amnesty international australia

Introduction

This paper has been prepared by Amnesty International for the Senate Select Committee on a Certain Maritime Incident on its inquiry into both the "children thrown overboard" claims by the Government during the election campaign, and the wider issue of the Government's "Pacific solution" in paying Pacific countries to take asylum seekers intercepted in Australian waters. Amnesty International will only be addressing the latter issue in this submission, addressing part (d):

(d) in respect of the agreements between the Australian Government and the Governments of Nauru and Papua New Guinea regarding the detention within those countries of persons intercepted while travelling to Australia, publicly known as the `Pacific solution':

(i) the nature of negotiations leading to those agreements,
(ii) the nature of the agreements reached,
(iii) the operation of those arrangements, and
(iv) the current and projected cost of those arrangements.

In this submission Amnesty International wishes to highlight both the human rights obligations the Australian government has to those fleeing persecution and how we see the 'Pacific solution' undermining those obligations. In particular this paper addresses the question of the lawfulness of the scheme in the context of Australia's international obligations.

When examining the '*nature of the agreements reached'* Amnesty International wishes to highlight:

- The fundamental right to seek asylum, including non-rejection at the frontier.
- Australia's obligations under Article 31(1) of the Refugee Convention
- The use of 'safe third countries'

When examining the *'operation of those agreements'* Amnesty International wishes to highlight:

- our concerns with Australia exporting mandatory detention
- the imperative not to detain children in these locations

Amnesty International submits that:

- the ‘Pacific solution’ undermines, rather than strengthens notions of burden, or responsibility, sharing;
- Australia's emphasis on combating ‘people smuggling’ unilaterally, which is a symptom of the inadequacy of refugee protection in countries of first asylum rather than a cause of refugee movement, does little to encourage international cooperation.

In making our submission we examine the following:

- The Universal Declaration of Human Rights
- The 1951 Convention relating to the Status of Refugees
- Executive Committee of the United Nations High Commissioner for Refugees (EXCOM) Conclusions[1]
- The International Covenant on Civil and Political Rights
- The Convention on the Rights of the Child
- The United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment

In this submission Amnesty International wishes to raise a number of important questions which need be addressed by the Australian government to ensure that its 'Pacific solution' meets its international obligations to those fleeing persecution. In particular, in order to ensure durable solutions are found for those in need of protection.

Amnesty International’s work on refugees

By way of background, because refugee rights are a fundamental tenet of human rights, Amnesty International aims to contribute to the worldwide observance of human rights as set out in the Universal Declaration of Human Rights and other internationally recognised standards. We oppose grave violations of the rights of every person, and support the right of people freely to hold and express their convictions and to be free from persecution by reason of their ethnic origin, sex, colour or language, and the right of every person to physical and mental integrity. We oppose abuses by state and non-state actors - such as opposition groups.

Arising from our concerns, we work to prevent the human rights violations that cause refugees to flee their homes. At the same time, Amnesty International opposes the forcible return of any individual to a country where he or she faces serious human rights violations on return. We therefore seek to ensure that states provide individuals with effective and durable protection from being sent against their will to a country where they risk such violations, or to any third country where they would not be afforded effective and durable protection against such return.

In this regard, Amnesty International bases its work on the fundamental principle of *non-refoulement*, which can be found in several treaties including the 1951 UN

[1] UNHCR’s Executive Committee pronounces on the interpretation of the Refugee Convention through Annual International Protection Notes, or Conclusions.

Convention relating to the Status of Refugees and Article 3 of the Convention Against Torture and is recognised by the international community as a norm of customary international law, binding on all states.

What is the 'Pacific solution'?

