

SWAPPING REFUGEES: THE IMPLICATIONS OF THE 'ATLANTIC SOLUTION'

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In a media release on 17 April 2007, Minister for Immigration, Kevin Andrews announced that Australia had signed memorandum of understanding (MOU) with the United States that would enable the two countries to 'swap refugees'.¹ Under the arrangement the United States will resettle up to 200 refugees who arrive in 'excised offshore places'² in Australia and are transported to Nauru by Australia for further processing. In exchange, Australia will consider the resettlement of refugees intercepted by the United States and currently detained at Guantanamo Bay in Cuba. The actual processing of asylum seekers to determine refugee status will remain the responsibility of the country where the asylum seeker initially sought protection.

This paper outlines the history of interception and offshore processing by the United States and Australia. The United States' processing of asylum seekers in Guantanamo Bay inspired Australia's own offshore processing in Nauru and Papua New Guinea. The recently announced 'refugee swap' is a reminder of the parallels between US and Australian practices towards refugees and asylum seekers.

The Minister for Immigration has suggested that the 'refugee swap' sends a 'strong deterrence message to people smugglers'.³ He has also claimed that the 'arrangement [with the United States] will ensure the integrity of the international system of protection.'⁴ This paper contends that the refugee swap is unlikely to deter people smuggling as has been suggested by the Minister. There is evidence that there has been an increase in the number of people engaging people smugglers to enter the United States following the signing of the MOU. The paper will also argue that rather than strengthening the integrity of the international protection system, as has been suggested by the Minister, the refugee swap will further

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1 Kevin Andrews MP, Minister for Immigration and Citizenship, 'War Crimes MOU and Asylum Agreement Signed', 17 April 2007 <<http://www.minister.immi.gov.au/media/media-releases/2007/ka07026.htm>>.

2 *Migration Act 1958*, s 5(1).

3 Kevin Andrews MP, above n 1.

4 *Ibid.*

undermine the international protection regime by facilitating breaches of the *Convention Relating to the Status of Refugees*⁵ (*Refugee Convention*) and *Protocol Relating to the Status of Refugees*.⁶

The Memorandum of Understanding between Australia and the United States

Both the United States and the Australian governments have stated that no refugee will be forced to accept resettlement under the recently signed MOU between the two countries.⁷ Neither country has however indicated whether the refugees who have been offered resettlement in another country would have any choice other than remaining at Guantanamo Bay or Nauru if they refuse the resettlement. Furthermore, given the range of visas granted to recognised refugees in Australia, it is unclear what rights the refugees will enjoy once they have been resettled. For example, would refugees resettled in Australia from Guantanamo Bay be granted permanent or temporary protection?⁸

The United States has been quick to stress the informality of the arrangements with Australia. When questioned about the refugee swap, the United States Department of State spokesperson, Sean McCormack stated:

There is no formal agreement between the United States and Australia. There is an informal arrangement for mutual assistance that provides that each will consider resettlement of people interdicted at sea and found to be in need of international protection.⁹

A spokesperson for the Minister for Immigration has confirmed that Sean McCormack's comments regarding the informality of the MOU 'reflect the agreement as it stands'.¹⁰

5 *Convention Relating to the Status of Refugees*, 189 U.N.T.S. 150, entered into force 22 April 1954.

6 *Protocol Relating to the Status of Refugees*, 606 U.N.T.S. 267, entered into force 4 October 1967.

7 See Cath Hart, "Refugee swap' not binding says US', *The Australian* (Sydney) 20 April 2007 <<http://www.theaustralian.news.com.au/story/0,20867,21588498-601,00.html>> at 26 June 2007.

8 At present, asylum seekers who seek Australia's protection, but who are taken to Nauru or Papua New Guinea for processing, will only be granted a visa if Australia's Minister for Immigration exercises the non-delegable and non-reviewable ministerial discretion under s 46A of the *Migration Act 1958* to allow the application. If the minister exercises the discretion, the asylum seekers may be permitted to apply for a sub-class 447 *secondary movement offshore entry visa*. This is a temporary protection visa that is granted to persons who are processed offshore. If there is a continuing protection need after the expiry of the 447 visa, refugees will only be eligible for successive temporary protection visas unless the Minister for Immigration exercises the non-delegable and non-reviewable ministerial discretion to grant a permanent protection visa.

9 United States Department of State, Daily Press Briefing, Sean McCormack, Spokesman Washington, DC, 18 April 2007 <<http://www.state.gov/r/pa/prs/dpb/2007/apr/83159.htm>> at 18 May 2007.

