Recent Implementation of the Refugee Convention in Australia and the Law of Accommodations to International Human Rights Treaties. Have We Gone Too Far?

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Introduction

Modern commentators refer to a *balance* in human rights law and policy which is characterised by a degree of tension between individual rights and State interests. Professor Hartman, for example, points to an "uneasy compromise between the protection of individual rights and the protection of national needs" which, she suggests, is overlaid by a "...tension between the international protection of human rights and states' control over domestic affairs."[2]

Writing in 1976, Dr Rosalyn Higgins[3] noted that: "...recent years have witnessed a considerable drive towards improving the position of the individual" and, in "attempting to redress the balance", it is necessary for these improved human rights to be matched by *accommodations* in favour of the States. She considered that such accommodations may be achieved by a variety of techniques, which include reservations as to the terms of a treaty, limitation or "clawback" clauses, derogation clauses and ultimately denunciation of the treaty.

The *Refugee Convention*[4] provides a good example of an international treaty where tensions between human rights and State interests have been stretched to breaking point. In the European Union a complex combination of restrictive measures has limited access to refugee status to such an extent that the United Nations High Commission for Refugees (UNHCR) has been prompted to describe the principle of asylum in Europe as "under siege"[5] European provisions include carrier sanctions and restrictive visa requirements, procedural limits such as time restrictions on the making of asylum claims, the use of speedy trial procedures and restrictions on judicial review, interdiction of asylum seekers outside State borders, detention of

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2 Hartman J, "Derogation from Human Rights Treaties in Public Emergencies", (1981) 22 *Harvard International Law Journal* 2.

3 Higgins R, "Derogations Under Human Rights Treaties", (1976-77) 48 *British Yearbook of International Law* 281.

4 1951 *Convention Relating to the Status of Refugees* and 1967 *Protocol Relating to the Status of Refugees*. For ease of reference, the term "*Refugee Convention*" will include both the Convention and Protocol.

5 Ratnasabapathy S, "Asylum Under Siege in Europe", in *Human Rights - The New Consensus* (Regency Press in association with the UNHCR, London, 1994) at 190.

claimants, limitation of access to legal counsel, and the concept of safe third countries and safe countries of origin.[6]

Whilst Australia has a far from perfect record in the implementation of its obligations under the *Refugee Convention*,[7] the most serious indications yet that the convention is "under siege" in this country began to appear in the latter part of 1994, with the Government's response to the arrival of some 120 Vietnamese "boat people" from Galang Island in Indonesia, further arrivals over the Christmas/New Year period of some 866 boat people from southern China[8] and the Government's legislative attempts to deny access to the refugee process by people claiming persecution under China's "one-child" policy. These measures have caused an angry debate, with accusations that Australia has unlawfully derogated or reserved its obligations under the *Refugee Convention*; indeed, on one occasion, the chair of the Parliament's Joint Standing Committee on Migration went so far as to publicly raise the possibility of Australia denouncing the Convention.[9]

Without seeking to pass judgment on the European developments, one can at least understand that there is a problem with the mass migration of people to that part of the world. One only has to consider the plight of Germany, which by December 1993, had accepted 183,000 people as refugees, and provided entry to 130,000 family members of those granted asylum and to a further 755,000 "de facto" refugees who either did not formally apply for asylum or who had had their asylum applications rejected but were not returned to their country of origin.[10] The continuing upheavals in the former Yugoslavia have increased fears in the European Union that there will be a further major influx of asylum seekers.[11]

Australia, by comparison, does not have a refugee problem. By 1993, Australia's refugee population was 32,400, or less than .002 per cent of the 23 million people considered as being "of concern" to the UNHCR,[12] and there is currently evidence

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6 Vanheule D, "The Role and Relevance of the 1951 Refugee Convention in 1995", paper presented to the 1995 Refugee Week Summit, Parliament House, Canberra, 21 June 1995 at 5-6 (copy with author).

7 See, for example, the criticisms of Australia's restrictive interpretation of the *Refugee Convention* in the late 1980s by James Crawford and Patricia Hyndman in "Three Heresies in the Application of the Refugee Convention" (1989) 1 *International Journal of Refugee Law* 155.

8 Department of Immigration and Ethnic Affairs (DIEA), "Boat Arrivals since 1989", Fact Sheet No 5 (15 August 1995).

9 Senator Jim McKiernan, Senate Legal and Constitutional Legislation Committee, 3 February 1995, *Hansard*, at 97-98.

10 UNHCR (1994), cited in Inglis C "Australia's Refugee Policy in an International Context" (1994) *Australian Quarterly* 15 at 23.

11 "Alarm at refugee numbers" *Sydney Morning Herald* 14 August 1995.

