GILBERT + TOBIN
CENTRE OF PUBLIC LAW

THE UNIVERSITY OF NEW SOUTH WALES

FACULTY OF LAW

Professor Jane McAdam
BA (Hons) LLB (Hons) (*Sydney*) DPhil (*Oxford*)

Australian Research Council Future Fellow

Non-Resident Senior Fellow,
Brookings Institution, Washington DC

Research Associate, Refugee Studies Centre,
University of Oxford

Committee Secretary
Senate Legal and Constitutional Affairs Committee
PO Box 6100
Parliament House
Canberra ACT 2600

BY ELECTRONIC SUBMISSION

14 December 2012

Dear Committee Secretary,

Inquiry into the Migration Amendment (Unauthorised Maritime Arrivals and Other Measures) Bill 2012

Thank you for the opportunity to provide a written submission in relation to this Bill.

The Bill proposes amendments to the Migration Act 1958 (Cth) to ensure that asylum seekers who arrive by boat will have the same legal status regardless of whether they arrive on the Australian mainland or at an excised offshore place. Essentially, the effect of the Bill is to 'excise' the Australian mainland from the 'migration zone' so that regional processing arrangements can apply to all asylum seekers who come by boat. Such people are unable to make a valid visa application 'unless the Minister personally thinks it is in the public interest to do so', and are 'subject to mandatory immigration detention, are to be taken to a designated regional processing country and cannot institute or continue certain legal proceedings' (Explanatory Memorandum, 1).

A provision-by- provision analysis reveals that there are virtually no substantive differences between this Bill and the Migration Amendment (Designated Unauthorised Arrivals) Bill 2006 introduced by the Howard Government. One exception is that the 2006 Bill included a reporting requirement obliging the Minister

to table in Parliament an annual report detailing the arrangements in place for assessing refugee claims by asylum seekers processed offshore and information about their the accommodation, health care and education. There is no such requirement in the 2012 Bill, which adds to the concerns expressed below about the lack of transparency and public scrutiny.

The 2006 Bill was eventually withdrawn when it became clear that it would be defeated in the Senate, with a number of Liberal Senators threatening to vote against it or abstain. The Senate Committee that reported on the Bill also recommended that 'the Bill should not proceed' in light of the evidence presented to it (Recommendation 1).

Given that the present Bill raises identical concerns, my submission below reiterates many of the same concerns I presented in my submissions on the 2006 Bill.

Yours sincerely,

Professor Jane McAdam
Director, International Refugee & Migration Law Project
Gilbert + Tobin Centre of Public Law
Faculty of Law, University of NSW

A INTRODUCTION

1. While Australia has a sovereign right to determine who enters its territory, this right is not absolute. It is limited by certain obligations which Australia has voluntarily accepted under international treaty law, as well as under customary international law. These mandate that Australia must not return refugees (either directly or by virtue of deflection or interception policies) to territories in which they face—or risk removal to—persecution on account of race, religion, nationality, political opinion or membership of a political social group; arbitrary deprivation of life; torture; or cruel, inhuman or degrading treatment or punishment.[1] Refugee law places limits on the otherwise unfettered exercise of State sovereignty, both at the point of admission to the territory and in subsequent State action.

2. This submission canvasses a number of international law concerns relating to the Bill and its effect of subjecting all boat arrivals to the regional processing regime. The first section discusses overarching issues regarding the Bill's conformity with Australia's international obligations, while the second section deals with specific substantive provisions which may be breached by the new regime.

B OVERARCHING INTERNATIONAL LEGAL ISSUES

(a) State responsibility

3. The effective 'excision' of the whole of Australia from the migration zone has no impact on Australia's obligations under international law.[2] Australia's international legal duties and liabilities remain unchanged.

4. Australia is responsible for the actions of its officials both within and outside of Australian territory, including within the territory of other sovereign States, such as Nauru and Papua New Guinea. The fact that any harm caused (or delegated) by Australian officials may be inflicted outside Australia, or in an area identified by domestic law as an international zone, in no way diminishes Australia's responsibility.[3]

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[1] Convention relating to the Status of Refugees (adopted 28 July 1951, entered into force 22 April 1954) ('Convention' or 'Refugee Convention') art 33; Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (adopted 10 December 1984, entered into force 26 June 1987) 1465 UNTS 85 ('Convention against Torture' or 'CAT') art 3; International Covenant on Civil and Political Rights (adopted 16 Dec 1966, entered into force 23 March 1976) 999 UNTS 171 ('ICCPR') arts 6, 7.

