rights standards in providing that protection.

On 25 July 2011, Australia and Malaysia signed an Arrangement whereby Australia undertook to resettle 4,000 UNHCR-recognized refugees from Malaysia, in exchange for Malaysia accepting 800 asylum seekers from Australia.<sup>3</sup> In concluding that Agreement, much emphasis was placed on the need for a regional framework and a ‘regional approach to a regional problem’. Indeed, the Australian Prime Minister hailed the Malaysian deal as ‘a genuine co-operation arrangement in our region under the Regional Co-operation Framework’, distinguishing it from the ‘unilateral’ Pacific Solution—as though the mere fact that a policy involves a bilateral arrangement makes it an inherently positive one.

While the Preamble to the Refugee Convention recognizes the need for ‘international co-operation’ to respond to what is clearly an international problem, in our view great care needs to be taken to ensure that ‘co-operation’ does not operate as a facade behind which violations of international law are permitted to take place.

This is particularly salient when one considers the experience of other regions in the world which have instituted responsibility sharing arrangements. Burden sharing arrangements in regions such as North America and Europe might be considered optimum or best practice schemes, given that they involve responsibility sharing between States which are all parties to the Refugee Convention, with reasonably

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<sup>1</sup> Convention relating to the Status of Refugees (adopted 28 July 1951, entered into force 22 April 1954) 189 UNTS 137 and Protocol relating to the Status of Refugees (adopted 31 January 1967, entered into force 4 October 1967) 606 UNTS 267.

<sup>2</sup> See for example, Executive Committee Conclusion No 85 (XII), ‘International Protection’ (1998), para (aa): ‘as regards the return to a third country of an asylum-seeker whose claim has yet to be determined from the territory of the country where the claim has been submitted, including pursuant to bilateral or multilateral readmission agreements, it should be established that the third country will treat the asylum-seeker (asylum-seekers) in accordance with accepted international standards, will ensure effective protection against *refoulement*, and will provide the asylum-seeker (asylum-seekers) with the possibility to seek and enjoy asylum.’ See also UNHCR Executive Committee, Conclusion No 58 (XL), ‘Problem of Refugees and Asylum-Seekers Who Move in an Irregular Manner from a Country in Which They Had Already Found Protection’ (1989) para f(ii).

<sup>3</sup> Arrangement between the Government of Australia and the Government of Malaysia on Transfer and Resettlement (25 July 2011) <http://www.minister.immi.gov.au/media/media-releases/pdf/20110725-arrangement-malaysia-aust.pdf>.

comparable domestic systems of refugee law, and similar (if not identical) international human rights obligations.

Yet, even in these regions serious problems have arisen. For example, in respect of the US–Canada Safe Third Country Agreement, serious concerns have been raised about the legality of transferring asylum seekers from Canada to the US given that there are both procedural and substantive differences in US law which make it less likely that a person will be recognized as a refugee in the US as compared to Canada.<sup>4</sup>

This concern is magnified in the multilateral Dublin scheme which has operated in Europe for several decades. For many years, advocates have been concerned with the inequity in the system and the resulting ‘asylum lottery’ which ensues. For example, UNHCR reports that a Chechnyan transferred from Austria to Slovakia sees his/her chance of being granted refugee status reduced from 80% to 0%.<sup>5</sup> Concerns about both the adequacy of the asylum system and general living conditions in Greece has led to the highest level courts in Austria, France, Germany, Hungary, Italy and Romania ruling against Dublin transfers to Greece in individual cases.

Such concerns have recently culminated in a decision of the European Court of Human Rights which found that Belgium violated a number of its human rights obligations by transferring asylum seekers to Greece to have their applications processed in Greece (as the country of first entry to the EU). This was on account of the inhuman and degrading circumstances in which they would be forced to live, and the absence of any effective legal remedies to assess the merits of asylum claims.<sup>6</sup> This was despite the fact that Greece had formally adopted common legal and procedural standards under both regional and international law.

Indeed, in a report released by the Council of Europe’s Parliamentary Assembly in June 2011, it was concluded that ‘while seeking an effective, co-ordinated system, Europe has ended up with a system, the implementation of which has given rise to infringements of the 1951 Refugee Convention’.<sup>7</sup>

By contrast to Europe, Australia is located in a region where very few States are parties to the Refugee Convention or have domestic systems of refugee law in place, and there is no regional human rights treaty. Any regional arrangement must therefore proceed with extreme caution and due regard to the inherent risks to the fundamental rights of refugees inherent in such a scheme.

The Australia–Malaysia Arrangement is a bilateral, non-legally binding, political arrangement, the primary aim of which is to deter asylum seekers from travelling by boat to Australia. Its very objective relies on the specific deterrence value of Malaysia as an inhospitable host country for asylum seekers. Indeed, were the partner

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<sup>4</sup> Michelle Foster, ‘Responsibility Sharing or Shifting? “Safe” Third Countries and International Law’ (2008) 25 *Refuge* 64.