12 UNHCR (1994), cited in Inglis C, *op cit*, note 10 at 16. These figures do not include people from refugee-like situations admitted to Australia under Australia's refugee and humanitarian programmes. It is important to note that the latter group do not enter Australia under the *Refugee Convention*, they are accepted for resettlement as migrants under an entry program loosely based upon some of the humanitarian concepts found in refugee determination.

that the number of asylum seekers in Australia is actually falling. As at July 1995, there was a total of 13,301 applicants awaiting decisions on their claims for refugee status, compared with 17,152 as at July 1994,[13] whilst the number of new applications for refugee status was anticipated to fall from 4,718 in 1994/95 to 3,036 in 1995/96.[14] Ironically, given that it is the boat people who have caused most of the controversy over the past five or so years, in numerical terms they have amounted almost to nothing. From the fall of Saigon in 1975 until 1979, 2,011 people arrived in Australia in 51 boats.[15] No more boat people arrived until November 1989, and since then, a total of 1,919 have arrived in 42 boats.[16]

This paper will consider the developments which have taken place in late 1994 and early 1995 in asylum policy and practice in Australia, both in terms of this country's adherence to the *Refugee Convention*, and in the wider context of the international law relating to accommodations to human rights treaties. It is the author's view that Australia is perilously close to breaching — if not already in breach — of its obligations under two of the most important provisions of the *Refugee Convention*; first, the definition of "refugee" under Article 1A(2), and secondly, in relation to our obligation of *non-refoulement* under Article 33.[17] In the author's opinion, this conduct cannot be justified by reference to the international law of accommodations.

The Refugee Convention in Australia: Recent Developments

The Refugee Convention as a binding international treaty

The 1951 UN *Convention Relating to the Status of Refugees* was acceded to by Australia on 22 January 1954, and the 1967 *Protocol Relating to the Status of Refugees* was acceded to by Australia on 13 December 1973.[18]

As at 25 January 1994, 117 States were party to both the *Refugee Convention* and *Refugee Protocol*,[19] which together "constitute general multilateral treaties in the accepted sense of the term...",[20] and are therefore binding upon signatory States at international law.

The term "refugee" is expressed in Article 1A(2) as applying to a person who:

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13 DIEA, Australian Client Services Division, *Monthly Summary: July 1995*, 10 August 1995, at 22.

14 *Ibid*, at 9.

15 Grant B, *The Boat People* (Penguin Books, Melbourne, 1979) at 180.

16 DIEA, *op cit*, note 8.

17 The author also believes that Australia's continuing policy of mandatory detention is in breach of Article 31, which deals with penalties for unlawful entry. Much has been written about this elsewhere; for example, see Crock M (ed) *Protection or Punishment: The Detention of Asylum Seekers in Australia* (Federation Press, Sydney 1993).

18 Joint Standing Committee on Migration, *Asylum, Border Control and Detention* (AGPS, Canberra, 1994) para 3.14.

19 *Ibid*, para 3.17.

20 Weis P, "The 1967 Protocol Relating to the Status of Refugees and Some Questions of the Law of Treaties"(1967) 42 *British Yearbook of International Law* 39 at 50.

> owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is 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; or who, not having a nationality and being outside the country of his former habitual residence, is unable or, owing to such fear, is unwilling to return to it.

The *Refugee Convention* then goes on to specify various obligations a signatory State shall have in respect to refugees in its territory, such as the right to practice religion (Article 4), access to the courts (Article 16), and welfare rights including the right to housing (Article 21) and education (Article 22).

It may be noted here that these obligations apply both to asylum seekers who have not yet been recognised as refugees, as well as to recognised refugees. This is because of the *declaratory* rather than constitutive nature of the determination of refugee status[21] — if a State fails to comply with its obligations in respect of a person who is later declared to have been a refugee, then it will have acted contrary to the *Refugee Convention*.

Article 1A(2) — the definition of "refugee"

A question which commonly arises when determining whether a person is a refugee under Article 1A(2) of the *Refugee Convention* is whether the person comes within one of five "convention reasons" — that is, race, religion, nationality, political opinion or membership of a particular social group. The first four of these reasons are fairly self evident; it is with the definition of the phrase "particular social group", that the Australian Government has become embroiled in controversy.

The history of this phrase has been fraught with difficulty. The *travaux preparatoires* are of little assistance; the term being introduced with little explanation by the Swedish delegate as a last minute amendment to the *Refugee Convention*.[22] Some commentators, such as Helton,[23] see the phrase as a "catch-all" to include those applicants who do not fit into the other four categories. Hathaway, on the other hand, prefers to apply the *ejusdem generis* principle so that, as with the other four categories, "membership of a particular social group" connotes a social subset defined by a fundamental, immutable characteristic.[24] For Hathaway, therefore, the term would encompass gender, sexual orientation, family, class or caste, and even voluntary association.[25]

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21 Hyndman P, "Refugees Under International Law with a Reference to the Concept of Asylum" (1986) 60 *Australian Law Journal* 148 at p 151, Greig D, "The Protection of Refugees and Customary International Law" (1984) 8 *Australian Yearbook of International Law* 108 at 134, see also UNHCR, *Note on Non-Refoulement* UN doc EC/SCP/2.

22 Hathaway J, *The Law of Refugee Status* (Butterworths, Toronto, 1991) at 157.

23 Helton A, "Persecution on Account of Membership in a Social Group as a Basis for Refugee Status" (1983) 15 *Colombia Human Rights Law Review* 39.