[2] Human Rights Committee 'General Comment 31 on Article 2 of the Covenant: The Nature of the General Legal Obligation Imposed on States Parties to the Covenant' (29 March 2004) UN Doc CCPR/C/21/ Rev.1/Add.13 (26 May 2004) para 10; Human Rights Committee 'Concluding Observations of the Human Rights Committee: Israel' UN Doc CCPR/C/79/Add.93 (18 August 1998) para 10; Human Rights Committee 'Concluding Observations of the Human Rights Committee: United States of America' UN Doc CCPR/C/79/Add.50 (6 April 1995) para 284. The *non-refoulement* obligation under article 33 of the Refugee Convention applies to actions taken 'in any manner whatsoever'.

[3] I Brownlie *System of the Law of Nations: State Responsibility, Part I* (OUP Oxford 1983) 135–37, 159–66.

5. As a matter of State responsibility, liability for breaches of international law can be both joint and several. Any State that aids or assists, directs or controls, or coerces another State to commit an internationally wrongful act is also responsible if it knows the circumstances of the wrongful act, and the act would be wrongful if that State committed it itself. Furthermore, an internationally wrongful act is attributable to a State if it is committed by a legislative, judicial or executive organ of government, or a person or entity which, although not a government organ, has nonetheless been delegated certain aspects of governmental authority (even if that person or entity exceeds the actual authority they have been given or goes against instructions). In other words, States cannot 'contract out' their international responsibilities.

6. Given Australia's involvement in the transfer and possible processing of the asylum seekers to be held in such places, Australia will remain responsible for any violations of international law relating to their treatment, under the Refugee Convention and its Protocol,[4] general international law, and human rights law.

(b) Asylum

7. Under international law, individuals have a right to seek and enjoy asylum from persecution. Every State has the sovereign right to grant asylum to refugees within its territory; the corresponding duty is respect for that asylum by all other States. Asylum is a peaceful, humanitarian and non-political act. Australia has a fundamental legal duty not to return people to persecution and other forms of significant harm. This duty is based on a long-standing principle of international treaty law and custom, is entrenched in domestic law, and cannot simply be abandoned for political reasons.

(c) Good faith

8. A basic principle of international law is that States have a responsibility to implement their treaty obligations in good faith.[5] This duty is breached if a combination of acts or omissions has the overall effect of rendering the fulfilment of treaty obligations obsolete, or defeating the object and purpose of a treaty. A lack of good faith is distinct from (although may also encompass) a violation of an express term of a treaty. The duty requires parties to a treaty 'not only to observe the letter of the law, but also to abstain from acts which would inevitably

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[4] Protocol relating to the Status of Refugees (adopted 31 January 1967, entered into force 4 October 1967) ('Protocol').

[5] Vienna Convention on the Law of Treaties (adopted 23 May 1969, entered into force 27 January 1980) 1155 UNTS 331 arts 26, 31; Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations, UNGA Res 2625 (XXV) (24 October 1970) para 3. See GS Goodwin-Gill 'State Responsibility and the "Good Faith" Obligation in International Law' in M Fitzmaurice and D Sarooshi (eds) *Issues of State Responsibility before International Judicial Institutions* (Hart Publishing Oxford 2004) esp 85–88; arguments presented by UNHCR as intervener in *R (European Roma Rights Centre) v Secretary of State for the Home Dept* [2003] EWCA Civ 785: UNHCR Skeleton Argument for the Court of Appeal, paras 48–108, 140–63 (on the asylum question specifically); UNHCR Written Case for the House of Lords, paras 24–38. The House of Lords rejected the issue of good faith there solely on the basis that the Refugee Convention was considered to be inapplicable to the case because the individuals concerned had not yet left their country of origin: *R v Immigration Officer at Prague Airport, ex parte European Roma Rights Centre* [2004] UKHL 55 para 64 (Lord Hope).

affect their ability to perform the treaty.'[6] Thus, a State lacks good faith 'when it seeks to avoid or to "divert" the obligation which it has accepted, or to do indirectly what it is not permitted to do directly.'[7] The test for good faith is an objective one; it looks to the practical effect of State action, not its intent or motivations.[8]

9. In the context of the right to seek asylum, measures which have the effect of blocking access to procedures or territory may not only breach express obligations under international human rights and refugee law, but may also constitute a breach of the principle of good faith. Although States do not have a duty to facilitate travel to their territories by asylum seekers, the options available to States wishing to frustrate the movement of asylum seekers are limited by specific rules of international law and by States' obligations to fulfil their international commitments in good faith. Even though immigration control per se may be a legitimate exercise of State sovereignty, it must nevertheless be pursued within the boundaries of international law.