The so-called 'Pacific solution', developed by the Australian government in response to the Tampa 'crisis', initially referred to the decision by the Australian government to detain those rescued by the MV Tampa. Subsequently the term was also applied to asylum-seekers either intercepted by the Australian Navy or landed on an excised Australian offshore territory, and sent to the Pacific Island State of Nauru, for processing (including financial arrangements). Its meaning has been further extended to include:

- the excising of certain Australian offshore territories;
- the decision by New Zealand to accept some of those rescued by the MV Tampa;
- the use of the Australian Navy to 'turn around' ships attempting to land asylum-seekers on an Australian territory;
- the setting up of detention facilities on Manus island, belonging to PNG (including financial arrangements);
- the setting up of detention facilities on Cocos and Christmas islands;
- the use of UNHCR 'determination procedures', even when the determination is being made by Australian officials, which has denied those being processed for refugee status in this way the same access to legal aid and appeal rights as those processed in Australia;
- the introduction of new legislation in September 2001, which has created new visa categories which provide a hierarchy of 'rights' (or more specifically penalties) depending on the manner, or route, taken by a refugee in reaching Australia.

Amnesty International's concerns with each of these elements of the 'Pacific solution' are either specifically addressed, or addressed in more general terms, when discussing the lawfulness of the 'Pacific solution' below.

Lawfulness of the 'Pacific solution'

(ii) The nature of the agreements reached

At the outset Amnesty International wishes to draw attention to the inherent contradiction embodied in the Australian Government's so-called 'Pacific solution.' On the one hand, Australia, which helped draft the *Universal Declaration of Human Rights* (adopted and proclaimed by the UN General Assembly) and by signing and ratifying the 1951 UN *Convention relating to the Status of Refugees*, has recognised the right of persecuted people to seek asylum. On the other hand, in the 'Pacific solution,' Australia is taking what are widely regarded internationally as extreme measures in order to prevent those fleeing persecution from exercising the right to seek asylum in Australia.

It is well settled at international law that a provision of national law cannot justify a breach of international law which is binding on the state. Likewise, a state's national

law on immigration and immigration control must not be implemented in a way which breaches its obligations under customary international law or treaties to which it is a party.

The right to seek asylum

The right to seek asylum and enjoy asylum from persecution is set out in the Universal Declaration on Human Rights, Article 14 (1).

The right to seek asylum is also implicitly recognised in the 1951 UN Convention relating to the Status of Refugees*,* to which Australia is a State Party. It has been expressed by the United Nations High Commissioner for Refugees:

> "While the right to seek asylum is not explicitly included in the 1951 Convention, it is nevertheless implicit in its very existence. Provisions of the Convention which are particularly relevant to the right to seek asylum include the prohibition on the imposition of penalties for illegal entry (Article 31), the prohbition on expulsion (Article 32), and, of course, the prohibition on refoulement (Article 33)."[2]

Also, in Conclusion 85 (XLIX), of the Executive Committee[3] "… reaffirms that the institution of asylum, which derives directly from the right to seek and enjoy asylum from persecution set out in Article 14 of the [Universal] Declaration, is among the most basic mechanisms for the protection of refugees."

The UNHCR has further noted:

> "States have a legitimate interest in controlling irregular migration and a right to do so through various measures, including visa requirements, airport screening and sanctions imposed on airlines and other group carriers for transporting irregular migrants. When, however, these measures interfere with the ability of persons at risk of persecution to gain access to safety and obtain asylum in other countries, then States act inconsistently with their international obligations towards refugees."[4]

By ratifying the Refugee Convention Australia implicitly recognises the right to seek and enjoy asylum in Australia, otherwise the 1951 Refugee Convention would be meaningless.

QUESTIONS RAISED:

- If the asylum seekers on Nauru and Manus Island are entitled to seek and enjoy asylum pursuant to Article 14 of the Universal Declaration of Human Rights through the vehicle of the 1951 Refugee Convention, in which country are they seeking asylum?
- In Nauru?
- In Manus Island?
- If they are not seeking asylum in those places, which despite their physical location they patently

[2] From Relocating Internally as a Reasonable Alternative to Seeking Asylum – The So-Called "Internal Flight Alternative" or "Relocation principle*"* UNHCR position paper, February 1999

[3] Australia is a member of EXCOM, an intergovernmental body of more than fifty states established by resolution of the UN General Assembly to advise the High Commissioner in the exercise of his programmes and to approve his assistance programmes. Its conclusions are generally adopted by consensus and are regarded as being authoritative in the field of refugee protection.

