



BRIEFING ON EXTRA TERRITORIAL PROCESSING OF ASYLUM CLAIMS AS THEY RELATE TO A REGIONAL PROCESSING CENTRE PROPOSAL

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Amnesty International works to promote and defend the observance of all human rights enshrined in the Universal Declaration of Human Rights and other international standards. Protecting the rights of refugees, asylum seekers and others seeking international protection is an essential component of the organisation's global work.

The current situation

Amnesty International Aotearoa New Zealand strongly believes that a regional approach that prioritises the protection needs of asylum seekers and refugees is the only genuine and effective way to ensure refugees and asylum seekers do not make dangerous boat journeys to Australia, New Zealand and Canada.¹

Amnesty International is deeply concerned that the policies previously proposed by both major parties in Australia effectively constituted extra-territorial processing, and that if implemented would breach international law and further erode refugee protection in the Asia Pacific. With the confirmation of Ms Julia Gillard as Australia's Prime Minister, Amnesty International now details its concerns with her proposal for a regional processing centre.

Amnesty International does not believe this proposal will contribute to providing real solutions to regional refugee movements. It advises caution to any New Zealand involvement that could see it breach its international obligations.

For people fleeing violence, finding safety can be a long and difficult process. If refugees do not find safety in the country to which they first flee, they are often forced to make dangerous onward journeys, including by boat, to seek protection elsewhere. In many cases they do so without valid travel documents. Across the Asia Pacific, protection for refugees in countries of first asylum is diminishing. This lack of protection places individuals and families at risk of exploitation and human rights violations at the hands of security forces, people smugglers and many other groups.

While Asia has traditionally hosted a significant proportion of the world's refugee population, in recent years we have seen governments in the region engage in practices that significantly diminish refugee protection. Common practices include: continually denying asylum seekers access to United

This briefing paper is designed to outline Amnesty International's concerns with extra-territorial processing set out in its report; UK/EU/ UNHCR Unlawful and Unworkable – Amnesty International's views on proposals for extra-territorial processing of asylum claims, AI Index: IOR 61/004/2003. In addition it draws strongly on a similar briefing prepared by AI Australia, and which reflects Amnesty's experiences with Australia's previous "Pacific Solution" and the existing Christmas Island processing centre. There is particular need at this time to reiterate these concerns in a Pacific context given Australia has put forward policies, in response to recent boat arrivals, which include extra-territorial processing. Following these policy initiatives New Zealand has received requests that it become involved with a Regional Processing Centre.



Nations High Commissioner for Refugees (UNHCR); forcibly returning (refouling) refugees recognised by UNHCR; pushing boats back to sea, resulting in a significant loss of life; and increasingly using detention.

As one of the few countries in the region to have signed the 1951 Convention relating to the Status of Refugees (Refugee Convention), New Zealand should be leading by example and demonstrating how best to protect refugees by treating them in a manner that is in keeping with its international obligations.

Policies designed to respond to unauthorised boat arrivals should be firmly grounded in principles of international human rights law and focused on the provision of durable solutions to refugees. The Australian proposal clearly represents an attempt to circumvent important domestic and international legal instruments, including the Refugee Convention. It should be noted that the current proposals are being developed in a highly charged political environment and demonstrate little regard for the long term legal, social, political and human consequences that would arise from the implementation of such policies.

Noting also Prime Minister John Key's announcement of a review of policy to counter people smuggling, in response to the increased risks of boats arriving in New Zealand²; Amnesty International urges that the particular vulnerabilities and rights of asylum seekers and refugees in these situations be acknowledged and respected in any response.

Amnesty International would welcome any New Zealand involvement maintaining its reputation as a leader in refugee jurisprudence.

Extra-territorial processing

Amnesty International considers that the involuntary transfer of asylum seekers from Australia and New Zealand to another country for extra-territorial processing is inherently unlawful. This practice would place asylum seekers at a high risk of human rights abuses. Amnesty International is also concerned that if asylum seekers are sent to offshore centres, they would not receive basic and necessary protections, including remedies for breaches of their human rights. Of particular concern are the likelihood that asylum seekers would be detained and the physical and psychological damage this has been shown to have caused.