24 Hathaway *op cit* note 22 at 160-161.

25 *Ibid*, at 162-169.

The phrase became controversial in the Australian context when a number of Chinese nationals, primarily boat people, made successful claims on the grounds of China's notorious "one-child policy" under which, it was claimed, the Chinese Government was tolerating forcible sterilisation and abortion of women who had given birth to one child.[26] Following several successful applications for refugee status in the Refugee Review Tribunal,[27] the matter came to a head in December 1994, when in the Federal Court of Australia, in *Minister for Immigration and Ethnic Affairs v Respondent A and Others*[28] Justice Sackville found that a Chinese couple came within the refugee definition on the grounds that their "particular social group" was

> those who, having only one child do not accept the limitations placed on them or who are coerced or forced into being sterilised.[29]

The Government's response was swift. Immediately upon the recommencement of Parliament on 31 January 1995, Migration Legislation Amendment Bill (No 3) 1995 (Bill No 3) was introduced into the Senate. Clause 2 of the Bill provided that:

> (3) The fertility control policies of the government of a foreign country are to be disregarded in determining if a non citizen is a member of a particular social group (within the meaning of the Refugee Convention as amended by the Refugee Protocol) for the purpose of considering an application for a protection visa.
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> (4) The fertility control policies of the government of the People's Republic of China are an example of the policies referred to in subsection (3).

The Government's concern was quite obviously a fear of being inundated with applications for refugee status based upon the one-child policy. When a hastily convened Senate committee raised concerns with the legislation Senator McKiernan, a member of the Committee, wheeled out the "floodgates" argument in a press release, proclaiming that:

> Australia will have to consider implementing a policy of interdiction and turning boats around at sea if the Bill relating to China's One Child Policy is defeated....I would anticipate that hundreds of thousands of people from China and some other Asian countries will shortly be making plans to get to Australia. They will hear, if they have not already heard, that the numbers are in the Senate to defeat the Bill....Turning boats, that carry illegal migrants to Australia, around at sea, may be the only way to stop the flood gates opening and protect Australia in the long term.[30]

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26 For an account of the one-child policy see Aird J, *Slaughter of the Innocents* (American Enterprise Institute, Washington DC, 1990).

27 For example, Decision No. N93/00656 of Member Lesley Hunt, 3 August 1994.

28 (1994-95) 127 ALR 383.

29 *Ibid*, at 405.

30 McKiernan J, "Interdiction May Have to be Considered", Media Release, 2 March 1995.

There was also considerable concern from the community sector in response to Bill. The UNHCR described the legislation as "a most unfortunate precedent, not only for Australia but for the world at large", and "a setback in the interpretation and application of the 1951 Convention."[31] A former legal officer with the UNHCR in Australia, Mr George Lombard, claimed that:

> ...the Bill does something which no other signatory to the Convention on Refugees has yet been prepared to do; that is, by legislation, restrict the convention definition within its own territory...Whatever ministers and administrators throughout the developed world have thought about the convention definition, they have until now always left final determination of who is a refugee to the courts.[32]

The Refugee Council of Australia accused the Government of unlawfully making a reservation to the Refugee Convention.[33] Other groups, such as the Victorian Council for Civil Liberties, suggested that the amendment amounted to a derogation from the *Refugee Convention*.[34] The Federation of Ethnic Communities Councils of Australia (FECCA), commented:

> If Australia does not consider that it has an obligation to consider, generally the claims of asylum seekers on-shore or specifically to consider the claims of those persons persecuted or in fear of persecution owing to membership of a particular social group it should in FECCA's view no longer be a signatory to the 1951 Refugee's Convention or alternatively limit by reservation its interpretation of its obligations.[35]

Even the mainstream *Sydney Morning Herald* expressed concern in an editorial about this "unprecedented action" which "...creates a precedent for future governments to pick and choose their obligations to refugees under the convention."[36]

As a result of this concern, Bill No 3 was ultimately abandoned and replaced by a new piece of legislation, Migration Legislation Amendment Bill (No 4) 1995 (Bill No 4 1995), which "clarified" the operation of the legislation, but was conceded by the Government to be "substantially the same" as Bill No 3.[37] In the meantime, an appeal from Justice Sackville's decision by the Minister to the Full Federal Court was successful on the grounds that the respondents were "not facing persecution by

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31 Letter from P M Fontaine to Senator Bolkus, 23 January 1995, quoted in House of Representatives *Hansard*, 8 March 1995, at 1850-1851.

32 "Refugee status a ticklish problem" *Canberra Times*, 11 May 1995.

33 Evidence of M Piper (Executive Director, Refugee Council of Australia), Senate Legal and Constitutional Legislation Committee, *Hansard*, 6 February 1995, at 162.

34 Victorian Council for Civil Liberties, submission to the Senate Legal and Constitutional Committee, 6 February 1995, Submissions Papers, at 230.

35 FECCA, submission to the Senate Legal and Constitutional Committee, 6 February 1995, Submissions Papers, at 35.

36 "Refugees From Sterilisation" *Sydney Morning Herald*, 4 January 1995.