10. In its Advisory Opinion on *Reservations to the Genocide Convention*, the International Court of Justice stated that in the area of human rights law, of which refugee law is an integral part, treaties have 'a purely humanitarian and civilizing purpose.' In such treaties,

    the contracting States do not have any interests of their own; they merely have, one and all, a common interest, namely, the accomplishment of those high purposes which are the *raison d'être* of the convention. Consequently, in … convention[s] of this type one cannot speak of individual advantages or disadvantages to States, or of the maintenance of a perfect contractual balance between rights and duties.[9]

11. While there is no provision that expressly mandates States to process asylum seekers within their borders, a combination of provisions in the Refugee Convention (no penalties for illegal entry, non-discrimination, *non-refoulement*, access to courts and the status which contracting States owe to refugees) reinforce the object and purpose of the Refugee Convention as assuring to refugees 'the widest possible exercise of … fundamental rights and freedoms'.[10] States are responsible for refugees in their territory, as well as those whom they subject to enforcement action beyond their territorial jurisdiction. This responsibility entails ensuring that refugees are not returned in any manner to territories in which they face—or risk return to—persecution, arbitrary deprivation of life, torture, or cruel, inhuman or degrading treatment or punishment; *and*, if sent elsewhere, have access to protection and durable solutions.

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[6] Yearbook of the International Law Commission, 1964, vol I (Summary Records of the 16th Session), 727th Meeting (20 May 1964) 70.
[7] UNHCR Skeleton Argument (n 5) para 18; UNHCR Written Case (n 5) para 32.
[8] I Brownlie *Principles of Public International Law* (6th edn OUP Oxford 2003) 400, 423, 426–27, 444; J Crawford *The International Law Commission's Articles on State Responsibility: Introduction, Text and Commentaries* (CUP Cambridge 2002) 84.
[9] *Reservations to the Genocide Convention* (Advisory Opinion) (1951) ICJ Reports 15, 23.
[10] Refugee Convention, Preamble.

12. By excising the whole of Australia from the 'migration zone', even in relation to those coming directly from countries in which they fear persecution or other significant harm, Australia is seeking to thwart the essence of the international protection regime. The present regional processing regime is not a true 'regional' scheme. It does not reflect any kind of multilateral regime based on shared goals, concerns and responsibility, but is instead premised on bilateral arrangements whereby Australia outsources refugee status determination to other States (with significant financial incentives for those States).

13. Furthermore, for States to seek to avoid their obligations by contracting them out to other States makes a nonsense of the multilateral treaty regime and is incompatible with the Refugee Convention's object and purpose. As UNHCR has powerfully observed:

    > such an agreement would create disparities between different parts of the world with regard to respect for international obligations and matters for which a common and coherent international practice is required. Such disparities have the effect of distorting the burden-sharing rationale underlying the 1951 Convention, by shifting the responsibility for examining certain types of asylum claims to other countries. The 1951 Convention, together with the 1967 Protocol, is framed to apply without geographic restrictions or discrimination. Its efficacy depends on it being global in scope and adherence, and if *inter se* agreements were permitted, the treaty regime as a whole would be rendered meaningless.[11]

14. The principle of good faith requires States to 'consider the use of reasonable alternatives proportionate to its policy objectives in international affairs, which are least likely to violate its international obligations.'[12] The millions of dollars allocated to regional processing arrangements would be better spent on humanitarian assistance to refugee-producing countries to seek to address the root causes of flight and meaningful capacity building in the region.

15. The broader international protection regime, comprising refugee law, human rights law and more generally applicable rules informed by the principle of good faith, provide a normative and institutional framework for durable solutions. The very nature of the international protection regime is premised on States *not* acting unilaterally and in their own self-interest. Kneejerk reactions may satisfy short-term political purposes, but ultimately contribute to undermining international cooperation and solutions. As Goodwin-Gill has observed: 'By sending out a message of unilateral disregard of the principles of international co-operation, they inevitably lead to a disinclination on the part of others to contribute to solutions.'[13] International disdain at Australia's unilateral response to the *Tampa* and its creation of the Pacific Strategy led to other countries viewing Australian

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[11] UNHCR Skeleton Argument (n 5) para 102.
[12] Ibid, para 24.
[13] GS Goodwin-Gill 'International Refugee Protection: A Work in Progress: Sovereignty and Cooperation' (Kenneth Rivett Oration No 2 Sydney 24 November 2005) 20 http://www.refugeecouncil.org.au/docs/resources/orations2005_1-3.pdf.

concerns as Australia's (self-created) problem.[14] UNHCR's reluctance to involve itself in the regional processing regime is a sign of repudiation of Australian unilateralism in this area of law.

(d) Refugee warehousing and access to rights

16. The Refugee Convention is premised on the understanding that States will protect refugees in their territories, or cooperate with other States to find durable solutions (local integration, voluntary repatriation and resettlement) for them.

