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## OFFSHORE ASYLUM CENTRE: AN AUSTRALIAN PROPOSAL

### **SUMMARY:**

1. The Australian-based proposal to remove asylum seekers and protection claimants to an offshore centre is unlawful
2. For the reasons set out below the New Zealand Government should cease to negotiate with the Gillard government over such proposals
3. The Human Rights Foundation is of the view that such a proposal will violate human rights obligations under international agreements.

## OFFSHORE ASYLUM CENTRE

1. The Australian Government is determined to set up an offshore refugee processing centre. Sources indicate that this will not be staffed by Australian agencies but that a separate “independent” agency will run the centre. UNHCR has been mooted. East Timor has been suggested as the site though Papua New Guinea and Nauru have also been mentioned. The New Zealand Government is known to be having discussions with the Australian Government concerning these proposals although there has as yet been no firm commitment indicated from New Zealand that it will participate. Discussions however are underway.
2. Australia has for some decades been intent on moving refugee processing to remote areas. The High Court of Australia declared in a landmark decision<sup>1</sup> on 11 November 2010 that the processing of refugee cases that now takes place on Christmas Island (which is not part of Australia’s immigration territory) had to be determined in accordance with Australian law and in particular the rules of procedural fairness. The Court found the Government had erred in not regarding that asylum determination process as being bound by the Australian Migration Act and decisions of Australian courts.
3. The proposal of the Australian Government to go to the expense of setting up an offshore asylum processing system is hard to fathom unless it is clearly linked with a desire *to reduce* the number of asylum seekers able to participate in the fair and robust refugee determination processes which exist in Australia (and also in New Zealand). It is duplicitous because on the one hand membership of the Refugee Convention is maintained, and along with that the obligations to determine and then provide shelter to refugee arrivals, whilst on the other hand interdicting would-be claimants. What has not been discussed at length is that asylum processes in a jurisdiction outside of the country that determines that its processes must be fair (the Court’s role in supervising Executive action) will mean that fairness, natural justice, including procedural fairness and substantively correct decision-making will not occur. Given that the Australian (and if New Zealand, then New Zealand) Government will have placed the individual in that environment (without the checks and balances that ensure robust decision making on-shore), liability will rest with Australia and New Zealand. One wonders whether the hope is that the end result will be a cheaper option. The price of human lives at risk should a wrong decision be made and a genuine (but misunderstood) refugee be sent back to harmful persecution or in some circumstances death, however appears not to have been factored in. There is no figure that can be put on a ruined or destroyed human life.
4. The clear indication is that refugees arriving either on the shores of Australia and New Zealand or at the airports will be transported somehow to the processing

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<sup>1</sup> See *Plaintiff M61 /2010E v Commonwealth of Australia; Plaintiff M69 of 2010 v Commonwealth of Australia* [2010] HCA 41

camp, probably in East Timor. There are discussions that the camp will house 4,000.

5. Australia interestingly has progressively moved refugees into increasingly remote areas. In 1991 for example the Port Headland Processing Camp at the far northern end of Australia was set up requiring refugee lawyers, interpreters and determination officers to travel large distances to process the cases.
6. Then in 2001, at least for boat arrivals, the processing was shifted even further away to the Phosphate Hill Immigration Detention Facility on Christmas Island. Australia while maintaining overall sovereignty over Christmas Island excised it from its “immigration territory”, a new concept “the Pacific Solution” invented for this purpose.<sup>2</sup>
7. Australia is alone in the way it acts. No other Convention country around the world, some of which receive far larger groups of refugee arrivals than Australia, have set up remote holding camps in order to process arrivals.<sup>3</sup>

### **Human rights**

8. The setting up of offshore determination centres and the removal of spontaneous refugee claimants from our borders wherever claimants arrive to those centres present the following human rights issues:
  - i. Whichever country or territory agrees to house the processing centre, the refugee applicant will lose all form of security during the processing of his claim. The willingness or ability to disclose his or her refugee claim would be drastically reduced. For example if an individual has fled from execution or persecution in his or her home country he or she must be confident that information relating to this case will be kept in confidence. Family members back home may be at risk or should the case be unsuccessful, the case itself might create a new risk. Australia and/or New Zealand will undoubtedly contract out parts of the determination process to individuals such as interpreters etc who will not be bound by the laws of Australia and/or New Zealand. Whoever is flown in, interpreters, lawyers or processing officers, it will be the legal system in Timor Leste or Nauru or PNG that applies. Procedural fairness will not be enforceable. Lives will be put at risk. Moreover the fledgling government and legal system in Timor Leste is not going to be able to

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<sup>2</sup> See Karin Fathimath Afeef “The Politics of Extraterritorial Processing: Offshore Asylum Policies in Europe and the Pacific: RSC Working Paper No. 36” (Prepared for University of Oxford: Refugee Studies Centre 2006) < [www.rsc.ox.ac.uk](http://www.rsc.ox.ac.uk) >

<sup>3</sup> In 2003 Britain proposed an extraterritorial approach to asylum-processing and refugee protection but which was ultimately withdrawn after widespread criticism. See Guys S. Goodwin-Gill and Jane McAdam *The Refugee in International Law* (3rd ed, Oxford University Press, New York, 2007) at 409-414. In the early 1990s the US tried unsuccessfully to accommodate asylum seekers from Haiti elsewhere. For a time Jamaica permitted the US to operate a boat in its waters and screening was done there. Later asylum seekers were taken to Guantanamo Bay.

cope with issues arising out of unlawful breaches of confidentiality on its territory.

