THE 'TEMPORARY' REFUGEES: AUSTRALIA'S LEGAL RESPONSE TO THE ARRIVAL OF IRAQI AND AFGHAN BOAT-PEOPLE

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I. INTRODUCTION

During the past year, over four thousand asylum seekers have travelled to Australia by boat, arriving without valid travel documents and seeking protection as refugees.[1] The overwhelming majority of these new arrivals are from Iraq and Afghanistan.[2] Typically, the final part of their travel to Australia has been facilitated by 'people smugglers' who operate from neighbouring South-East Asian countries, particularly Indonesia.[3]

The Australian Government has responded to these arrivals with a range of initiatives. Most controversially, it has created a two-tiered system of refugee protection: permanent protection visas are granted to those who apply for

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1 "In 1999-00, 4 174 people arrived without authority on 75 boats, compared with 920 on 42 boats in 1998-9 (an increase of 354 per cent)": Department of Immigration and Multicultural Affairs ("DIMA"), DIMA Fact Sheet 81: *Unauthorised Arrivals by Air and Sea*, 25 July 2000. However, as the Refugee Council of Australia ("RCOA") has pointed out, the total number of people seeking asylum in Australia is still "extremely small compared with other western countries: 8 257 in the year ended June 1999 compared to 51 795 in the United Kingdom and 98 644 in Germany in the same period": RCOA, *The Size and Composition of the 2000-2001 Humanitarian Program Views from the Community Sector*, February 2000, p 50.

2 DIMA, Fact Sheet 63: *Temporary Protection Visas*, 21 January 2000 ("DIMA Fact Sheet 63"), p 2; Senate Legal and Constitutional References Committee, *A Sanctuary Under Review: An Examination of Australia's Refugee and Humanitarian Determination Processes* (Canberra, 2000) ("Senate Committee Review"), para 1.61.

3 DIMA, Fact Sheet 83: *People Smuggling*, 30 May 2000 ("DIMA Fact Sheet 83").

refugee status from outside Australia or whilst in possession of valid travel documents; temporary protection visas with a limited range of entitlements are granted to the others. The Government argues that such a policy is necessary to deter potential asylum seekers from using people smugglers to come to Australia instead of awaiting the result of an application for refugee status lodged from abroad.

In the year to come, there will be considerable scope at both international and national levels for a detailed examination of the challenge posed by people smugglers and their human cargo.[4] The Executive Committee of the United Nations High Commissioner for Refugees ("UNHCR") has recently recognised "the importance of adopting comprehensive measures" to deal with the phenomenon.[5] At the same time, the Australian Government has announced that it intends to meet with United Nations officials and with the Ministers of 'like-minded countries' in an effort to "reform the Office of the UNHCR and its Executive Committee".[6] The Government argues that:

> suitable reform would enable the UNHCR and its Executive Committee to provide better assistance and support to countries in meeting the challenges of providing refugee protection to those most in need, whilst combating people smuggling.[7]

Thirdly, at community and state levels, there is ongoing criticism directed not at institutions and processes, but at the human impact of the policy – its effect on the new class of 'temporary' refugees.

It is against this background that we provide an introduction to the issues as they have arisen in the Australian context. This article focuses on the asylum seekers who have arrived in Australia by boat in the past year and a half. Since the vast majority of them are originally from Iraq or Afghanistan, we begin with a brief overview of the political situations in Iraq and Afghanistan that have led to the large flow of refugees over their borders. Having considered some of the main factors precipitating the arrival of the asylum seekers in Australia, we then examine Australia's international obligations towards them and the grounds upon which they may obtain refugee status in Australia. The article then focuses on one major aspect of the Australian Government's legal response to the situation: the creation of a new temporary protection visa category for refugees who enter Australia 'illegally'. We consider arguments that a policy which provides 'illegal' refugees with temporary visas and a diminished range of entitlements may be either inconsistent with the 1951 Convention Relating to the Status of Refugees ("Refugees Convention")[8] or practice under the Convention. Having reflected upon some of the political factors which have played a part in

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4 The business of smuggling humans around the world is said to earn criminals $20 billion in profits annually: T Fennell et al, "The Human Smugglers: Running the US Border with a Cargo of Refugees", *Maclean's*, November 22 1999, p 18.

5 UNHCR, Executive Committee Conclusions, *Conclusion on International Protection* (No 89(LI), 2000) ("2000 Conclusion").

6 Minister for Immigration, P Ruddock (Minister for Immigration and Multicultural Affairs), "Australian Government Measures to Reform UN Refugee Bodies", Media Release, 29 August 2000.

7 *Ibid.*

8 The 1951 Convention Relating to the Status of Refugees ("the Refugees Convention") was concluded at Geneva on 28 July 1951 (Australian Treaty Series 1954 No 5; 189 UNTS No 2545 at 137).

the Government's response, and the human costs of denying settlement services and family reunion rights to 'temporary' refugees, we conclude that the policy deserves further detailed evaluation.

II. ORIGINS OF THE PROBLEM

Iraq and Afghanistan are Muslim countries, one in the Middle East and the other in central Asia. The United Nations is actively involved in both countries and has imposed economic sanctions on each of them.

Iraq has a secular, Stalinist-type government.[9] The country is racially and religiously divided between Arabs, Kurds, Sunni Muslims and Shia Muslims.[10] The flood of refugees from Iraq began in 1991 following the occupation of Kuwait, the Gulf War, and the consequent rebellions by Kurds in northern Iraq and Shia Muslims in southern Iraq.[11] The UN Security Council has imposed strict economic sanctions against Iraq.[12] These sanctions continue to have a severe effect on the Iraqi population[13] despite the fact that in 1996 the Security Council allowed Iraq to export limited amounts of oil in exchange for food and medicine.[14]

There is no doubt, given the political circumstances in Iraq, that the vast majority of Iraqis who have fled Iraq, particularly Kurds and Shia Muslims, are refugees within the meaning of the Refugees Convention and its Protocol, and therefore non-citizens to whom Australia has protection obligations under the *Migration Act* 1958 (Cth). However, it is also clear that the economic situation in Iraq, resulting from the UN sanctions, has played an important part in bringing Iraqis to Australia.[15]

Various Western countries including Australia have played a major role in ensuring that sanctions continue to be imposed against Iraq – sanctions which have affected the living conditions of the people of Iraq rather than the power of its dictator.[16] However, Australia is one of the few Western countries which has

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9 See generally, A Baram, *Culture, History and Ideology in the Formation of Ba'thist Iraq, 1968-89*, Macmillan (1991); S Khalil, *Republic of Fear: The Politics of Modern Iraq*, University of California Press (1989); E Karsh and I Rautsi, *Saddam Hussein: A Political Biography* (1991); SK Aburish, *Saddam Hussein, The Politics of Revenge*, Bloomsbury (2000).

10 See P Marr, *The Modern History of Iraq*, Westview (1985); E Ghareeb, *The Kurdish Question in Iraq*, Syracuse University Press (1981).

11 G Barzila et al, *The Gulf Crisis and its Global Aftermath*, Routledge (1993).

12 UN Security Council Resolutions 661 and 666.

13 GL Simons, *Imposing Economic Sanctions: Legal Remedy or Genocidal tool?*, Pluto Press (1999); AH Cordesman and AS Hashim, *Iraq: Sanctions and beyond*, Westerview (1997).

14 UN Security Council Resolution 986.

15 As a result, the Minister for Immigration has argued that many of the Middle-Eastern refugees have left their countries for economic reasons, and that the considerable costs of making their way to Australia have been met by relatives in Australia who have previously been successful in establishing refugee status here. Certainly, the amount charged by people-smugglers for a sea journey from Iraq or Afghanistan can be very significant, particularly given the economic situation in those two countries.