10 Cath Hart, above n 7.

An MOU will be binding in international law and will be akin to a treaty if the drafters intend it to be legally binding. A legally binding intent is commonly reflected in the presence of a final clause that notes the term and date of entry into force and the use of words such as 'the parties' and 'agree'.¹¹ The MOU between Australia and the United States is confidential. It is difficult to determine the intention of the drafters without access to the document. However MOUs are most often found to be 'politically binding' rather than legally binding.¹² This is particularly the case with MOUs between the United States and Britain, Canada and Australia.¹³ Even if the MOU with the United States is not legally binding, it nevertheless implies a political undertaking from both the United States and Australia to exchange refugees. The MOU between the United States and Australia will not be reviewed until April 2009.

History of Guantanamo Bay as a Refugee Processing Centre

The MOU between Australia and the United States relates only to refugees processed in offshore processing facilities. The United States has a long history of offshore processing of refugees. In 1981, the Reagan administration in the United States came to believe that asylum seekers, most notably from Haiti, had become 'a serious national problem detrimental to the interests of the United States'.¹⁴ As a response, the United States negotiated an agreement with Haiti to establish a cooperative interdiction program.¹⁵ Under the *Haitian Migration Interdiction Program*,¹⁶ US Coast Guard vessels were to stop and board Haitian or unflagged vessels on the high seas. Haitians were to be interviewed or 'screened' on board the Coast Guard cutters. If they were found to have a 'credible fear' of persecution they were to be taken to the United States where they could lodge an asylum claim.¹⁷ All other Haitians were returned directly to Haiti.¹⁸

11 John McNeill, 'International Agreements: Recent US-UK Practice Concerning the Memorandum of Understanding' (1994) 88 (4) *The American Journal of International Law* 821.

12 Ibid.

13 John McNeill argues that in the area of defence MOUs this is because Canadian, UK and Australian defence departments may not enter into legally binding agreements without obtaining authority to do so from their foreign ministries. Furthermore, parliamentary action and oversight may also be necessary in these jurisdictions. Therefore, to avoid an additional cycle of review and approval of agreements by foreign ministries, a rationale has been developed in the jurisdictions that defence MOUs are only politically binding acts. See John McNeill, above n 11.

14 Proclamation No. 4865, 46 Fed. Reg. 48, 107, (1981).

15 Agreement on Interdiction of Haitian Immigration to the US, 23 September 1981, US-Haiti, 33 U.S.T. 3559.

16 Above n 14.

17 Above n 15.

18 Arthur Helton, 'The United States Government Program of Intercepting and Forcibly Returning Haitian Boat People to Haiti: Policy Implications and Prospects' (1993) 10 *New York Law School Journal of Human Rights* 325.

In 1991, former US President, George H.W. Bush changed this policy. His administration sought to establish regional arrangements whereby neighbouring countries would accept interdicted asylum seekers for resettlement. Few countries approached by the United States were willing to participate. The Bahamas and the Dominican Republic refused US requests for assistance. After much negotiation Honduras, Venezuela, Belize, Trinidad and Tobago agreed to resettle Haitian refugees intercepted by US Coast Guards. However, the numbers were small. Only 550 Haitians were taken to the countries which agreed to resettle Haitians intercepted at sea by the United States.¹⁹

Despite these measures the number of Haitians attempting to come to the US by boat continued to increase. Faced with the refusal of Caribbean countries to take more than a mere token number of Haitians and holding firm to their resolution to refuse Haitian asylum seekers access to the United States, the government needed to find a solution. The George H.W. Bush administration found their answer by building a detention facility, guarded by US troops and surrounded by barbed wire,²⁰ in its territory of Guantanamo Bay, Cuba.²¹

Immigration and Naturalization Service (INS) asylum officers were sent from the United States mainland to Guantanamo Bay. By the end of November 1991, the first major offshore processing program at Guantanamo Bay was fully functional. Asylum interviews were conducted at the detention facility and Haitians who were unsuccessful in their asylum claims were returned to Haiti.