[4] UNHCR Position: Visa Requirements and Carrier Sanctions (September 1995)

are not, are they seeking asylum in Australia?

- Is it possible to seek asylum nowhere?

Non-rejection at the frontier

Amnesty International remains concerned about elements of the 'Pacific solution' whereby the Australian Navy has been positioned in waters off the Australian coast with the express purpose of ensuring that those boats do not reach Australian shores. That the principle of *non-refoulement* includes non-rejection at the frontier is stated explicitly in international instruments.[5] In EXCOM Conclusion 22[6] paragraph (II)(A)(2) of 1981, it is stated that:

> "2. In all cases, the fundamental principle of *non-refoulement,* including non-rejection at frontiers, must be respected. The displaced should receive admission to safety, and UNHCR should be given unrestricted access to persons of its concern."

While there has as yet been no indication that *refoulement* has resulted, it cannot be ruled out, especially given that Amnesty International is aware of no persons subject to the 'Pacific solution' who has in fact found effective and durable protection. The reasons for this are straightforward. Although rejection at the frontier of the putative asylum State may not result in immediate or direct return to the country where the individual would face persecution, the State whose international obligations have been engaged loses control but retains responsibility if *refoulement* results.

Given that the prohibition in Article 33(1) of the 1951 Refugee Convention is against return "in any manner whatsoever" and Australia's protection obligations have clearly been engaged, including by its own acknowledgement, it is clear that responsibility for any *refoulement* that results in this instance will be attributable to Australia.

QUESTIONS RAISED:

- At international law, what positive legal authority can Australia draw on for sending persons seeking asylum in Australia to another country?
- Given the protective purpose and spirit of the 1951 Refugee Convention, is the argument that "there is nothing in the Convention that says we can't" a sustainable one? Put another way, can Australia do anything to refugees as long as the 1951 Convention does not expressly prohibit it?

Article 31 - non-penalisation

It is important to consider to what extent the actions of the Australian government are contrary to the spirit of Article 31(1) of the Refugee Convention which requires that refugees shall not be penalised solely by reason of unlawful entry or because, being in need of refuge and protection, they remain illegally in a country. Under Article 31 of the Refugee Convention, State Parties:

[5] The OAU: 1969 Convention on the Specific Aspects of Refugee Problems in Africa, Article 2(3) found in the 1984 Cartagena Declaration III (5)

[6] It is important to note that Australia sponsored EXCOM Conclusion 22

> "shall not impose penalties, on account of their illegal entry or presence, on refugees who, coming directly from a territory where their life or freedom were threatened ... enter or are present in their territory without authorisation, provided they present themselves without delay to the authorities and show good cause for their illegal entry or presence."

QUESTIONS RAISED:

- Does Australia rely on Article 31 of the 1951 Refugee Convention as providing a basis on which to establish the "Pacific solution"?
- Is it possible to reconcile the Pacific solution with Australia's obligations under Article 31 of the 1951 Convention given that the scheme permits for no consideration or analysis of the circumstances of each individual case?[1]
- Does refusal of entry by the armed forces and transfer to another country for all intents and purposes against the will of the individuals concerned constitute a penalty under Article 31 of the Convention?
- If it is not a penalty, what is it?
- Even if it could be established in the individual case that a person had not "come directly" as required by Article 31(1), is the "Pacific solution" penalty disproportionate to the alleged "offence"?
- Is it a restriction on movement under Article 31(2)?
- If so, if it is being imposed without regard to the circumstances of any given individual, how is it possible to consider the measure other than arbitrary?

The only element of this provision which raises any real question is the interpretation of "coming directly", however the Australian government needs to explain how its interpretation of "coming directly" is consistent with internationally accepted interpretations of the expression.

