

Discussion Paper

Strengthening refugee protection in the region

With the end of the Pacific Solution and Temporary Protection Visa systems signalling some important reforms in the protection environment in Australia, it is worth taking stock of some of the current issues in our region. The imperative to identify those people needing international protection, among the high numbers of people on the move in the broader Asia Pacific region, remains as important as ever. At the same time states are legitimately concerned to maintain effective control of their borders.

To explore the issue from different perspectives, UNHCR invited contributions on the theme of strengthening protection in the region from the Australian and New Zealand governments, legal representatives and UNHCR's own offices in Canberra and the Regional Protection Hub in Malaysia.

Disclaimer: the views expressed in this discussion paper are those of the authors and, unless otherwise stated, are not necessarily held or endorsed by UNHCR.

Rohingya refugees in Bangladesh. Conditions are tough in Teknaf camp. Movement of refugees is restricted and housing is in need of repair or renewal.

Benefits of having state systems to identify refugees

by UNHCR's Regional Protection Hub for the Asia-Pacific

Mixed movements in the Asia-Pacific

Worldwide, states are faced with people who arrive at their borders or are already on their territory and need to establish how they will be treated. Why and how these people arrive varies. They may be seeking a better life, or they may have been forced to flee persecution where they were individually targeted or caught in the cross fire of warring parties in their home countries, and they could no longer be protected by their own government. They

may have entered at official border crossings with valid travel documents, or they may have crossed clandestinely with no documents at all and under the cover of smugglers and traffickers.

International refugee law and UNHCR's mandate relate primarily to refugees -- people fleeing human rights abuses, armed conflict and other threats to their life and freedom. However, the distinction between refugees and others, such as economic migrants, has become increasingly blurred. The movement of refugees and other migrants frequently intersect. Refugees are now more often found in mixed movements, travelling in the same directions, and using the same routes and means of transport as economic migrants. They can all face the same perils,

such as travelling in overcrowded, rickety boats operated by smugglers and ending up in the hands of traffickers for bonded labour. Refugees travelling in mixed groups are inevitably perceived as people trying to sneak past the law.

In the Asia-Pacific, the increased demand for foreign labour is multiplying the complexity of movements. A number of countries are either sources of labour -- such as the Philippines, Indonesia and Bangladesh, or have relied on labour migration from neighbouring countries, such as Malaysia and Thailand. While a clear distinction needs to be maintained between forced displacement and labour migration, it is increasingly evident that the two phenomena overlap.

State systems for identifying refugees needed

Objectives

As the web of people on the move becomes more intricate, there is an increasing necessity for states in the Asia-Pacific to establish predictable and globally recognized mechanisms to identify people in need of international protection. However, only a handful of countries in the region have acceded to international refugee instruments. In addition, most countries in the region do not have proper asylum systems in place. While there is a tradition of hosting refugees under informal arrangements, for example India's acceptance of Tibetans, and Malaysia's hosting of Filipino Muslims, toleration alone is not enough to provide refugees with the protection states are obliged to provide under international law. Consequently, UNHCR is left to be the main actor for protection and assistance, even though it cannot, and is not meant to, replace governmental structures for refugees.

In establishing refugee identification systems, some fundamental objectives need to be considered and further explored, such as those addressed in UNHCR's 10 Point Action Plan on Refugee Protection and Mixed Migration. One key objective is to ensure that people who are in need of international protection have access to the territory of other states, and are able to have their case assessed in fair and effective refugee status determination procedures. Adequate refugee protection safeguards need to be properly included in whatever measures states take or envisage in the broad area of freedom of movement. The fundamental difference between refugees and economic migrants is essentially related to the question of

whether or not they can return to their own country. While ordinary migrants usually can return and avail themselves of the protection of their own country, refugees cannot. The core norm is therefore the fundamental principle of *non-refoulement*. Under this principle, countries cannot expel or return refugees to any territory where their lives or freedom would be threatened.¹ The immediate effects of the application of this principle relate to access and admission to territory, as well as proper identification through fair and efficient screening of those who are in need of international protection, for instance in the context of deportation proceedings.

Mechanisms and obligations

The 1951 Convention relating to the Status of Refugees and its 1967 Protocol² are key mechanisms enabling governments to identify, and determine the status and treatment of refugees and, therefore, enable them to regulate such situations more predictably and rationally. They provide the first general and universally-

applicable definition of a "refugee", and set out a uniform legal status, as well as basic standards of treatment.

The international refugee protection system is complemented by regional refugee instruments³, particularly in Africa and Latin America, but also in the Asia-Pacific, as well as legislation and administrative measures adopted at the national level. Human rights law and international humanitarian law also supplement refugee law. More generally, fundamental refugee protection principles are embedded in customary international law and therefore binding for all states, irrespective of accession to the international refugee instruments.

Fundamental refugee protection principles, as well as the aforementioned international instruments, can only be applied if refugees are identified as such. States that are party to the 1951 Convention are competent and responsible for determining refugee status. The



An Italian coastguard vessel rescues boat people near Lampedusa Island.

majority of signatory states have established procedures for this purpose.

States that have not acceded to international refugee instruments are still bound by customary international law to respect basic refugee protection principles, especially the principles of *non-refoulement*, a basic standard of treatment and cooperation with UNHCR. In consequence, they need criteria and mechanisms to determine how non-nationals should be treated, in particular to identify, within wider migration movements, refugees who require international protection.