Detention of Cubans on Guantanamo Bay

Former US President, Bill Clinton, continued the use of Guantanamo Bay as a detention centre for Haitians. On 19 August 1994, President Clinton announced that Cubans interdicted on the high seas would also not be permitted to reach the United States.²² The President announced that interdicted Cubans would instead be taken to the Guantanamo Bay to join the 15,000 Haitians already there.²³

The controversial use of the Guantanamo Bay naval base for Cuban asylum seekers and 'immigrants' reversed the long standing policy of welcoming Cubans fleeing the Castro government into the United States. Cubans enjoy priority immigration status in the United States.²⁴ The

19 Vernon Briggs, 'US Asylum Policy and the New World Order' (1993) 1 (3) *People and Place* 1.

20 Jane Franklin, 'How Did Guantanamo Become a Prison' (2005) <<http://hnn.us/articles/11000.html>> at 26 June 2007.

21 Ibid.

22 Maria Sartori, 'The Cuban Migration Dilemma: An Examination of the United States Policy of Temporary Protection of Offshore Safe Havens' (2001) 1 *Georgetown Immigration Law Journal* 319.

23 Ibid, 328.

24 *Cuban Adjustment Act 1966*.

interception and detention of Cuban asylum seekers in Guantanamo Bay became part of the United States' 'wet foot dry foot' policy. Under the policy, Cubans who are able to reach the US mainland continue to receive privileged immigration status. In contrast, Cubans who are unsuccessful in their attempt to reach the United States are intercepted at sea.

In May 1995, the Clinton administration entered into a new agreement with the Cuban Government regarding Cubans detained in Guantanamo Bay.²⁵ Under the arrangement, the US government agreed to give permanent entry to the remaining Cubans detained at the naval base. The United States also agreed to return all Cubans interdicted by the US from the 2 May 1995, to Cuba. In exchange, the Cuban Government made an undertaking not to persecute returned Cubans.

According to the US State Department, almost all Haitian and Cuban asylum seekers intercepted by the United States are now returned to Haiti and Cuba.²⁶ However, small numbers of Cubans and Haitians are detained in Guantanamo Bay after being intercepted by the United States. For short periods in October 1996 and February 1997 Cuban and Haitian nationals were also joined by Chinese nationals who were intercepted en route to the United States.²⁷ It is believed that the first refugees to be sent to Australia from Guantanamo Bay under the MOU will be 150 Cuban nationals.²⁸

The MOU with Australia is not the first attempt by the US to resettle refugees from Guantanamo Bay. In early 2007, the United States began similar negotiations with the Canadian Government.²⁹ In March 2007, the Czech Republic resettled ten refugees processed in Guantanamo Bay by the United States.³⁰ Australia accepted a Haitian couple for resettlement from Guantanamo Bay in May 2002. At that time the Federal Government denied that the United States and Australia were considering a deal to exchange refugees.³¹

25 Joint Statement of the United States and Cuba, 1 May 1995, cited in Jonathan Wachs, 'Recent Development: The Need to Define the International Legal Status of Cubans Detained at Guantanamo' (1996) 11 *The American University Journal of International Law and Policy* 79.

26 Hilda Hoy, 'Cuban families gain asylum in ČR', *Prague Post*, 18 April 2007 <<http://www.praguepost.com/articles/2007/04/18/cuban-families-gain-asylum-in-cr.php>> at 26 June 2007.

27 The Chinese nationals were intercepted as part of Operation Marathon (1996), and Operation Present Haven (1997); see History of Guantanamo Bay <<http://www.nsgtmo.navy.mil/htmlpgs/gtmohistory.htm>> at 25 January 2007.

28 AAP, 'We'll be refugee halfway house: Rudd', *The Australian* (Melbourne) 18 April 2007 <<http://www.theaustralian.news.com.au/story/0,20867,21576776-601,00.html>> at 26 June 2007.

29 See Transcript, Michael Vincent, 'Mixed response to 'refugee swap' in US', *World Today*, ABC Local Radio, Thursday, 19 April 2007 <<http://www.abc.net.au/worldtoday/content/2007/s1901531.htm>> at 18 May 2007.

30 Hilda Hoy, above n 26.

31 See 'Government denies report of US 'refugee swap' deal', *Sydney Morning Herald* (Sydney) 19 May 2002 <<http://www.smh.com.au/articles/2002/05/18/10214544085342.html>> at 18 May 2007.

