AUSTRALIA

SEA CHANGE:

AUSTRALIA'S NEW APPROACH TO ASYLUM SEEKERS

U.S. COMMITTEE FOR REFUGEES

February 2002

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This paper was written by Jana Mason, USCR policy analyst for East Asia and the Pacific. It is based in part on a site visit to Australia and Indonesia in June and July 2001. It was edited by Bill Frelick and Margaret Emery. USCR intern Nancy Vogt provided research and writing assistance. This report was produced by Koula Papanicolas and Eunice Kim of the IRSA staff.

The author is grateful to numerous organizations and individuals who facilitated her trip and provided information, including the staff of the United Nations High Commissioner for Refugees, the International Organization for Migration, and the Australian Department of Immigration and Multicultural Affairs.

The U.S. Committee for Refugees is honored to be a grantee of The Ford Foundation, The German Marshall Fund of the United States, The 21st Century ILGWU Heritage Fund, The John D. and Catherine T. MacArthur Foundation, The Joyce Mertz-Gilmore Foundation, and the Andrew W. Mellon Foundation.

Cover Photo: A young Iraqi asylum seeker in Bogor, Indonesia weeps after more than 350 persons, mostly Iraqis and Afghans, drown off the Indonesian coast when their boat sinks en route to Australia, August 2001. Photo Credit: AP

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I. INTRODUCTION

In August and September 2001, the international community witnessed a dramatic example of Australia's efforts to prevent unauthorized boat arrivals to its shores. The Australian government refused to allow the entry of more than 400 persons—mostly believed to be from Afghanistan—aboard a Norwegian freighter, the *Tampa*, that had rescued them at sea and attempted to bring them to Australia's Christmas Island. Eventually, Australia struck a deal with Nauru—one of the world's smallest republics—to house the asylum seekers while their claims were processed, in exchange for U.S. $10 million in aid.

The *Tampa* incident commanded headlines and ushered in a significantly new approach to Australia's treatment of unauthorized arrivals. Australia's previous policy had been to transport people arriving without documentation to mainland detention facilities and allow them to apply for asylum.

Despite the publicity this group received, it was hardly the first to arrive by boat at Australian territory. During Australia's fiscal year 1999-2000 (which ended June 30, 2000), 4,175 unauthorized migrants arrived on the nation's shores by boat—an increase of 354 percent over the previous year.[1] In fiscal year 2000-2001, the number decreased only slightly, to 4,141.[2] While the first few months of fiscal year 2001-2002 showed continued steady arrivals, the pace of arrivals increased dramatically in August.

The majority of recent arrivals have been from Afghanistan and Iraq, with smaller numbers from Iran, Pakistan, and elsewhere. Most have travelled through the aid of organized smugglers. As the number of such arrivals has increased, Australia has embarked on a multi-pronged approach to discourage and prevent such migration, either at its source, en route, or upon arrival. Australia initiated most components of this approach months or years before the *Tampa's* much-publicized saga.

One controversial component of the government's plan is an "overseas information campaign." Along with posters and other materials, the campaign has included video spots showing the shark-infested seas around Australia, the crocodiles closer to shore, and the snakes further inland—where, as it happens, some of the detention centers housing unauthorized migrants are located. The title, and the message, of the campaign: "Pay a people smuggler and you'll pay the price."

Another component involves cooperation with other countries, including the "source countries" of asylum seekers (such as China); countries of "first asylum," which asylum seekers enter when fleeing their homelands and where they sometimes reside for months or years (such as Pakistan and Iran); and the transit countries (such as Indonesia) through which asylum seekers pass on their way to Australia. The Australian government believes that its negotiations with the Chinese government are responsible at least in part for virtually stopping the arrival of Sino-Vietnamese "boat people" in Australia. Australia seeks similar results with respect to Afghans, Iraqis, and others from the Middle East/South Asia region, who now form the bulk of the new arrivals.

Other components of Australia's effort to deter unauthorized migration include: the mandatory detention of all unauthorized arrivals, including asylum seekers (a policy that began in response to Cambodian and Vietnamese boat arrivals in the mid-1990s, but which has been maintained by successive governments in response to increasing numbers of unauthorized arrivals); the location of some detention facilities in remote, desert areas (where the government has said

that "existing infrastructure" was readily available); and the granting of temporary protection visas to successful asylum applicants who arrived in an unauthorized manner, rather than the permanent protection visas for which authorized arrivals are eligible. In fiscal year 1999-2000, Australia also temporarily suspended refugee visa grants from overseas (refugee resettlement) to compensate for increased "onshore" asylum approvals. Australia combines refugee admissions and asylum grants under a single "humanitarian" ceiling.