Advantages

Apart from the legal and humanitarian imperatives, an established process of identifying refugees under internationally recognised standards provides states with tools to enhance migration management, national security and, more broadly, international relations. Regarding irregular migration management, an established refugee identification process improves a state's capacity to manage and differentiate between refugees having a well-founded fear of persecution from foreigners who may have entered its territory for other reasons. States have a predictable mechanism for ensuring that refugees are granted international protection, while at the same time a mechanism for identifying people who are not in need of international protection and can either return to their home countries in a dignified manner or opt to regularize their status through the state's existing migration policies.

A fair and efficient state system for identifying refugees also enhances national security by screening out those who could be excluded from refugee status. In this regard, the refugee definition explicitly provides for the

exclusion from refugee status of undeserving individuals who have committed certain serious crimes.

An internationally recognised system for identifying and protecting refugees also furthers a state's standing in the international community. It demonstrates a state's commitment to internationally recognized legal and humanitarian standards, as well as a spirit of burden sharing for refugee protection. In addition, international refugee law principles have repeatedly affirmed the non-political and impartial character of identifying and protecting refugees. Potential friction between states can be avoided if the refugee criteria are applied in a manner consistent with international standards, which allow for the granting of refugee status to be viewed as a peaceful, humanitarian and legal act.

An added advantage is that establishing relevant criteria and procedures also allows the host state to tap the labour and other skills refugees can offer by providing a legal basis for their presence in the country. This is particularly beneficial in regions faced with complex and mixed migratory patterns, such as the Asia-Pacific region.

UNHCR's role

When a country has no adequate government procedure in place – either due to a lack of sufficient resources, expertise or experience, or, in other cases, because of a reluctance to establish one, UNHCR steps in under its mandate to provide protection and assistance to refugees, including for conducting individual refugee status determination. However, as noted above, the Office cannot and is not meant to replace whole government structures that

would be necessary to protect and assist refugees.

Statistics at a glance

- In the Asia-Pacific, there are almost 1 million refugees and asylum-seekers.
- Some 14 countries and territories have acceded to the international refugee instruments. They include Australia, Cambodia, China, Macau SAR, Japan, Republic of Korea, New Zealand, Papua New Guinea, Philippines, Timor-Leste, Fiji, Samoa, Solomon Islands and Tuvalu.
- There are eight countries with domestic mechanisms in place, including Australia, Fiji, Japan, New Zealand, Papua New Guinea, Philippines, Republic of Korea, and Timor-Leste.
- UNHCR currently conducts RSD in 12 countries and territories, including in two signatory states, and in one special administrative region. They include Bangladesh, Brunei Darussalam, Cambodia, China, Hong Kong SAR, India, Indonesia, Malaysia, Mongolia, Singapore, Sri Lanka, and Thailand.
- Over the last six years, the number of RSD applications submitted in the Asia-Pacific has risen by 24 percent, with some 21,000 applications received in 2001, while some 26,000 applications were received in 2007. This figure is likely to be higher if statistics were actually reported uniformly.

UNHCR Regional Protection Hub for the Asia-Pacific, May 2008.

1. Refer to the 1951 Refugee Convention, Article 33
2. Hereafter the 1951 Convention (this also includes its 1967 Protocol).
3. These regional instruments include the OAU Convention Governing the Specific Aspects of Refugee Problems in Africa of 10 September 1969; the Cartagena Declaration on Refugees of 19-22 November 1984; and the Final Text of the Revised AALCO 1966 Bangkok Principles on Status and Treatment of Refugees (updated in 2001).

Strengthening protection in the region and beyond – Australia's commitment

by the Department of Immigration and Citizenship

The Australian Government is strongly committed to helping refugees and other people who face serious abuses of their human rights. As a signatory to the Refugees Convention, Australia has a fair and robust system for assessing the claims of people arriving on our shores who are seeking asylum. However, it must be recognised that this is but one piece of a more complex international commitment to the protection of some of the world's most vulnerable people.

Our Humanitarian Program, one of the largest in the world, represents the Government's commitment to providing opportunity to those most in need. It is also an important tool that assists us to work with host countries to alleviate the pressures posed by large refugee populations. One of the hallmarks of our program is its inherent flexibility, which ensures that its focus remains on helping victims of human rights abuses and conflicts where the most appropriate option is resettlement. By working cooperatively with UNHCR and other states, we have been able to ensure that places available under our program have been used to maximum effect, in a way that benefits not only the person resettled but the refugee community as a whole. A larger program in 2008-09 will see a greater focus on provision of assistance to Iraqis and refugees in Africa who are unable to return to their homes. Asia will continue to be an important focus.

The Australian Government prioritises stabilising the situation of displaced people at source or in countries of first asylum and has provided a dedicated fund to assist in this endeavour. Through this fund support is provided for programs or activities which help stabilise displaced populations, assist displaced persons to safely return to their country of origin or assist them to resettle to third countries. Projects funded range from

provision of emergency humanitarian relief through to education programs, protection of vulnerable women and children and training for employment. Funding is also provided to support the protection role of UNHCR, and other relevant agencies, in source countries and countries of first asylum. 2008-09 will see an increase in these activities to assist Iraqi refugees who have been forced to flee.

At a time when global concern regarding terrorism and trans-national crime is growing, we have also seen a dramatic rise in the number of persons of concern to UNHCR. International migration, including irregular migration, has grown apace. It is clear that there is an increased need for states to consider how best to manage their borders in a protection sensitive manner ensuring that those who require protection are identified and given appropriate support. Effective measures to prevent exploitation of vulnerable persons by people smugglers and human traffickers are also essential.

Addressing rising numbers of displaced persons and the challenges posed by increasing irregular migration are not issues that any one country can face in isolation from those around them. A key objective of our international engagement and cooperation strategies and programs is to support regional and global approaches to the development of policies, standards and practices for humanitarian and migration management and border security.