16 TG Weiss et al (eds), *Political Gain and Civilian Pain: Humanitarian Impacts of Economic Sanctions*, Rowman and Littlefield (1997); AH Cordesman and AS Hashim, *Iraq: Sanctions and Beyond*, Westview (1997).

experienced the major side-effect of the sanctions: increased numbers of asylum seekers from Iraq.

Afghanistan is not a Middle Eastern country. It is a central Asian Muslim country with significant racial, religious and ethnic divisions.[17] Once again, both the United Nations and the West have been involved in the country's affairs since the Soviet Union's occupation of the country in 1978.[18] The West financially and logistically supported the Mujahidin, against the Soviet Union. The Mujahidin encompassed various Afghan factions, among them extremist groups including Osama Bin Laden and his followers. The situation was aggravated when the Soviets withdrew from Afghanistan. A civil war erupted and in 1994 a new fundamentalist group known as the Taliban was established by the Pakistani intelligence services.[19] The Taliban now controls 90 per cent of Afghanistan but has not been recognised by the United Nations or the international community as the legitimate government of Afghanistan. It nonetheless imposes the strictest form of Islamic punishment in the world.[20] Under the Taliban rule, many Afghans are persecuted because of their religion, gender and political opinion. The majority of Afghan illegal immigrants arriving in Australia are from the minority Tajik, Uzbek, Hazara and Shia Muslim groups, who have been persecuted in Afghanistan. Refugees from Afghanistan account for over half of the world's refugee population.[21]

III. AUSTRALIA'S INTERNATIONAL OBLIGATIONS

Australia is a party to the Refugees Convention and to its Protocol.[22] Although international instruments are not automatically incorporated into

17 See A Saikal, *Regime Change in Afghanistan*, Crawford House Press (1991) pp 13-16; A Banuazizi and M Weiner (ed) *The State, Religion and Ethnic Politics: Afghanistan, Iran, and Pakistan*, Syracuse University Press (1986); J Nassim, *Afghanistan: A Nation of Minorities*, Minority Rights Group (1992).

18 See TT Hammond, *Red Flag Over Afghanistan*, Westview (1984); A Saikal, The Afghanistan Conflict, Discussion Paper, Parliament of the Commonwealth of Australia (1978).

19 A Rashid, *Taliban: Militant Islam, Oil and Fundamentalism in Central Asia*, Yale University Press (2000); M Huband, *Warrious of the Prophet: the Struggle for Islam*, Westview (1999).

20 P Marsden, *The Taliban: War, Religion and the New Order in Afghanistan*, Oxford University Press (1998).

21 H Anvari, "Closing the Door" *The Middle East*, September 1999, p 18.

22 In relation to the Refugees Convention, see note 8 *supra*. The Protocol to the Convention Relating to the Status of Refugees ("the Protocol") was concluded in 1967 (Australian Treaty Series 1973 No 37; 606 UNTS No 8791 at 267).

Australian law,[23] Australia has partially implemented the Convention and Protocol through the protection visa regime included in the *Migration Act* 1958 (Cth).[24]

The *Migration Act* creates a class of visa called a protection visa. According to s 36(2) of the Act:

> [a] criterion for a protection visa is that the applicant for the visa is a non-citizen in Australia to whom Australia has protection obligations under the Refugees Convention as amended by the Refugees Protocol.

The *Migration Regulations* 1994 (Cth) set out various criteria for the grant of a permanent protection visa (visa subclass 866) including the requirement that "[t]he Minister is satisfied that the applicant is a person to whom Australia has protection obligations under the refugees convention".[25] This same criterion must be satisfied in the case of a grant of a temporary protection visa (visa subclass 785).[26]

As a result, those provisions in the Refugees Convention which describe the nature of Australia's protection obligations under the Convention are implicitly incorporated into Australian law. As the Full Federal Court acknowledged in *Minister for Immigration and Multicultural Affairs v Thiyagarajah* ("*Thiyagarajah*"), as a matter of domestic law the Government could, through the *Migration Act* 1958 (Cth), have varied Australia's obligations under the Refugees Convention.[27] However, "by enacting in s 36(2) that the relevant criterion for a protection visa is whether Australia has protection obligations under the Refugees Convention, it has not done so".[28]

That said, it is necessary to identify the provisions in the Refugees Convention which set out Australia's protection obligations under the Convention. This is a question over which there may be some differences of opinion. However it seems clear that in *Thiyagarajah* the Full Federal Court considered that the

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23 See *Simsek v Macphee* (1982) 148 CLR 636 per Stephen J; *Kioa v West* (1985) 159 CLR 550 at 570-1, 603 and 630; *Minister for Immigration and Ethnic Affairs v Teoh* (1994) 183 CLR 273; *Minister for Immigration and Multicultural Affairs v Thiyagarah* (1997) 151 ALR 685 (Full Fed Ct) ("*Thiyagarajah*") at 692-3 per Von Doussa J; M Crock, *Immigration and Refugee Law in Australia*, Federation Press (1998) p 126; T Musgrave, "Refugees" in S Blay et al (eds) *Public International Law: An Australian Perspective*, Oxford University Press (1997) 301 at 319. As mentioned in the text accompanying note 30 *infra*, there is some support for the view that the principle of non-refoulement set out in Article 33(1) has achieved the status of a principle of customary international law. However in Australia it is unlikely that rules of customary international law automatically form part of domestic law: see, for example, *Chow Hung Ching & Ano v The King* (1949) 77 CLR 449 at 471; I Shearer, "The Relationship between International Law and Domestic Law", and Sir A Mason, "International Law as a Source of Domestic Law", in BR Opeskin & DR Rothwell (eds), *International Law and Australian Federalism* (1997) at 48-51 and 212-8 respectively; R Balkin, "International Law and Domestic Law" in S Blay et al, *Public International Law, An Australian Perspective*, Oxford University Press (1997); and J Crawford & WR Edeson, "International Law and Australian Law in KW Ryan (eds) *International Law in Australia*, LBC (1984) 71 at 72-9

24 The *Migration Act* 1958 (Cth) was extensively revised by the *Migration Reform Act* 1992 (Cth): see *Thiyagarajah, ibid* at 693.

25 Clause 866.221 in Part 866 of Schedule 2 of the *Migration Regulations* 1994 (Cth).

26 Clause 785.221 in Part 785 of Schedule 2 of the *Migration Regulations* 1994 (Cth).

27 *Thiyagarajah*, note 23 *supra* at 697.

28 *Ibid.*

central protection obligations assumed by Australia were those contained in Articles 31, 32 and 33 of the Convention. In addition, the Court regarded the definition of 'refugee' in Article 1 of the Convention as incorporated into Australian law – since this is the provision which identifies the persons to whom Australia has protection obligations.[29]

The ambit of Articles 32 and 33 of the Convention is reasonably clear. According to Article 32, contracting states "shall not expel a refugee lawfully in their territory save on grounds of national security or public order" and only "in pursuance of a decision reached in accordance with due process of law". This is regarded in international law as an obligation not to remove a 'lawful' refugee to another state regardless of whether they would face persecution there.

Article 33, on the other hand, imposes a protection obligation applicable to *all* refugees, regardless of whether they have valid travel documents which justify their presence in the territory. The principle of *non-refoulement* set out in Article 33(1) forms the centrepiece of the international refugee protection system. There is some support for the view that the principle has achieved the status of a principle of customary international law,[30] and that all states – whether or not parties to the Refugees Convention – are therefore obliged to adhere to it. Article 33(1) provides as follows:

> Article 33 - Prohibition of Expulsion or Return ("*Refoulement*")
>
> 1. No Contracting State shall expel or return ("refouler") a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion.