<sup>5</sup> See UNHCR, ‘2005 Global Refugee Trends’ (2006) <http://www.unhcr.org/statistics/>; see also European Council on Refugees and Exiles, ‘Sharing Responsibility for Refugee Protection in Europe: Dublin Reconsidered’ (March 2008) 15.

<sup>6</sup> *MSS v Belgium and Greece*, App No 30696/09 (21 January 2011) (‘MSS’).

<sup>7</sup> Council of Europe Parliamentary Assembly, ‘Asylum Seekers and Refugees: Sharing Responsibilities in Europe’, Doc 12630 (6 June 2011) para 31.

country New Zealand, or any other country with a strong human rights record, the deterrent effect would not exist. The Australian government argues that the reason for the Arrangement is that it will ensure that 800 people will ‘go to the back of the queue.’ This fails to recognize that the lack of protection in Malaysia is a reason for people to move on to Australia in the first place, and that a ‘queue’ is a heartless and inappropriate analogy for circumstances in which the right to seek asylum is not recognized and asylum seekers are subjected to detention for attempting to earn a living.

Although the Arrangement has two positive features—it represents an opportunity to engage with Malaysia to improve the circumstances of asylum seekers and refugees there, and it creates an additional 4,000 resettlement places in Australia for refugees—these do not outweigh the lack of legal safeguards and protection outcomes for the 800 asylum seekers sent to Malaysia.

## **2. Is Responsibility Sharing Lawful?**

The Refugee Convention is silent as to whether a State may engage in a responsibility sharing arrangement with another State. However, what is clear is that a State cannot ‘contract out’ of its legal obligations or transfer responsibility for such legal obligations to another State. As the European Court of Human Rights held in the seminal *TI* judgment:

Where states establish international organizations, or *mutatis mutandis* international agreements, to pursue co-operation in certain fields of activities, there may be implications for the protection of fundamental rights. It would be incompatible with the purpose and object of the [European] Convention if Contracting states were thereby absolved from their responsibility under the Convention in relation to the field of activity covered by such attribution.<sup>8</sup>

Accordingly, it is well accepted that in order lawfully to transfer a refugee—which logically includes any asylum seeker not yet found to be a refugee (given the declaratory nature of the refugee status determination procedure)—a State must ensure that its obligations under the Refugee Convention will be fulfilled in the destination State.

Indeed, so much is explicitly recognized in section 198A of the *Migration Act*, which the High Court found in *M70* is the only provision which empowers the Minister for Immigration to transfer asylum seekers to another country pursuant to a regional arrangement.<sup>9</sup>

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<sup>8</sup> *TI v United Kingdom*, 2000-III ECtHR 435, 456–57.

<sup>9</sup> *Plaintiff M70/2011 v Minister for Immigration and Citizenship; Plaintiff M106 of 2011 v Minister for Immigration and Citizenship* [2011] HCA 32 (31 August 2011) (*‘M70’*).



Section 198A(3) of the *Migration Act* currently provides that the Minister may declare in writing that a specified country:

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

A wide range of well-respected scholars and experts in international refugee law have emphasized the importance of States involved in any regional arrangement being parties to the Refugee Convention. This is because accession to the Refugee Convention matters: it represents a binding commitment by a State to respect the provisions of the Convention and to implement those provisions in practice. Accession to the Refugee Convention also involves a binding commitment to cooperate with the UNHCR (article 35), which gives the UNHCR a degree of leverage it might otherwise not have. In addition, accession to the Refugee Convention includes the compulsory obligation to submit to the jurisdiction of the International Court of Justice in relation to ‘any dispute between parties to the Convention’ (article 38). This cannot be derogated from. Hence, acceding to the Convention means submitting to another form of supervision. By removing a refugee to a State that is not a party to the Refugee Convention, the possibility of any formal compulsory supervision is precluded, arguably reducing the scope of refugee protection.<sup>10</sup>

The only recognized exception to the requirement that the destination State is a party to the Refugee Convention is where ‘the third state has developed a practice akin to the 1951 Convention and/or its 1967 Protocol’<sup>11</sup>—in other words, a system of refugee protection in domestic law notwithstanding the absence of an international legal obligation.

The High Court of Australia held in its judgment in *M70* that in order for the Minister to declare a country safe under section 198A(3) of the *Migration Act*, the destination State must be bound by international or domestic law to do the various things set out in section 198A(3).<sup>12</sup> The court’s ruling recognizes that to ensure refugee and asylum seeker rights are enjoyed in practice, at a minimum a legal framework for the protection of those rights is required.

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<sup>10</sup> See generally Michelle Foster, ‘Protection Elsewhere: The Legal Implications of Requiring Refugees to Seek Protection in Another State’ (2007) *Michigan Journal of International Law* 223, 238–42.