Central to our approach has been engagement in and support for regional processes which allow us to work with both source and transit countries. An important example is the work that has been done under the auspices of the *Bali Process on People Smuggling, Human Trafficking and Related Trans-national Crime (the Bali Process)*. Through capacity building initiatives and practical workshops, the Bali Process has succeeded in creating an environment in which regional law

enforcement, immigration and foreign ministries are increasingly cooperative and effective in their action to address key areas of abuse and exploitation. A further example can be found in the smaller but significant regional forum of the *Asia-Pacific Consultations on Refugees, Migrants and Displaced Persons* through which we have actively sought to support increased dialogue on protection issues within our region.

We also place considerable emphasis on working bilaterally with both source and transit countries to assist in developing their capacity to establish sound migration management practices and to enhance protection space both within our region and beyond it in areas where pressures are high. Capacity building initiatives have included a focus on assisting transit countries to effectively identify those moving across their borders; work to support implementation of refugee legislation; and bolstering the capacity of transit countries to support victims of abuse, in particular those who have fallen into the hands of those who wish to profit from their misfortune.

Our bilateral work extends to a range of like-minded countries, where cooperation and collaboration is focussed around shared interests in strengthening international protection and managed migration.

As we move forward, we can be sure that the pressures that we and other states face will increase. Challenges posed by climate change and environmental degradation, widening divides between rich and poor with an increasing scarcity of basic goods, and worsening situations of protracted displacement will pose complex problems that will require the international community to work in concert. The work already undertaken will provide a good base from which to move forward, but there will be a need for us to be open to new opportunities as they present themselves.

Uncharted Waters by David Manne*

Refugee protection in Australia remains in uncharted waters. With the advent of political regime change after a decade of substantial departures from past practice and accepted international principles of refugee protection, some notable reforms – including the end of the ‘Pacific Solution’ and Temporary Protection Visas – have been introduced by the new Government. But just how much has changed and what remains uncertain?

As a lawyer who has been directly involved in providing legal assistance and advocacy for many refugees seeking protection in Australia, these questions appear particularly pertinent in relation to Australia’s future approach relating to ‘effective protection elsewhere’ or ‘safe third countries’.

Australia has been a key regional exponent of the global trend by states to devise sophisticated strategies aimed at preventing refugees from accessing protection in the territory in which they are seeking it. A core element of this ‘protection elsewhere’ policy seeks to transfer refugees to third countries where they already have obtained or could seek protection.

Central to this policy has been an attempt by Australia to reduce its responsibility for refugee protection to those who claim protection within its territory, and to risk circumventing obligations owed under the Refugees Convention and other treaties.¹

In February this year, the new Government dismantled the so-called ‘Pacific Solution’, which had formed a crucial foundation of the architecture of

Australia’s deflection policies for some time. It had represented a radical departure from mainstream principles of domestic and international human rights law, principally by: ‘excising’ Australian territory to preclude refugees who arrived in Australia informally by boat from equal access to legal rights, such as making refugee protection claims in Australia under Australian law; and by transferring them to Nauru or PNG to have their claims assessed under inferior status determination processes outside the rule of law.

The reform resulted in seven Burmese and 82 Sri Lankan refugees in Nauru being promptly resettled to Australia, and the abandonment of efforts seeking third country resettlement under the policy, as well as attempts to first seek the readmission of the seven Burmese to their former ‘transit’ country of Malaysia.²

However, what does the end of this policy mean in practice? The new Government has retained the excision law and a policy which condemns informal boat arrivals to remote and inaccessible detention in Australian territory on Christmas Island in circumstances which remain unclear. There remains the risk of replicating the core features of the ‘Pacific Solution’ – with the exception of foreign warehousing and possibly of pursuing third country resettlement – albeit on Australian soil. Depending on where asylum seekers arrive and what rights they have in Australia, we still end up with two classes of refugees. Those arriving in excised territory risk being denied: (1) equal rights, such as access to Australian law for and independent review of refugee status determinations; (2) adequate access to legal assistance, which can

prove critical to a refugee’s ability to properly present their case. And it remains completely uncertain what will happen to those found to be refugees under whatever process is adopted, including whether they will automatically be granted protection in Australia.

Another policy which remains unclear is whether Australia will turn back boats of asylum seekers to third countries such as Indonesia, as was attempted by the former Government in relation to the arrival of 83 Sri Lankans in Australia by boat from Indonesia. To do so would raise serious legal and practical issues. Like the regional cooperation arrangements involving interception of asylum seekers in Indonesia, it would effectively treat Indonesia *de facto* as a ‘safe third country’. While protection ‘elsewhere policies’ may not be prohibited per se under the Refugees Convention, they should only be utilised in confined circumstances and under stringent conditions.³

It is far from clear that such circumstances would exist under these arrangements. Indonesia is not a signatory to the Refugees Convention and does not otherwise in practice, respect the full suite of rights afforded by the Refugees Convention. Although Indonesia may allow for status determination to be conducted by the UNHCR, this alone does not equate to effective protection.⁴ Further, by law, Australia cannot subcontract its obligations under the Refugees Convention to Indonesia and thereby avoid liability under that instrument.

Moreover, returning boats to Indonesia would appear to involve a blanket assumption of effective ‘safety’ without any prior consideration of an individual’s

claims. It also appears unlikely that a person would be able to contest the legality of their transfer; a problem which has previously occurred in a number of cases of actual or proposed third country transfers by Australia.