17. Subjecting asylum seekers who arrive by boat to the regional processing regime is not a durable solution. The Australian government's intention to delay processing and resettlement options for those found to be refugees (as part of the 'no advantage' principle) undermines a key purpose of the Refugee Convention. Under the Refugee Convention, refugees are entitled to a status, which includes *inter alia* the right to employment, social security, education and freedom of movement. Clearly, Australia will breach these obligations if recognized refugees are not accorded a legal status recognized in domestic law. There is no indication as to how Convention rights could be realized in regional processing countries. As noted in paragraphs 3–6 above, Australia's responsibilities under international law are not absolved merely by moving people offshore. As UNHCR has explained, 'the practical application of the "no advantage" test cannot comfortably be aligned with Australia's obligations under the Refugee Convention'.[15]

18. One concern is that recognized refugees may end up languishing in regional processing countries (in some cases in detention) for years, waiting to be resettled, without access to the rights to which they are entitled. The previous offshore processing regime under the Howard government revealed that attempts to get other States to resettle refugees were overwhelmingly unsuccessful.[16] Without having sought guarantees for international responsibility-sharing and durable solutions, other countries (rightly) saw such refugees as Australia's responsibility.

19. As a wealthy, industrialized nation with the economic and environmental capacity to host refugees, Australia's regional processing policy is irresponsible and unlikely to achieve its ends. If its aim is to deter asylum seekers and/or 'save lives at sea', then clearly there are considerable misunderstandings about the nature of flight (sudden, and often covert for fear of retribution) and the methods

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[14] The international community's lack of support for the Australian response was perhaps best reflected in the award by UNHCR of the 2002 Nansen refugee medal to the captain and crew of the *Tampa*. No other State formally supported the Australian position, with all acquiescing in UNHCR's condemnation of it.

[15] UNHCR, 'UNHCR Calls for Compassion and Legal Principles to Be at Centre of Policy Responses (23 November 2012) http://unhcr.org.au/unhcr/index.php?option=com_content&view=article&id=278:unhcr-calls-for-compassion-and-legal-principles-to-be-at-centre-of-policy-responses&catid=35:news-a-media&Itemid=63.

[16] Senate Standing Committee on Legal and Constitutional Affairs, 'Estimates (Additional Budget Estimates)', *Hansard* (19 February 2008) L&CA 124, Senator Chris Evans (Immigration Minister); Andrew Metcalfe (Departmental Secretary).

by which flight must occur given that States do not generally provide visas for individuals seeking to flee persecution. The regional processing regime risks contributing to the significant problem of refugee 'warehousing', the practice by which refugees are kept 'in protracted situations of restricted mobility, enforced idleness, and dependency—their lives on indefinite hold—in violation of their basic rights under the 1951 UN Refugee Convention.'[17] This typically occurs in poor African and Asian countries which host millions of refugees but lack the economic and environmental capacity to support them within the local community. Australia's decision to contribute to this global problem illustrates contempt for the protection regime and highlights a lack of good faith in implementing its international obligations.

(e) Effective protection

20. Although the transfer of asylum seekers to a third country may be permissible under international refugee law, this will only be the case where appropriate 'effective protection' safeguards are met.[18] Any transfer agreement must at least ensure that the asylum seeker will be admitted; enjoy effective protection against *refoulement*; have access to a fair and effective asylum procedure; and be treated in accordance with international refugee and human rights law and standards.

21. In considering the issue of 'effective protection' in the context of transfer to safe third countries, safe countries of asylum and safe countries of origin, the Lisbon Expert Roundtable defined its critical elements as including 'respect for fundamental human rights ... in accordance with applicable international standards, including ... no real risk that the person would be subjected to torture or to cruel, inhuman or degrading treatment or punishment'.[19] Furthermore, protection is only 'effective' if the asylum seeker does not fear persecution in the host State, is not at risk of being sent to another State in which effective protection would not be forthcoming, has access to means of subsistence sufficient to maintain an adequate standard of living, and has his or her fundamental human rights respected in accordance with international standards. The State must comply with international refugee and human rights law in practice (not just in theory),[20] grant access to fair and efficient determination procedures which include protection grounds that would be recognized in the State in which asylum was originally sought, take into account any special

[17] M Smith 'Warehousing Refugees: A Denial of Rights, A Waste of Humanity' in US Committee for Refugees *World Refugee Survey 2004* 38; see also G Chen 'A Global Campaign to End Refugee Warehousing' in US Committee for Refugees *World Refugee Survey 2004* 21.

[18] Executive Committee Conclusion No 85 (1998), Executive Committee Conclusion No 87 (1999). Conclusion No 85 provides that the host country must treat the asylum seeker in accordance with accepted international standards, ensure protection against *refoulement* and provide the asylum seeker with the possibility to seek and enjoy asylum.

[19] Lisbon Expert Roundtable 'Summary Conclusions on the Concept of "Effective Protection" in the Context of Secondary Movements of Refugees and Asylum-Seekers' (9–10 December 2002) para 15(b).