Australia's Adoption of Offshore Processing

Unlike the United States, Australia has had relatively few asylum seekers seeking protection.³² Nevertheless, the Australian Government has made many attempts to curb the number of refugees and asylum seekers arriving on its shores by boat. Australia entered regional agreements (most notably with China) in the late 1980s and 1990s to stem the flow of asylum seekers at their source.³³

In 2000, Australia created a similar agreement with Indonesia. Under the agreement, Indonesia is paid to intercept asylum seekers before they travel to Australia. Australia also pays the International Organisation for Migration to house and interview asylum seekers intercepted en route to Australia and taken to Indonesia. Refugee processing is done in Indonesia by the United Nations High Commission for Refugees under its mandate.³⁴ The UN High Commission for Refugees undertakes refugee status determination in the absence of national procedures.³⁵ In April 2007 the Federal Government strengthened the agreement with Indonesia by announcing an increase in funding to the International Organisation for Migration.³⁶

The agreement with Indonesia has not stopped all asylum seekers coming to Australia by boat. One notable group of asylum seekers which was not stopped were the 433 people rescued on the verge of drowning by a Norwegian flagged container ship, *MV Tampa*, in August 2001. The Australian Government refused *Tampa* permission to dock and land on the Australian territory of Christmas Island. When *Tampa* came within four nautical miles of Australian territory, the government deployed forty five

32 For example, in August 2001, the month of the 'Tampa incident', only 969 asylum seekers made refugee applications in Australia. In comparison, 9,138 refugee applications were submitted in Germany in August 2001; 8,600 in the United Kingdom; 4,370 in the United States and 4,370 in Canada. See United Nations High Commissioner for Refugees Statistical Yearbook 2001 <http://www.unhcr.org/static/home/statistical_yearbook/2001/toc.htm> at 26 June 2007.

33 See Mary Crock, Ben Saul and Azadeh Dastyari, *Future Seekers II: Refugees and Irregular Migration in Australia* (2006).

34 UNHCR's mandate for refugee protection exists independently of states' obligations to provide international protection under the *Refugee Convention* and Protocol. See Erika Feller, 'Operationalising Protection', statement to the 56th Session of the Executive Committee of the High Commissioner's Programme by Director, Department of International Protection UNHCR (Geneva, 5 October 2005) <<http://www.unhcr.org/cgi-bin/texis/vtx/admin/opendoc.htm?tbl=ADMIN&id=4343ff484>> at 27 June 2007.

35 UNHCR, 'Guidelines on the Application in Mass Influx Situations of the Exclusion Clauses of Article 1F of the 1951 Convention relating to the Status of Refugees' <<http://www.unhcr.org/cgi-bin/texis/vtx/refworld/rwmain/opendocpdf.pdf?docid=43f48c0b4>> at 27 June 2007.

36 See Federal Budget 2007–2008, Fact Sheet: Assistance for Management and Care of Irregular Immigrants in Indonesia' <http://www.minister.immi.gov.au/media/media-releases/2007/budget0708/budget0708-immigration_management_facilities.pdf> at 18 May 2007; See also Cath Hart, 'Cash to Indonesia to deter refugees' *The Australian* (Melbourne) 3 May 2007 <<http://www.theaustralian.news.com.au/story/0,20867,21588498-601,00.html>> at 18 May 2007.

Special Air Service (SAS) troops to board and take control of the ship. The Prime Minister declared that Australia 'was not going to allow these people to be processed on Australian soil or in Australian territory'.³⁷

The 'Tampa incident' led to bipartisan support for changes to the law pertaining to asylum seekers³⁸ and was the genesis of the so-called 'Pacific Solution'.³⁹ Almost ten years after the opening of Guantanamo Bay as a refugee processing centre, Australia sought to establish its own offshore processing facility. Under the Pacific Solution, certain Australian territory can be 'excised' from the migration zone.⁴⁰ Any asylum seekers who land in an excised place can be taken to a 'declared country'⁴¹ for processing. Following the Tampa incident, the Department of Foreign Affairs and Trade had formal consultations with Nauru, Papua and New Guinea, Kiribati, Fiji and Palau and informal discussions with Tuvalu, Tonga and French Polynesia, in the hope that Pacific countries would agree to establish detention centres for third country processing of Australia's asylum seekers.⁴² Only the Republic of Nauru and Papua and New Guinea agreed to host Australia's asylum seekers and are currently recognised as 'declared countries'.

Since 2001, more than 4,891 islands have been excised from Australian territory. Between September 2001 and June 2005, 1,547 people were detained in offshore processing centres in Papua and New Guinea and Nauru.⁴³ According to the Department of Immigration, 482 people processed there have returned to their home country and there has been one death of an asylum seeker on Nauru. The rest of the 1,547 have been resettled.⁴⁴

The Australian Government had hoped that the asylum seekers processed offshore would be resettled in countries other than Australia. However, as was the US experience in the Caribbean, most countries have refused to resettle Australia's refugees. New Zealand, Norway, Canada, Denmark and Sweden have accepted refugees from Nauru and Papua

37 Transcript of the Prime Minister, The Hon John Howard MP Joint Press Conference with the Minister for Immigration, the Hon Philip Ruddock MP, September 2001 <<http://www.pm.gov.au/news/interviews/2001/interview1206.htm>> at 18 May 2007.