The use of 'safe third countries'

While the use of 'safe third country' legislation to deny asylum seekers the right to seek protection is not new, being used by countries in Western Europe and North America, as well as Australia, the most recent approach by the Australian government under the 'Pacific solution' is unique. Traditionally safe third country legislation referred to legislation used by states to not consider the asylum claims of refugees deemed to have passed through another, "safe", country on their way to that state. When examining a states responsibility under Article 31(1) of the Refugee Convention and also due to the fact that there are no guarantees asylum seekers will be admitted, or will have access to a fair and satisfactory asylum procedure or will be protected against *refoulement*, these practices can be seen to violate a number of the fundamental obligations states have towards refugees.

A state can only be released from its obligations to consider someone's asylum application substantively if that responsibility is assumed by a safe third country, and it must first be establish that the third country is both safe and explicitly guarantees that it will take on the responsibility. Even when such guarantees can be obtained, an asylum-seeker who has compelling reasons to remain, such as established family links in the asylum country, should not be removed.[7]

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[7] Amnesty International, Refugees Human Rights Have No Borders, Amnesty International Publications, United Kingdom, 1997, p75

The decision by the Australian government to use 'safe third countries', even though Australia will continue to process the asylum seekers, under the 'Pacific solution' also raises serious questions under the appropriate use of 'safe third country' legislation. In examining the agreements between Australia and Nauru it is made quite explicit that the government of Nauru does not take on the responsibility for those being detained on its territory in any substantial way. Also, when examining the "irregular mover" concept as set in EXCOM Conclusion 58, which requires that a person must *have found* protection in order to be expected to return to their country of 'first asylum', not to mention the fact that an individual should have a connection or close links (see EXCOM Conclusion 15) it is difficult to determine on what basis the Australian government is transporting people against their will to 'third countries', especially when no durable solutions have been outlined by the Australian government.

QUESTIONS RAISED:

- Are the people on Nauru and Manus Island "refugees without an asylum country" (see EXCOM Conclusion 15)?
- If not, which is their asylum country, i.e. whose protection obligations have been engaged? Nauru? Manus Island - PNG? Australia?

If the asylum seekers are "refugees without an asylum country" then EXCOM Conclusion 15 should apply, which provides, *inter alia*, that: "It is the humanitarian obligation of all coastal States to allow vessels in distress to seek haven in their waters and to grant asylum, or at least temporary refugee, to persons on board wishing to seek asylum". The same conclusion also provides that: "Regard should be had to the concept that asylum should not be refused solely on the ground it could be sought from another State. Where, however, it appears a person, before requesting asylum, already has a connection or close links with another State, he may if it appears fair and reasonable be called upon first asylum from that State."

(iii) The operation of those arrangements

Mandatory detention of unauthorised arrivals

Amnesty International is extremely concerned that the Australian policy of mandatory detention has been exported to its Pacific neighbours.

Amnesty International has consistently taken the view that Australia's mandatory detention law and policy is both arbitrary and unlawful as a matter of international law. The export of a similar mandatory detention regime lends support to the view that Australia is implicating both itself and its Pacific counterparts in similar human rights violations.

Australia has committed itself to other relevant international human rights standards, in addition to the 1951 Refugee Convention. These standards apply to anyone in Australian territory, including foreigners without proper travel documents. Apart from the Refugee Convention, international standards and guidelines particularly relevant to refugee protection in Australia include the Annual International Protection

Notes and the "Guidelines on Detention of Asylum Seekers" issued by UNHCR, the International Covenant on Civil and Political Rights (ICCPR), the Convention on the Rights of the Child, the UN Standard Minimum Rules for the Treatment of Prisoners (the Standard Minimum Rules) and the Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment.

With specific reference to Australia's mandatory detention policy, under Article 9 of the ICCPR a person may only be detained on grounds and under procedures that are lawful and reviewable in court, as well as not arbitrary or otherwise in violation of human rights standards. The Article's provisions covering administrative detention - such as detention of asylum-seekers in Australia - state that:

> "1. Everyone has the right to liberty and security of person. No one shall be subjected to arbitrary arrest or detention. No one shall be deprived of his liberty except on such grounds and in accordance with such procedure as are established by law […]
>
> 4. Anyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings before a court, in order that that court may decide without delay on the lawfulness of his detention and order his release if the detention is not lawful.
>
> 5. Anyone who has been the victim of unlawful arrest or detention shall have an enforceable right to compensation."