<sup>11</sup> Lisbon Expert Roundtable, ‘Summary Conclusions on the Concept of “Effective Protection” in the Context of Secondary Movements of Refugees and Asylum Seekers (December 2002), para 15(e) (‘Lisbon Expert Roundtable’); ‘The Michigan Guidelines on Protection Elsewhere’, (2007) 28 *Michigan Journal of International Law* 207, paras 2–3 (‘Michigan Guidelines’).

<sup>12</sup> *M70* (n 9) paras 126–36, per Gummow, Hayne, Crennan and Bell JJ; para 244 per Kiefel J. It is noted that the focus of the majority was on paragraphs (i) to (iii) of section 198A(3).

Malaysia is not a party to the Refugee Convention or its Protocol, or the main human rights treaties. Nor does it have any provision in domestic law for the protection of refugees; hence it cannot be said that it has established a de facto domestic system of refugee protection. As French CJ recognized, in order to ensure that human rights are enjoyed in practice over time, legal obligations to protect rights are vital.<sup>13</sup>

Legal obligations are necessary, but not on their own sufficient, for a country to be considered as a ‘safe third country’ for refugees or asylum seekers. While the legal framework in any given country is an important consideration when determining whether or not it is ‘safe’, it is also essential to assess how it treats people in practice.<sup>14</sup> Although the joint judgment in *M70* does not decide the extent to which section 198A(3) of the *Migration Act* requires the Minister to have regard to ‘factual elements’, nor the extent to which such factual elements might be reviewable by the court,<sup>15</sup> the concurring judgments written by French CJ and Kiefel J do address the importance of having regard to the facts on the ground.<sup>16</sup> As French CJ noted, ‘[c]onstitutional guarantees, protective domestic laws and international obligations are not always reflected in the practice of states’.<sup>17</sup>

As a matter of international law, in order to rely on another country’s refugee protection mechanisms, that country must respect the rights of refugees and asylum seekers in practice. As stated by the eminent lawyers who adopted the Michigan Guidelines on Protection Elsewhere,

Reliance on a protection elsewhere policy must be preceded by a good faith empirical assessment by the state which proposes to effect the transfer (‘sending state’) that refugees defined by Art. 1 will in practice enjoy the rights set by Arts. 2–34 of the Convention in the receiving state. Formal agreements and assurances are relevant to this inquiry, but do not amount to a sufficient basis for a lawful transfer under a protection elsewhere policy. A sending state must rather inform itself of all facts and decisions relevant to the availability of protection in the receiving state.<sup>18</sup>

In the case of the Arrangement between Australia and Malaysia, the reverse has occurred. In the face of the evidence that refugees and asylum seekers are *not* protected in Malaysia, the Australian government sought governmental assurances. As French CJ stated in *M70*, the Minister’s affidavit indicated that he approached his task, in part, on the basis that Malaysia was ‘keen to improve its treatment of refugees and asylum seekers’, ‘had made a significant conceptual shift in its thinking about how it wanted to treat refugees and asylum seekers’, and ‘had begun the process of improving the protection offered to such persons.’<sup>19</sup> This was the best the Minister could say about the situation in Malaysia—he could not, on the evidence presented to

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<sup>13</sup> *Ibid*, para 61, per French CJ.

<sup>14</sup> See Guy S Goodwin-Gill and Jane McAdam, *The Refugee in International Law* (3<sup>rd</sup> edn, 2007) 394; *MSS* (n 6) paras 353–54.

<sup>15</sup> *M70* (n 9) para 124 per Gummow, Hayne, Crennan and Bell JJ.

<sup>16</sup> *Ibid*, para 67 per French CJ; para 245 per Kiefel J.

<sup>17</sup> *Ibid*, para 67, citing Foster (n 10) 243.

<sup>18</sup> Michigan Guidelines (n 11) para 3.

<sup>19</sup> *M70* (n 9) para 62 per French CJ.

him (by the Department of Foreign Affairs and Trade, for example), sincerely guarantee that Malaysia protects refugees and asylum seekers.

### **3. Constraints on Lawful Responsibility Sharing**

In light of the fact that a State party to the Refugee Convention, such as Australia, cannot contract out of its legal obligations, we now turn to consider the content of those obligations and the manner in which such obligations operate as a constraint on any burden sharing agreement with countries in our region.

#### **3.1 Article 33: Direct *Refoulement***

Australia must be satisfied that no asylum seeker transferred to Malaysia has a well-founded fear of persecution in Malaysia on any of the Refugee Convention grounds. Australia must also be satisfied that transfer will not result in breach of its obligations under other human rights treaties.