38 On the 26th and 27th of September the Commonwealth Parliament passed the following bills: *Migration Amendment (Excision from Migration Zone) Act 2001*; *Migration Amendment (Excision from Migration Zone) (Consequential Provisions) Act 2001*; *Border Protection (Validation and Enforcement Powers) Act 2001*; *Migration Legislation Amendment (Judicial Review) Act 2001*; *Migration Legislation Amendment Act (No 1) 2001*; *Migration Legislation Amendment Act (No 5) 2001*; *Migration Legislation Amendment Act (No 6) 2001*.

39 *Migration Amendment (Excision from Migration Zone) Act 2001* and *Border Protection (Validation and Enforcement Powers) Act 2001*.

40 *Migration Act 1958*, s 5(1).

41 *Migration Act 1958*, s 198A.

42 Senate Select Committee for an Inquiry into a Certain Maritime Incident, *Inquiry into a Certain Maritime Incident* (2002).

43 DIMA Annual Report 2004-05 <http://www.immi.gov.au/about/reports/annual/2004-05/output1.5_asylum_seeker.htm> at 18 May 2007.

44 *Ibid.*

and New Guinea. Generally the resettlements in all but New Zealand have been of refugees who had family links in the resettling countries. The majority of refugees from the offshore processing centres have been resettled in Australia.

The detention centre in Papua New Guinea was mothballed in 2004. However, the detention centre in Nauru continues to operate. In September 2006, a group of eight Burmese asylum seekers reached the Australian territory of Christmas Island and sought Australia's protection. Seven of the eight were transferred to Nauru for refugee processing. In February 2007 they were joined in Nauru by 82 Sri Lankan nationals who were intercepted in the Indian Ocean en route to Australia.⁴⁵ It is believed that the Sri Lankan and Burmese asylum seekers will be the first to be exchanged with the United States under the refugee swap arrangements.⁴⁶

Deterrence

According to the Minister for Immigration, the refugee swap will deter people smugglers from bringing asylum seekers to Australia or the United States. However, the arrangement is unlikely to discourage people for whom the prospect of safety in Australia or the US is more appealing than a life of persecution in their home country.

Indeed, there are reports that the number of Haitians attempting to reach the United States has increased since the announcement of the refugee swap.⁴⁷ In March 2007, there were only five reported cases of Haitians intercepted by US Coast Guards. Following the announcement in April, more than 700 Haitians have risked their lives to travel without valid documentation to the United States.⁴⁸ According to media reports Haitians interviewed have given the prospect of protection in Australia as a reason for their journey to the United States.⁴⁹

The prospect of protection in the United States is also unlikely to deter refugees and asylum seekers who would otherwise seek the protection of Australia. However, Australia has not seen the same rise in the number of people seeking protection in Australia following the announcement of

45 Stephanie Peatling, 'Asylum seeker solution: detention in Nauru', *Sydney Morning Herald* (Sydney) 16 March 2007 <<http://www.smh.com.au/news/national/asylum-seeker-solution-detention-in-nauru/2007/03/15/1173722657919.html>> at 18 May 2007.

46 Eleanor Hall, 'Federal government's 'refugee swap' plan', *The World Today*, 18 April 2007 <<http://www.abc.net.au/worldtoday/content/2007/s1900506.htm>> at 18 May 2007.

47 See Editorial, 'Boat people in the Caribbean', *Herald Sun* (Sydney) 10 May 2007 <<http://www.news.com.au/heraldsun/story/0,21985,21702775-24218,00.html>> at 18 May 2007.

48 AAP, "'Refugee swap' could mean deaths: Labor', *Sydney Morning Herald* (Sydney) 9 May 2007 <<http://www.smh.com.au/news/National/Refugee-swap-could-mean-deaths-Labor/2007/05/09/1178390359560.html>> at 18 May 2007.