- ii. The availability of legal assistance will be much reduced. There are no senior refugee lawyers in Timor Leste as yet. It is also doubted that competent practitioners will be sent in. Refugee status cases are complex legal processes involving evidence that, where necessary, need to be corroborated, explained, or revealed. An incorrect decision might mean that the person is returned to face serious harm or persecution which could in fact be life-threatening. Access to competent legal assistance is a critical issue.
- iii. The decisions made will not be susceptible to scrutiny through judicial review or appeal bodies (presumably that is the reason for moving the processing centre offshore). If the processing is carried out by UNHCR (UNHCR should flatly refuse) there is no judicial or administrative appeal process within UNHCR or any other third party, or within Timor Leste (which apparently has just 18 judges) able to cope with complex issues involving an assessment of whether or not a case has been properly evaluated by refugee determination officers. The remoteness of the camp from the legal world will also mean that meaningful legal assistance will not be available. It is almost predictable that independent lawyers will not be flown to East Timor to scrutinise decisions that are made.

### **New Zealand and Australia's international obligations**

9. Both New Zealand and Australia are signatories to the Convention relating to the Status of Refugees. Moving persons who arrive into the territories or at the borders of the two countries to another country or territory and handing the individuals over to a third party for processing is a clear breach of the international obligations promised by signing the Convention<sup>4</sup>.
10. New Zealand cannot ensure the lawfulness, fairness or reasonableness of third party agents who process the cases. Neither will there be any control over removal decisions by the host country to refole the declines. If the sending country (Australia or New Zealand) is ultimately responsible for removing declines then it will also be responsible for refolement of declines that are wrongly declined. It is hard to understand why a state would be better off with this arrangement unless the purpose is to *avoid* responsibility over the outcomes involved. Australia and New Zealand will not be able to guarantee that decisions have been made fairly or in accordance with law. Each sovereign nation however is duty bound by virtue of

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<sup>4</sup> One view is that removal of asylum seekers to an extraterritorial location before substantive consideration of asylum status is likely to breach the 1951 Refugee Convention and may also give rise to a breach of the European Convention on Human Rights. See JUSTICE "Response to House of Lords Select Committee on the European Union: Inquiry on new approaches to the asylum process" (2003) JUSTICE <[www.justice.org.uk](http://www.justice.org.uk)>.

the fact that it is a signatory, to uphold the particular Convention that it has signed. It seems that this seems to have been lost sight of.<sup>5</sup>

11. There is no principle at international law that entitles a sovereign nation which has an international obligation to fulfil its international promise by disposing of its obligations by handing the matter over to another state party (or for that matter a country or territory which is not a state party). For example, a sovereign nation that handed over its prison population to a third country would be responsible if its prisoners were then in fact tortured whilst in custody in the second country. So too will New Zealand or Australia be responsible if the third country destination unlawfully or in contravention to the Convention refuses to grant protection to a bona fide refugee and removes the individual to their home country where he or she is then persecuted or tortured. Along the way breaches of confidentiality, failure to use competent interpreters or lawyers, failure to follow procedural fairness, failure to consider all the evidence or give it proper weight will result in decisions made in error, committed by a third party, and which will create harm. The countries that placed the individual in that environment will be responsible. Presumably unpleasant litigation will follow as returnees are tortured or mistreated.<sup>6</sup>
12. The moving about of persons through extradition, deportation or as in more recent years, extraordinary renditions, is a matter for law and due process. The request of one state to extradite an individual from another state is a process which is carefully scrutinised by the sending country, the process usually involving judicial scrutiny. The whole notion of processing refugee claims carefully in Australia and New Zealand is premised on the basis that such processing is necessary in order to fulfil the country's international obligations under the Convention.
13. Arguably therefore there is no possible room for any involvement at all in developing an offshore refugee or protection processing centre. It must, by its very nature, amount to an egregious breach of the rights of asylum seekers, and in fact the Convention. The whole notion is in fact quintessentially flawed. UNHCR should refuse to participate. New Zealand should also obtain an appropriate legal opinion about the proposal addressing the issues raised in this paper.
14. The Human Rights Foundation therefore urges the New Zealand Government to discontinue all dialogue with the Australian Government on this issue. It essentially amounts to a derogation of all duties and obligations guaranteed under the Refugee Convention. It is not sufficient to offer to "take back" those who are

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<sup>5</sup> The Vienna Convention on the Law of Treaties (1969) to which both New Zealand and Australia are signatories confirms that treaties are binding international obligations. See *Zaoui v Attorney-General (No 2)* [2005] 1 NZLR 690, para 127, where the court applied the Vienna Convention in determining the requirements of the Refugee Convention.