In both scenarios, serious and unresolved problems persist. In this context, it is important to recognise the role of 'regional protection and co-operation mechanisms' in managing refugee flows and global responsibility sharing. While there may be some constructive aspects to this model,⁵ it is flawed in many respects. Many hundreds

of refugees (or other people of concern) have been stuck for protracted periods in Indonesia without access to third country resettlement options. Other concerns include Indonesia's limited capacity and interest concerning practical protection of refugees, and the real risk of orbit and refoulement situations. Australia may well be complicit in any such dangerous departures from Convention obligations.

This forms part of Australia's recent, broader strategy of seeking to shore up regional cooperation arrangements in South East Asia. Under this emergent 'South East Asian Solution', Australia is seeking – whether through transfer or interception measures – to use regional transit countries such as Malaysia to host refugees. A case in point was the recent attempt by the former Government to transfer our eight Burmese Rohingya clients from Nauru to Malaysia. Malaysia's agreement to readmit was procured. In a contortion of protection principles, Australia asserted, on the one hand, that the Burmese could obtain 'effective protection' in Malaysia, and on the other, that their claims for refugee protection in Australia would only be assessed once they were back in Malaysia, but not if they remained in Nauru. No individualised assessment of their submitted claims of past or prospective persecution in Malaysia was undertaken.

It is highly questionable whether such practices are permissible under 'protection elsewhere' principles, and the risk of dangerous orbit and chain refoulement is evident. Malaysia is not a signatory to the Refugees Convention, it does not in law or practice provide for acceptable protection of refugees, and it has a poor human

rights record, including in relation to refugee rights.⁶

The situation of our Burmese clients points to the pitfalls of Australia's 'protection elsewhere' policies on this front. For many years, they were unable to achieve third country resettlement and, despite seeking UNHCR help, were subjected to systematic mistreatment at the hands of Malaysian authorities, including extortion, beatings, arbitrary detention, denial of access to employment, education and health services, and deportation to Thailand where they faced the real risk of refoulement to Burma.

For regional protection mechanisms to properly serve their purpose, the commitment of participating states – particularly wealthy, industrialized states like Australia – in providing meaningful protection and resettlement of a reasonable number of refugees, as compared to merely prioritising preventing flows of irregular movement of asylum seekers, is critical.⁷

Similar questions arise in relation to the use by Australia of certain Memorandums of Understanding (MOU) with Papua New Guinea (PNG) and South East Asian countries, such as Malaysia. Under an MOU between Australia and PNG in effect since 2003, an asylum seeker can be returned to PNG if they had been in PNG for more than seven days. Their refugee claims are to be assessed and protection provided there if recognised as a refugee.⁸

This scheme also contains a blanket, automatic assumption of 'safety'. However, there are compelling reasons in principle and practice for requiring question and challenge of any transfer. For instance, Indonesian nationals of West Papuan



UNHCR/J. Redfern

This part of the Salween River, near the Thai village of Mae Sam Laep, has been a popular point of entry for refugees fleeing human rights abuses in Myanmar.

ethnicity can carry a pro-Independence profile which involves genuine protection fears within PNG, including targeting by Indonesian-sponsored state and non-state agents, and ineffective state protection. Generally, independent evidence indicates that PNG has a problematic human rights record in which its ability to provide enduring refugee protection is unclear.⁹

Other concerns include whether sufficient 'connections' with PNG exist, and the absence of a formal bilateral agreement requiring compliance with full refugee rights and monitoring of protection.¹⁰

Another interesting question is: what are the moral and legal implications for Australia, particularly regarding arrangements where Australia exercises influence or control, financially and otherwise?

The moral dimensions may be described as the 'ethics of proximity' –

that is, certain obligations to assist and protect arise from the close presence of an individual whose plight we have been made aware of, and who we have the capacity to assist.¹¹ Choosing to act, as Australia has, in ways which affect peoples' rights abroad could also contribute to this obligation.¹²

Legally, not only is Australia unable to subcontract its protection obligations to another state by human transfer, but arguably, in financing, if not controlling, interception and hosting arrangements in Indonesia and elsewhere, it could assume legal obligations to guard against deprivations of social and economic rights which occur there.¹³

Another concern relates to restrictions regarding onshore asylum applications. Australian legislation has modified 'effective protection' principles to exclude an applicant from protection if s/he has "a right to enter and reside" in a third

country.¹⁴ This has precluded Australian protection to people with little or no link, let alone recognition as a refugee, in third countries, and often on dubious and generalised assumptions of status and safety there.¹⁵

While ending the 'Pacific Solution' may be welcome, Australia's current policy trajectory seems to perpetuate many of its most troubling aspects, albeit one step removed. In sponsoring protection arrangements where refugees are held in transit countries which do not provide effective protection and where refugees are likely to languish in limbo for prolonged periods, experience indicates that far from offering adequate 'solutions', these situations commonly re-traumatise people. They are often at fundamental odds with the core aim of securing durable solutions.

To fix the fundamentals of the post-'Pacific Solution' policy, reform needs to return to the assessment of asylum claims in Australian territory to ordinary approaches under the mainstream of Australian and international law, which involve equal access to and adjudication under the rule of law, with the right of independent review, removal of obstacles to access full legal and other assistance, and guaranteed, durable protection in Australia for recognised refugees.

More broadly, 'protection elsewhere' policies, including regional co-operation arrangements, need to ensure application of minimum standards. Serious questions of compliance arise concerning certain Australian practices. Regional arrangements must also be coupled with more expansive responsibility sharing measures, which not only involve sufficient funding, but also resettlement or relocation



This sparsely furnished room is school for these Rohingya children, in an area outside of Kuala Lumpur. Refugee children have no access to formal education and the adults frequently set up spaces like these to teach their children, though classes are limited by lack of books and qualified teachers.

of a reasonable proportion of those needing protection.