49 Joseph Guyler Delva, 'Australia, U.S. refugee deal seen as bait by Haitians', *Reuters*, 6 May 2007 <http://today.reuters.com/news/articlenews.aspx?type=domesticNews&storyid=2007-05-06T173942Z_01_N06284551_RTRUKOC_0_US-HAITI-AUSTRALIA-IMMIGRANTS.xml> at 18 May 2007.

the refugee swap. Historically the numbers seeking protection in Australia have been considerably lower than in the United States.⁵⁰ Given the small number of asylum seekers who have arrived by boat in recent years,⁵¹ it is more difficult to ascertain an increase in numbers and it may still be too early to assess the effect of the announcement in the Pacific region.

Breaches of the Refugee Convention and Protocol

Whether or not the refugee swap will deter asylum seekers, questions arise about the legitimacy of causing pain to one group to deter others. Furthermore, if one aim of the policy is to compel refugees (through increased uncertainty and hardship) to return home once in a country, it would most likely be considered *refoulement*, which is prohibited under article 33 of the *Refugee Convention*.⁵²

Australia is a party to both the *Refugee Convention* and Refugee Protocol. The United States is only a party to the Refugee Protocol. However, article 1 of the Protocol states that parties to the Protocol 'undertake to apply Articles 2 to 34 inclusive of the Convention'. The Convention and Protocol are binding on all organs of a signatory state including any other persons or entity acting on the signatory state's behalf.⁵³ According to the UN Human Rights Committee, which supervises the application of

50 For example from January to June 2006, 1,727 asylum seekers sought protection in Australia. In the same period 17,318 asylum seekers submitted an asylum application to the to the US Department of Homeland Security and 8,189 asylum seekers lodged an application with the Executive Office of Immigration Review. See UNHCR, 'Asylum Levels and Trends in Industrialized Countries Second Quarter, 2006 Overview of Asylum Applications Lodged in 31 European and 5 Non-European Countries' <<http://www.unhcr.org/statistics/STATISTICS/450fa85d2.pdf>> at 26 June 2007.

51 According to the Department of Immigration 1,524 people were sent to the Nauru and Manus processing centres between 2001 and 2003. No new people were sent to the offshore processing centres until October 2006 when eight Burmese men were sent to Nauru. Eighty two Sri Lankan nationals were transferred to Nauru in March 2007. See 'Department of Immigration and Citizenship Fact Sheet 76. Offshore Processing Arrangements' <<http://www.immi.gov.au/media/fact-sheets/76offshore.htm>> at 26 June 2007. It is interesting to note that the fall and rise in the number of asylum seekers arriving in excised territory prior to the announcement of the MOU with the United States has corresponded with a fall and rise in the number of refugees globally, which in turn corresponds to global push factors. According to UNHCR, asylum applications in 50 industrialised countries fell sharply between the years 2001–2005. See UNHCR, 'Asylum Applications in the Last Five Years Drop By Half' <<http://www.unhcr.org/cgi-bin/texis/vtx/news/opedoc.htm?tbl=NEWS&id=441929762>> at 26 June 2007. Asylum applications were on the rise again in 2006 according to UNHCR, the number of people of concern to UNHCR rose from 21 million in 2005 to 32.9 million in 2006. See UNHCR, '2006 Global Trends: Refugees, Asylum-Seekers, Returnees, Internally Displaced and Stateless Persons' <<http://www.unhcr.org/statistics/STATISTICS/4676a71d4.pdf>> at 26 June 2007.

52 Asher Davidson, 'Article 31(2) of the Refugee Convention and its Implementation in New Zealand: Is Detention Defensible?' <<http://www.refugee.org.nz/Comment/davidson.htm#78>> at 18 May 2007.

53 United Nations High Commissioner for Refugees, *Advisory Opinion on the Extraterritorial Application of Non-Refoulement Obligations under the 1951 Convention Relating to the Status of Refugees and its 1967 Protocol* <www.unhcr.org/home/RSDLEGAL/45f17a1a4.pdf> 27 June 2007.

the Convention and its Protocol,⁵⁴ obligations under the Convention are not subject to territorial restrictions but apply wherever a state exercises *jurisdiction* (emphasis added).⁵⁵

In addition to potentially breaching article 33 of the *Refugee Convention*, the refugee exchange and offshore processing by the United States and Australia may also breach article 31. According to Professor James Hathaway, the drafters of the *Refugee Convention* supported a prohibition on sanctions for having entered a territory unlawfully.⁵⁶ Article 31 prohibits penalising or discriminating against refugees on the basis of their illegal entry or presence in a country if the refugees have come directly from a territory where their life or freedom was threatened and provided they present themselves without delay to the authorities. According to Professor Guy Goodwin-Gill:

any treatment that [is] less favourable than that accorded to others and [is] imposed on account of illegal entry [is] a penalty [under] Article 31 unless objectively justifiable on administrative grounds.⁵⁷