[20] In particular, the third State must be a signatory to the 1951 Convention and/or 1967 Protocol and comply with those instruments, or at least demonstrate that it has developed a practice akin to what those instruments require: Ibid, para 15(e).

vulnerabilities of the individual, and maintain the privacy interests of the individual and his or her family.[21]

22. In a letter to the Immigration Minister about the regional processing arrangements, the UN High Commissioner for Refugees, António Guterres, stated that protection safeguards should include:

- respect for the principle of *non-refoulement*;
- the right to asylum (involving a fair adjudication of claims);
- respect for the principle of family unity and best interests of the child;
- the right to reside lawfully in the territory until a durable solution is found;
- humane reception conditions, including protection against arbitrary detention;
- progressive access to Convention rights and adequate and dignified means of existence, with special emphasis on education, access to health care and a right to employment;
- special procedures for vulnerable individuals with clear pre-transfer assessments by qualified staff (including best interests determinations for children, especially unaccompanied and separated children) and support for victims of torture/trauma or suffering from disabilities (including aged/disabled); and,
- durable solutions for refugees within a reasonable period.[22]

23. While the legal framework in a particular State is very important in determining whether or not it is 'safe', even more significant is what it does in practice. It is essential that asylum seekers are treated in accordance with accepted international standards.[23] Mere ratification of human rights and refugee instruments does not equate to compliance with their standards, and an absence of ratification raises particular concerns about what level of protection might realistically be expected.

24. Nauru acceded to the Refugee Convention in 2011 but has only recently sought to establish national refugee status determination procedures. As such, there is no expertise within that country for determining refugee claims. As the UN High Commissioner for Refugees wrote to the Immigration Minister, there is no 'experience or expertise to undertake the tasks of processing and protecting refugees on the scale and complexity of the arrangement under consideration in Nauru.'[24] Furthermore, Nauru is not a party to the ICESCR,[25] ICCPR or CAT. This means that it has not agreed to respect the human rights set out in those

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[21] Ibid, para 15. See also Legomsky's seven elements of 'effective protection': SH Legomsky 'Secondary Refugee Movements and the Return of Asylum Seekers to Third Countries: The Meaning of Effective Protection' (UNHCR Legal and Protection Policy Research Series, Geneva, February 2003) PPLA/2003/01, 52–81.

[22] Letter from António Guterres, UN High Commissioner for Refugees to the Hon Chris Bowen MP, Minister for Immigration and Citizenship of Australia (5 September 2012) 2 http://unhcr.org.au/unhcr/images/120905%20response%20to%20minister%20bowen.pdf.

[23] UNHCR 'Note on International Protection' UN Doc. A/AC.96/914 (7 July 1999) para 19.

[24] Letter from António Guterres (n 22) 2.

[25] International Covenant on Economic, Social and Cultural Rights (adopted 16 December 1966, entered into force 3 January 1976) 993 UNTS 3 ('ICESCR').

instruments, including *non-refoulement* obligations based on the right to life and the right to be free from torture or cruel, inhuman or degrading treatment or punishment.

25. Although Papua New Guinea is a party to the ICCPR, ICESCR, CERD,[26] the CRC[27] and CEDAW,[28] it has a significant reservation to the Refugee Convention. This provides that Papua New Guinea does not accept the obligations set out in articles 17(1) (work rights), 21 (housing), 22(1) (education), 26 (freedom of movement), 31 (non-penalization for illegal entry or presence), 32 (expulsion) and 34 (facilitating assimilation and naturalization). This means that there is a significant curtailment of the rights of refugees and asylum seekers in Papua New Guinea. Again, this means that asylum seekers transferred there are receiving different treatment than asylum seekers processed in Australia (or even on Nauru), which may amount to discriminatory treatment. As the UN High Commissioner for Refugees wrote to the Immigration Minister in October 2012, 'PNG does not have the legal safeguards nor the competence or capacity to shoulder alone the responsibility of protecting and processing asylum-seekers transferred by Australia.'[29]

26. In a recent visit to Nauru, Dr Graham Thom from Amnesty International described the conditions in which asylum seekers were living. Up to 14 men were housed in a single tent, and '[i]n summer, in the heat, it gets to over 40 degrees during the day in those tents and it was certainly very hot and humid when we were in there. When it's raining, as it is now, the tents are leaking and their bedding gets wet at night.' He recounted how a number of asylum seekers complained of skin conditions that were a consequence of the humidity and sleeping in wet bedding.[30] Many are experiencing extreme mental anguish as a result of long with delays in processing, the uncertainty surrounding their future, and their inadequate living conditions, with hunger strikes and suicide attempts well documented. Cases before the courts in the UK and Europe concerning asylum seekers' living conditions suggest that the cumulative impact of the measures described above could well amount to cruel, inhuman or degrading treatment, in violation of Australia's obligations under article 7 of the ICCPR.[31]

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[26] International Convention on the Elimination of All Forms of Racial Discrimination (adopted 7 March 1966, entered into force 4 January 1969) 660 UNTS 195 ('CERD').