The approach adopted by Australia in the 1980s under the Comprehensive Plan of Action (CPA) in response to the Indochinese refugee exodus provides a useful precedent for adaption to the contemporary context. Australia resettled 177,000 Indochinese refugees, many coming from holding camps in countries such as Malaysia and Indonesia by agreement with those countries. Between 1981 and 1987, there were no refugee boat arrivals, partly due to this policy. While potential complications - such as the creation of pull factors - exist, a more principled, rational and expansive management of refugee flows, focused on concrete and meaningful protection solutions, is required by Australia and its regional partners.

If Australia continues on its current course, it will mainly be dealing with the prevention of refugees coming to Australia. The region will be left with an intractable backlog of refugees requiring resettlement from Indonesia, Malaysia and elsewhere. What responsibility Australia will take for this predicament is far from settled. Protection of borders has predominated at the expense of protection of people. A realignment is required so that protection of people can assume its rightful role.

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This Chin man escaped near death when he fell 13 storeys while working on a construction site in Malaysia and steep hospital fees were difficult to meet on his meagre wages. He lives in this shack with other men from his community.

1. Michelle Foster, 'Constraints on Protection Elsewhere Schemes imposed by the Refugee Convention' (prepared for Workshop, Protection Elsewhere: International law and the off-shore processing and protection of refugees, 23 Feb. 2007, Melb. Law School), p 2.
2. My organisation was legal representative for the Burmese and 27 of the Sri Lankans.
3. *Id.*
4. See generally, Foster *supra* n 1 above.
5. For example, discouraging dangerous boat journeys to Australia, encouraging refugees to access UNHCR protection mechanisms, and provision of albeit limited financial aid to host countries.
6. See for example, Human Rights Watch, Malaysia/Burma, "Living in Limbo: Burmese Rohingyas in Malaysia" (August 2000 Vol. 12 No.4 (C)); and USCRI *World Refugee Survey*, Malaysia for 2005, 2006 and 2007.
7. See further, Refugee & Immigration Legal Centre Inc "Submission Concerning Article 31 of the Refugee Convention - "Non-Penalisation, Detention and Protection", paper prepared for UNHCR Global Consultations, Macau, May 2001.
8. See Savitri Taylor, 'Effective Protection Under Australia's Regional Cooperation Arrangements with

- Indonesia and PNG: Whose Responsibility' (prepared for Workshop, Protection Elsewhere: International law and the off-shore processing and protection of refugees, 23 Feb. 2007, Melb. Law School), pp 13-14.
9. See for example, US Department of State, 'Country Reports on Human Rights Practices - 2007, Papua New Guinea, March 11, 2008. Further, a number of PNG nationals have recently been recognised as Convention refugees by Australian determination bodies.
10. PNG has made reservations in relation to a number of Refugees Convention rights, including to employment (Art 17(1)), housing (Art 21), education (Art 22(1)), and freedom of movement (Art 26).
11. Robert Manne with David Corlett, *Sending Them Home: Refugees and the New Politics of Indifference*, Quarterly Essay, Issue 13, 2004, p 82.
12. J R Lucas, *Responsibility* (1993), cited in Taylor, *supra* n 9, pp 39-40.
13. For example, rights under the ICESCR; See Taylor, *id* at 32-40.
14. *Migration Act* 1958 section 36(3).
15. Examples include: Colombians vis-à-vis the US, UK or Argentina; a West Papuan vis-à-vis Japan; and Iraqis vis-à-vis Syria.



UNHCR/J. Brouwer

Refugees and asylum-seekers line up at the UNHCR registration area in Kuala Lumpur to meet with UNHCR officers for a variety of reasons, including welfare assistance.

Strengthening protection in the region: UNHCR's perspective

By UNHCR Regional Office, Canberra

Over the last six years, UNHCR estimates that the number of refugee status applications submitted in the Asia-Pacific region has risen by over 24 per cent, while worldwide figures decreased during the same period. While some 60 nationalities are represented among the asylum-seekers in the region, more than half of these are from Myanmar. Other significant countries of origin are Sri Lanka, Iraq and Afghanistan.

While countries in the region have in many cases demonstrated sustained generosity to refugees, relatively few of them have formally acceded to the principal instrument for refugee protection – the 1951 Convention relating to the Status of Refugees – and even fewer have refugee-specific domestic legislation in place. This absence of refugee specific mechanisms can result in unpredictable ad hoc approaches to refugees and others of concern. It also means UNHCR continues to have to undertake refugee status determination under its mandate while not being able to guarantee effective protection.

In this context, UNHCR is keen to promote a balance which effectively reconciles state interests with international

protection. Such a balance would involve genuine efforts to strengthen the capacity of states to deal with mixed migration, but in a way that does not deflect or appear to deflect responsibility from states to provide international protection and that respects the internationally recognized right of everyone "to seek and to enjoy in other countries asylum from persecution".¹ As the High Commissioner said in his 19 May keynote address to the Sana'a Conference on Refugee Protection and International Migration in the Gulf of Aden, "UNHCR does not have – and does not seek to have – a mandate for migration. It does, however, have a responsibility to assist governments in identifying and protecting refugees within migratory flows."²

In some cases, restrictive immigration practices inhibit the ability of asylum-seekers to gain access to fair and efficient asylum systems in the region. These include: interception measures; deterrent policies such as mandatory detention; the development of bilateral memoranda of understanding regarding readmission, in some cases to countries where there is no guarantee of protection or the quality of protection is uncertain; and the criminalizing of 'irregular migration'. No matter how good asylum systems are, if people cannot access these, improvements are largely academic.