In Amnesty International's view, extra-territorial processing contravenes the intent and purpose of the right to seek and enjoy asylum set out in the Universal Declaration of Human Rights (UDHR) and the protection regime established by the Refugee Convention. Such practices also seek to avoid a range of other binding obligations under international human rights law.

Amnesty International would welcome initiatives to increase protection capacity in countries of first asylum and expand resettlement programmes. However, these initiatives can never serve as a substitute for, or grounds to discredit, spontaneous requests for asylum. Nor can they be used to

² "Review of laws to combat people smuggling under way – PM" Radio New Zealand (24 August 2010) <<http://www.radionz.co.nz/news/political/55033/review-of-laws-to-combat-people-smuggling-under-way-pm>> (Accessed 09.09.10).



take people to places where responsibility, enforceability and accountability for refugee protection and human rights is weak and unclear.

In order to be effective, the Refugee Convention depends on international solidarity and serious, credible and principled sharing of responsibilities for the protection of refugees. Practices such as extra-territorial processing undermine the Refugee Convention in a multitude of ways, including:

- Compromising protection by diluting applicable legal standards and procedural safeguards;
- Threatening the principle of international solidarity on which international protection and solutions for refugees depend;
- Creating a two-tiered system whereby rich and powerful states can select who they will accept as refugees while other countries are compelled to host large numbers of refugees and asylum seekers.

Countering People Smuggling, and the Bali Process

Noting that extra territorial processing has been put forward as a solution to discourage people smuggling Amnesty International acknowledges that people smuggling is a crime and accepts that governments must take measures to reduce incidents of unauthorised immigration. It also recognises that it is a significant issue on the rise both in the Asia- Pacific region and globally. However, the organisation firmly believes that to effectively reduce incidents of people smuggling, in a manner both durable and humane, New Zealand must address the reasons that force asylum seekers onto boats.

It is well documented that asylum seekers in these regions of conflict do not have access to effective protection measures and in the 2009 UNHCR Report on asylum levels and trends Regional Representative to the UNHCR Rick Towle commented:

“Conflict and human insecurity in places of origin are the key reasons why people flee their homes to seek protection further afield.”³

In developing anti people smuggling strategies it is imperative for the New Zealand Government to remember the reasons men, women and children risk their lives in unseaworthy boats to seek asylum in Australia, New Zealand and Canada.

Amnesty urges the New Zealand Government to combat people smuggling and engage in the Bali Process⁴ in a way that does not compromise or undermine its international human rights obligations as a signatory to the 1951 UN Refugee Convention. This would mean ensuring that:

- interception measures should not result in asylum seekers and refugees being denied access to international protection, or result in those in need of international protection being returned, directly or indirectly, to the frontiers of territories where their life or freedom would

³ UNHCR Media Release “New Asylum Report: 377,200 people seek refuge in industrialized countries in 2009, mainly in Europe and North America” 23 March 2010 available at - http://www.unhcr.org.au/pdfs/100323_stats_release_aul.pdf (Accessed 09.09.10).

⁴ The Bali Process is a collaborative initiative established in 2002 by over 50 nations in the Asia Pacific Region for the purpose of combating human trafficking and people smuggling. See <http://www.baliprocess.net/> (Accessed 13.09.10).



be threatened, or where the person has other grounds for protection under international law. Intercepted persons found to be in need of international protection should have access to durable solutions;

- the special needs of women and children and those who are otherwise vulnerable should be considered as a matter of priority;
- intercepted asylum seekers and refugees should not become liable to criminal prosecution under the Protocol Against the Smuggling of Migrant by Land, Sea or Air for the fact of having been the object of conduct set forth in article 6 of the Protocol; nor should any intercepted person incur any penalty for illegal entry or presence in a State in cases where the terms of Article 31 of the 1951 Refugee Convention are met.