[27] Convention on the Rights of the Child (adopted 20 November 1989, entered into force 2 September 1990) 1577 UNTS 3 ('CRC').

[28] Convention on the Elimination of All Forms of Discrimination against Women (adopted 18 December 1979, entered into force 3 September 1981) 1249 UNTS 13 ('CEDAW').

[29] Letter from António Guterres, UN High Commissioner for Refugees to the Hon Chris Bowen MP, Minister for Immigration and Citizenship of Australia (9 October 2012); extracts contained in Ehssan Veiszadeh, 'PNG Not Ready for Refugee Transfers: UNHCR', *Sydney Morning Herald* (12 October 2012) http://news.smh.com.au/breaking-news-national/png-not-ready-for-refugee-transfers-unhcr-20121012-27hh8.html.

[30] Cited in M Gordon, 'Amnesty Shocked at Nauru Conditions', *Sydney Morning Herald* (20 November 2012) http://www.smh.com.au/opinion/political-news/amnesty-shocked-at-nauru-conditions-20121120-29npa.html.

[31] See *R v Secretary of State for the Home Department, ex parte Adam* [2005] UKHL 66; *MSS v Belgium and Greece* (European Court of Human Rights, Grand Chamber, App No 30696/09, 21 January 2011).

27. Finally, in this context, it should be recalled that the practice of transferring asylum seekers to other States for processing has typically been limited to refugees who have passed through other countries on their way to the State in which asylum is ultimately claimed. The new policy targets individuals for whom Australia may be the first country in which asylum could be claimed—in other words, they have come directly to Australia. It is clear that the policy shuts down Australia as an asylum country for persons fleeing by boat, which contravenes the very foundation of the international protection regime.

C SPECIFIC CONCERNS

(a) *Non-refoulement* (Art 33 Refugee Convention; Art 3 CAT; Arts 6 and 7 ICCPR)

28. The principle of *non-refoulement* is the cornerstone of international refugee law. States have a duty under the Refugee Convention, CAT and the ICCPR,[32] as well as under customary international law, not to return individuals (either directly or by virtue of deflection or interception policies) to territories where their lives or freedom are threatened by virtue of their race, religion, nationality, political opinion or membership of a particular social group, or where they are at risk of being subjected to arbitrary deprivation of life, torture, or cruel, inhuman or degrading treatment or punishment. This obligation also prohibits States from sending refugees to other territories from which they risk removal to such harm (often described as chain *refoulement*).

29. Although Nauru is now a party to the Refugee Convention, its implementing legislation has no practical force as yet and Nauru lacks the resources to put in place its own refugee status determination system. Despite any bilateral agreements with Australia, Nauru's status as a sovereign State means that it could force the expulsion of asylum seekers and refugees should it so choose. This would, in turn, place Australia in breach of its *non-refoulement* obligations, since a State that sends refugees to a country which in turn expels that person to persecution or other forms of serious harm will be liable under international law for *refoulement*. This principle applies regardless of whether it occurs 'beyond the national territory of the State in question, at border posts or other points of entry, in international zones, at transit points, etc'.[33]

(b) Penalties (Art 31 Refugee Convention)

30. Article 31(1) of the Refugee Convention provides that States must not impose penalties on refugees for illegal entry or presence, provided that they have come directly from a territory where their life or freedom was threatened, present themselves without delay to the authorities, and show good cause for their illegal entry or presence. Having a well-founded fear of persecution is generally

[32] Refugee Convention, art 33; CAT, art 3; ICCPR, art 7.
[33] E Lauterpacht and D Bethlehem 'The Scope and Content of the Principle of *Non-Refoulement*: Opinion' in E Feller, V Türk and F Nicholson (eds), *Refugee Protection in International Law: UNHCR's Global Consultations on International Protection* (Cambridge University Press, Cambridge, 2003) para 67.

recognized in itself as constituting 'good cause'.[34] This protection applies not only to persons ultimately accorded refugee status, but also to persons claiming asylum in good faith, including those travelling on false documents.[35]

31. This is a fundamental aspect of the Refugee Convention because it underscores the right of people in distress to seek protection, even if their actions constitute a breach of the domestic laws of a country of asylum. It recognizes that the circumstances compelling flight commonly force refugees to travel without passports, visas or other documentation, coupled with the fact that restrictive immigration policies mean that most refugees are likely to be ineligible for visas sought through official migration channels.