The scope of Article 31(1) is more controversial. It applies specifically to 'illegal' refugees:

> Article 31 - Refugees Unlawfully in the Country of Refuge
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> 1.The Contracting States shall not impose penalties, on account of their illegal entry or presence, on refugees who, coming directly from a territory where their life or freedom was threatened in the sense of article 1, enter or are present in their territory without authorization, provided they present themselves without delay to the authorities and show good cause for their illegal entry or presence.

The provision can be regarded as imposing a protection obligation since it prohibits a state from adopting practices that might deter refugees from seeking protection there. In addition, some commentators consider that Article 31(1) imposes an obligation on contracting states to treat all refugees alike – that is, not to treat 'illegal' refugees less favourably than refugees who have some other lawful justification for their presence in the territory.[31] This argument, which

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29 This view is tacitly supported in recent judgments of the High Court: see, for example, *Minister for Immigration and Multicultural Affairs v Ibrahim* [2000] HCA 55 (unreported, 26 October 2000) per Gummow J at paras 107-9, 136.

30 See the various views discussed in G Goodwin-Gill, *The Refugee in International Law*, Oxford University Press (2nd ed, 1996) pp 134-7.

31 See note 102 *infra* and accompanying text.

has been put forward by some critics[32] of the new temporary protection visa regime in Australia, will be discussed further, below.

In addition to the protection obligations incorporated into Australian law, Australia is duty-bound as a signatory to the Refugees Convention to adhere to numerous other obligations in relation to its treatment of refugees. In some cases – for example, work entitlements and social security – the obligation extends only to the treatment of "refugees lawfully staying in [the] territory".[33] In other cases – for example, rights to public elementary education, access to the courts and identity papers – the entitlement is to be extended to all refugees.[34]

It has sometimes been suggested that since the Refugees Convention, for the most part, imposes obligations regarding the treatment of 'refugees' rather than 'asylum seekers', contracting states are under no obligation to extend any of its entitlements to asylum seekers until they have been determined to be refugees. However, such an argument seems disingenuous since it is well accepted in international law that a person who meets the Convention definition of a refugee is a refugee whether or not a determination has been made to that effect.[35] A state who fails to apply Convention obligations to asylum seekers will therefore be in breach of the Convention in respect of those persons who are subsequently determined to be refugees.

Finally, Australia has in some instances extended to refugees entitlements which are not mentioned in the Refugees Convention. One such entitlement that Australia extends to permanent protection visa holders is the right to sponsor close family members. The Australian Government argues that as this right to family reunion does not appear in the Refugees Convention and is considerably wider than the principle of family unity contemplated by the UNHCR, it is under no obligation to extend the right to all refugees.[36] In particular, it argues that it is under no obligation to extend the right to family reunion to refugees who have entered Australia without valid travel documentation and so have been granted temporary, rather than permanent, protection visas.

A. Interpretation of the Refugees Convention

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32 *Ibid.*

33 Article 24 of the Refugees Convention.

34 See Articles 22, 16 and 27 respectively. In respect of the latter provision, see also Article 28(1), which imposes an obligation on states to 'give sympathetic consideration' to 'illegal' refugees with respect to travel documents enabling them to travel outside the territory in cases in which the refugees "are unable to obtain a travel document from the country of their lawful residence".

35 G Goodwin-Gill, note 30 *supra*, pp 137, 141; UNHCR, *Handbook on Procedures and Criteria For Determining Refugee Status* (1979), para 28; A Grahl-Madsen, *The Status of Refugees in International Law*, Sijthoff (1966) vol 1 pp 340-1. In *Chan v Minister for Immigration and Ethnic Affairs* (1989) 169 CLR 379 ("*Chan*") at 414, Gaudron J cited the latter two authorities with approval on this issue.. This is a different point from the question of which facts (ie the facts at which time) should be relied upon during the course of the refugee status determination process: see *Chan* at 432 per McHugh J.

36 DIMA, *Effective Protection in Australia – The Facts* (November 1999) ("Effective Protection"), p 3, which refers to "the principle of family unity as established by the Final Act of the Conference that adopted the 1951 Convention", and to the UNHCR *Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol Relating to the Status of Refugees* (1992), para 184 C6.

The UNHCR offers some guidance to states on the interpretation of the Refugees Convention,[37] but does not provide the sort of detailed commentary on provisions available in relation to other international human rights instruments.[38] As a result, signatory states have some latitude when interpreting particular provisions of the Convention. Nonetheless, it is clear that a well-developed international framework for the protection of human rights has grown up around the Refugees Convention and that the Convention must be interpreted in that context.

The international human rights framework, through extensive use of individual complaint procedures, now focuses primarily on the rights of individuals rather than the obligations of states. The Australian Government has not accepted the dynamic nature of international law when interpreting the Refugees Convention.[39] For example, in response to criticism of the temporary protection visa policy it has recently said:

> Current criticism of Australia's protection framework is largely argued from a narrow platform based solely on the principles of human rights for an individual. Such criticism fails to recognise that Australia, as a sovereign state, has obligations, not only to individuals, but also to its citizenry as a whole and to the international community. It also fails to recognise that *the Refugees Convention is a statement of the obligations of states, not the rights of individuals.*[40]

A second example is to be found in the Government's recent announcement of its intention to consider the scope of state obligations under the Refugees Convention. Here, the Government has emphasised that it intends to prevent parties from arguing that the scope of the Refugees Convention should be extended "in ways which countries did not envisage when they signed (the Convention)".[41]

These statements are a reasonable indication of the Government's understanding of the international human rights framework within which the

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37 The Executive Committee of the UNHCR is "the only specialised forum which exists at the global level for the development of international standards relating to refugees": V Turk & P Twomey (eds), *Refugee Rights and Realities: Evolving International Concepts and Regimes*, Cambridge University Press (1999) p 165. The Executive Committee issues annual Conclusions on International Protection which although only advisory in nature have "an important standard-setting effect" since they "document consensus of the international community on...specific protection matter(s) and are usually worked out in close co-operation with UNHCR": V Turk & P Twomey, cited *supra*. However, the Conclusions tend to contain references to general principles rather than detailed consideration of particular issues.

38 For example, the UN Human Rights Committee provides detailed guidance on the interpretation and application of provisions in the International Covenant on Civil and Political Rights (adopted 6 December 1966, entered into force 23 March 1976, GA Res 2200A (XXI), UN Doc A/6316 (1966), 999 UNTS 171). The Committee provides written views on individual communications referred to it, and also provides General Comments which set out its views on the scope of many of the provisions in the Covenant.

39 "In UNHCR's view, an appropriately liberal interpretation, in the dynamic spirit of international law, of the Geneva Convention criteria would mean that a large number of persons falling within UNHCR's competence could – and indeed should – be considered Convention refugees": V Turk, note 37 *supra*, p 56.

40 DIMA, Effective Protection, note 36 *supra* at 6. (Emphasis added).

41 P Ruddock, Media Release, note 6 *supra*.

Refugees Convention now operates. As a refugee expert from UNHCR has emphasised:

> Protection principles and the regime of asylum state responsibilities cannot effectively be viewed in isolation of the broader framework in which they will be applied. It is their contemporary political, social and economic context which significantly enables or constrains their application at any given time.[42]

At a national level, Kirby J in the High Court has recently rejected the argument that the Refugees Convention "should be narrowly interpreted to meet only refugee problems of the kind and number envisaged at the time the Convention was adopted in 1951".[43] Justice Kirby also points to the fact that the language of the Refugees Convention "unusually for its time, focussed attention on personalised criteria involving individuals".[44]

The Australian Government would do well to acknowledge and accept the fact that the purpose of the Refugees Convention is to address the needs of refugees, rather than the concerns of states. Clearly, the interpretation of the Refugees Convention must be informed by its context: that is, by contemporary refugee issues and by an international human rights framework which emphasises the rights of individuals rather than the obligations of states. Acceptance of this underlying premise will not mean a descent into uncertainty and confusion in the interpretation of the Refugees Convention.