Based on the majority views of UN delegates involved in the drafting of the Convention, the prohibition of "arbitrary" detention has long been recognized to mean not only detention "against the law", but also detention which is not just, appropriate and necessary in all the circumstances of the case.

> "Cases of deprivation of liberty provided for by law must not be manifestly unproportional, unjust or unpredictable, and the specific manner in which an arrest is made must not be discriminatory and must be able to be deemed appropriate and proportional in view of the circumstances of the case."[8]

In April 1997 the UN Human Rights Committee expressed its views in similar terms on the detention for over four years of a Cambodian refugee in Australia. It found that arbitrary detention must be interpreted more broadly than "against the law" and

> "include[s] such elements as inappropriateness and injustice. Furthermore, remand in custody could be considered arbitrary if it is not necessary in all the circumstances of the case, for example to prevent flight or interference with evidence: the element of proportionality becomes relevant in this context. [...] [E]very decision to keep a person in detention should be open to review periodically so that the grounds justifying the detention can be assessed. In any event, the detention should not continue beyond the period for which the State can provide appropriate justification. For example, the fact of illegal entry may indicate the need for investigation and there may be other factors particular to the individual such as the likelihood of absconding and lack of cooperation, which may justify detention for a period." (A v Australia[9]).

[8] Manfred Nowak (1993), Commentary on the UN Covenant on Civil and Political Rights, p. 173
See also UN Document A/4045 (1958), paragraph 49

[9] Views of the Human Rights Committee in the case of A (name deleted) v Australia, Communication No. 560/1993, UN Document CCPR/C/59/D/560/1993 (30 April 1997)

International standards of refugee protection provide clear grounds for acceptable, temporary detention of asylum-seekers, including Conclusion 44 (1986) of EXCOM. Conclusion 44 states that *"in view of the hardship which it involves, detention should normally be avoided"*, but recognises a state's right to temporarily detain an asylum-seeker in exceptional cases where detention is necessary in order:

(a) to verify his or her identity,

(b) to determine the elements on which the claim to protection is based,

(c) to deal with cases where refugee or asylum seekers have destroyed their travel and/or identification documents in order to mislead the authorities of the State in which they intend to claim asylum, or

(d) to protect national security and public order[10].

However, detention on any of these grounds, should not be automatic or prolonged. The Australian Government accepted as recently as December 1997 that *"prolonged or indefinite detention is undesirable"*. The acceptance came in response to the Human Rights Committee's opinion that *"detention should not continue beyond the period for which the State can provide appropriate justification"*. The UNHCR's "Guidelines on Detention of Asylum Seekers" state that asylum-seekers should only be detained as a last resort on exceptional grounds, after all possible alternatives to detention have been exhausted.

Specific concerns for those detained under the 'Pacific solution'

While Amnesty International has broader concerns with those detained under the 'Pacific solution', as set out above, Amnesty International believes that a number of other rights refugees are entitled to under international standards are also not being respected, or are severely limited, under the 'Pacific solution'. These include:

- Right of access to legal counsel;[11]
- Right to communicate with UNHCR;[12]
- Right to notify their family of the fact and place of detention;[13]
- Right to be visited by, and to correspond with, members of their family;[14]
- Right to communicate with the outside world;[15]

[10] Conclusion No. 44, 1986 of the UNHCR's Executive Committee (EXCOM), Detention of Refugees and Asylum-Seekers, paragraph b

[11] Each detainee must be informed promptly of their right to a lawyer of his/her own choice and how to avail him/herself of this right (UN Body of Principles 13). The detainee has the right to communicate with and be visited by counsel without delay. The detainee and his/her counsel must have adequate time and facilities for the preparation of their case concerning the lawfulness of detention (UN Body of Principles 17, 18)

[12] EXCOM Conclusion 44 (g) and 22.III.