Two-tiered international protection system

According to UNHCR there are currently 43.3 million forcibly displaced people around the world, of which just over 15.2 million are refugees. The vast majority of these refugees reside in developing countries. For example over one million Afghans currently reside in Iran, and a further one to two million Afghan refugees reside in Pakistan.

In comparison, in 2009, only 377,200 people made asylum claims in the world's 44 industrialised countries. The United States received the largest number of asylum claims, with 49,000. Australia received just 6,170 applications, which equates to less than two per cent of all applications for asylum in the industrialised world. New Zealand received 336 claims for refugee status from 1 July 2009 to 30 June 2010; accepted 89, declined 198 and approved two subsequent claims during this period. New Zealand also accepted 709 refugees under the quota system in this year.⁵

It has been clearly articulated by UNHCR that equitable burden and responsibility sharing is fundamental to international protection, as is the building of capacities to receive and protect refugees in the developing world. Creating a two-tiered system whereby developing countries are subject to inferior procedures, but developed countries can pick and choose which refugees are allowed to enter their territory, flies in the face of the internationally accepted principles of burden and responsibility sharing.

Diminished legal protection and denying access to justice

National asylum systems should be accessible, fair and effective. Yet one of the primary motivations for states to undertake extra-territorial processing is to locate refugees beyond the domain of justice. Despite government commitments, previous practice has shown that this form of processing enabled Australia to circumvent its international legal obligations. This had the effect of undermining the international refugee protection regime, by taking asylum seekers out of the jurisdiction of states responsible. Diminished legal protections, including important safeguards such as access to

⁵ Immigration New Zealand Statistics, see <<http://www.immigration.govt.nz/migrant/general/generalinformation/statistics/>> (Accessed 09.09.10)



counsel, seriously undermined the fairness of procedures to which asylum seekers would have access.

If the current proposals are implemented, not only will procedural safeguards be diminished, but it is clear that asylum seekers' access to appropriate procedures and protection will also be curtailed. As shown with Australia's current practice on Christmas Island, asylum seekers transferred offshore are accorded fewer rights than those who seek asylum on the mainland. Previous experience with the appeals process on Nauru demonstrates the practical difficulties in pursuing appeal rights. Such difficulties effectively rendered appeal rights meaningless. Time-honoured safeguards of judicial scrutiny that accompany in-territory status determination and ensure visibility and public accountability would be entirely absent.

Transfers

Amnesty International believes the Australian proposal seeks to undermine the object and purpose of the Refugee Convention which, in the spirit of international co-operation, is to bind states parties to respect the rights of asylum seekers and refugees arriving in their territory. While the Refugee Convention is silent on whether transfer is permissible, state practice since 1951 creates a presumption against transfer, instead imposing an obligation to accord protection on the state in which an asylum seeker arrives. In highlighting its concerns with previous Australian legislation pertaining to off-shore processing, UNHCR has stated that such "arrangements would deviate significantly and negatively from this long standing practice"⁶, which has been endorsed as the right approach by UNHCR's Executive Committee ("EXCOM"), of which both Australia and New Zealand are members, and represents the norm in all countries in the developed world.

Further, as Australia is proposing to only transfer those asylum seekers that arrive undocumented by boat, this would put Australia in breach of Article 31 of the Refugee Convention, which prohibits penalising refugees based on their mode of arrival. In Amnesty International's view, the differential treatment and conditions are discriminatory when compared to those applicable to on-shore arrivals. Such policies are clearly designed as a deterrent measure and amount to penalisation of asylum seekers who arrive by boat. This constitutes a breach of Article 31. It should also be noted that over 90% of asylum seekers who arrive in Australia by boat are found to be genuine refugees.⁷

The possibility of breaches of other basic human rights in the course of transfers, in particular forcible transfers, is high. Not only is there potential for the disproportionate use of force, in the past, asylum seekers have been held in incommunicado – like detention, where they were denied access to lawyers, legal remedies, contact with the outside world and information relating to their rights, status and destination.

