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The Legal and Ethical
Implications of
Extra-Territorial Processing
of Asylum Seekers:
Europe Follows Australia

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Abstract

In this paper I will discuss the current European proposals in comparison with our Pacific Strategy and canvass the legal and ethical implications of such plans in the light of the international system of refugee protection.

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The Legal and Ethical Implications of Extra-Territorial Processing of Asylum Seekers: Europe Follows Australia

In this presentation I explained how Europe is looking to Australia as a model for the treatment of asylum seekers, and in particular at Australia's use of extra-territorial processing under the Pacific Solution. Generally when lawyers talk about asylum seekers they talk about rights – the right to seek and enjoy asylum, the right not to be *refouled* or returned to a place where they would be persecuted. But in this talk I took another theme, which fits with the idea of 'Europe Follows Australia', namely the ethical. Legal talk about rights and duties (of states) gets tangled up particularly as states (governments) respond by referring to their sovereign right to control who comes into a country. And whilst not denying that, the ethical view, which I take to be focussed upon outcomes, upon fairness and equity, helps us to stand aside. In particular it directs us to the global picture, and here we see that amidst all the problems stemming from protracted refugee situations, wealthy industrialised nations follow each other in denying the right to seek asylum. For this is essentially what happens with extra-territorial processing of asylum seekers. They are prevented from making a claim for asylum in the territory to which they head whilst they are in flight and instead are interdicted and taken to another place for processing.

So the question I asked was whether extra-territorial processing is ethical? My starting premise is that in a world where we see poverty on a large-scale, does extra-territorial processing lead to an equitable distribution of resources? Does it take the burden off the poorer countries of origin and transit? Moreover does it lead to better humane outcomes for the individuals? Overall are human rights respected?

I first explained why Europe is now looking at the possibility of extra-territorial processing and then used Australia's Pacific Strategy as the measure to answer the questions above.

European Policy (The European Union)

Unlike Australia, the European Union (EU) does not have an offshore resettlement programme. European countries are not generally speaking countries of immigration. Over the last decade and more the EU has erected barriers around itself in the name of harmonisation. One aspect of this is that member states share the responsibility for processing asylum seekers. In practice this means that on the basis of agreed cri-

teria (such as the fact that a person has already passed through another EU member state), states can shift the responsibility onto another. So paradoxically, as the policy has tightened up (through the creation of the Schengen area) the burden has fallen on the southern transit states – Italy and Spain in particular.

The crisis of asylum seekers and other forced migrants seeking to cross the Mediterranean to reach Italy, Greece and Spain has escalated in the past two years. In a speech on 12 October 2005 Mr. Antonio Guterres, UN High Commissioner for Refugees said:

In the last few weeks we have seen terrible images, which we should not have to see – from North Africa, the Mediterranean, the Gulf of Aden.¹

The majority of these persons have moved from sub-Saharan Africa and areas of known ‘protracted’ refugee situations in Africa. Coincidentally they come from poor countries. It is not known how many of these people are asylum seekers because most are not given a chance to make a claim. Many are being returned without a hearing. Many others have lost their lives at sea.

It is these Mediterranean ‘boat people’ which is driving the push for offshore processing, or a ‘Mediterranean Plan’ in that region. In this context Europe and the UK have turned to Australia for inspiration, just as Australia looked to an earlier USA model in constructing its Pacific Strategy. But the EU is also focussing upon other extra-territorial and regional solutions which could lead to fairer outcomes. For example, the European Commission to the Council and the European Parliament proposes the establishment of *Regional Protection Programmes* (RRPs). RRP’s aim to ‘enhance the capacity of areas close to *regions of origin* to protect refugees’. RRP’s are intended to comprise two main elements: first measures to enhance the protection capacity of areas close to refugees’ regions of origin; and secondly a joint EU *resettlement* programme. In a response dated 12 October 2005 the UNHCR has given cautious support for this idea. Mr. Antonio Guterres, UN High Commissioner for Refugees remarked that it will be important to ensure full coordination of these Programmes with other initiatives and especially to ensure consultation with the countries concerned. He warned that ‘building protection capacity in third countries cannot replace asylum in Europe.’²

In this context, Europe is being forced to see the problem of asylum seekers in the context of ‘forced migration’ issues, but is arguably putting undue focus on the Mediterranean situation. The bulk of asylum seekers to the EU in fact come from the eastern borders of the EU.

1. ‘Remarks by Mr. António Guterres, UN High Commissioner for Refugees, on the occasion of the European Union Council of Ministers of Justice and Home Affairs’: <http://www.unhcr.org/cgi-bin/texis/vtx/admin/opendoc.htm?tbl=ADMIN&id=435612ec4>.