Blanket designations of particular countries as ‘safe’ are inconsistent with the principle of *non-refoulement*, which requires a case-by-case assessment that a particular country is safe for a particular individual.<sup>20</sup>

Without an individual assessment by Australia of asylum seekers to be sent to Malaysia, this cannot be guaranteed. The Arrangement provides only that Australia will put in place an ‘appropriate pre-screening assessment mechanisms in accordance with international standards before a transfer is effected’,<sup>21</sup> and the Operational Guidelines stipulate only the gathering of biodata, basic security checks and fitness to travel assessments.<sup>22</sup> The criteria for the assessment should be transparent and address all relevant country information. In the absence of a proper legal assessment of individuals’ claims for protection, Australia risks breaching its *non-refoulement* obligations. Indeed, several of the plaintiffs in *M70* raised this very argument on the basis that they claimed to have a well founded fear of being persecuted in Malaysia on the grounds of their religion.

As a matter of international law, Australia has voluntarily undertaken to respect the principle of *non-refoulement*. This principle is reflected in article 33 of the Refugee Convention, article 3 of the Convention against Torture, articles 6 and 7 of the ICCPR, articles 6 and 37 of the Convention on the Rights of the Child, and article 5(b) International Convention on the Elimination of All Forms of Racial Discrimination, and is generally accepted as customary international law. If complementary protection is introduced into Australia, as envisaged by the Migration Amendment (Complementary Protection) Bill 2011, which reflects some of the *non-refoulement* obligations beyond the Refugee Convention, asylum seekers would not

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<sup>20</sup> UNHCR, ‘Asylum Processes (Fair and Efficient Asylum Procedures)’ UN Doc EC/GC/01/12 (31 May 2001) paras 12–18 for a discussion of best practice; House of Lords Select Committee on the European Union, *Handling EU Asylum Claims: New Approaches Examined*, HL 74, 11th Report (2003–04), para 66; Report of the Human Rights Committee, vol 1, (2002–03) UNGAOR (58th Session) Supp No 40 (UN Doc A/58/40), ‘Estonia’, 79 (13); Lisbon Expert Roundtable (n 11) para 9; *MSS* (n 6).

<sup>21</sup> Clause 9(3).

<sup>22</sup> Guidelines in Annex A, 1.1.1.

have access to protection on these grounds in Malaysia. This is why the Arrangement provides for the transfer elsewhere for people with a complementary protection need.<sup>23</sup> It is very unclear where they would go.

### 3.2 Article 33: Indirect *Refoulement*

The obligation to respect the principle of *non-refoulement* is not confined to the question whether transferred asylum seekers will be persecuted in Malaysia. Rather, as the House of Lords has noted,

‘[f]or a country to return a refugee to a state from which he will then be returned by the government of that state to a territory where his life or freedom will be threatened will be as much a breach of Article 33 as if the first country had itself returned him there direct. This is the effect of Article 33.’<sup>24</sup>

This means that Australia must ensure that asylum seekers will not be sent back to their country of persecution by Malaysia, which necessarily requires that they have access to an adequate procedure for determining their eligibility for refugee status.

As mentioned above, Malaysia has no guarantee in domestic law that asylum seekers (or indeed recognized refugees) will be protected from *refoulement*. Nor does the Arrangement with Australia require such legislative protection. The Arrangement states that Malaysia will ‘respect the principle of non-refoulement’,<sup>25</sup> but this undertaking is in a non-binding political agreement.

A minimum requirement for a sending State to be assured that the principle of indirect *non-refoulement* will be respected in the State of transfer is that the latter State ‘grants the person access to fair and efficient procedures for the determination of refugee status.’<sup>26</sup> As the European Court of Human Rights held in *MSS v Belgium*, ‘[w]hen they apply the Dublin Regulation, therefore, the states must make sure that the intermediary country’s asylum procedure affords sufficient guarantees to avoid an asylum seeker being removed, directly or indirectly, to his country of origin.’<sup>27</sup>

Malaysia does not have a domestic refugee status determination procedure in place. At the grace of the Malaysian government, UNHCR is permitted to conduct refugee status determination in Malaysia. UNHCR is not a State, does not have jurisdiction over Malaysian territory, and does not have the same resources available to it as a country like Australia, which has a highly sophisticated refugee status determination system in place with both merits and judicial review. While Malaysia permits UNHCR to determine refugee status, UNHCR does not have the ability to grant durable solutions or guarantee that people will not be expelled from Malaysia, since ultimately, Malaysia exercises jurisdiction over asylum seekers in its territory and could decide to expel them. This is undoubtedly one reason UNHCR has stated that

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<sup>23</sup> Clause 11(2).

<sup>24</sup> *R (ex parte Adan) v Secretary of State for the Home Department* (2001) 2 WLR 143, 165.

<sup>25</sup> Clause 10(2).

<sup>26</sup> Lisbon Expert Roundtable (n 11) para15f; Michigan Guidelines (n 11) 211.