The detention of refugees in Nauru, Papua and New Guinea and Guantanamo Bay and the transfer of refugees between Australia and the United States may therefore constitute a prohibited penalty under article 31 of the *Refugee Convention*. Haitian and Cuban asylum seekers detained in Guantanamo Bay have come directly from their countries of persecution. Although many refugees coming to Australia may have stopped over in countries such as Indonesia en route to Australia, they may not have been able to enjoy protection in the transit country.⁵⁸ Furthermore, the offshore processing regime and the refugee swap apply both to refugees who have come directly to Australia and those who have stopped en route to Australia. Offshore processing is not necessary⁵⁹ for administrative purposes since processing in country can be undertaken at less cost⁶⁰ and with

54 Key Provisions, Convention Relating to the Status of Refugees July 28, 1951, 19 U.S.T. 6259, 6275, 189 U.N.T.S. 150.

55 Above n 53.

56 James Hathaway, *The Rights of Refugees Under International Law* (2005) 409.

57 Guy Goodwin-Gill, 'Article 31 of the 1951 Convention Relating to the Status of Refugees: Non-Penalisation, Detention, and Protection' in Erica Erika Feller, Volker Turk and Frances Nicholson (eds) *Refugee Protection in International Law: UNHCR's Global Consultations on International Protection* (2003) 194.

58 For example, Indonesia is not a signatory to the *Refugee Convention*.

59 *Convention Relating to the Status of Refugees 1951*, art 31(2).

60 Processing in Guantanamo Bay costs the US Government \$US700,000 per day and required a start up cost of \$US100 million. See Harold Hongju Koh, 'Human Rights International Law Symposium: America's Offshore Refugee Camps' (1994) 29 *University of Richmond Law Review* 139. The running of offshore processing centres by the International Organisation for Migration (IOM) cost the Australian Government \$119,463,592.51 between 2002 and 2005. This did not include associated costs such as transport of asylum seekers to offshore processing centres. See, 'Questions Taken on Notice Supplementary Budget Estimates Hearing: 1 November 2005' <<http://www.andrewbartlett.com/PDF-misc/settlement-services.pdf>> at 20 January 2007. This is considerably more expensive than processing of asylum seekers in country. For example, in 2002–2003, \$90 million was spent on offshore asylum seeker management

greater efficiency.⁶¹ Furthermore, there is no administrative justification for the ongoing detention of refugees in offshore processing centres after the regularisation of their status and their recognition as refugees.

Although it may be argued that the prohibition on penalties under article 31 refers to 'refugees' and not asylum seekers and thus cannot be applied to the offshore processing of asylum seekers by Australia and the United States, this is an overly simplistic distinction. As has been argued by the UN High Commission for Refugees, 'recognition of refugee status does not make an individual a refugee but declares him to be one.'⁶² Consequently a refugee seeking asylum would already be entitled to the protection of the Convention while awaiting UNHCR recognition.

Australia and the United States may also attempt to argue that article 31 does not constrain a state's prerogative to expel an unauthorised refugee from its territory.⁶³ However, as Hathaway correctly argues, the right of a state to expel refugees is qualified by its non-refoulement obligations under article 33.⁶⁴ Therefore states may not expel individuals who may satisfy the definition of 'refugee' under article 1 of the *Refugee Convention* and return them to a place of persecution.

Furthermore, a state's right to expel a refugee is qualified by article 32 of the *Refugee Convention*.⁶⁵ Seeking asylum is lawful under the domestic laws of Australia and the United States. Under article 32 of the *Refugee Convention*, a state may only expel a person lawfully in its territory on national security or public order grounds. When expelling a refugee under article 32, a state may only do so 'in accordance with due process of law'.⁶⁶ Neither the United States nor Australia has justified offshore processing of asylum seekers who reach its territory on grounds of national security or public order.

Offshore processing may also constitute a penalty because of the lack of safeguards offered in offshore processing centres. Goodwin-Gill has observed:

by Australia. In comparison, only \$5 million was spent on administering the entry of 4,000 refugees under the offshore humanitarian program (assisted passage and medical clearance costs) in that year. See Mary Crock, Ben Saul and Azadeh Dastyari, above n 33, 73.