The media has scrutinized some aspects of this approach, particularly the detention policy and conditions. Less publicized is the regional cooperation component, which Australia has initiated with a number of countries in the Asia/Pacific region, particularly Indonesia, whose strategic importance was illustrated by the August 2001 events off Christmas Island.

In June and July 2001, the U.S. Committee for Refugees (USCR) conducted a site visit to Indonesia and Australia to assess Australia's response to asylum seekers, particularly the "regional cooperative arrangements" between Indonesia and Australia. At that time, two months prior to the events surrounding the *Tampa*, officials of Australia's Department of Immigration and Multicultural Affairs (DIMA) explained their revised approach to refugee protection: "We looked at our [Refugee] Convention obligations. We wanted to be generous, but, since we provided more than what's required by the Convention, we asked, what is the minimum that's required?"

Numerous persons interviewed by USCR during the site visit said that the Australian government is consumed by "the smuggling issue" and that its desire to curb human smuggling to Australia is driving much of its policy toward asylum seekers. In turn, many said, the focus on smuggling has been driven by domestic political concerns, particularly leading up to the contentious election of November 2001. Despite international criticism, the events surrounding the *Tampa* helped determine a policy change that reversed the once-threatened political fortunes of Australia's prime minister and his conservative government.

Many refugee and human rights advocates have been highly critical of the government's approach to the smuggling issue. However, many observers, including some refugee advocates, are also quick to say that Australian officials have rigorously investigated all aspects of the issue, including the smuggling/asylum nexus, and have taken the lead in challenging the international community, including refugee organizations, to develop a responsible and comprehensive response.

II. AUSTRALIA: RECENT EVENTS IN CONTEXT

Understanding Australia's evolving policy toward asylum seekers, particularly the dramatic policy shift of late 2001 and the highly charged domestic political atmosphere that accompanied it, require a brief look at Australia's history as an immigrant and refugee-receiving country.

A. Immigration and Refugee Background

Early Settlement

The Aboriginal peoples of Australia are thought to have first migrated to Australia from an undetermined location in Asia about 50-60,000 years ago.[3] The "modern" history of Australia can be dated from August 22, 1770, when Captain James Cook claimed all of what is now Eastern Australia for King George III of England.

Up until the American Revolution, Britain had been sending her convicts to the "new world." Once America became independent, Britain kept its convicts at home, and it was not long before the prisons were "full to overflowing." The island continent at the "end of the world seemed a perfect place to send them."[4]

Thus, the immigration of Europeans to Australia began in 1788 with the transportation of convicts from Britain—a system that lasted until 1868. During this period, 180,000 convicts, mainly of English and Irish descent, were sent to Australia. "Free" settlers first arrived there in 1793.[5]

Asian immigration began in 1848 with the first arrival of significant numbers of Chinese. They came both freely and as indentured laborers to work on the Victorian goldfields. By 1861, the Chinese population had grown to 55,000. The Chinese and European migrants remained separate, and antagonism grew between them, resulting in riots between 1857 and 1877.[6]

According to Don McMasters, author of *Asylum Seekers: Australia's Response to Refugees*:

By 1857, negative views of Chinese civili-

zation were widespread throughout the eastern states. Apprehension of an imminent and enormous influx of Chinese grew, characterized as the "swamping" of the "handful" of white people by swarming Asians and the "hordes from the north." The growing numbers of Chinese migrants prompted both cultural and economic insecurity among the British and their Australian-born descendants. During this era the white colonists, desiring to keep Chinese immigration in check, came to believe that the only feasible policy was one of exclusion.[7]

The "White Australia" Policy

Between 1891 and 1901, Australia developed its now-infamous "White Australia policy." The initial goal was reducing Chinese immigration, although the policy was later expanded to keep out "all peoples whose presence was, in the opinion of Australians, injurious to the general welfare." Immigrants from India and Japan, as well as the Melanesians or Kanakas, who were used as cheap labor in Queensland, were included in the expanded category of undesirables.[8]

The July 1900 passage of the Commonwealth of Australia Constitution Act of 1900[9] established the legal foundation for the White Australia policy. The legislation allowed parliament to make laws concerning "the people of any race, other than the aboriginal race in any State, for whom it is deemed necessary to make special laws." The law also permitted parliament to regulate immigration and the relations between Australia and its Pacific neighbors.