<sup>6</sup> See the case of *R (on the application of Al-Jedda) v. Secretary of State for Defence* [2007] UKHL 58 where a majority of the House of Lords found that alleged acts of wrongful detention by British troops whilst serving in Iraq were attributable to the United Kingdom and not attributable to the United Nations in spite of the fact the British Troops were part of a multinational force serving in Iraq under an UN Security Council resolution.

granted refugee status by the third party as there can never be any guarantee that the third party will follow due process in relation to the declinees unless the third party is controlled by Australia and New Zealand itself and can come under the scrutiny of the courts in New Zealand and Australia.

15. As recently as 1 February 2011 Julia Gillard stated that she was discussing with President Ramos-Horta of East Timor the possibility of establishing a regional processing centre for the purpose of receiving and processing irregular entrants to the region.
16. The response from a number of refugee commentators and human rights organisations has been that the Convention needs to be brought to bear to ensure that if this process goes ahead it should be accompanied by guarantees of fairness and process requirements. Little has been written about the inherent illegality of such a proposal or the injustices that will arise out of such a processing centre. Furthermore, nobody has explained why no other country in the world has thought to copy the Guantanamo Bay solution in refugee and immigration determination processes.<sup>7</sup> It is understood that the plans concern a fairly large facility capable of housing as many as 4,000 persons.

## **Conclusion**

17. The notion of offshore immigration detention and the offshore processing of refugee and other protection claims (such as Torture Convention claims) are inherently inconsistent with obligations that a sovereign nation has under the Convention. Even if the processing of such claims is carried out by the UNHCR, any mistakes or errors that occur are inevitably the responsibility of the country that forced the individual to be positioned in the third country processing centre. To deny such responsibility would be to deny the chain of events.
18. If a person is refouled<sup>8</sup> and then persecuted as a result of the (earlier) actions taken by officers of the New Zealand Government responsible for removing the person to an intermediate destination in the first place, in doing so, then New Zealand will have failed to prevent the harm that then occurs.
19. The possibility of harm occurring as the end result of actions taken by officers of the governments of New Zealand and/or Australia (in transferring such individuals) is a potentially serious issue. The notion that once a person arrives in a country that a sovereign signatory nation can then hand over that individual to some other party and still be complying with the Convention itself, is impossible to fathom. Because this is quite clear, the only position that is consistent with New

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<sup>7</sup> See however, above at footnote 3.

<sup>8</sup> The act of implementing geographic strategies in order to prevent the possibility of asylum by denying access to sovereign territory has been characterised by academics as constituting *neo-refoulement*. See Jennifer Hyndman and Alison Mountz "Another Brick in the Wall? Neo-Refoulement and the Externalization of Asylum by Australia and Europe" (2008) 43 Government and Opposition 249

Zealand's obligation arising from the international treaties it has signed is *not* to participate in Australia's illegal (at international law) scheme.

20. The agenda that the Australian Government has pursued over a twenty-year period of time involving the pushing back of the point of refugee determination into more remote regions is clear. Until now New Zealand has never participated in such schemes. Even with regard to the Tampa Boat/Nauru project, New Zealand contributed to the resolution of the problem faced by Australia, not by participating in Australia's processing systems up in Nauru but by receiving unprocessed asylum seekers,<sup>9</sup> and the processing them on our territory, in the normal way. New Zealand has always regarded itself as a country which prides itself in its international obligations and has always done so willingly.
21. Australia it would seem continues to behave grudgingly on the world stage through its, for example, interdiction at sea, long term refugee detention prisons in remote areas of Australia, the so-called Pacific solution at Nauru Island and then followed by the Christmas Island "solution" and now the proposals of a detention facility to house 4,000 individuals in East Timor. In so doing, the Australian Government proposes to remain a signatory of the Convention but yet hand over the determination of refugee cases to another independent party. Up until now the processes have at least always involved Australian agencies.
22. The Human Rights Foundation is of the view that a sovereign nation cannot abdicate its duties to determine an asylum case under the Convention by handing it over to another party in another territory. Accordingly the negotiations or discussions that are taking place ought not to continue.

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<sup>9</sup> See Lynsey Parsons "Report prepared for Refugee Services: **Refugee Resettlement in New Zealand and Canada**" (2005) <[www.refugeeservices.org.nz](http://www.refugeeservices.org.nz)>