IV. GROUNDS FOR REFUGEE STATUS

A person is regarded as a refugee under the Refugees Convention when he or she satisfies the various criteria set out in Article 1A(2) of the Convention and does not fall within any of the exclusions in Article 1. As mentioned earlier, the definition in Article 1 is implicitly incorporated into Australian law by the *Migration Act* 1958 (Cth). It includes the fundamental requirements that the person has a "well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion", is therefore "outside the country of his nationality", and is "unable, or owing to such fear, is unwilling to avail himself of the protection" of that country.[45]

In Iraq and Afghanistan, many people are persecuted for Convention reasons – because of their race, religion, nationality, membership of a particular social group or political opinion. For instance, in Iraq, the largest ethnic minority,[46] the Kurds, have for decades, been denied their basic rights and have been the subject of severe persecution and brutality,[47] particularly since the end of the Gulf

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42 E Feller, note 102 *infra*.

43 *Ibrahim*, note 29 *supra* at para 198.

44 *Ibid*.

45 Article 1A(2) Refugees Convention.

46 The Kurds are thought to constitute at least 15 per cent of the population of Iraq: *The Encyclopedia of the Third World*, Oxford (1992) p 891.

47 For example, in March 1988, over five thousand Kurdish civilians (almost the entire population of the town) were killed in *Halabja*, a Kurdish town in Iraq when the Iraqi army used chemical weapons against the Kurdish civilians.

War.[48] Such treatment has been condemned by the UN Security Council in Resolution 688. Even Shia Muslims, who constitute a majority of the population (over 60 per cent) in Iraq have been the subject of persecution, particularly after their rebellion against the Government following the Gulf War.[49] In Afghanistan, the Taliban has oppressed women,[50] religious minorities, all political opponents and members of social groups such as homosexuals.

Iraq and Afghanistan are obviously two of the worst perpetrators of human rights abuses in the world. For Australia, this has complicated the legal and political issues relating to illegal arrivals from these countries. On the one hand, it seems that a high proportion of the new arrivals will qualify as refugees under Australian law. According to the Refugee Council of Australia:

> in the year ended 30 June 1999, approximately 97 per cent of Iraqis and 92 per cent of Afghans who applied were found ... (by either the Department of Immigration or the Refugee Review Tribunal) to meet the strict definition of refugee status.[51]

On the other hand, given the large numbers of refugees from these areas and the cost of supporting them, Australia as a sovereign independent state has legitimate concerns for its security[52] and for its economic interests.

V. TEMPORARY PROTECTION VISAS

The Australian Government has responded to the arrival of the Iraqi and Afghan asylum seekers with a range of initiatives.[53] The Government has launched an overseas information campaign aimed at deterring people smugglers and their targets, and the Minister for Immigration has travelled to Iran, Pakistan,

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48 MA Musallam, *The Iraqi Invasion of Kuwait: Saddam Hussein, His State and International Power Politics*, British Academic Press (1996); KE Schultz et al, (eds) *Nationalism, Minorities and Diasporas: Identities and Rights in the Middle East*, Tauris Academic Studies (1996).

49 *Ibid.*

50 ME Ghasemi, "Islam, International Human Rights and Women's Equality: Afghan Women Under the Taliban" (1999) 8 *Southern California Review of Law and Women's Studies* 445; A Telesetky, "In the Shadows and Behind the Veil: Women in Afghanistan Under the Taliban Rule" (1998) 13 *Berkeley Women's Law Journal* 293.

51 RCOA, note 1 *supra* p 50. According to the Refugee Council, "[o]f the current arrivals whose cases have been finalised, all have been determined to be refugees": RCOA note 1 *supra* pp 50-1. The authors sought statistics from DIMA on this point, but DIMA was unable to provide the statistics in the short time available.

52 Neither Afghanistan nor Iraq are governed by the rule of law. Afghanistan in particular does not have an internationally recognised government. In both countries power is exercised by factions holding a variety of political and ideological beliefs. These include groups which employ violence for political purposes. Members of these groups, such as the followers of Osama Bin Laden in Afghanistan, may be amongst the refugees who have recently arrived in Australia. As a result of the chaotic conditions within Afghanistan in particular it is often difficult for Australian immigration authorities to verify claims made by the asylum-seekers as to their good character. We therefore suggest that Australian law be amended to enable Australian authorities to deport or to charge under Australian criminal law any asylum-seekers who are subsequently found to have been involved in serious criminal activities, particularly terrorist activities and war crimes.

53 See DIMA Fact Sheet 83, note 3 *supra* at 2.

Turkey, Syria, Jordan[54] and Indonesia to support the campaign. New legislation prohibits asylum seekers with other avenues of protection overseas from obtaining onshore protection in Australia.[55] Legislative amendments prescribe significant penalties for convicted people smugglers and confer on the Department of Immigration and Multicultural Affairs ("DIMA") and Customs officers powers to board, search and detain vessels in international waters.[56]

In addition, the Government has created a new category of refugee: the temporary protection visa-holder. Previously, all asylum seekers in Australia who had established that they were refugees within the definition provided in the Refugees Convention were entitled to a *permanent* protection visa.[57] This visa provides a right to permanent residence, access to comprehensive settlement services and access to the "mainstream social welfare system to obtain pensions and new start allowance(s)".[58] Further, where permanent protection visa-holders have left close family members behind in their country and have mentioned those family members in their applications for refugee status, the family members are able to apply for a visa to enable them to join the successful refugee claimant in Australia.[59]

Asylum seekers who have applied for and established refugee status after being immigration cleared[60] (so-called 'legal' refugees) are still able to obtain permanent protection visas and to bring in 'off-shore' family members. However, during 1999, the Australian Government decided that the range of entitlements available to 'illegal' refugees was "attracting misuse of Australia's off-shore protection arrangements by organised people smuggling rackets".[61] On 20 October 1999, the Australian Government amended the *Migration Regulations* 1994 (Cth) so that asylum-seekers who had established refugee status but had not been immigration cleared could only obtain a three year temporary protection visa.[62]

Refugees on temporary protection visas are theoretically able to work, may obtain Medicare benefits and remain eligible for various family and other allowances.[63] However, they do not have a right to permanent residence or to the settlement services and other social welfare benefits available to permanent

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54 Minister for Immigration and Multicultural Affairs ("MIMA"), "Minister's Anti-People Smuggling Campaign Brings Increased Cooperation", Press Release, 26 January 2000.

55 *Border Protection Legislation Amendment Act* 1999 (Cth), Part 6.

56 See DIMA, "New Campaign to Stop Illegal Immigrants", press release, 29 October 1999, p 2; *Border Protection Legislation Amendment Act* 1999 (Cth).

57 A 'Subclass 866 visa'.

58 DIMA Fact Sheet 63, note 2 *supra* at 1.

59 A 'Subclass 202 (global special humanitarian) visa'.

60 A person will be "immigration cleared" if he or she presents to Immigration authorities at an Australian port documents which the authorities regard as acceptable proof of the person's identity and right to enter Australia (ie a valid visa): *Migration Act* 1958 (Cth), s 172.