32. The term 'penalties' is not defined in article 31, prompting the question whether it encompasses only criminal sanctions, or whether it also extends to administrative penalties (such as administrative detention). Following the Human Rights Committee's reasoning that the term 'penalty' in article 15(1) of the ICCPR must be interpreted in light of that provision's object and purpose,[36] article 31 warrants a broad interpretation reflective of its aim to proscribe sanctions on account of illegal entry or presence. An overly formal or restrictive approach is inappropriate, since it may circumvent the fundamental protection intended.[37] Thus, measures such as arbitrary detention[38] or procedural bars on applying for asylum may constitute 'penalties'.[39] This is supported by Executive Committee Conclusion No 22 (1981), stating that asylum seekers should 'not be penalised or exposed to any unfavourable treatment solely on the ground that their presence in the country is considered unlawful'.

33. Irregular or 'unlawful' movement does not reveal anything about the credibility of a protection claim. Yet, asylum seekers who arrive in Australia by boat will have access to a markedly inferior determination regime which lacks the procedural safeguards of the onshore system. By contrast to the onshore system, it imposes a harsher procedure on boat arrivals, denies access to independent merits review and judicial review in Australia, effectively institutes detention of

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[34] GS Goodwin-Gill 'Article 31 of the 1951 Convention relating to the Status of Refugees: Non-Penalization, Detention, and Protection' 196, and Expert Roundtable 'Summary Conclusions: Article 31 of the 1951 Convention' (Geneva, 8–9 November 2001) para 10(e), in Feller, Türk and Nicholson (eds) (n 33).

[35] *R v Uxbridge Magistrates' Court; ex p Adimi* [1999] Imm AR 560.

[36] *Van Duzen v Canada* Comm No 50/1979, UN Doc CCPR/C/15/D/50/1979 (7 April 1982) para 10.2; see also T Opsahl and A de Zayas 'The Uncertain Scope of Article 15(1) of the International Covenant on Civil and Political Rights' (1983) Canadian Human Rights Yearbook 237.

[37] eg Decision of the Social Security Commissioner (UK) in Case No CIS 4439/98 (25 November 1999) para 16, where Commissioner Rowland found that *treatment* less favourable than that accorded to others, which is imposed on account of illegal entry, constitutes a penalty under article 31, unless it is objectively justifiable on administrative grounds.

[38] See Expert Roundtable (n 34) para 11(a): 'For the purposes of Article 31(2), there is no distinction between restrictions on movement ordered or applied *administratively*, and those ordered or applied *judicially*. The power of the State to impose a restriction must be related to a recognized object or purpose, and there must be a reasonable relationship of proportionality between the end and the means. Restrictions on movement must not be imposed unlawfully and arbitrarily.' (emphasis added).

[39] Note Executive Committee Conclusion No 15 (1979) para (i): 'While asylum-seekers may be required to submit their asylum request within a certain time limit, failure to do so, or the non-fulfilment of other formal requirements, should not lead to an asylum request being excluded from consideration'.

children and their families, and delays durable solutions for recognized refugees. Furthermore, the Minister has stated that asylum seekers who arrive post-13 August 2012 and are processed in Australia 'will remain on bridging visas even after they are regarded through the process as refugees.'[40] Together, these measures may be regarded as a 'penalty' for unlawful arrival, which is in flagrant violation of the terms of the Refugee Convention which Australia has freely accepted.

(c) Non-discrimination (Art 3 Refugee Convention; Art 2 ICCPR)

34. The proposed legislation will implement different processes and standards of treatment which discriminate between asylum seekers who arrive by plane and by boat. Such people are unable to make a valid visa application 'unless the Minister personally thinks it is in the public interest to do so', and are 'subject to mandatory immigration detention, are to be taken to a designated regional processing country and cannot institute or continue certain legal proceedings' (Explanatory Memorandum, 1).

35. Article 3 of the Refugee Convention prohibits countries from discriminating between refugees or asylum seekers on the basis of race, religion or country of origin. It is buttressed by anti-discrimination provisions in international human rights law, such as article 2 of the ICCPR and ICESCR.

36. According to the Minister, the Bill provides a way of ensuring that *all* boat arrivals get equal treatment—at the lowest level: 'just as people who are on Nauru and Manus Island do not receive work rights, people on bridging visas in Australia will also not have the right to work.'[41] However, even if the Bill seeks to treat all boat arrivals equally, it creates an unacceptable distinction between two groups of asylum seekers on the basis of mode (and time) of arrival: asylum seekers who come by boat versus those who arrive by plane. Furthermore, it is arguably discrimination on the grounds of race as well, since asylum seekers who arrive by boat typically come from a different set of countries than those who arrive by plane.