<sup>27</sup> *MSS* (n 6) 342.

its ‘preference has always been an arrangement which would enable all asylum-seekers arriving by boat into Australian territory to be processed in Australia.’<sup>28</sup>

Furthermore, putting the onus on to UNHCR represents an abrogation of Australia’s responsibilities as a country with the ability and resources to conduct refugee status determination (and which has one of the most sophisticated systems in the world for doing so). UNHCR is not a State and cannot be expected to replicate the complex decision-making models—including review processes—which States can construct. Its envisaged role is only to conduct refugee status determination in circumstances where States themselves are unable to do so.

As the High Court observed in *Plaintiff M70*,

A country ‘provides access’ to effective procedures for assessing the need for protection of persons seeking asylum of the kind described in s 198A(3)(a)(i) if its domestic law provides for such procedures or if it is bound, as a matter of international obligation, to allow some third party (such as the United Nations High Commissioner for Refugees—‘UNHCR’) to undertake such procedures or to do so itself. A country does not provide access to effective procedures if, having no obligation to provide the procedures, all that is seen is that it has permitted a body such as UNHCR to undertake that body’s own procedures for assessing the needs for protection of persons seeking asylum.<sup>29</sup>

Asylum seekers in Malaysia do not have access to the same degree of merits or judicial review as they would if their claims were processed in Australia.<sup>30</sup> Therefore, there is a risk that refugees will not be recognized as such and will be subject to *refoulement*.

Although neither the Refugee Convention nor its Protocol formally stipulates procedures for refugee status determination, ‘their object and purpose of protection and assurance of fundamental rights and freedoms for refugees without discrimination, argue strongly for the adoption of such effective internal measures.’<sup>31</sup> This has been supported by the Executive Committee of UNHCR, of which Australia is a member, which has recommended that refugee status determination procedures satisfy the following basic requirements:

- (i) The competent official (e.g. immigration officer or border police officer) to whom the applicant addresses himself at the border or in the territory of a Contracting state, should have clear instructions for dealing with cases which might be within the purview of the relevant international instruments. He should be required to act in accordance with the

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<sup>28</sup> UNHCR Statement on the Australia–Malaysia Arrangement’ (25 July 2011).

<sup>29</sup> *M70* (n 9) para 125, per Gummow, Hayne, Crennan and Bell JJ.

<sup>30</sup> The High Court made clear in *Plaintiff M61/2010E v Commonwealth of Australia; Plaintiff M69 of 2010 v Commonwealth of Australia* [2010] HCA 41 (11 November 2010) that even where an asylum seeker is subject to the alternative refugee status determination procedure on Christmas Island, such procedure must accord with the principles of procedural fairness, be made according to Australian law, and is subject to judicial review by the federal courts. Any procedure undertaken in Malaysia by the UNHCR is not able to meet this standard.

<sup>31</sup> Goodwin–Gill and McAdam (n 14) 530.

principle of non-refoulement and to refer such cases to a higher authority.

- (ii) The applicant should receive the necessary guidance as to the procedure to be followed.
- (iii) There should be a clearly identified authority -- wherever possible a single central authority -- with responsibility for examining requests for refugee status and taking a decision in the first instance.
- (iv) The applicant should be given the necessary facilities, including the services of a competent interpreter, for submitting his case to the authorities concerned. Applicants should also be given the opportunity, of which they should be duly informed, to contact a representative of UNHCR.
- (v) If the applicant is recognized as a refugee, he should be informed accordingly and issued with documentation certifying his refugee status.
- (vi) If the applicant is not recognized, he should be given a reasonable time to appeal for a formal reconsideration of the decision, either to the same or to a different authority, whether administrative or judicial, according to the prevailing system.
- (vii) The applicant should be permitted to remain in the country pending a decision on his initial request by the competent authority referred to in paragraph (iii) above, unless it has been established by that authority that his request is clearly abusive. He should also be permitted to remain in the country while an appeal to a higher administrative authority or to the courts is pending.<sup>32</sup>

Given the lack of procedural safeguards, it cannot be said with certainty that asylum seekers and refugees are protected from *refoulement* from Malaysia. There were reports of *refoulement* of Uighurs just two days before the High Court hearings in *M70*. Were asylum seekers sent by Australia to Malaysia subjected to *refoulement*, Australia would be in breach of its international obligations: *refoulement* 'in any manner whatsoever', including return to unsafe countries, is forbidden by article 33 of the Refugee Convention.

### **3.3 Respect for Other Refugee Convention Rights**

While attention is often focused primarily on article 33 of the Refugee Convention in the context of responsibility sharing, the Refugee Convention in fact contains a wide range of other rights to which refugees are entitled. Some of these rights are applicable as soon as a refugee (or asylum seeker) is physically within the territory or jurisdiction of a State party, which would of course include all asylum seekers in Australia subject to any transfer to Malaysia.