Interception

Where a state intercepts people during their journey, on the basis that they do not have proper documentation to travel to that state, such people may be unable to have access to the territory or asylum procedures of states, may be unable to establish contact with UNHCR and may be at risk of being returned to or left in dangerous circumstances. Where done at airports, the fate of such individuals is hard to track. It is essential, in UNHCR's view, that government officials undertaking such interception receive relevant training and are accountable for their actions.

While still only a small percentage of people movements, the rising death toll in the Mediterranean, Eastern Atlantic, Gulf of Aden, Indian Ocean and Caribbean reinforces the need to address people moving by sea. The fundamentally humanitarian action of rescue-at-sea can be undermined by some essentially control-oriented measures, such as interception, interdiction, and, in some cases, a refusal to disembark those rescued at sea.



UNHCR/S. Holbak

It is normal for refugees in Malaysia to live in small flats with up to 30 people, with the population turning over from week to week. These men are explaining how sometimes 20 people live there, and sometimes 30.

UNHCR believes that this subject is one that requires further consideration and very clear guidelines, drawing on longstanding maritime and humanitarian traditions. To this end, UNHCR convened the Third Interagency Meeting on the Treatment of Persons rescued at sea in December 2007. The High Commissioner is working collaboratively with the heads of other agencies, including IOM, ILO, IMO, the Office of the High Commissioner for Human Rights and UN-DOLOAS to work on an interagency plan of action relating to rescue-at-sea. Together with IMO, UNHCR will issue a new edition of guidance on rescue-at-sea for shipmasters. UNHCR is also of the view that an Executive Committee conclusion on international protection could usefully elaborate principles relevant to UNHCR's work in this field.

Onward movements

Another particularly difficult issue for UNHCR as well as for states to deal with is where people have gained refugee status or otherwise found protection in one state, but move on to another country. Even more difficult is where people have passed through one or more countries in which they could have found protection before reaching a state in which they eventually submit an application for refugee status.

In some cases such onward movements may be properly understood as part of the process of flight from the country of origin, but even where a refugee moves on for non-protection reasons, he/she remains a person of concern to UNHCR and must be protected against *refoulement*. Such refugees may, however, face the prospect of a return to their country of first asylum pursuant to readmission agreements.

A number of countries in different regions have employed the concept of 'safe third country' or 'effective protection elsewhere' to return asylum-seekers or refugees to a country where they were 'safe' or had found 'effective protection'. While UNHCR considers such arrangements can work within a multilateral, legal framework, such as that of the European Union, where clear reciprocal obligations exist which define which state has responsibility to accept and determine a claim for refugee status, it is concerned where states introduce such arrangements in the absence of clear, binding and reciprocal undertakings being in place. In the context of Australia and New Zealand, most asylum-seekers come to the region through countries which are neither signatory to the 1951 Refugee Convention and which do not have the most basic capacity to provide protection

and durable solutions to refugees. The mere presence of an office of UNHCR in another country certainly does not equate to 'effective protection'. UNHCR recently made submissions to this effect in the context of New Zealand's draft new immigration legislation.³

There is a clear need to elaborate a better framework for onward movements, one which ultimately must take into account the disparities in wealth and security of different countries and the need to provide refugees with durable solutions. At the High Commissioner's Dialogue on Protection Challenges held in Geneva in December 2007, which brought together states, intergovernmental and non-governmental organizations and relevant experts, participants asked him to explore this further with UNHCR's Executive Committee.⁴

Regional cooperation

In the Asia-Pacific regional cooperation is very advanced in the fields of document fraud, people tracking and verification. The emphasis has been on border control and the need to combat irregular migration and criminal networks. While these are clearly important, UNHCR is of the view that greater emphasis needs to be placed on the need to ensure humanitarian protection for individuals who are caught up in these movements.

Processes such as the Pacific Immigration Directors Conference (PIDC) and the Bali Process on People Smuggling, Trafficking in Persons and Related Transnational Crime, which are border control oriented, also need to have a protection dimension built into them. UNHCR is ready to work with states in the region towards this end in these fora as well as in the Asia-Pacific Consultations on

Refugees, Displaced Persons and Migrants (APC).

Ten Point Plan of Action

In the search to reconcile refugee protection with states' migration management interests, UNHCR has developed a 10 Point Plan of Action which provides a framework of activities for UNHCR, states and other actors to use to assist governments in developing protection-sensitive migration strategies (see box below). This Plan of Action is in different stages of development in different regions; in North Africa and Europe UNHCR has moved to the implementation stage. UNHCR is preparing Guidelines relating to the Plan, providing a detailed explanation, along with good practice examples, of its 10 components.

UNHCR's Regional Office for Australia, New Zealand, Papua New Guinea and the South Pacific considers the 10 Point Plan of Action particularly apposite in the Pacific region where it is clear that refugee protection cannot be divorced from states' efforts to manage migration.

With this in mind, UNHCR has developed a capacity-building strategy for the Pacific region based on the 10 Point Plan of Action which takes into account: the number and complexity of asylum-seekers likely to arrive in this region; the existence and capacities of other national and international partners; and the resources available in each state in the region. In addition to addressing traditional concerns and drawing on well-established UNHCR policies and practices with regard to international refugee protection, some elements of the Plan are designed to take into account current developments and the causes and profiles of people movements in the region and the different asylum

processes and procedures. The Plan also highlights the need to explore and to identify alternative and legal migration options for non-refugees.

Over the next three years, UNHCR will work with a range of partners to operationalize the 10 Point Plan of Action for the Pacific to ensure border control and refugee protection are mutually reinforcing in this rapidly evolving region.