[13] UN Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment (UN Body of Principles) 16; UN Standard Minimum Rules for the Treatment of Prisoners 92

[14] UN Body of Principles 19; UN Standard Minimum Rules for the Treatment of Prisoners 92.

[15] UN Body of Principles 19

- Right to medical care;[16]
- Right to humane conditions of detention, which take into account their special status as asylum-seekers; they should not be held in places where there physical safety is endangered;[17]
- Refugee children should not be detained.[18]

Regardless of which Pacific island the Australian government has negotiated (including financial inducements) for significant numbers of asylum seekers to be detained, ultimately the Australian government has built the facilities, is providing "security" by contracting private firms, is processing their claims and will be responsible for them once their status has been determined. As such it is ultimately the responsibility of the Australian government to ensure that all the rights of those detained are recognised and respected in accordance with Australia's international obligations.

When examining the fundamental principle of *non-refoulement* another specific concern with the Australian government's 'Pacific solution' is the uncertainty about what will happen to those individuals who are rejected as refugees but where an assessment is made, under the UNCAT, that they cannot be returned to their own country as it would amount to *refoulement*. As yet the Australian government has not publicly stated what it intends to do with people who fall in to this category. Currently in Australia it would appear, under Australian law, that people who fall into this category are forced to remain in detention indefinitely, raising serious concerns that their detention will ultimately become arbitrary under Article 9 of the ICCPR. Given the commitments made by the Australian government to the governments of Nauru and PNG that people will not be detained indefinitely on their territories Amnesty International is deeply concerned, given the lack of assurances from the Australian government regarding the possible fate of those individuals who fall into this category, as to how Australia plans to meet its human rights obligations towards these individuals.

QUESTIONS RAISED:

- How will Australia ensure compliance with Article 3 of the Convention against Torture, in cases where the 1951 Refugee Convention may not apply?
- How will Australia ensure that such persons are not held in indefinite detention in violation, *inter alia*, of Article 9 of the International Covenant on Civil and Political Rights?

Children in detention

Amnesty International has raised with the Australian government, on a number of occasions, our concerns with Australia's mandatory detention policy and its compatibility with Australia's obligations under the Convention on the Rights of the Child CROC). Australia's ratification of the CROC obligates Australia under international law to ensure certain standards regarding children. The convention

[16] UN Body of Principles 24, 25 and 26
[17] EXCOM Conclusion 44(f)
[18] 1989 Convention on the Rights of the Child, Article 37

applies to all children. Under the convention, in any decision regarding children the child's best interest must be a primary consideration (Article 3(1)). Importantly, Article 37(b) provides that a child must *not* be *arbitrarily* deprived of his/her freedom. Detention should be a *last* resort and for the *shortest* period possible. According to international standards, if it is necessary to detain a child, that child must be supervised by *competent* and suitably *well-trained* staff. Particularly, the child must be separated from adults unless it is not in their best interests to do so (Article 37(c)). As such, the Australian government has an international law obligation to ensure that every child receives special protection from all forms of abuse (Article 19 CROC) and further, that no child be subjected to torture or other cruel, inhuman or degrading treatment or punishment (Article 37(a) CROC).

QUESTIONS RAISED:

- What specific training has been given to those operating the facilities on Manus and Nauru with regard to the supervision of children?
- On what basis can detention of children under the 'Pacific solution' be considered a last resort under Australia's obligations under the CROC?

Access to fair procedures

States' asylum procedures, including the procedures and practices followed at their airports and borders, must be adequate to identify asylum-seekers who would risk serious human rights violations if sent against their will to another country.

Amnesty International calls on all governments to observe certain basic principles in their asylum procedures. These procedures are essential in helping to prevent the forcible return of asylum-seekers at risk of serious human rights violations. These principles are based on international standards, such as are set out in the ICCPR, relevant Conclusions adopted by EXCOM, and Recommendation R(81)16 of the Committee of Ministers of the Council of Europe dealing with the harmonization of national procedures relating to asylum. They include specific practical measures which are necessary for the effective implementation of international standards.