37 Mrs Crosio, Second Reading Speech, House of Representatives *Hansard*, 8 March 1995, at 1802.

reason of membership of any social group having a recognisable existence separate from the persecutory acts complained of",[38] and on 5 July 1995, the respondents' solicitors lodged an application for special leave to appeal to the High Court of Australia.[39]

At the time of writing, Bill No 4 1995 has passed through the House of Representatives and is due to be introduced into the Senate. The Opposition has indicated that it will not be opposing the legislation;[40] however, it appears that the Government may be awaiting the outcome of the application to the High Court.

Article 33 — non-refoulement

The term *non-refoulement*, comes from the French word *refouler*, meaning to return, reconduct or send back, and "by this term is indicated the principle which prohibits the return of refugees to territories where they are likely to become victims of persecution."[41]

Article 33(1) states:

> 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 very nature of Article 33(1) makes the prohibition on refoulement the key provision of the *Refugee Convention*:

> If it can be said of any particular person that he or she is a 'refugee' it can also be said that Australia has expressly undertaken the non-refoulement obligation in article 33(1) of the Refugee Convention in relation to that person.[42]

The *non-refoulement* obligation requires Australia to make an *individual* assessment of the status of each asylum seeker.[43] However, in late 1994, Australia introduced legislation which, it has been argued, breaches the *non-refoulement* obligation by denying asylum seekers any right of access to our refugee determination process on a group basis.

In September 1994, Migration Legislation Amendment Bill (No 4) 1994 (Bill No 4 1994) was introduced into the Senate. Bill No 4 sought to prevent two groups of

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38 *Minister for Immigration and Ethnic Affairs v Respondent A and Others* (1995) 130 ALR 48 at 62.

39 Conversation with Ms Geraldine Read, Legal Aid Commission of New South Wales, 22 August 1995.

40 Mr Ruddock, House of Representatives *Hansard*, 8 March 1995 at 1806.

41 Hyndman P, "Asylum and Non-refoulement - Are These Obligations Owed to Refugees Under International Law?"(1982) 57 *Philippine Law Journal* 43 at 49.

42 Taylor S, "The Right to Review in the Australian On-Shore Refugee Status Determination Process: Is it an Adequate Procedural Safeguard Against Refoulement?" (1994) 22 *Federal Law Review* 301 at 301-302.

43 Hyndman P *op cit* note 41 p 49.

asylum seekers from gaining access to Australia's refugee determination process: first, all non-citizens who are "covered" by the Comprehensive Plan of Action;[44] secondly, all non-citizens for whom there is a "safe third country".

The first aspect of Bill No. 4 1994 was a direct response to the arrival on 7 July 1994 of a boat carrying 17 Vietnamese nationals from Galang Island in Indonesia.[45] Galang Island houses a refugee camp where boat people who had departed mainly from Vietnam were held and had been entitled to apply for resettlement in Western countries under a 1989 agreement between States in the region known as the Comprehensive Plan of Action (CPA).[46] The CPA, which grew out of the concern of countries of first asylum such as Hong Kong, Thailand and Indonesia with the ever increasing numbers of asylum seekers arriving from Vietnam, was originally designed to screen persons in for resettlement in Western countries by using the criteria set out in the *Refugee Convention*. However, it has been roundly criticised in its implementation as a cynical attempt to discourage Vietnamese asylum seekers by summarily classifying them as economic migrants unworthy of refugee status.[47]

The refugee screening process in Galang in particular, which was supervised by the UNHCR, has been severely criticised as both inadequate and tainted by corruption and mismanagement. In the Senate Legal and Constitutional Legislation Committee hearings into Bill No 4 1994, a detailed report was supplied by the Vietnamese Community in Australia which contained eyewitness accounts of demands for money and sexual favours in return for the granting of refugee status.[48] The corrupt nature of the Galang process was confirmed by one lawyer who was employed as a legal consultant for UNHCR in 1992[49], who also criticised the cursory screening process as falling well short of the process offered to asylum seekers in Australia.[50] The UNHCR responded to these criticisms by refusing to deny or confirm that there had been corruption, adding the disingenuous argument that even if there was corruption, there is no evidence that deserving refugees were screened out for non-payment of bribes, but only that non-deserving refugees were screened *in* by paying bribes.[51] The fact that three of the 17 arrivals on the first boat had been granted

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44 See below.

45 Mrs Crosio, Second Reading Speech, House of Representatives *Hansard*, 8 November 1994, at 2831. Another five boats carrying a total of 103 Vietnamese nationals were to arrive from Galang Island from August to December 1994.

46 Comprehensive Plan of Action approved by the International Conference on Indo-Chinese Refugees, held at Geneva, Switzerland, from 13-14 June 1989. See *Migration Act* 1958 (Cth) s 91B.

47 See Hathaway J, "Labelling the 'Boat People': The Failure of the Human Rights Mandate of the Comprehensive Plan of Action for Indochinese Refugees"(1993) *Human Rights Quarterly* 686.