(See also Discussion Paper: *Refugee protection and durable solutions in the context of international migration*, UNHCR/DPC/2007/Doc. 02 of 19 November 2007 and *Refugee Protection and Mixed Migration: A 10-Point Plan of Action* of 1 January 2007 at www.unhcr.org/protect/PROTECTION/4742a30b4.pdf)

Elements of the 10-Point Plan of Action

- 1. Cooperation among key partners**
- 2. Data collection and analysis**
- 3. Protection-sensitive entry management (in-country, borders and at sea)**
- 4. Reception arrangements**
- 5. Mechanisms for profiling and referral**
- 6. Differentiated processes and procedures**
- 7. Solutions for refugees**
- 8. Addressing secondary movement**
- 9. Return arrangements and alternative migration options for non-refugees**
- 10. Information strategy in countries of origin, transit and arrival**

1. Article 14, Universal Declaration of Human Rights.

2. See www.unhcr.org

3. See full submission on www.unhcr.org.au

4. See Chairman's Summary, 12 December 2007, www.unhcr.org

Lost in transit – interdiction and New Zealand’s international obligations

by **Richard McLeod***

In 2000 at a meeting of international refugee adjudicators and judges in Auckland, Ms Erika Feller (then Director of the Department of International Protection, UNHCR) discussed the risks of states employing practical and legal devices that prevent asylum-seekers and refugees from gaining a legal and physical foothold in an asylum country. She concluded -

“[I]nstead of the law being used as a humanitarian instrument to protect people

in accordance with international obligations, it becomes a shield to deflect those very same obligations.... The law must be allowed to develop in a way that remains principled and true to its original object and purpose and yet is sufficiently pragmatic and responsive to the practical challenges faced by states.”

As if oblivious to that warning, New Zealand has joined Australia in shutting out genuine refugees through a process known as “interdiction”, a vigorous off-

shore immigration screening system that intercepts asylum seekers attempting to board craft to New Zealand. Interdiction involves the placing by the New Zealand Government of immigration officials at overseas airports with the task of preventing passengers from boarding flights to New Zealand because their documentation is incorrect or they meet a specific risk profile. The New Zealand Government has invested \$136 million into border security since 2000, and its interdiction project has been hugely successful. During the five years from 2001-2005, asylum applications in Australia and New Zealand plummeted by 75 per cent. In August 2006, a senior official of New Zealand’s border security told a media conference that the interdiction system had resulted in 680 people being declined permission to board planes in the 2005-06 financial year, compared with 103 in the year 2003-04. The official stated that the interdiction process had contributed to the drop in asylum seekers reaching New Zealand borders – from 263 in the 2002-03 financial year to 87 in the 2005-06 financial year. In June 2007, then-Immigration Minister David Cunliffe confirmed that interdiction had stopped 762 people “from coming here ... even before they get on a plane” during the 11 months to May 2007. The same month, a Human Rights Foundation Aotearoa New Zealand report noted that the downturn in asylum seekers reaching New Zealand was reflected in figures relating the number of successful claimants – from 247 successful claimants in 2002/2003, to only 67 successful claimants in 2005/2006.



Children make up about 65 percent of the population of the Nayapara camp, Bangladesh, but there is little for them to do. Here, boys play football in the rain.

Concerns

Interdiction may be welcomed by those who claim that asylum seekers are a drain on our public purse, or are not welcome here, or who have false or not well-founded claims. To a degree, its proponents have statistics on their side. Since 2002, Immigration New Zealand's refugee status approval rate has averaged only 20% of total asylum claims, while the Refugee Status Appeals Authority has approved only 18.08% percent of total refugee appeals since its inception.

But there are growing concerns over the practice of interdiction alongside our international obligations. Human Rights Foundation Aotearoa New Zealand warns that within the interdiction system, "there seem to be no mechanisms in place to ensure that genuine refugees are not prevented from reaching New Zealand's borders". Such concerns are justified by pure and simple mathematics: if the average refugee approval rate is approximately 20% of all asylum seekers, and if almost 200 fewer asylum seekers have reached New Zealand on average per year since 2002, then our immigration officials have prevented approximately 40 genuine refugees from reaching protection in New Zealand each year, for the past six years.

Interdiction and International Refugee Law

So, what happened to those 240 genuine refugees (and the hundreds of other asylum seekers) who were prevented from boarding planes or apprehended by our immigration officials in the transit lounges of Singapore, Jakarta, Kuala Lumpur and Bangkok? We have not been told by our

Immigration Service or by UNHCR what fates these men, women and children have met. The practice of interdiction threatens a fundamental premise of international refugee protection - that no-one shall be expelled or returned (*refouler*) to a place where his/her life or freedom is at risk. Yet this is precisely what New Zealand's interdiction measures have been achieving - although the New Zealand Government may not be expelling genuine refugees from our own shores, it is certainly preventing them from reaching here - at a statistical probability rate of at least forty genuine refugees a year. At the very least, this system impacts upon the right of individuals to seek asylum in Article 14 (1) of the Universal Declaration of Human Rights. At worst, it may indirectly be bringing about the *refoulement* of genuine refugees by immigration officers, which would be a clear breach of our international obligations under the Refugee Convention and arguably a breach of our own immigration laws. Section 129X(2) of the Immigration Act 1987 requires that "[i]n carrying out their functions under this Act in relation to a refugee or refugee status claimant, immigration officers must have regard to the provisions of this Part and of the Refugee Convention".