⁶ Submission of the Office of the United Nations High Commissioner for Refugees to the Senate Legal and Constitutional Legislation Committee, "Migration Amendment (Designated Unauthorised Arrivals) Bill", 1996, p1. Tellingly, when commenting on the previous Pacific Solution, UNHCR stated "Australia's actions tend to undermine EXCOM's authority" (p5).

⁷ Amnesty International Australia *Frequently Asked Questions on Refugees and Asylum Seekers* <<http://www.amnesty.org.au/refugees/comments/22902/>> (Accessed 10.09.10).



Other Convention obligations

An asylum seeker who enters the territory of a state party to the Refugee Convention engages not only the obligations of that state under the Refugee Convention, but also the other human rights obligations by which that state is bound. Amnesty International believes that if it engaged in forcible transfers of asylum seekers, New Zealand would retain legal responsibility for ensuring the protection of their fundamental human rights. These rights include those protected under the UN Convention Against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment (UNCAT), the International Covenant on Civil and Political Rights (ICCPR), and the UN Convention on the Rights of the Child (CRC) – all of which New Zealand is signatory to..

A significant failing of the previous system of off-shore processing, on Nauru, was that it did not take into account Australia's obligations to those who may not be refugees but still require international protection under Australia's other convention obligations. A form of 'complementary protection'⁸ must exist if Australia does not wish to be in breach of these obligations. New Zealand is required to meet these same standards and a regional system would require that New Zealand's new Immigration Act creating the 'protected persons' category be taken into account.

Detention

Detention appears to be an inevitable part of the extra-territorial scheme proposed by Ms Gillard, especially if transfer is not voluntary. Amnesty International is gravely concerned at the lack of protection asylum seekers and refugees would have against arbitrary and unlawful detention. Detention is considered arbitrary and unlawful if it cannot be justified in the individual case, or is not open to periodic review so that the grounds justifying detention can be assessed. Long-term detention of those who have not been charged or convicted of a criminal offence has also been found to be arbitrary and in breach of a state's international obligations.⁹

Amnesty International opposes the detention of asylum seekers unless they have been charged with a recognizably criminal offence, or unless the authorities can demonstrate in each individual case that the detention is necessary, that it is on grounds prescribed by law, and that it is for one of the specified reasons which international standards recognize may be legitimate grounds for detaining asylum seekers. Amnesty International calls for each asylum seeker who is detained to be brought promptly before a judicial or similar authority whose status and tenure afford the strongest possible guarantees of competence, impartiality and independence, to determine whether her detention is lawful and in accordance with international standards.¹⁰

⁸ As agreed to in the Agenda for Protection agreement by Convention signatories in 2001 (UNHCR Agenda for Protection 3rd ed, October 2003). 4 See *A v Australia* (560/1993) 30 March 1997, UN Doc. CCPR/C/59/D/560/1993. 5 UK/EU/ UNHCR Unlawful and Unworkable – Amnesty International's views on proposals for extra-territorial processing of asylum claims AI Index: IOR 61/004/2003, p30.

⁹ See *A v Australia* (560/1993) 30 March 1997, UN Doc. CCPR/C/59/D/560/1993.

¹⁰ UK/EU/ UNHCR Unlawful and Unworkable – Amnesty International's views on proposals for extra-territorial processing of asylum claims AI Index: IOR 61/004/2003, p30.



The automatic detention of asylum seekers not only runs counter to UNHCR's own guidelines, which state unequivocally that "[t]here should be a presumption against detention," but also exposes both receiving states and transferring states to the very real risk that they will be found to have transgressed international human rights standards applicable to detention.

Previous experience on Nauru has demonstrated that the reception conditions faced by those transferred for extra-territorial processing do not meet international standards, for instance those set out in EXCOM Conclusion No. 93. These standards include not only respect for international human rights law and standards but include meeting the specific needs of children and women. The significant number of unaccompanied minors (UAMs) who have recently been processed on Christmas Island, coupled with the previous experiences of UAMs on Nauru, provides ample concern for the potential for future breaches by Australia of both the standards sent out by EXCOM and also Australia's obligations under the CRC. Again, this practice is not something New Zealand should be associated with.