48 Evidence of Mr Cuong Vo, President, Vietnamese Community in Australia, and Mr Phan Thien, NSW Refugee Fund Committee, Senate Legal and Constitutional Legislation Committee, *Hansard*, 5 October 1994, at 201-203 and at 205-205.

49 Evidence of Mr S Jeans, Senate Legal and Constitutional Legislation Committee, *Hansard*, 5 October 1994, at 205-209. Mr Jeans estimated that the "going rate" for refugee status was US$3,000 to US$10,000.

50 *Ibid*, at 206.

51 Evidence of P M Fontaine, Regional Representative, UNHCR, Senate Legal and Constitutional

refugee status by the Australian authorities before Bill No 4 was enacted was cited repeatedly by witnesses before the Committee as evidence that the Galang process was flawed.[52]

The primary criticism of this first aspect of Bill No 4 1994 was in terms of the obligation of *non-refoulement*. If Australia has taken on the responsibility to individually assess applications for asylum under the Refugee Convention, then the refusal of access to one particular group of people raises the possibility that Australia may unwittingly *refoule* genuine refugees.[53]

The second aspect of Bill No 4 1994 was to implement the concept of "safe third country" in Australia. In general terms, this concept provides that where a person has access to protection in a safe third country, they will be denied access to Australia's on-shore refugee process. The concept of safe third country is not new, having been implemented in Europe under the Dublin Convention[54] and Schengen Agreement[55], by which an asylum seeker who has travelled through one signatory country to another signatory country may be expelled from the latter country without accessing its refugee process, as the former country is regarded as responsible for determining the asylum claim. The concept was in theory designed to prevent the "refugee in orbit" phenomenon, where asylum seekers went forum-shopping between countries for the most favourable process. However, there is increasing concern that in practice the opposite has been the case, and that European countries are now abrogating their responsibility to determine asylum claims by expelling asylum seekers as a matter of course, often to countries which have questionable asylum procedures.[56]

Once again, the criticism of the safe third country provision is that the expulsion of an asylum seeker without access to the refugee process may be in breach of the principle of *non refoulement* under Article 33 of the *Refugee Convention*, if the expulsion results either directly or indirectly in that person being returned to a place of persecution or indeed being persecuted in the so-called "safe third country". These concerns were regarded as being particularly relevant to Australia, which, unlike most European countries, is surrounded by States which are not parties to the major human rights instruments.[57] The UNHCR in its submission to the Senate

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51— *Continued*
Legislation Committee, *Hansard*, 30 September 1994 at 156.

52 Evidence of Eve Lester, Co-ordinator, Refugee Advice and Casework Service (Vic) Inc, Senate Legal and Constitutional Legislation Committee, *Hansard*, 30 September 1994, at 175.

53 Evidence of Dr Mary Crock, Senate Legal and Constitutional Legislation Committee, *Hansard*, 5 October 1994, at 197-198.

54 *Convention Determining the State Responsible for Examining Applications for Asylum Lodged in One of the Member States of the European Communities*, signed in Dublin on 15 June 1990.

55 *Convention Applying to the Schengen Agreement*, 14 June 1985.

56 Achermann A and Gattiker M, "Safe Third Countries: European Developments" (1995) 7(1) *International Journal of Refugee Law* 19.

57 Of the major countries in our region, neither Indonesia, Malaysia, Singapore nor Vietnam are signatories to the *Refugee Convention* or the *International Covenant on Civil and Political Rights*

Committee requested that specific safeguards be put in place, including a requirement that the safe third country must have ratified and/or demonstrated its compliance with the *Refugee Convention* and international human rights instruments, that it has shown its willingness to accept returned asylum seekers and will allow them to stay whilst a durable solution is found for them and that the specific reference be made to the obligation of *non-refoulement*.[58] These proposals, except for the reference to the principle of *non-refoulement*, were ultimately included in the final legislation, albeit in a watered down form which simply obliged the Minister when declaring a country to be a safe third country, to table a statement in Parliament setting out the relevant details.

The safe third country principle took on great significance in Australia with the arrival of the boat people from China over the Christmas/New Year period. These arrivals were mainly ethnic Chinese who had been expelled from Vietnam to China in the late 1970s following a border war between the two countries. All were from the Behai area of southern China, and in subsequent hearings before the Senate Committee it was accepted that the trigger which had led to their departure was the demolition of their housing by the Chinese authorities, as they had been refused household registration in Behai and were treated as squatters.[59] The claims by these Sino-Vietnamese, therefore, were against *China*, not Vietnam, and indeed, on the four boats which had arrived between 1991 and mid-1994 with similar claimants, almost all had been accepted by the Australian authorities as refugees.[60]

Nevertheless, in an atmosphere approaching panic on the part of the Government[61], regulations were rushed through on 27 January 1995 designating China to be a safe third country for the purposes of all Vietnamese nationals who had been resettled in China,[62] and Migration Legislation Amendment Bill (No 2) 1995 (Bill No 2)

57— *Continued*
(ICCPR). China has signed the *Refugee Convention* but not the ICCPR: *International Instruments: Chart of Ratifications as at 31 December 1994* (UN doc ST/HR/4/Rev.11).