While the Commonwealth had attempted to confine the meaning of 'protection' both at international law and in the context of section 198A(3) of the *Migration Act* to protection against *non-refoulement*, in *M70* the High Court emphatically rejected such a narrow understanding of Australia's obligations.

The High Court observed:

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<sup>32</sup> Executive Committee Conclusion No 8 (XXVIII) 'Determination of Refugee Status' (1977) para (e).

When s 198A(3)(a) speaks of a country that provides access and protections it uses language that directs attention to the kinds of obligation that Australia and other signatories have undertaken under the Refugees Convention and the Refugees Protocol. Reference has already been made to the non-refoulement obligation imposed by Art 33(1) of the Refugees Convention. But signatories undertake other obligations. Those obligations include:

- to apply the provisions of the Convention to refugees without discrimination as to race, religion or country of origin;
- to accord to refugees within a signatory's territory treatment at least as favourable as that accorded to its nationals with respect to freedom to practice their religion and freedom as regards the religious education of their children;
- to accord to a refugee free access to the courts of law;
- to accord to refugees lawfully staying in its territory the most favourable treatment accorded to nationals of a foreign country in the same circumstances as regards the right to engage in wage-earning employment;
- to accord to refugees the same treatment as is accorded to nationals with respect to elementary education; and
- to accord to refugees lawfully in its territory the right to choose their place of residence and to move freely within its territory, subject to any regulations applicable to aliens generally in the same circumstances.

The extent to which obligations beyond the obligation of non-refoulement (and the obligations under Art 31 of the Refugees Convention concerning refugees unlawfully in the country of refuge) apply to persons who claim to be refugees but whose claims have not been assessed is a question about which opinions may differ. It is not necessary to decide that question. What is clear is that signatories to the Refugees Convention and the Refugees Protocol are bound to accord to those who have been determined to be refugees the rights that are specified in those instruments including the rights earlier described.<sup>33</sup>

These minimum standards in the Refugee Convention are now supplemented by international human rights law, in both treaties (although Malaysia is not party to many of them) and customary international law. Thus, Malaysia's human rights record is relevant. This includes assessment of substantive and procedural standards, including questions of remedies, non-discriminatory or equivalent treatment with nationals, and protection of fundamental human rights.<sup>34</sup>

Human rights organizations have documented the very uncertain legal status of asylum seekers in Malaysia and their lack of access to basic services. While the Arrangement states that those transferred will be 'treated with dignity and respect and

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<sup>33</sup> *M70* (n 9) para 117, per Gummow, Hayne, Crennan and Bell JJ (footnotes omitted).

<sup>34</sup> Goodwin-Gill and McAdam (n 14) 396.

in accordance with human rights standards',<sup>35</sup> and that they will enjoy standards of treatment consistent with those set out in the Operation Guidelines at Annex A',<sup>36</sup> the Operational Guidelines do not include any reference to human rights. Instead, they list forms of assistance that will be provided to those transferred to Malaysia which will obviously help to 'fulfil' certain human rights, but without any mechanisms to ensure these rights are 'respected' and 'protected'.<sup>37</sup> These forms of assistance include:

- provision of accommodation by the International Organization for Migration (IOM) for approximately one month after arrival;<sup>38</sup>
- support payment to cover living costs for first month;<sup>39</sup>
- access to self reliance opportunities including employment;<sup>40</sup>
- access to private or information education for school age children;<sup>41</sup>
- access to basic health care under UNHCR and IOM arrangements;<sup>42</sup>
- access to UNHCR's arrangements for supporting vulnerable persons.

Much of the assistance provided for by the Guidelines is to be delivered by UNHCR or IOM. Indeed, the Arrangement was concluded 'on the basis that UNHCR and International Organization for Migration (IOM) can fulfil the roles and functions envisaged in the Operational Guidelines'.<sup>43</sup> The resources of these organizations, particularly UNHCR, are extremely limited.

This list of entitlements falls considerably short of Australia's human rights obligations under international law. To the extent that the assistance stipulated in the Guidelines *does* fulfil particular human rights obligations, no provision is made for how Australia or Malaysia will monitor and guarantee delivery, or what would happen in the event that UNHCR or IOM cannot fulfil the relevant roles and functions. As the High Court's judgment in *M70* recognizes, asylum seekers transferred to Malaysia have no mechanisms for enforcing their rights, and Malaysia's lack of international treaty obligations means that they cannot bring a complaint against Malaysia before an international human rights body, such as the UN Human Rights Committee or the UN Committee against Torture.

Human rights organizations and others have also documented forms of ill-treatment to which asylum seekers in Malaysia are exposed.<sup>44</sup> Under Malaysian law, refugees and

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<sup>35</sup> Clause 8(1).

<sup>36</sup> Clause 10(4)(a).