61 DIMA Fact Sheet 63, note 2 *supra* at 1.

62 A 'Subclass 785 visa'.

63 DIMA Fact Sheet 63, note 2 *supra* at 2; DIMA, *Refugee and Humanitarian Issues: Australia's Response* (October, 2000) ("Australia's Response"), p 23.

protection visa-holders.[64] In practice, this means that these refugees – typically adult male 'breadwinners' – are often unable to access the free or affordable English language classes which would enable them to gain sufficient linguistic skills to obtain work.[65] They are thus unable to contribute to the Australian community or, in the case of married males, to send money back to their wives and children at home.[66]

Most seriously, temporary refugees are prevented from seeing (and often – because of communication difficulties in their country – from even communicating with) their off-shore family members. Close family members, including wives and children, may only obtain a visa to join the refugee in Australia if, after a period of at least 30 months has elapsed, the latter is able to establish that he or she remains at risk of persecution in the home country and is therefore entitled to a permanent protection visa.[67] In many cases, therefore, it will be more than three years before temporary refugees have any form of contact with their family.

The Australian Government has thus created two classes of refugee: on the one hand, those refugees who have entered Australia with travel documents that confer (or appear to confer) a legal right to enter and, on the other hand, those who have entered Australia without such documents – often because unsafe conditions in their country and in neighbouring countries precluded them from obtaining a valid visa.[68]

VI. DISCRIMINATION BETWEEN CLASSES OF REFUGEES

In the Australian context, temporary visas have previously been issued on an *ad hoc* basis to meet particular circumstances where people in Australia have been unable to return to their countries. The visas have been used 'sparingly' and only as a humanitarian response to particular events such as the massacre in Tiananmen Square or in relation to particular war-torn areas such as Lebanon, Sri Lanka and more recently the Former Yugoslavia.[69] The recipients have had

64 *Ibid*; DIMA, Effective Protection, note 36 *supra* at 9. For details of the Integrated Humanitarian Settlement Strategy ("IHSS") and the Adult Migrant English Program ("AMEP") available to permanent protection visa holders see DIMA, Australia's Response, note 36 *supra* at 29-31.

65 Four Afghan temporary protection visa holders described this as a common predicament during a meeting at Senator Andrew Bartlett's office (attended by the author Belinda Wells): Brisbane, 1 August 2000.

66 *Ibid.*

67 *Migration Regulations* 1994 (Cth), cls 866.228 and 202.21; DIMA Factsheet 63, note 2 *supra* at 2. The Minister may specify a shorter period in a particular case: see cl 866.228.

68 See, for example, R Lachowicz, "Hunger-striking Refugees Deserve a Fair Hearing", *Courier Mail*, 10 February 2000.

69 RCOA, *Submission to the Senate Legal and Constitutional References Committee on Australia's Refugee and Humanitarian Program* (1999) ("Submission No 24"), p 19; Senate Committee Review, note 2 *supra* para 1.106. RCOA points out that "a later application of this principle was the creation in June 1997 of a series of special temporary visa classes for people from a number of countries, including China, Sri Lanka, Lebanon and Iraq, who had arrived lawfully in Australia on or before certain specified dates": RCOA, Submission No 24, p 19.

"work rights, family reunion rights and most other rights of permanent residents".[70]

In April 1999, following a request from UNHCR, the Australian Government announced that it would provide a temporary safe haven "for up to 4 000 Kosovars from the refugee camps in the Former Yugoslav Republic of Macedonia, for an initial period of three months".[71] In September it extended the safe haven program to encompass "1 450 East Timorese evacuated from the UN Compound (in East Timor) as well as a further 350 United Nations Mission in East Timor ("UNAMET") locally engaged staff and their families".[72] The *Migration Act* 1958 (Cth) was amended to create two new visa subclasses: the Kosovar Safe Haven (Temporary) visa (visa subclass 448) and the Humanitarian Stay (Temporary) visa (visa subclass 449).[73] As the Senate Legal and Constitutional References Committee noted in its recent report on aspects of Australia's refugee and humanitarian determination process, "[t]here was widespread support for the new policy both internationally and within Australia", with many regarding it as "a direct and appropriate response to global emergency and crisis situations".[74]

However, in some sectors there was disquiet about the precedent set by the temporary safe haven visas. Safe haven visa holders are unable to insist upon the full rights of refugees under the Refugees Convention since they are generally precluded from applying through the refugee determination process for recognition as a Convention refugee.[75] The visas were seen by some as diluting the rights – including the crucial right of *non-refoulement* – of potentially genuine refugees.[76]

The generalised temporary protection visa regime for 'illegal' refugees followed soon after. In contrast to the spirit of goodwill and largesse which accompanied the temporary safe haven initiative, the Australian Government portrayed the new temporary protection visas[77] as a deterrent: a measure designed to deter the future arrival of 'illegal' offshore asylum seekers and the activities of the people smugglers assisting them. It emphasised the need to discriminate between 'lawful' refugees and 'illegal' refugees by withholding certain privileges from the latter category of refugees.

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70 RCOA, Submission No 24, p 19; Senate Committee Review, note 2 *supra*, para 1.106.

71 Senate Committee Review, note 2 *supra*, para 1.67.

72 *Ibid*, para 1.69.

73 The *Migration Legislation Amendment (Temporary Safe Haven Visas) Act* 1999 which came into force on 20 May 1999 established a class of visas known as temporary safe haven visas: Senate Committee Review, note 2 *supra* paras 1.77-1.78. The Senate Committee Review (para 1.80) reported that at the time of writing the Government had created two subclasses of visa under the Act: subclasses 448 and 449.

74 Senate Committee Review, note 2 *supra*, para 1.81. As mentioned below, the Senate Committee was operating under specific terms of reference which did not require it to consider the appropriateness of the new temporary protection visa regime: see note 121 *infra*..

75 *Migration Legislation Amendment (Temporary Safe Haven Visas) Act* 1999, ss 91K and 91L; Senate Committee Review, note 2 *supra*, para 1.86.

76 RCOA, Amnesty International and others expressed their concern in submissions to the Senate Committee Review: Senate Committee Review, note 2 *supra*, paras 1.86-1.90.

77 Visa Subclass 785

The Australian Government argues that states worldwide must take measures to combat people smuggling. It contends that such measures will protect the lives of asylum seekers exploited by people smugglers whilst preserving places in the refugee programmes of developed countries for offshore applicants.[78] The Government suggests, probably accurately, that some of the people brought to Australia by people smugglers are "seeking a migration outcome rather than protection", whilst others, who are refugees:

> are leaving countries of first asylum where they have effective protection, or have transited or bypassed neighbouring countries that can provide effective protection in order to apply for protection in a country of their choice.[79]

Certainly, there is anecdotal evidence that some of the Iraqi and Afghan asylum seekers have voluntarily left countries of first asylum such as Iran and Pakistan in order to come to Australia. However, there do not appear to be any publicly available statistics on this issue.[80] In addition, the Australian Government continues to emphasise that the deterrence measures designed to stem the flow of 'illegal' asylum seekers to Australia are necessary in order to maintain the support of the Australian public for Australia's refugee and humanitarian intake.[81]

These are persuasive arguments when couched in general terms. However, the real debate is about the particular form that the Government's deterrence measures have taken: the question of whether the Government should have limited itself to measures such as country of origin visits and increased powers to intercept and penalise people smugglers. As a matter of both public policy and law, should the Government have gone further than this, and created a new form of protection visa conferring more limited rights on 'illegal' refugees? We consider below the major arguments that have been raised against the temporary protection regime.