58 Evidence of P M Fontaine, Regional Representative, UNHCR, Senate Legal and Constitutional Legislation Committee, *Hansard*, 30 September 1994, at 148-151.

59 Evidence of P M Fontaine, Regional Representative, UNHCR, Senate Legal and Constitutional Legislation Committee, *Hansard*, 3 February 1995, p 128.

60 These were the *Dalmatian* (arrived 4/3/91, 7 out of 7 accepted); *Pluto* (24/11/93, 46 out of 53); *Toto* (28/5/94, 6 out of 20) and *Unicorn* (4/6/94, 51 out of 51). See evidence of Ms Pip Martin, Coalition for Asylum Seekers, Senate Legal and Constitutional Legislation Committee, *Hansard*, 3 February 1995, at 85-86.

61 See, for example, "Darwin braces for new wave of boat people" *The Australian* 26 December 1994; "We'll send them back, warns Bolkus" *Sydney Morning Herald* 29 January 1995; "The third wave" *The Weekend Australian* 31 December 1994-1 January 1995; "Government overreacts on new arrivals" *Sydney Morning Herald* 3 January 1995; "Bolkus's panic over a few boat people diminishes Australia" *The Australian* 4 January 1995; "Boat people panic" *The Age* Editorial, 7 January 1995.

62 Migration Regulations Amendment 1995 (Cth), SR 1995 No 3 (notified in the *Commonwealth of Australia Gazette* 27 January 1995).

backdated these provisions to 30 December 1994, the day that Immigration Minister Bolkus had announced that such legislation was to be enacted.[63]

Once again, the spectre of floodgates was raised,[64] and concept of "national interest" was used to justify the legislation, Senator Ellison noting that:

> ...we have to balance Australia's interests with the interests of those people who seek to gain asylum in this country. We have to balance human rights with pragmatism, and that is always the most difficult of tasks.[65]

Once again, refugee advocates strongly criticised the legislation as an abrogation of Australia's obligations under the *Refugee Convention*, particularly in its acceptance of China as a safe country to which these applicants could be returned. Amnesty International took the view that:

> ...should the legislation be passed into law, it would indicate a serious move away from Australia's international obligation for protection under the 1951 convention...In effect, the safe third country legislation is being used to declare China a safe country of origin. This is a misuse of our legislation and it refuses to recognise legitimate concerns about the human rights situation in the People's Republic of China.[66]

One group was moved to comment:

> What is the point of a refugee definition that gets narrowed every time it looks like there may be too many refugees?[67]

On the other hand, the UNHCR, which had undertaken the role of resettling the Sino-Vietnamese in Behai in the early 1980s, accepted the assurances of China it would not mistreat returnees under Bill No 2.

The Bill was duly passed into law by the Australian Parliament on 9 February 1995, and the first deportations began with the removal of 53 Sino-Vietnamese on 9 May 1995.[68] By July 1995, a total of 254 asylum seekers had been deported to China under the legislation without having been allowed any access to our refugee process.[69]

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63 Senator Nick Bolkus, Australia takes action to stop boat arrivals, Press Release, 30 December 1994.

64 "...without this action the number of unauthorised arrivals in Australia would have continued to increase" - evidence of Mr Dennis Richardson, Deputy Secretary, DIEA, Senate Legal and Constitutional Legislation Committee, *Hansard*, 3 February 1995, at 82.

65 Senate *Hansard*, 9 February 1995, at 801. See also comments in the House of Representatives *Hansard*, 9 February 1995 by Mr Ruddock ("we think it is legislation that is necessary in the national interest" at 881) and Mr Campbell (describing opponents of the Bill as "opposed to our national interest" at 886).

66 Evidence of Mr Matthew Zagor, Research Officer, Amnesty International, Senate Legal and Constitutional Legislation Committee, *Hansard*, 3 February 1995, at 93-94.

67 Evidence of Ms Marion Le, Indo-Chinese Refugee Association, Senate Legal and Constitutional Legislation Committee, *Hansard* 3 February 1995 at 90-91.

68 "Reassured boat people deported" *The Australian* 9 June 1995.

69 "Detainees deported" *Telegraph Mirror* 28 July 1995.

Can Australia Justify its Conduct by Reference to the Law of Accommodations?

It is apparent from the foregoing that the author believes that in its recent implementation of the *Refugee Convention*, Australia is almost certainly in breach of Articles 1A(2) and 33. The question therefore arises, can Australia justify its conduct in terms of the international law of accommodations?