<sup>37</sup> All human rights obligations require States to respect and fulfil rights themselves, and to ensure they are protected from violation by third parties (private individuals, for example). The obligations to respect and protect necessitate State machinery for the protection of rights.

<sup>38</sup> Guidelines 3.1(c).

<sup>39</sup> Guidelines 3.2(c).

<sup>40</sup> Guidelines 3.2(a).

<sup>41</sup> Guidelines 3.3(a).

<sup>42</sup> Guidelines 3.4.

<sup>43</sup> Clause 3.

<sup>44</sup> See eg Human Rights Watch, 'Malaysia: Country Summary' (January 2011); Amnesty International, 'Abused and Abandoned: Refugees Denied Rights in Malaysia' (2009); Amnesty International, 'Human Rights at Risk in Mass Deportation of Undocumented Migrants' (2004); UN Human Rights Council, *Report of the Working Group on Arbitrary Detention: Mission to Malaysia* UN Doc A/HRC/16/47/Add.2 (8 February 2011).



asylum seekers are considered to be ‘illegal’ migrants and have no formal legal status. It was an agreed fact between the parties in *M70* that Malaysia does not recognize refugee status in its domestic law, nor is it a party to the Refugee Convention or its Protocol.<sup>45</sup> Indeed, section 6(3) of the *Immigration Act 1959* (Malaysia) provides that it is an offence for a non-citizen to enter Malaysia without a valid entry permit or pass, the punishment for which is a fine, imprisonment for a term not exceeding five years or both, and whipping of not more than six strokes,<sup>46</sup> although pursuant to the Arrangement the 800 transferees are, in theory, to be exempted from this.<sup>47</sup> In *M70*, however, French CJ commented on the ‘fragility’ of this arrangement, especially in so far as persons who have already breached Malaysia’s domestic law are concerned.<sup>48</sup>

Asylum seekers in Malaysia face the possibility of arrest, detention in squalid conditions, whipping (which qualifies as torture), return to persecution, and other forms of ill-treatment.<sup>49</sup> There are insufficient safeguards in the Arrangement to exclude the possibility of such ill-treatment, especially over the longer term. It is particularly important to note that if living conditions in Malaysia threaten people’s ability to live in dignity and to subsist, then they may amount to inhuman or degrading treatment, which is a violation of international human rights law.<sup>50</sup>

#### **4. Additional Considerations in relation to Children**

It is very unclear what procedures are in place to assess special vulnerabilities of asylum seekers and to provide for them. The Arrangement does not adequately address this, and, given the general conditions for asylum seekers in Malaysia, it is unlikely they would be sufficiently catered for. The Arrangement provides no express protection to children, apart from stating that special procedures for vulnerable cases, including unaccompanied minors, ‘will be developed’.<sup>51</sup> The ‘development’ of guidelines for vulnerable persons is not a sufficient guarantee.

The Arrangement may result in violation of Australia’s obligations under the Convention on the Rights of the Child. Australia is obliged to ensure refugee children ‘receive appropriate protection and humanitarian assistance in the enjoyment of applicable rights’ (article 22) and to make the best interests of the child a primary consideration in ‘all actions’ concerning children (article 3), including decisions such as those made under section 198A(1) to take refugee and asylum seeker children to a so-called safe third country.

In relation to children seeking asylum, UNHCR has developed Guidelines on Formal Determination of the Best Interests of the Child.<sup>52</sup> The aim of these guidelines is to assist States to ensure that they are complying with their obligations under the

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<sup>45</sup> *M70* (n 9) para 30 per French CJ.

<sup>46</sup> *Ibid.*

<sup>47</sup> Pursuant to section 55(1) of the Malaysian Act.

<sup>48</sup> *M70* (n 9) paras 33, 66 per French CJ.

<sup>49</sup> Amnesty International, ‘Abused and Abandoned’ (n 44) 3.

<sup>50</sup> See eg *R (Limbuella) v Secretary of State for the Home Department* (2006) 1 AC 396; *MSS* (n 6); Michigan Guidelines on the Right to Work (2010) 31 Michigan Journal of International Law 289, 295 (explanatory note) paras 9, 22.

<sup>51</sup> Clause 8(2).

<sup>52</sup> UNHCR, ‘Guidelines on Determining the Best Interests of the Child’ (May 2008) <http://www.unhcr.org/refworld/docid/48480c342.html>.

Convention on the Rights of the Child in relation to child asylum seekers and refugees. The Best Interest Assessment ('BIA') and Best Interest Determination ('BID') should be carried out by individuals with some expertise in child protection or welfare needs. The aim of the BIA/BID process is to ensure that there is a comprehensive review of a child's individual situation and needs, and to enable the child's views to be heard and protection gaps to be identified. It is not clear that a BIA or BID takes place before children are removed pursuant to the Arrangement.