According to a DIMIA Fact Sheet[19], "Refugee status determination is being conducted in accordance with the standards and broad processes adopted by the UNHCR". Amnesty International is concerned that the Australian Government is deliberately using the so-called "offshore processing facilities" to circumvent the implementation of its own procedures established under Australian law, in particular the safeguards that have been built into them. Amnesty International is concerned that the determination of refugee status procedures on Nauru, and presumably also on Manus Island, fall short of acceptable standards in the following respects:

- assurances of competence, impartiality and independence - if Australia is deliberately avoiding scrutiny, how can we be confident of that the procedures bear these hallmarks of a fair and satisfactory asylum procedure?
- right to legal counsel and interpreters
- right to contact with UNHCR [to date those on Manus have not been visited by UNHCR]

[19] DIMIA Fact Sheet 75 "Processing Unlawful Boat Arrivals"

- right to of appeal to an independent body, which should normally be of a judicial nature.

Amnesty International has concerns not only about the adequacy of procedural safeguards themselves but also how procedures are implemented.

Responsibility, or burden sharing

One of the bases on which Australia is persisting with its 'Pacific solution' and seeking to engage other States to resettle persons found to be refugees is the so-called principle of burden or responsibility-sharing. A number of factors mitigate strongly against any reasonable conclusion that the 'Pacific solution' represents a legitimate approach to responsibility-sharing. The first are the relatively small numbers of people involved, which the Australian government is calling on other countries to resettle. The second, is the cost of the 'Pacific solution' compared with the amount of money Australia provides internationally to organisations and countries faced with far greater "burdens".

EXCOM Conclusion 15 indicates that the principle of burden or responsibility sharing is triggered in situations of large scale influx. It is impossible to sustain an argument that the numbers arriving in Australia are constitutive of a large scale influx. It is worth noting that due to the plight of the Indo-Chinese asylum-seekers, during the late 1970s and early 1980s, a UN meeting in July 1979 was initiated in order to ensure those fleeing persecution would receive protection. This meeting produced a number of practical proposals for those rescued at sea including substantially increased resettlement offers and financial aid. A subsequent meeting in August 1979 saw the settlement scheme known as DISERO (Disembarkation Resettlement Offers) established. Interestingly Australia was one of the nine countries who attended this meeting, along with Canada, France, Federal Republic of Germany, Italy, Japan, the Netherlands, the UK and the US. It is also interesting to note the numbers rescued during this period, as compared to those detained under the 'Pacific solution', with UNHCR recording 8,624 individuals rescued by 128 vessels in 1979; 15,563 rescued by 217 ships in 1980 and 14,589 rescued from 213 ships in 1981. Importantly, for those establishing a right to refugee protection during this time, a durable solution (resettlement) would follow.

At present globally UNHCR is concerned with 21.8 million people (2001), of which 914,000 asylum seekers (4%) are of concern to UNHCR. In the Asian region there are approximately 25,000 asylum seekers, or 0.1% of the total number of people of concern to UNHCR. In 2000-2001 Australia had 13,015 people apply for asylum, amounting to 0.06% of the total number of concern to UNHCR. It is also worth noting that while the Italian government called for a "coordinated response at a European level" following the arrival of the merchant ship the Monica on 18 March 2002, with nearly 1000 people on board, they did not talk about burden, or responsibility sharing initiatives, nor initiate there own 'Pacific solution'.

When discussing burden or responsibility sharing the cost of the unilaterally initiated 'Pacific solution' is also of concern. Official government figures estimate the cost of setting up and running the detention centres in the Pacific at $96 million in 2001-02 ($72 million for the camps in Nauru, and $24 million for the detention centre in PNG). Nauru has been pledged a further $30 million for taking the asylum seekers

which is being spent on a range of development programs and PNG another $1 million.[20] These amounts need to be compared with the amount provided in aid to Afghanistan, $40.3 million, as of the 21 January 2002 and the US$11.9 million to UNHCR.