If one begins with *reservations* to international treaties, it appears most unlikely that Australia could attempt any new reservation to its obligations under the *Refugee Convention*. Whilst Article 42(1) of the Convention allows for certain reservations, it specifically excludes any reservation to Articles 1 and 33; moreover, and in line with Article 2(1)(d) of the *Vienna Convention on the Law of Treaties* (the Vienna Convention),[70] it stipulates that any reservation must be entered into at the time of signature, ratification or accession. Australia has no outstanding reservations to the *Refugee Convention*,[71] and it is simply too late to attempt any fresh reservation to its obligations.[72]

Limitation or "*clawback*" clauses, which permit "...in normal circumstances, breach of an obligation for a specified number of public reasons",[73] may be found in several articles of the Refugee Convention, including Article 33(2), which provides that the benefits of *non-refoulement* may not be claimed by a refugee "whom there are reasonable grounds for regarding as a danger to the security of the country", or "who, having been convicted by final judgment of a particularly serious crime, constitutes a danger to the community of that country." However, once again, Australia would be hard-pressed to rely on this clause; as Patricia Hyndman points out, the limitation:

> ...would seem to be directed at the *individual* refugee who might constitute a danger to the security of the receiving country and its community and not to provide an excuse for the *refoulement* of groups of refugees.[74]

Of all the available accommodations, it is most likely that Australia would attempt to rely upon *derogations*, "...which allow suspension or breach of certain obligations in circumstance of war or public emergency."[75] It is this concept which accords

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70 As done at Vienna on 23 May 1969 - entry into force: 27 January 1980.

71 Reservations were initially made to articles 17, 18, 19, 26, 28(1) and 32; the last being withdrawn in 1971.

72 The author has not included any discussion at this point as to whether any reservation to Articles 1 or 33 of the *Refugee Convention* would offend the principle embodied in Article 19 of the *Vienna Convention*, that any reservation would have to be compatible with the *object and purpose* of the Convention. It is doubtful, however, that a reservation to either of these articles, which are two of the most fundamental provisions in the *Refugee Convention*, would be acceptable.

73 Higgins R, *op cit* note 3 at 281.

74 Hyndman P, *op cit* note 41 at 52-53.

75 Higgins R, *op cit* note 3 at 281.

most closely with the sorts of comments made by Australian parliamentarians such as McKiernan[76] and Ellison,[77] who paint a scenario whereby the relaxation of restrictive policies would lead to the floodgates opening to an uncontrolled influx of asylum seekers. In the apparent view of our policy makers, such a scenario can only be prevented by a pragmatic approach which holds back the masses, in spite of Australia's obligations under the *Refugee Convention*.

Derogation clauses are common in human rights treaties, and both the *ICCPR*[78] and the *ECHR*[79] contain provisions which share three broadly similar pre-conditions which must exist before a State may derogate from the rights contained in each treaty. In each case, there must be a public emergency which threatens the life of the State, emergency measures must be strictly required by the exigencies of the situation and the measures must not be inconsistent with the State's other international obligations.[80]

Article 9 of the *Refugee Convention* also contains a derogation clause, although interestingly, the clause includes a reference to the national security-type provision relating to individuals which is also found in limitation clauses:

> Nothing in this Convention shall prevent a Contracting State, in time of *war or other grave and exceptional circumstance*, from taking *provisionally* measures which it considers to be essential to the *national security* in the case of a *particular person*, pending a determination by the Contracting State that that person is in fact a refugee and that the continuance of such measures is necessary in his case in the interests of national security. (emphasis added)

There are a couple of other major differences between the derogation clause in the *Refugee Convention* and those in the *ICCPR* and *ECHR*. In the first place, the use in Article 9 of the word "provisionally", denotes that any measure to derogate may only be temporary. Secondly, as has been noted in relation to Article 42(1), the reference to "particular person" would seem to indicate that derogations under the Refugee Convention cannot be made on a group basis.

The requirement that there be a high degree of actual threat in order to invoke derogation clauses is reflected in the European jurisprudence. For example, in the *Greek* case[81], the European Commission on Human Rights stated that the following elements were required to satisfy these conditions: (1) an actual or imminent

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76 See above, at 5.

77 See above, at 11.

78 *International Covenant on Civil and Political Rights*, adopted and opened for signature and ratification and accession by General Assembly Resolution 2200 A (XXI) of 16 December 1966 - entry into force: 23 March 1976.

79 *European Convention on Human Rights*, signed in Rome on 4 November 1950 - entry into force on 3 September 1953.

80 ICCPR, Article 4; ECHR, Article 14.

81 *Greek* case, *Yearbook*, 12 (1969), para 153, cited in Higgins R, *op cit* note 3 p 301.

emergency; (2) involving the whole nation; (3) threatening the continuance of the organised life of the community; (4) the normal measures or restrictions permitted by the Convention for the maintenance of public safety, health and order being inadequate.[82]

This threshold is likely to remain relatively high, despite the more recent tendency of the European bodies to allow a wide discretion, or "margin of appreciation" to States in assessing the justifiability of a departure from particular rights.[83]

Yet in the Australian context, when one separates the rhetoric from the reality, there is little doubt that Australia would be in no position to derogate from the *Refugee Convention*. Even if Australia was able to get over the initial hurdle in Article 9 that derogation can only apply to a *particular* person rather than a group[84], it plain that the recent boat arrivals do not pose such a problem as would justify any derogation from our obligations. No matter how vehemently Australian politicians may try to talk up the possibility of large numbers of boat arrivals being a threat to the very fabric of Australian society, the reality is that such arrivals are a threat only to the highly questionable policy of migration control.[85] It would do little for Australia's international credibility if our Government seriously sought to justify the limitation of our obligations under the *Refugee Convention* because of an "influx" of less than 2,000 asylum seekers, when other countries are accommodating hundreds of thousands, even millions, of asylum seekers. It would take many more hundreds of thousands of asylum seekers to arrive in Australia before our Government could attempt to justify any derogation from the *Refugee Convention*.[86]