The UNHCR's position is that while every state has the sovereign right to protect its borders from breach and abuse, interdiction policies which prevent access to effective protection systems for self serving reasons and in the absence of adequate safeguards cannot be regarded as compatible with international obligations. According to the UNHCR, Immigration New Zealand has agreed to refer all of its "interdicted" persons to a



A small shop run by a Rohingya refugee in Cox's Bazar District, Bangladesh

UNHCR office. Yet human rights observers have expressed concern over whether this is in fact occurring, especially in countries which are not signatories to the UNHCR Convention. Officially, no information has been released on the fate of intercepted asylum seekers, but according to the testimonies of many asylum seekers, off-shore interception invariably results in asylum seekers being turned over to airport authorities, detained and deported. It is difficult to imagine how referring interdicted detainees to a local UNHCR office could ensure that adequate protection is provided to genuine refugees. (This rarely happens in practice but if it were to, then UNHCR does its best to take responsibility to do RSD and protect - as it does in Indonesia, PNG, Malaysia and Thailand. The wider question is, however, one of state responsibility that cannot be delegated to UNHCR).

Finding the protection balance in resettlement

To date, there has been little or no discussion or debate around an interdiction practice that works to deny asylum seekers the right to seek asylum in the first place.

The onus is on those states in which interdiction takes place - as well as on those Immigration New Zealand officials who work in interdiction teams offshore – to account for all interdicted asylum seekers. At the very least, this ought to include a greater level of transparency around the entire interdiction process, the adoption of proper measures for ensuring that interdiction practices are consistent with international obligations, and the implementation of a mandatory UNHCR referral mechanism which would be immediately engaged once an intercepted person has indicated to officials their intention to seek asylum from persecution.

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1. See "Lost in migration: Asylum seekers face challenges amid efforts to stem flows of illegal migrants", (UNHCR) (William Spindler) 2006; http://www.un.org/events/tenstories_2006/story
2. Field, "Airline to be sued for flying illegals to NZ", 25 August 2006.
3. Press release 28 June 2007 "National's shameful record with immigration fraud".
4. June 2007 *Shadow Report to the 15th, 16th and 17th consolidated report of the New Zealand Government under the International Convention on the Elimination of All Forms of Racial Discrimination*, Human Rights Foundation Aotearoa New Zealand para 3.15-17.
5. Although the past two years averaged 27% (2007) and 24% (2006). See Immigration New Zealand Statistics – Approve and Decline rates for Refugee Status Claims decided by the *Refugee Status Branch* (Table 7), see <http://www.immigration.govt.nz/Imigrant>
6. Although the past two financial years have seen a grant rate above that average. See Refugee Status Appeals Authority Annual Report to 30 June 2007
7. June 2007 *Shadow Report* (above footnote 4), para 3.16
8. "Everyone has the right to seek and enjoy in other countries asylum from persecution".
9. Erika Feller, Director, Department of International Protection, UNHCR, Geneva – *The role of adjudicators and judges in international refugee protection*, address to inaugural meeting IARLJ Australian / New Zealand Chapter, 10 March 2000.
10. June 2007 *Shadow Report* (above footnote 4), para 3.17
11. Ibid

State responsibility v interests of the state By Kevin Third*

There has been much debate over whether refugees should be selected for resettlement based solely on their protection needs, or their ability to settle in a new environment. Some resettlement countries are actively considering the latter and I understand there may already be ministerial directive in one or two states to pursue this type of assessment. In writing on this issue I will refrain from giving an opinion either way, rather I will comment on the issues relevant to the debate that need to be considered when a state agrees to resettle UNHCR mandated refugees.

One of the roles of government is to create public value. In doing so, the interests of the state are in fact a balancing act between the interests of many groups or sections of society. What is seen as value by one section of the community may be of no interest whatsoever to another and the actions of government in attempting to uphold the "interests of the state" may in fact be detrimental to its survival if it disaffects a large enough proportion of the voting public.

Refugee resettlement is an issue that can divide society and states that agree to provide this valuable durable protection solution can find they are grappling with the tension between the responsibilities to their citizens around ensuring all newcomers to the country (this includes all migrants as well as refugees) settle and integrate well, and responsibilities as an international citizen.

One of the points that can become lost in the debate is that being a good international citizen is in fact all about creating public value. The reputation of a state impacts on many parts of the political arena and the interests of the state, which of course are by definition the interests of the public who are served by the machinery of the state, can be well served by a good reputation as an international

citizen. Thus the tension mentioned earlier can in fact be a matter of perception that can be actively managed.

In considering the views of society on refugee resettlement it is therefore important that states consider the level of impact public opinion might have on their individual situations. Particular states may determine that a low level of support for settlement outcomes will not impact on either the domestic political fabric or their international reputation. This being the case then the complete protection approach will produce satisfactory outcomes. (Although in reality it is unlikely that any state would absolve itself of the responsibility to provide some level of settlement or integration programme for its refugees). However if the domestic politics of a state will be significantly affected by the lack of settlement and integration outcomes then a much more significant approach to integration will be required.

Focussing on outcomes does not necessarily require a state to only resettle "easy" cases. As stated earlier there is an implied responsibility for states to provide some form of settlement or integration policies and programmes for refugees. To what extent a state can accommodate difficult protection cases depends very much on the types of programme in place.

So in summary, how does a state find the protection balance? Each state must weigh up the factors considered in this article and address those that best relate to their individual political and international priorities. What should not be forgotten though is that the state is accountable to its citizenry and an appropriate policy response needs to be well thought through within the political context while maintaining a focus on the humanitarian nature of refugee protection.

** Kevin Third is the Director, Refugee Division of Immigration New Zealand. However, the views expressed in this article are not to be taken as the official views of the New Zealand Government.*