When commenting on Australia's previous "Pacific Solution" policy in 2006, UNHCR stated: "experience gained from offshore processing on Nauru, ..., should not be considered the "outstanding success" it is characterised as ..., but to the contrary has resulted in prolonged detention-like situations of asylum-seekers and refugees alike, as well as extended separation of families. The practice is also known to have contributed to serious mental health problems."¹¹

Regional solutions

If states are serious about developing multilateral agreements which genuinely share responsibility, it is imperative that they do so in a principled manner. Such cooperation should be focused on the protection of refugees, rather than driven solely by individual state interests, and should be developed using a rights-based framework. The proposal for extraterritorial processing amounts, to a greater or lesser extent, to a responsibility shifting arrangement rather than responsibility sharing. It is important that New Zealand does not lose sight of the complexities of building protection capacity in this region. States such as Australia, New Zealand and Timor Leste which have signed the Refugee Convention should demonstrate their good faith not by diminishing access to those seeking asylum but rather lead by example and look at ways it can increase its own protection capacity.

Durable solutions - The path to a genuine regional solution

The only effective way of preventing asylum seekers and refugees from attempting dangerous journeys in pursuit of safety is to provide this vulnerable group with viable alternatives. This requires increasing regional protection space through access to durable solutions in countries of first asylum. The UNHCR recognises three durable solutions for refugees – voluntary repatriation, local integration and resettlement to a third country.

¹¹ Submission of the Office of the United Nations High Commissioner for Refugees to the Senate Legal and Constitutional Legislation Committee, "Migration Amendment (Designated Unauthorised Arrivals) Bill", 1996, p2.



If asylum seekers and refugees are unable to access any of these durable solutions, they will inevitably be forced to seek protection further afield. As such, if New Zealand genuinely wishes to reduce the need for onward journeys, it must help to develop a regional, multilateral agreement that provides genuine and lasting protection solutions for asylum seekers and refugees throughout the region.

Voluntary repatriation

While it would be desirable for people to be able to voluntarily return to their country of origin, this option is only possible if refugees can return to situations of safety. The New Zealand Government must play its part in addressing ongoing security issues in the Asia Pacific region through development, peace keeping and the promotion of international human rights standards. It must be acknowledged that many refugee producing countries in the Asia Pacific, such as Afghanistan and Myanmar, remain deeply unstable and prone to widespread human rights violations. As such, repatriation is simply not an option for millions of asylum seekers and refugees in the region.

Because safe and voluntary repatriation is often impossible, most refugees remain in countries such as Iran, Malaysia, Pakistan and Thailand. Local integration is often highly problematic in these places and refugees face dangers and uncertainty, including the risk of forcible return.

Local integration

For local integration in first countries of asylum to be a viable option, asylum seekers and refugees in those countries must be given greater access to protection. A fundamental part of any effective regional agreement would include states working towards the following:

- state recognition of refugee status, and an end to policies that penalise asylum seekers and refugees;
- an end to refoulement, the practice of forcibly returning people at risk of persecution in their country of origin;
- providing recognised refugees with the legal right to work, as well as access to basic services such as education and healthcare;
- greater support for, and recognition of, the UNHCR;
- policies that ensure refugees and asylum seekers have full access to the UNHCR; and
- ratification and implementation of international human rights treaties, in particular the Refugee Convention

Australia and New Zealand both have an important role to play in encouraging and leading the development and implementation of these crucial elements of refugee protection throughout the Asia Pacific region. New Zealand must work with its neighbours to provide appropriate financial and technical support for these measures. At the same time, New Zealand should increase the number of refugees it resettles from the region. Doing so would increase the capacity for other refugees to achieve sustainable local integration in other Asia Pacific countries.



Resettlement

Traditionally resettlement is used when refugees can neither return to their country of origin nor be integrated into their country of first asylum. By increasing resettlement numbers, New Zealand can help encourage other countries to seek durable solutions for other individuals and allow the international community to share the work of protecting refugees.