37. Presumably, the distinction is made on the basis that the first group come without a valid visa, whereas the latter arrive with documentation. Yet, as noted above, article 31 of the Refugee Convention prohibits States from penalizing asylum seekers for arriving without travel documents, and hence this is an unlawful justification. International law permits distinctions between aliens who are in materially different circumstances, but prohibits unequal treatment of those similarly placed. In general, differential treatment between non-citizens is allowed where the distinction pursues a legitimate aim, has an objective justification, and there is reasonable proportionality between the means used and the aims sought to be realized.[42] While Australia may seek to invoke

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[40] Interview with Immigration Minister Chris Bowen, *7.30* (ABC, 21 November 2012) http://www.abc.net.au/7.30/content/2012/s3638131.htm.
[41] Ibid.
[42] GS Goodwin-Gill, *International Law and the Movement of Persons between States* (Clarendon Press, Oxford, 1978) 78; Human Rights Committee, 'General Comment No 18: Non-Discrimination' (1989) para 13; ECOSOC Commission on Human Rights, 'Prevention of Discrimination: The Rights of Non-

immigration control or 'saving lives at sea' as a 'legitimate aim' in this context, it would be difficult to establish that the means by which that aim is sought to be realized is *proportionate* to the aim itself. In this context, the difference in treatment is based solely on the mode of arrival (boat rather than air) and time of arrival (before or after 13 August 2012). Asylum seekers, whether onshore or offshore, are otherwise in materially identical circumstances: they are seeking protection from persecution and other forms of significant harm, and have an equal need for fair procedures and humane conditions in which to have their protection claims determined, as well as for a legal status that conforms with the Refugee Convention and human rights law if determined to be a Convention refugee.

38. The new offshore processing regime will deny assistance to people who would be protected as refugees if they were processed through the onshore system in Australia. Under the onshore system, people who arrive in Australia with a visa can lodge a refugee claim and have full access to tribunal and court review. Those recognized as refugees are granted protection visas entitling them to live in Australia. By contrast, the new offshore system will separate the process for *recognizing* Convention refugees from the actual *granting* of visas. This means that a person declared offshore to be a refugee may live for many years without access to a durable solution and the full complement of rights set out in the Refugee Convention and human rights law.

(d) Complementary protection

39. The Statement of Compatibility with Human Rights (Attachment A to the Explanatory Memorandum) does not engage with a critical omission from the regional processing regime generally, which is that there is nothing in the legislation safeguarding the right of asylum seekers to have their claims assessed on complementary protection grounds. In March 2012, provisions entered into force in the Migration Act which implemented Australia's *non-refoulement* obligations under international human rights law. Onshore asylum seekers now have their protection claim assessed against the Refugee Convention *and* human rights law, which means that they cannot be removed if they face a real risk of arbitrary deprivation of life, the death penalty, torture, or cruel, inhuman or degrading treatment or punishment. To avoid violating its *non-refoulement* obligations, Australia must ensure that any person who is transferred to a regional processing country has his or her protection claim examined against these additional grounds.

(e) Procedures

40. Apart from the discriminatory aspects of the lower level of procedures to be implemented under the proposed new regime, such procedures may conflict with Australia's international obligations. At a minimum, procedures should conform with standards set down by various Executive Committee Conclusions. For example, Conclusion No 93 (2002) requires *inter alia* that asylum seekers have

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Citizens' (26 May 2003), UN Doc E/CN.4/Sub.2/2003/23, para 24; *Belilos v Switzerland* (1988) 10 EHRR 466.

access to assistance for basic support needs, such as food, clothing, accommodation, medical care and respect for privacy; that reception arrangements are sensitive to gender and age—in particular the educational, psychological, recreational and other special needs of children, and the specific needs of victims of sexual abuse and exploitation, of trauma and torture; and that family groups be housed together. Executive Committee Conclusion No 8 (1977) stipulates *inter alia* that recognized refugees be issued with documentation certifying that status (which may not be met here because of the separation between recognition of status and the issuance of a visa), and persons not recognized as refugees have a reasonable time to appeal. Numerous conclusions emphasize that UNHCR should be given access to asylum seekers, and asylum seekers should be entitled to have access to UNHCR.[43] Above all, treatment must not be inhuman or degrading.[44]

41. Best practice requires that individuals have access to legal advice and representation; access to up-to-date, authoritative and public country of origin information; written reasons for decisions; and an opportunity for appeal on matters of fact and law. Decisions that have been made according to such practices are defensible and can withstand public scrutiny and questioning, whereas decisions that have (or which appear to have) been made without proper regard to due process and impartiality remain open to criticism.

(f) Public scrutiny

42. The extent to which the regional processing arrangements will be open to public scrutiny remains unclear. While some NGOs have been able to visit the centre in Nauru, there is considerable concern about general accessibility for lawyers and other professionals—not least on account of practical obstacles such as an absence of accommodation for them to stay in. It is a matter of serious concern if lawyers, international bodies such as UNHCR and other UN agencies, independent domestic bodies such as the Australian Human Rights Commission and the Ombudsman, and the media are unable to access and assist asylum seekers.

[43] Executive Committee Conclusions Nos 33 (1984), 44 (1986), 48 (1987), 75 (1994), 82 (1997), 93 (2002), 101 (2004).
[44] ICCPR, art 7.