Finally, a word on *denunciations*. Whilst it is the case that the *Refugee Convention* does provide for denunciation in accordance with the procedures set out in Article 44, it is unlikely that denunciation of the *Refugee Convention* would have the effect at international law which may be desired by some parliamentarians. This is due to the principle embodied in Article 43 of the *Vienna Convention* that denunciation of a treaty will not impair the duty of a State to fulfil any obligation to which it would be

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82 See also the *Lawless v Ireland (No 3)* 1 EHRR 15 at para 28, cited in *ibid*.

83 See, for example, *Brannigan & McBride v UK*, 1993 Ser A, No 258-B, commented upon in Marks S, "Civil Liberties at the Margin: the UK Derogation and the European Court of Human Rights" (1995) 15 *Oxford Journal of Legal Studies* 69 at 85.

84 This might be a possibility if Australia was to seek to rely upon the principle of derogation under customary international law, as opposed to the *Refugee Convention*.

85 See Cronin K, "A Culture of Control: An Overview of Immigration Policy-Making", in Jupp J, and Kabala M, (eds) *The Politics of Australian Migration* (AGPS, Canberra, 1993): "...Australia's immigration mythology is redolent with fear, with anxieties about the size, the composition or the profile of the immigration program...The fear of uncontrolled or under controlled immigration to Australia is certainly real" at 87.

86 And even then, Australia may still be under an obligation to provide temporary protection according to customary international law; see Coles G, "Temporary Refuge and the Large Scale Influx of Refugees" (1984) 8 *Australian Yearbook of International Law* 189.

subject under international law independently of the treaty, which of course includes *customary* international law.

The problem, from Australia's point of view, is that it is almost certain that many of the principles in the *Refugee Convention* have now assumed the status of customary international law, which would mean that Australia could not escape its obligations by denunciation of the *Refugee Convention*.

Greig is emphatic on this point with regard to the Article 1A(2) definition, claiming that it is:

> ...inescapable that the definition of refugee for purposes connected with the obligations contained in the Convention and Protocol has attained a general currency.[87]

Greig also goes on to conclude that:

> ...there seems to be no doubt as to the reception of *non-refoulement* as a rule of customary international law.[88]

This conclusion is supported by a number of authors, including Hyndman,[89] Chowdhury[90] and Mathew,[91] as well as the Regional Representative of the UNHCR in Australia, Mr Pierre-Michel Fontaine.[92]

Thus, even if Australia were to denounce the *Refugee Convention* this would be largely a pointless exercise, as two of the primary obligations under the *Refugee Convention* — the definition of "refugee" under Article 1A(2) and the prohibition against *non-refoulement* under Article 33, are almost certainly part of customary international law and therefore binding upon Australia regardless of whether or not it is a signatory to the Convention.

Conclusion

Australia has a special relationship with the *Refugee Convention*. This country was one of the original drafters of the Convention, and on 22 January 1954, Australia became its sixth signatory, thus triggering the entry into force of the *Refugee Convention* under Article 43. Indeed, the UNHCR has commended Australia as

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87 Greig D, "The Protection of Refugees and Customary International Law" (1984) 8 *Australian Yearbook of International Law* 108.

88 *Ibid*, at 133-134.

89 *Op cit* note 21 at 153-154.

90 Chowdhury S, "A Response to the Refugee Problems in Post Cold War Era: Some Existing and Emerging Norms of International Law"(1995) 7(1) *International Journal of Refugee Law* 101 at 103-106.

91 Mathew P, "Sovereignty and the Right to Seek Asylum: The Case of Cambodian Asylum Seekers in Australia", (1995) 15 *Australian Year Book of International Law* 35, at 56.

92 Senate Legal and Constitutional Legislation Committee, *Hansard*, 3 February 1995, at 99.

"one of the most active, dynamic and supportive members of the executive committee of the high commissioner's program."[93]

It would be a pity, therefore, if the recent implementation of our asylum policy were to place this special relationship at risk. Whilst much good has been achieved in the administration of our asylum programme over the past few years,[94] the continuing pre-occupation of our decision makers with a couple of thousand boat people remains a cause for concern and, with recent media hype about a flood of new asylum seekers from East Timor [95] and the possible political risks in granting asylum to these people,[96] can we seriously entrust Australia's record to this Government?

93 PM Fontaine, *Ibid*.

94 Most notably, with the creation of the Refugee Review Tribunal, pursuant to the *Migration Reform Act* 1992 (Cth).

95 "Activists warn of E Timor refugee exodus" *The Australian* 30 May 1995.

96 "Asylum move could harm ties with Jakarta" *Sydney Morning Herald* 22 August 1995.