The strategic use of resettlement plays an important role in a well-functioning and robust international protection system. When implemented effectively, resettlement allows international agencies such as UNHCR the ability to leverage other durable solutions (local integration, voluntary return) for those individuals remaining. An increasing number of states are well-placed to offer their resettlement programmes strategically, while still targeting those who are most vulnerable, to greater enhance international protection initiatives.

It must be reiterated that resettlement should be treated as a complement to, rather than as a substitute for, the right to seek asylum. As a durable solution resettlement will only ever be able to meet the needs of a small number of refugees for whom return and integration are not possible. Even then, the number of refugees identified by UNHCR as being in need of resettlement far outstrips the capacity of resettlement states to provide places. For the vast majority of people fleeing persecution and in need of protection, the ability to seek asylum remains paramount. The Australian proposal seriously undermines this fundamental plank of international protection; New Zealand needs to resist any undermining of the right to seek asylum.

The previous experience with extra-territorial processing on Nauru has seen Australia call on other resettlement countries, including New Zealand to take a number of those recognised as refugees in these centres. Putting pressure on the small number of resettlement countries to give up a portion of the small number of resettlement places they offer UNHCR each year, will only further undermine this important durable solution. It will do this by, firstly diverting places available to UNHCR, which will limit UNHCR's ability to use resettlement strategically, to leverage other protection outcomes. Secondly, instead of targeting individuals in acute need, including women at risk, it will target those who Australia is already well placed to protect. Thirdly, it will undermine any sense of responsibility sharing, with places being diverted from countries hosting significant numbers of refugees, to respond to small numbers of people who legitimately seek asylum in New Zealand.

Note: Australia is the only country to numerically link its onshore and offshore programs. All other resettlement countries acknowledge their responsibilities to protect those who reach their territory to seek asylum, while at the same time having a distinct offshore program so they can state with certainty how many people they will bring to their country each year under a humanitarian program. Amnesty International compliments New Zealand for maintaining the quota system and the family reunification scheme within its programme. The Nauru experience clearly demonstrated the difficulties in convincing other resettlement countries that they should use their limited resettlement quota to “share” Australia’s “burden” rather than target countries hosting the vast majority of refugees in the Africa, Asia and the Middle -East regions.



As UNHCR has noted, when commenting on Australia’s previous practice on Nauru, refugees “would be compelled to remain for a prolonged period under unacceptable conditions in the off-shore processing country pending a durable solution.”¹² Recognised refugees should not only have access to durable solutions but must have all their rights protected while such solutions are being sought. Again previous experience on Nauru has demonstrated this will not be the case.

Any genuine solution for refugees must ensure effective protection. This includes the ability for people to access durable solutions. With local integration unlikely to be an option for those taken for extra-territorial processing, resettlement would appear to be the only possible durable solution available. Australia has not clarified what will happen to those individuals recognised as refugees under its proposed system. Without a guarantee that those recognised as refugees would automatically be entitled to a durable solution in Australia, then previous experience from Nauru, which saw many refugees left in detention-like conditions, continues to raise fundamental human rights concerns.

Conclusion

As long as desperate people have no access to adequate protection in the Asia Pacific, it is inevitable that some will make their way to New Zealand. Amnesty International strongly urges New Zealand to treat all those who arrive on its territory, whether by sea or air, equally and in keeping with its human rights obligations under the Refugee Convention and the other binding obligations of international human rights law. Only by demonstrating that New Zealand is willing and able to meet its international obligations can it expect other Asia Pacific governments to likewise offer effective and durable solutions to those in need of protection.

If New Zealand genuinely wishes to develop a regional framework, such efforts must be undertaken to enhance access to protection and durable solutions for asylum seekers and refugees. These capacity-building measures must never be viewed, either legally or politically, as a substitute for the long-established obligation to accord protection to those spontaneously seeking asylum in New Zealand.

¹² Ibid, p7.