In General Comment No 6 on Treatment of Unaccompanied and Separated Children Outside their Country of Origin, the Committee on the Rights of the Child recognized a broad *non-refoulement* norm whenever 'irreparable harm' may occur to a child. This includes protection arising under article 6 of the Convention on the Rights of the Child, which concerns the life, survival and *development* of the child. The Committee set out a number of protection criteria which must be fulfilled, including the appointment of a guardian, access to education and so on.<sup>53</sup> As the Australian Human Rights Commission submitted in its intervention in *M106*, there is simply not enough detail in the Arrangement with Malaysia to ensure that Australia meets its protection obligations towards unaccompanied minors.<sup>54</sup> It does not appear that unaccompanied minors will have guardian in Malaysia and it is not clear how their vulnerability will be addressed.

To return children to a situation where they are not assured of even the basic guarantees for refugees, let alone a durable solution, will impact adversely on them. We note that in the EU, under article 6 of the Dublin II Regulation,<sup>55</sup> unaccompanied minors are permitted to reunite with family members legally staying in one of the other EU Member States, and that in the absence of such family members, the State responsible for hearing the child's claim to asylum is the State in which the claim is *lodged*. In other words, the legal position in comparable countries is that unaccompanied minors should not be sent to the back of a so-called 'queue' on the basis that they have arrived without a visa. Rather, they are entitled to be treated with the compassion and concern that their status as children—extremely vulnerable children—demands.

## 5. Conclusion

It is clear that the Arrangement between Australia and Malaysia is driven by domestic political considerations and not by international legal principle or ethical considerations. The argument that the Agreement will save lives at sea is a smokescreen. Asylum seekers will continue to make dangerous journeys because they are desperate, but the Australian government hopes these journeys will not be to Australian shores. There are other, less punitive ways in which the Australian

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<sup>53</sup> Committee on the Rights of the Child, 'General Comment No 6', UN Doc CRC/GC/2005/6 (1 September 2005).

<sup>54</sup> Submissions on behalf of the Australian Human Rights Commission (intervening), para 60: [http://www.hcourt.gov.au/assets/cases/m70-2011/M106-2011\\_HRC.pdf](http://www.hcourt.gov.au/assets/cases/m70-2011/M106-2011_HRC.pdf).

<sup>55</sup> Council Regulation (EC) No 343/2003 of 18 February 2003 establishing the Criteria and Mechanisms for Determining the Member State Responsible for Examining an Asylum Application Lodged in One of the Member States by a Third-Country National, OJ L 50 (25 February 2003), 1–10. There is currently a proposal to amend Dublin II and to incorporate the best interests principle.

government could implement measures to improve conditions and processing in the region which could lessen the need for these dangerous journeys.

The Arrangement shows a remarkable level of ignorance about the way forced displacement occurs in practice. It is farcical to assume that Australia can smash the people smugglers' 'business model'. Neither Australia, nor any other State, can alone stall the operation of smugglers who are tapping into human suffering and desperation. Pouring similar amounts of resources into root causes of movement, conditions for asylum seekers in the region broadly, and encouraging our neighbours to implement international legal standards and domestic safeguards for protection would be a far more productive exercise. But perhaps with a policy of mandatory detention and appalling conditions of treatment well-documented in countless international and national reports, Australia has outsmarted itself. Pot, kettle and black are three words that spring to mind.

We would strongly urge the Committee to re-read the many recommendations made by previous inquiries into refugee issues in Australia. Rather than spending countless hours yet again retracing the same material in a slightly different guise, taking note of submissions and recommendations made by experts in the field over many years might lead to an alternative strategy which actually produces humane, principled and efficient outcomes.

Finally, the arguments in the submission should in no way be misconstrued as suggestion that the alternatives offered by the Coalition are preferable. They are not. The Howard government systemically violated international refugee and human rights law through an asylum policy focused on deterrence, interdiction, and penalization, rather than the rights and needs of refugees and asylum seekers, as many of us have written elsewhere.<sup>56</sup> The reintroduction of the Pacific Solution and related policies would once again raise serious human rights concerns and the extent to which Australia is implementing its treaty obligations in good faith.

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<sup>56</sup> See eg Penelope Mathew, 'Australian Refugee Protection in the Wake of the Tampa' (2002) 96 *American Journal of International Law* 661; Mary Crock, 'In The Wake Of The Tampa: Conflicting Visions Of International Refugee Law in the Management of Refugee Flows' (2003) 2 *Pacific Rim Journal of Law and Policy* 49; Savitri 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; Angus Francis, 'Bringing Protection Home: Healing the Schism between International Obligations and National Safeguards created by Extraterritorial Processing' (2008) 20 *International Journal of Refugee Law* 253; Jane McAdam and Kate Purcell, 'Refugee Protection in the Howard Years: Obstructing the Right to Seek Asylum' (2008) 27 *Australian Year Book of International Law* 87.