A. The Human Cost

The Australian Government's policy towards 'illegal' refugees has a significant human cost. Clearly the political situation in Iraq and Afghanistan is unlikely to improve in the near future.[82] As a result, most of the temporary visa holders will eventually be granted permanent protection visas.

In the meantime, as 'temporary' refugees in Australia, their lives are very difficult. Once their refugee status is determined by the Department of

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78 See, generally, DIMA, Effective Protection, note 36 *supra*.

79 DIMA, Australia's Response, note 63 *supra* at 10.

80 Several experts at DIMA who were approached during research for this article stated that DIMA did not have statistics on this issue. Obviously, it would be difficult to gauge the accuracy of any such statistics since information about countries of first asylum and transit is largely dependant on the testimony of asylum seekers, some of whom may not wish to divulge such information.

81 See, for example, DIMA, Effective Protection, note 36 *supra* at 7, quoting from the statement made by the Australian delegation in the General Debate of the Executive Committee of the UNHCR in October 1999.

82 See, for example, B Whitaker, "Baghdad Resumes Domestic Flights", *Guardian Weekly*, November 9-15 2000; and R McCarthy, "Starving Tajiks Fear New Wave of Afghan Refugees", *Guardian Weekly*, October 19-25 2000.

Immigration, the refugees are released from the detention centre (typically in a remote area such as Woomera, Port Hedland or Derby), taken by bus to a capital city, provided with a couple of nights accommodation and a Centrelink contact, and then left to fend for themselves.[83] The Federal Government does not assist the refugees in obtaining housing or furniture, or provide access to English language training to enable them to use their skills and qualifications or other settlement services.

Many of Australia's peak welfare bodies and ethnic community councils have called on the Government to provide access to comprehensive settlement services.[84] All of them criticise the creation of 'two classes of refugees'.[85] They are supported in their views by elements within the political system including the Australian Democrats and the South Australian Government.[86]

Most significantly, the temporary protection visa regime prevents refugees from seeing their families – their spouse and children – for up to five years. As the Refugee Council of Australia has argued, this will often "cause significant psychological distress to the refugee, result in the refugee being impoverished in Australia" (since any money that is earned will be sent overseas to support other family members), and extend the period during which the refugee's spouse and children are in danger.[87]

B. Non-refoulement

The legal arguments which may be mounted against the temporary protection visas turn on two issues: the meaning of the right to *non-refoulement* contained in Article 33(1) of the Refugees Convention and the interpretation of Article 31(1) which prohibits the imposition of penalties on 'illegal' refugees.

The Refugees Convention confers on all refugees a right to *non-refoulement* – a right not to be returned to the country of possible persecution. It is well accepted both internationally[88] and by Australian courts, that this is a right not to be returned rather than a right to permanent asylum. In *Applicant A v Minister for Immigration and Ethnic Affairs*, for example, Gummow J accepted that:

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83 See open letter from National Shelter Inc to John Howard dated 22 August 2000 ("Shelter letter"); and ABC, Four Corners, "The Queue Jumpers" (unpublished television programme transcript, broadcast 16 October 2000) ("Four Corners transcript").

84 Australian Council for Social Services ("ACOSS") et al, "Call for Government to Reverse Decision to Withhold Services to Refugees", Media Release, 23 October 2000; Shelter letter, *ibid.*

85 *Ibid.*

86 See, for example, Senator Andrew Bartlett, "Democrats Back ACOSS on Refugees", Media Release, 23 October 2000; Four Corners transcript, note 83 *supra* at 6, 11. The Premier of South Australia has argued strongly that all refugees in Australia should have access to English language instruction so that they have the "capacity to become self-sufficient within Australian society": Four Corners transcript. note 83 *supra* at 6.

87 RCOA, note 1 *supra* at 59.

88 See M Crock, *Immigration and Refugee Law in Australia*, Federation Press (1998) p 154 and the references cited therein; G Goodwin-Gill, note 30 *supra*, p 196; JC Hathaway, *The Law of Refugee Status*, Butterworths (1991) p 14; and P Hyndman, "Refugees Under International Law with a Reference to the Concept of Asylum" (1986) 60 *ALJ* 148 at 153.

> The Convention only obliges States parties to guarantee *non-refoulement* or non-return to the place of persecution. It does not guarantee asylum in the sense of permanent residence or full membership of the community.[89]

Nonetheless, Professor Goodwin-Gill has argued that in the case of individual refugees, a presumption of permanent residence arises:

> In [the case]...of the individual, the fact of being a refugee in the sense of the 1951 Convention/1967 Protocol may properly give rise to a presumption or expectation that asylum in the sense of a local, lasting solution will be forthcoming. As a matter of principle, that presumption should only be rebutted by evidence clearly indicating the personal acceptability of the refugee.[90]

Professor Goodwin-Gill contrasts this with the position of asylum seekers in a situation of 'mass influx', where "formal determination of status may be impracticable in view of the numbers", and where:

> any expectation or presumption of a local solution may be redundant in face of evidence of cross-cultural, ethnic, or religious conflict, or for other demographic, resource and costs-related reasons.[91]

The distinction between the situation of individual asylum seekers and that of crises involving large-scale border movements is emphasised by a number of commentators. The Note on International Protection put to the UNHCR Executive Committee ("EXCOM") in 1999 referred critically to the "growing tendency for states to extend the application of temporary protection regimes to asylum-seekers arriving outside the context of mass displacement".[92] A number of EXCOM Conclusions imply that temporary protection is to be provided only in cases of large-scale influx.[93] In addition, EXCOM Conclusion 74 emphasises that "in providing temporary protection, states and UNHCR should not diminish the protection afforded to refugees under (the Convention)".[94]

In the light of these statements by EXCOM, Amnesty International has argued that it is 'inappropriate' to grant temporary protection visas to individual refugees in Australia.[95] Amnesty regards the four or five year delay in providing the refugees with a durable solution as 'unnecessarily harsh'.[96]

The European Council on Refugees and Exiles has stated that:

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89 *Applicant A v Minister for Immigration and Ethnic Affairs* (1997) 190 CLR 225 at 274, quoting from P Mathew, "Sovereignty and the Right to Seek Asylum: The Case of the Cambodian Asylum Seekers in Australia (1994) 15 *Aust Yearbook of International Law* 35 at 54-5.

90 G Goodwin-Gill, note 30 *supra*, pp 197, 202.

91 *Ibid*, p 197.

92 United Nations High Commissioner for Refugees ("UNHCR"), *Note on International Protection*, UN General Assembly, Executive Committee of the High Commissioner's Program ("EXCOM"), fiftieth session, A/AC.96/914, 7 July 1999.

93 See UNHCR EXCOM Conclusions 19, 22 and 71, which have been relied upon by Amnesty International in a submission on the introduction of a temporary protection visa regime in Australia: Amnesty International, Submission to the Joint Standing Committee on Treaties, April 2000 ("Amnesty Submissions").

94 Cited in Amnesty Submission, *ibid*.

95 Amnesty Submission, note 93 *supra*. See also the discussions of the use of temporary protection in Amnesty International, *Refugees: Human Rights have no Borders, Amnesty International Publications* (1997) pp 79-83.

96 *Ibid*.

> temporary protection represents a reasonable administrative policy only in an emergency situation where refugee status is not immediately practicable and where temporary protection will ensure admission to the territory.[97]

This position has been endorsed by the Refugee Council of Australia, which has said that it is "totally opposed to the use of temporary visas for people granted refugee status in Australia".[98]

Clearly, any use of temporary protection visas for Convention refugees will be controversial. On the one hand, it is well accepted that "[t]he Refugee Convention does not stipulate what kind of visa sovereign States should issue to refugees in fulfilling...[their obligation under Article 33 of the Convention]".[99] On the other hand, there is muted criticism from UNHCR and other commentators indicating that they do not regard it as an acceptable practice to use temporary protection visas in situations other than those of large-scale influxes.