2. Ibid.

The Ethical Implications

There are many lessons to be learnt from Australia's approach, the primary one being that refugee policy must be concerned foremost with protection outcomes and burden sharing, rather than deterrence. The focus of the Pacific Strategy was on punishing 'secondary movers', that is it attempted to keep the asylum seekers in the countries of first asylum and transit. But they were poor countries with limited resources. Whilst the Pacific Strategy has assisted some of our poorer Pacific neighbours, it did nothing to alleviate other regional refugee situations, and did little for the overall global refugee problem. There is no evidence that the Pacific Strategy involved direct support to refugee communities in the countries of origin, or addressed the 'root causes' of the refugee situation. Rather it boosted the flagging economy of Nauru in particular by providing it with a new industry. It also provided additional contracts to the private organisation that runs Australia's detention centres.

The human rights aspects of the Pacific Strategy have been well documented.³ The conditions of detention, the quality and timeliness of the processing and the eventual outcomes in the form of temporary protection are all matters that raise concern. Some specific lessons for the EU from the Pacific Strategy are these:

- Processing of asylum seekers must be fair, transparent and efficient to ensure confidence in the outcomes and to guard against *refoulement*.
- The detention of asylum seekers must be for the minimum duration, for the purpose of identity and security checks. Persons whose claims are clearly 'unfounded' should be returned to their country of origin, but others must be released into a community.
- If found to be in need of protection and if temporary protection is granted, it must provide genuine protection. For example, it should be recognised that it will lead to permanent protection after a specified time, if conditions in the country of origin have not improved, and the asylum seeker continues to have a 'well founded fear'.
- The conditions which are attached to temporary protection must respect the human rights and dignity of persons. The need for stability in the lives of asylum seekers must be recognised.
- The costing of such strategies must ensure that those who need support and can contribute to the solution of a refugee crisis are the main recipients of financial aid.

For the remainder of this paper I want to concentrate on Australia's relationship with Indonesia as a country of transit.

3. See in particular Oxfam, *Community Aid Abroad, Adrift in the Pacific: The Implications of Australia's Pacific Refugee Solution*, February 2002 accessed at <http://www.caa.org.au/campaigns.PDF> (refer to page 110).

The Failure of Co-operative Arrangements

The Pacific Strategy did not work as a burden-sharing arrangement. During the *Tampa* crisis which led to the Pacific Strategy, Australia was isolated by both the international community and Indonesia. Clearly Indonesia's practical capacity to help during the *Tampa* crisis was limited and on the basis of previous practice, it considered the refugees to be Australia's responsibility. And presumably so did the international community, especially those industrialised countries with their own refugee crises.

Although Australia had put in place a 'Regional Co-operation Model' with Indonesia in 2000, which was later formalised through the 'Bali Process' in 2002 and 2003, the focus of this was on prevention of people smuggling within a transnational crime framework rather than upon protection of refugees. At the 2003 meeting the UNHCR reminded the parties that the issue was not 'about rejecting persons who flee to your countries but in treating them properly'. The UNHCR argued that if durable solutions and burden sharing were practiced, they would result in a reduction in people smuggling and related transnational crime:

But to be effective in fighting crime, it is not sufficient to increase border control and attack criminal networks. You have been engaged in this for many years, but the problem is still with us. One needs to limit the 'oxygen' of this crime, to reduce the number of victims available to be exploited by criminal networks. You must therefore not only live up to the spirit of the 1951 Convention, but also engage in comprehensive solutions – in Convention Plus. Solutions for refugees and burden sharing is not only a humanitarian but a political challenge. It is also about fighting crime.⁴

However the Australian Government did not heed this warning.

Australia – Indonesia Co-operation – A Missed Opportunity?

For those coming from the Middle East, the key countries of transit in South East Asia have been Malaysia and Indonesia. Indonesia is not a signatory to the Refugees Convention, but despite its own massive internal problems, and its shaky relationship with Australia, it has been willing to co-operate with the UNHCR in relation to asylum seekers. As it is not a signatory to the Refugees Convention, it cannot be regarded as a 'safe country' of first asylum as the risk of *refoulement* exists.

As a result of Australia's intervention, the UNHCR and the IOM 'fill the Indonesian domestic legal and policy vacuum' in regards to the administration of asylum seekers and refugees. Under the arrange-

4. UNHCR, Statement to the Regional Ministerial Conference on People Smuggling, Trafficking in Persons and Related Transnational Crime, 29-30 April 2003, at p 10.

ment between Australia, Indonesia, UNHCR and IOM, Australia funds the upkeep of asylum seekers in Indonesia, who are placed under the care of IOM (who provide accommodation, food and medical supplies to the applicants), and provides funds for UNHCR's processing of asylum seekers. IOM's role is to provide an initial assessment to asylum seekers and advise them of their options, one of which is voluntary return to their country of origin or a transit country. If a fear of return is expressed, IOM is obliged to contact the UNHCR who will then process the asylum seeker's claim. However, the ability of this cooperative arrangement to provide protection to asylum seekers is questionable, as 'the provision of temporary refuge is entirely dependent upon UNHCR and IOM, organisations which do not have the same legal accountability as a sovereign state and which rely upon cooperation from Indonesian authorities at their discretion'.⁵