- 61 Inefficiency in offshore processing arises because of the need to transfer both asylum seekers and the personnel responsible for their processing offshore. In Nauru offshore processing of refugees has been undertaken by the Australian Department of Immigration officials as well as UNHCR personnel. Offshore processing in Guantanamo Bay is conducted by Immigration and Naturalisation Services personnel.
- 62 Office of the United Nations High Commissioner for Refugees, Geneva, UNHCR Revised Guidelines on Applicable Criteria and Standards Relating to the Detention of Asylum Seekers <http://www.unhcr.bg/events_records/2004/svilengrad_en.pdf> at 26 June 2007.
- 63 James Hathaway, above n 56, 412.
- 64 Ibid, 413.
- 65 Ibid.
- 66 *Refugee Convention*, art 32.

While administrative detention is allowed under Article 31(2), it is equivalent, from the perspective of international law to a penal sanction whenever basic safeguards are lacking (review, excessive duration etc).⁶⁷

The MOU between Australia and the United States reinforces offshore processing regimes that deny rights to refugees and asylum seekers.⁶⁸ Refugees processed in Nauru, Papua and New Guinea and Guantanamo Bay possess limited rights of review compared to their counterparts in the Australian and US mainlands. In Australia, refugees processed offshore have no rights to merit review at the Refugee Review Tribunal unlike those processed onshore.⁶⁹ Asylum seekers processed in the US mainland have a right of review of their primary refugee determination before an Immigration Judge at the Executive Office for Immigration Review. No right of review is enjoyed by asylum seekers processed at Guantanamo Bay.

Refugees processed offshore may be denied the right to legal representation. Asylum seekers processed in the United States have a right to have a lawyer present during their refugee determination interviews.⁷⁰ In contrast many refugees processed in Guantanamo Bay have been denied the right to legal assistance.⁷¹ The experience of offshore processing in Australia has been similar. Between August 2001 and March 2003 many lawyers volunteered to travel to Nauru to provide legal assistance to asylum seekers detained there.⁷² However, their visa applications were refused by Nauru even though they were supported by the UN High Commission for Refugees. No reasons were provided for the refusals.⁷³ This is in stark contrast to asylum seekers processed in mainland Australia. Most asylum seekers in detention in Australia (as well as some applying from within the community) are given access to government-funded assistance if they sign a form requesting such help.⁷⁴

If one consequence of the denied rights to review and legal assistance in offshore processing centres is that refugees who have a well-founded fear of persecution are denied refugee status, Australia and the US for that reason may also be in breach of article 33 of the *Refugee Convention*. Poor

67 Guy Goodwin-Gill, above n 57, 219.

68 See discussion of Australia's offshore processing of refugees in Ralph Wilde, 'Legal 'Black Hole'? Extraterritorial State Action and International Treaty Law on Civil and Political Rights' (2005) 26 *Michigan Journal of International Law* 739.

69 *Migration Act 1958*, s 411(2)(a).

70 8 CFR § 208.5.

71 Victoria Clawson, Elizabeth Detweiler and Laura Ho, 'Litigating as Law Students: An Inside Look at Haitian Centre Council' (1994) 103 *The Yale Law Journal*, 2337

72 Australian Lawyers for Human Rights, Submission to Senate, Legal and Constitutional References Committee Inquiry on Inquiry into the Provisions of the Migration Amendment (Designated Unauthorised Arrivals) Bill 2006 <http://www.aph.gov.au/Senate/committee/legcon_ctte/mig_review_provisions/submissions/sub09.pdf> at 18 May 2007.

73 *Ibid.*

74 Department of Immigration and Citizenship, 'Fact Sheet 63: Immigration Advice and Application Assistance Scheme' <<http://www.immi.gov.au/media/fact-sheets/63advice.htm>> at 27 June 2007.

procedures may lead to the return of refugees to a place where their lives or freedom are threatened.

Conclusion

The MOU with the United States is unlikely to achieve either of the goals espoused by the Minister for Immigration. Rather than acting as a deterrent, the refugee swap may in fact be attracting asylum seekers and the people smugglers who bring them. The MOU may also compromise the international refugee protection regime. There is the danger of progressively eroding refugee rights as governments shift responsibility for refugee protection from country to country.

The MOU with the United States demonstrates that states are willing to go to extreme lengths to deny rights to those seeking their protection. The refugee swap not only leads to instability and uncertainty for already vulnerable persons but robs them of self determination. Under the MOU refugees are treated like commodities that can be traded rather than human beings whose dignity and rights must be respected. The MOU places Australia and the United States in risk of breaching their obligations under international law and renders refugees dangerously invisible.