C. Imposition of Penalties

Secondly, it can be argued that the temporary protection visa regime contravenes Article 31 of the Refugees Convention.[100] The argument is that where the Australian Government extends entitlements to lawful refugees, Article 31 of the Refugees Convention precludes the Government from penalising 'illegal' refugees by refusing to extend the same entitlements to them. This argument may be made both in relation to obligations imposed on states by the Refugees Convention and in relation to rights, such as family reunion rights, which the Australian Government has voluntarily conferred on 'lawful' refugees. It effectively interprets Article 31 as prohibiting any discrimination[101] in the treatment of refugees who have entered Australia, whether they possess valid travel documents or not.

This interpretation of Article 31 is supported by Erika Feller, the Director of International Protection at UNHCR, who has recently stated that the temporary protection visa regime in Australia imposes a number of 'penalties' within the meaning of Article 31, not the least of which is its removal of the right to apply

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97 See discussion in RCOA, note 1 *supra* at 28-9. The European Council on Refugees and Exiles "emphasises that temporary protection ... should not be applied in any way which erodes existing forms of protection, such as the 1951 Geneva Convention" and states that the rights afforded should include, as a minimum, various rights such as rights to family unity and education: RCOA, note 1 *supra* at 28.

98 RCOA, note 1 *supra* at 28-9.

99 UNHCR, Office of the Regional Representative for Australia, New Zealand, Papua New Guinea and the South Pacific, Media Release, Canberra, 19 November 1999. This media release could be interpreted as supportive of the temporary protection visa regime in Australia. However it could equally be read as general support for Governments in their efforts to counter people smuggling.

100 The RCOA has put forward this argument, together with arguments that the temporary protection visa regime may be inconsistent with Australia's obligations under Articles 23 and 28 of the Refugees Convention: RCOA, note 1 *supra* at 58.

101 That is, a non-justifiable difference in treatment.

for immediate family reunion.[102] This, she has said, runs counter to the statement by the Executive Committee of UNHCR, in its Conclusions of 1999, that states should adopt measures which protect "the unity of the refugee's family".[103]

The Australian Government, however, has interpreted Article 31(1) more narrowly. It argues that the provision only prevents the imposition of penalties "such as fines or imprisonment" which the state might "otherwise impose in relation to illegal entry into the state".[104] In its view, Article 31(1) does not prevent the differential treatment of unauthorised arrivals. Again, in the absence of an authoritative international standard on the interpretation of the Convention provision,[105] the issue is open to argument.

VII. POLITICAL AND INTERNATIONAL CONSIDERATIONS

In any event, whatever the strengths of the legal arguments against temporary protection visas, for the Australian Government many of the dilemmas arising from the people smuggling situation – and many of the answers – are political and diplomatic rather than legal. The political issues, domestic and international, relevant to the treatment of the Middle Eastern and Afghan refugees can be considered from a number of perspectives.

First, domestic politics has played an important role in influencing the Australian Government's approach to the issue of 'illegal' asylum seekers. At least initially, a significant portion of Australian society regarded the arrival of the Iraqi and Afghan boat-people as a disturbing foreign incursion. Since the introduction of the temporary protection visa regime however, welfare and charitable organisations, politicians, and refugee and human rights groups have begun to challenge the public perception of the asylum seekers as 'forum shoppers' and have exerted some pressure on the Australian Government to modify or dispense with the regime. Nonetheless, the Government continues to see its role in refugee protection as one which reflects and responds to majority public sentiment – whether or not well informed – rather than as one which attempts to transform public attitudes towards refugees.[106]

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102 E Feller (Director, Department of International Protection, UNHCR), "Refugee Protection: An Unwelcome Responsibility? Emerging Issues Globally and in Australia" (unpublished, presentation to the Centre for International and Public Law, Faculty of Law, Australian National University, 6 March 2000), p 12. Further support for the view that the regime imposes a penalty within the meaning of Article 31 of the Refugees Convention is to be found in P Mathew, "Recent Diminution of Refugee Rights" (2000) 9(1) *Human Rights Defender* 18-19.

103 E Feller, *ibid.*

104 DIMA, Effective Protection, note 36 *supra* at 8. The discussion on this issue refers to passages from JC Hathaway, note 88 *supra*, and to the statement by Professor Goodwin-Gill (note 30 *supra* at 305) that the term 'penalties' in Article 31 "appears to comprehend prosecution, fine and imprisonment, but not administrative detention".

105 See notes 37, 38 *supra* and accompanying text.

106 See, for example, the passage from the Australian delegation's statement delivered in the General Debate of the Executive Committee of the UNHCR in October 1999 set out in DIMA, Effective Protection, note 36 *supra* at 7.

Secondly, the Australian Government and some sections of the public remain concerned about the prospect of large numbers of refugees arriving from southern Asia. It is still possible, for example, that parts of Indonesia – the largest Muslim country in the world with a population of nearly 200 million – will descend into major political and civil conflict. If this occurs, the Australian Government may defer to its experience with the Middle Eastern and Afghan refugees, and in particular, its experience with the temporary protection visas.

Thirdly, Australia's response to the arrival of the Iraqi and Afghan asylum seekers – the introduction of temporary protection visas amongst other initiatives – will to some extent affect Australia's reputation as a country which observes international human rights standards. Australia has traditionally been regarded as extending a generous range of entitlements to successful asylum seekers. However, in recent years the Australian Government's attitude towards human rights generally and the protection of refugees in particular has been the subject of criticism.[107] As mentioned earlier, within Australia a wide range of welfare and charitable organisations, refugee and human rights advocacy groups, and politicians have criticised the underlying premise of the temporary protection visa policy: the creation of a two tiered system of refugee protection.[108]

The Australian Government has not bowed to domestic or international pressure to improve its treatment of 'illegal' asylum seekers. Instead, at an international level its response to the arrival of the asylum seekers has been to initiate consultations with members of the international community to confront issues such as people smuggling. As mentioned earlier, the Government has announced that during the next twelve months that it will meet with UN officials and with the Ministers of 'like-minded countries' in an effort to "reform the Office of the UNHCR and its Executive Committee".[109] The Minister argues that:

> suitable reform would enable the UNHCR and its Executive Committee to provide better assistance and support to countries in meeting the challenges of providing refugee protection to those most in need, whilst combatting people smuggling.[110]

The Government intends to provide the UN with reports which discuss "agreed recommendations for reform".[111]

At the same time, the Australian Government has said that it intends to discuss with other countries the scope of obligations assumed by contracting parties to

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107 For example, UN officials in New York have been reported as saying that the Australian Government's recent decision to "review its co-operation with UN committees that monitor compliance with international human rights treaties" had "set a dangerous precedent" which "jeopardised the moral authority Australia earned from its leadership role in East Timor": "UN Attacks Could 'Undo Timor Work'", *The Australian*, 1 April 2000. See also "New Approaches to Handle Illegal Arrivals" *The Australian*, 25-6 November 2000; "Woomera Riot Relax Poor Refugees Policy" *The Australian*, 30 August 2000; "Australia Rates in Abuse List" *Sydney Morning Herald*, 25 October 1999; "UN Attacks Could 'Undo Timor Work'" *The Australian*, 1 April 2000; Amnesty International Australia, "Australia's New Border Protection Laws: Good-bye to Refugee Protection", Media Release, 26 November 1999.