Neither the current or past Minister for Immigration has put a dollar figure on the cost of this agreement but the former Minister Ruddock promoted the notion that Australia saves considerable amounts of money 'in comparison to what it would cost if people arrived in Australia and had to be dealt with under our determination program and detained in the humane conditions in which we do detain people'.⁶ But, unless sufficient resettlement places are found for those determined by the UNHCR to be refugees, they will end up living indefinitely in Indonesia. In light of this 'cost – benefit' analysis, it is clear that what is being sold, is the right of asylum seekers to due process and to live with dignity.

The evidence suggests that asylum seekers in Indonesia live in a twilight world. The processing of asylum seekers in Indonesia is slow and difficult. UNHCR is stretched for resources and personnel in Indonesia and asylum seekers must often wait weeks and even months simply for an interview. Those asylum seekers who do gain access to the UNHCR processing system but whose claims for protection are rejected, are in theory subject to deportation from Indonesia. However that requires Indonesia to have the funds to effect deportation or that the asylum seekers' home embassy provides the necessary funds.

Asylum seekers who are processed by the UNHCR and determined to be in need of protection are under the care of UNHCR, not the IOM. They are relocated to Jakarta, found temporary housing, provided cash assistance by the UNHCR, and submitted for potential resettlement. As the UNHCR has stressed, these persons do not have 'effective protection' in Indonesia. They do not have lawful residence and their presence in Indonesia is merely tolerated. They have no lawful access to the labour market and are not able to work legally. There is no possibility of their exercising civil, economic, social or cultural rights. The only basic rights they hold are of freedom of movement and stay of deportation. Australia does not pay UNHCR's costs of assistance to approved refugees, but contributes to the accommodation costs of those who remain in Indonesia but are denied refugee status by the UNHCR.

5. HRW, *'By Invitation Only': Australian Asylum Policy*, Australia Vol 14 No 10(C) December 2002, p 49.

6. Peter Mares, 'Moving the Barriers Offshore: Cooperation with Indonesia reduces the number of 'boat people' arriving on Australia's shores', *Rantau* (edition 2) September 2001, p 11.

In terms of 'durable solutions', sheltering in Indonesia is ambivalent. The number of resettlement places available is very limited. For example, between January 2000 and February 2002, UNHCR in Indonesia identified 535 Afghans, Iraqis and Iranians as refugees but only 65 had been found resettlement places.⁷ When Australia initiated the cooperative arrangement with Indonesia, it declared that it would not accept any person for resettlement who was intercepted under the arrangement. However following pressure from the US government, the Howard Government agreed to consider those with family links in Australia. Out of 389 refugees resettled by the UNHCR between January 2001 and October 2001 Australia resettled 41, New Zealand resettled 65 and Canada resettled 70. However, the problem facing refugees awaiting resettlement in Indonesia is that other resettlement countries view them as Australia's responsibility and are therefore generally reluctant to accept them. Australia will not acknowledge its resettlement responsibility, and argues that to combat the people smuggling, refugees should never reach their desired destination.

There is evidence that there are still large numbers of asylum seekers in Indonesia although less than at the height of the Afghan crisis. In 2003, 196 persons mostly from Iraq and Afghanistan asked for asylum and it was estimated that Indonesia hosted over 300 asylum seekers and refugees that year. As at June 2004, IOM estimated that they were caring for 370 persons, of whom 210 were refugees.⁸

Conclusions

A key goal of the UNHCR's Convention Plus approach is:

Sharing burdens and responsibilities more equitably and building capacities to receive and protect refugees.

By contrast the Pacific Strategy was conceived in the self-interest of Australia as a short-term policy of deterrence. It is to be hoped that the Europeans can do better by entering into arrangements which lead to equitable distribution of resources and which take the burden off poorer countries of transit.

Some Readings:

US Committee for Refugees, *Sea Change: Australia's New Approach to Asylum Seekers* (February 2002)
Oxfam, Community Aid Abroad, *Adrift in the Pacific: The Implications of Australia's Pacific Refugee Solution* (February 2002) available at: <http://www.caa.org.au/> (refer to page 110).

Oxfam, Community Aid Abroad, *Still Drifting: Australia's Pacific Solution Becomes 'A Pacific Nightmare'* (August 2002) available at: <http://www.caa.org.au/> (refer to page 110).

7. Oxfam, Community Aid Abroad, *Adrift in the Pacific: The Implications of Australia's Pacific Refugee Solution*, February 2002, p 15 accessed at <http://www.caa.org.au/campaigns.PDF> (refer to page 110).

8. Information supplied by the Department of Immigration to the author.