Rather than promoting burden sharing, organisations such as Amnesty International have noted how the measures undertaken by the Australian government have also been cited by countries more burdened by refugee influxes than Australia as a justification for refusing calls from the international community to open their borders.[21]

Focus on 'people smuggling'

Australia's highly controversial policy constitutes a challenge to international refugee protection and the global debate on the smuggling of asylum-seekers by transnational crime syndicates. Amnesty International recognizes that people smuggling poses serious and increasingly difficult challenges to governments. However, the organization is concerned that anti-people smuggling justification for the new emphasis on deflecting asylum seekers does not provide an effective solution to the problem, rather concerns surrounding issues of 'people smuggling' need to be addressed comprehensively, not unilaterally. Indeed, it does little to encourage international cooperation on humane and durable protection for those in need of it. We consider that the Pacific solution as a tool to combat people smuggling is both objectionable in terms of human rights and refugee protection standards and questions that it raises in that regard, and palpably fails to address the principle cause of so-called secondary movement, in particular the protection failures and inadequacies in countries of first asylum.

[20] Oxfam Community Aid Abroad, "Adrift in the Pacific" February 2002, p5
[21] Amnesty International, "Refugee protection is human rights protection", December 2001, AI Index: IOR 51/011/2001, p9

Conclusion

People intercepted off the coast of Australia and then taken to Nauru, to other Pacific islands or to off-shore Australian territories remain entitled to the same basic rights protecting their human dignity that apply to Australians in their home country. By making off-shore islands exempt from the application of Australian refugee law, or by taking asylum-seekers to Pacific countries, Australia cannot absolve itself of its responsibilities towards these people. By taking control of boats carrying asylum-seekers, transferring them to an Australian vessel and transporting them to another country where their treatment and safety is largely subject to Australian control, Australia has actively adopted responsibility for the safety and destiny of affected asylum-seekers. The fact that the laws of Nauru or Papua New Guinea apply in relation to asylum-seekers sent there does not absolve Australia from its considerable responsibility for the safety and well-being of these people.

At least as serious is the lack of binding guarantees and practical safeguards that none of those asylum-seekers whose refugee claims are rejected will be returned against their will to a country where they may face serious human rights violations, or which may deport them to where they face persecution. Such guarantees are essential to safeguard the fundamental principle of international refugee law that:

> "No Contracting State shall expel or return ("refouler") a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion."

The Australian government has indicated that the asylum-seekers it took to Nauru and Papua New Guinea will not be returned against their will to a place where they may face such persecution. However, it remains unclear how this assurance is to be met, and whether it would extend to the protection of rejected asylum-seekers against involuntary return to where they may face human rights violations and abuses not covered by Australia's interpretation of its obligations under the Refugee Convention. So far, the development of Australian refugee law, and domestic Australian debate on its new refugee policy has focused almost entirely on the Refugee Convention, effectively ignoring Australia's obligations under other international human rights instruments, such as the Convention against Torture and the International Covenant on Civil and Political Rights.

Amnesty International believes the so-called 'Pacific solution' is inherently flawed, because (a) it punishes the victims exploited by people smugglers in order to combat the crime, and (b) because it leaves thousands of refugees in a situation where they cannot achieve a durable solution to their plight. In addition, it disregards a number of fundamental human rights while purporting to preserve the barest minimum of protection rights enshrined in the 1951 Refugee Convention. Amnesty International believes that such selective regard for binding international human rights instruments is sending the wrong message to countries struggling to grant protection rights to far larger numbers of refugees and asylum-seekers than Australia has ever encountered.

It is simply an expression of shifting responsibility rather than sharing it, and a failure to responsibly fulfill in good faith Australia's commitment to refugee protection.

SUBMISSION PREPARED FOR AMNESTY INTERNATIONAL AUSTRALIA BY:

Dr Graham Thom
Refugee Coordinator
Amnesty International Australia
Private Bag 23
Broadway NSW 2007

(w) (02) 92177642