108 See, for example, Amnesty International Australia, "Amnesty Outraged at Government Attack on Refugees", Media Release, 14 October 1999; and the various materials mentioned at note 83 *supra*.

109 P Ruddock, Media Release, note 6 *supra*.

110 *Ibid*.

111 *Ibid*.

the Refugees Convention. The Minister for Immigration argues that it is necessary to "arrest the trend which has led to some pressure groups and organisations seeking to extend the scope of the Convention in ways which countries did not envisage, when they signed".[112] One such trend may be the expectation that states will issue permanent rather than temporary visas when complying with their *non-refoulement* obligations under Article 33 of the Convention. The Government has announced that a complementary review will occur at a domestic level. It says that it is "reviewing the interpretation and implementation of the Refugees Convention in Australia", and that:

> where necessary the government will consider introducing legislation to ensure that only the obligations accepted by Convention parties are taken into account in our refugee determination processes.[113]

The Australian Government's proposals raise a number of important questions about refugee protection in Australia – not the least of which is the suggestion that the Government may legislate to override judicial interpretation of the Refugees Convention inconsistent with its own opinion. However, in the context of the treatment of 'illegal' asylum seekers in Australia, the initiatives are important because they will allow the continued examination of the temporary protection visa issue, and will feed into the consultation process recently embarked upon by the UNHCR.

For the UNHCR and the international community, the increasing role of people smugglers is a major challenge which needs to be confronted.[114] The Executive Committee of the UNHCR has recently recognised "the importance of adopting comprehensive measures, between all relevant states and in cooperation with UNHCR, international organisations and other appropriate organisations" to deal with the phenomenon.[115] Significantly, UNHCR emphasises that a central focus of any such measures is to "ensure ... that international protection and assistance needs of asylum seekers and refugees are identified and fully met, consistent with international protection responsibilities, and in particular the principle of *non-refoulement*".[116]

For the Australian Government and critics of the temporary protection visa regime alike, there appears to be ample opportunity to make their views known to the UNHCR. On the eve of the 50th anniversary of the Refugees Convention the UNHCR has embarked upon a process of global consultations with states, refugee protection experts and non-government organisations to consider mechanisms for:

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112 *Ibid.*

113 *Ibid.* Mr Ruddock was reported as saying that the Refugees Convention should be "toughened, either administratively, or by reviewing the actual treaty document itself": M Seccombe, "'Toughen UN Convention: Ruddock'" *Sydney Morning Herald*, 22 March 2000, p 4 ("Toughen Convention"). Mr Ruddock made his statement prior to the visit by a UNHCR team investigating the conditions in Australian migrant detention centres: M Seccombe, "Toughen Convention" cited *supra*.

114 See note 4 *supra*.

115 UNHCR, Executive Committee Conclusions, *Conclusion on International Protection* (No 89(LI), 2000) ("2000 Conclusion").

116 *Ibid.*

> revitalising refugee protection and promoting the effective implementation of the Convention and the Protocol, while at the same time identifying new approaches to meet new situations not covered by these instruments.[117]

However, UNHCR initiatives alone are unlikely to persuade the Australian Government to significantly modify or abolish its temporary protection visa policy. Domestic politics are the main mechanism by which such pressure might be exerted on the Government. This will occur only if public opinion shifts significantly, to the point where the human cost of the policy – its impact on the lives of the 'temporary' refugees and their families – is regarded as too high.

VIII. CONCLUSION

Australian society has recently faced the prospect of absorbing large numbers of asylum seekers who have arrived without valid travel documentation from Iraq and Afghanistan. Many of these asylum seekers have left behind situations of political and religious persecution and so are regarded as refugees under the Refugees Convention. Most have also left conditions of economic hardship. The Australian Government is obliged under international and national law to protect most of the asylum seekers against return to the country in which they may be persecuted. The Government has not denied the existence of that obligation. However, it has argued that the large number of asylum seekers arriving here raise economic and security concerns for Australia. Further, it has emphasised its view that the 'generous' entitlements offered by Australia to permanent protection visa holders have encouraged the activities of people smugglers.

The Government's response to the situation has been to create a new temporary protection visa category which provides only a limited range of entitlements. After a year of operation, it may be too early to evaluate the extent to which the introduction of the new visas has deterred the arrival of potential 'illegal' asylum seekers.[118] The effect of the visas may in any case be difficult to assess given the likely deterrent effect of other complementary measures adopted by the Australian Government at the same time.

What does seem clear is that most of the temporary visa holders should eventually be granted permanent protection visas, since the political situation in Iraq and Afghanistan is unlikely to improve in the near future.[119] In the meantime, however, the practical impact of the temporary visa policy on asylum seekers is harsh. Refugees who have fled situations of extreme persecution are required to establish their refugee status on two separate occasions and to live 'in limbo' for nearly three years without access to settlement services and close

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117 UNHCR, 2000 Conclusion, note 5 *supra*. See also UNHCR, *'Three Circles' Consultations: Concept Paper* (Department of International Protection, UNHCR, Geneva, August 2000).

118 The authors had sought statistics from DIMA on this point, but DIMA was unable to provide the requested information in the short time available.

119 See note 82 *supra*.

family members.[120] The arrangements penalise genuine individual refugees who seek protection in a 'non mass-influx' situation.

As this article has indicated, the temporary protection visa regime raises complex legal, social, political, international, economic and security issues. In view of the widespread criticism of the regime, and its human cost, the policy should certainly be made the subject of a comprehensive review.[121] The review should consider, as central issues, the extent to which the policy can be said to have deterred potential journeys by people smugglers,[122] and whether other measures could be implemented in an effort to curb people smuggling activities. Examination of these issues could take place within the context of the Government's current review of "the interpretation and implementation of the Refugees Convention in Australia".[123] In any event, it is vital that the review incorporate consultation processes which enable all interested parties – refugees, governments, welfare and charitable groups – to participate. The review may also be seen as a worthwhile investment in the future, since a balanced approach which seeks to protect both the rights of genuine refugees and the interests of the Australian community might anticipate any future crises arising from regions such as South-East Asia.

International cooperation and liaison with UNHCR is crucial to achieving success in this area. As the Australian Government has recognised, only with a high level of international cooperation will it be possible to "fashion the unique approaches required to meet the characteristics and challenges presented by such long-term refugee populations as the Afghans and Iraqis".[124] As an example, we suggest that the Australian Government consider initiating a regional agreement in the Asia Pacific region to combat people smuggling. The agreement would impose obligations on states to investigate, prosecute and heavily penalise people smugglers. Attempts should be made to involve states such as Indonesia, Malaysia, China and Pakistan. The implementation of such a regional agreement by signatory states would have the more salutary effect of deterring people smugglers, rather than punishing genuine refugees.

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120 See G Goodwin-Gill, note 30 *supra*, pp 197, 202

121 The appropriateness of temporary protection visas did not form part of the specific terms of reference considered by the Senate Legal and Constitutional References Committee in its Review of Australia's Refugee and Humanitarian Determination Processes: see Senate Committee Review, note 2 *supra*. The Review was instituted in May 1999, and the legislation creating the new temporary protection visa category was not enacted until October 1999. As a result, most written submissions received by the Review did not address the issue. The Committee's report briefly describes the new regime, but does not evaluate it in any detail: Senate Committee Review, note 2 *supra* at xxiv, 20-22.

122 The review should consider statistics on the number of asylum seekers who have arrived by boat since the introduction of the temporary protection regime.

123 P Ruddock, note 6 *supra*.

124 Minister for Immigration, P Ruddock (head of Australian delegation), "UNHCR@50: From Response to Solutions" (statement to the Executive Committee of the UNHCR, Geneva, 3 October 2000), para 37.