The following year, Australia further tightened its immigration rules through the Pacific Islanders Laborers Act, which provided for the "regulation, restriction, and prohibition of the introduction of laborers from the Pacific Islands," and the Immigration Restriction Act of 1901, which was designed to exclude virtually all non-European migrants to Australia. Although the specific language of the 1901 Act does not restrict immigration on the basis of "race," there is an overwhelming consensus that the primary mechanism of exclusion contained in the Act—the dictation test—"was an example of implicit racial control rather than an explicit color bar, which would have caused tension with neighbors and with Britain."[10]

Although the Immigration Restriction Act was amended seven times before 1950, it remained in effect until replaced by the Migration Act of 1958. The Migration Act, however, "left the policy unchanged apart from scrapping the dictation test as the method of exclusion. Ministerial discretion was substituted as the preferred strategy."[11]

While non-Australians criticized the White Australia policy, the Australian public accepted it "almost universally." It was not until the late 1950s that any significant push for reform of the policy developed within Australia itself. By 1966, Australia had begun to ease restrictions on non-European immigration.[12]

Toward Multiculturalism

The Labor government of Gough Whitlam, elected in 1972, shifted towards "cultural pluralism." The new government declared a "commitment to the 'avoidance of discrimination on any grounds of race or color of skin or nationality.'"[13] The government institutionalized this commitment through the Racial Discrimination Act of 1975. As McMaster observes, however, the removal of race as a primary determinant of immigration status did not automatically translate into a generalized increase in immigration. The overall number of immigrants, in fact, fell from 170,000 in 1970-71 to only 50,000 in 1975.[14]

It was left to the subsequent administration, the Liberal-National coalition government of Prime Minister Malcolm Fraser, once again to increase immigrant admissions, and to try to apply the non-discriminatory admissions policies to the increasing numbers of Vietnamese "boat people" arriving on the Australian coastline.

In 1977, Australia's immigration minister, M.J.R. Mackellar, identified clearly different rationales behind immigration policy and refugee policy. MacKellar described immigration policy as "pragmatic and self-interested," while refugee policy is "a response to situations of human misery by providing refuge, security, freedom and hope."[15]

A New Restrictionism

In the early 1980s, a new Liberal immigration minister, Ian MacPhee, initiated policies favoring skilled migrants and shifting the refugee criteria from an application of the UN High Commissioner for Refugees' (UNHCR) group determinations for certain categories of Southeast Asians to an individually based application of the refugee definition.[16] This resulted in

a significant decrease in the total number of Indochinese refugees granted entry.[17]

Elected in 1983, the Labor government headed by Bob Hawke continued the new hard line on immigration and refugee issues, with policies that included the mandatory detention of unauthorized boat arrivals. In 1989, a new wave of Indochinese "boat people" began arriving in Australia. Although their numbers were far fewer than in the late 1970s, they again sparked a fierce public debate. Many arrived from Vietnam via camps in Indonesia or from resettlement sites for Sino-Vietnamese refugees in southern China. Others were Chinese nationals or Cambodians.[18]

The Hawke government began detaining all unauthorized boat arrivals for as long as it took to determine their asylum claims. Originally housed in a low-security migrant hostel in Melbourne, the asylum seekers were transferred to a more secure facility after some of them began to escape. The government built the first remote detention facility, in Port Hedland, Western Australia, in 1991.[19]

Lawyers for the asylum seekers complained that there was no legal foundation for the long-term detention of boat arrivals. In 1992, lawyers sued for the release of fifteen Cambodian asylum seekers who had been in detention for more than two years. Two days before the federal court was to hear the arguments, the government pushed through parliament the Migration Amendments Act of 1992. The legislation required that any person who arrived by boat in Australia after November 19, 1989 was to be kept in custody until he or she left Australia or was given an entry permit. The Act also said that no court was to order the release of such persons.[20]

The mandatory detention policy has since been strengthened through amendments and has achieved broad bipartisan support. However, it is sharply criticized by refugee and human rights advocates.

Under the leadership of Prime Minister Paul Keating from 1991 to 1996, Australia sent mixed signals on immigration and refugee protection. Although Keating reaffirmed multiculturalism as a great domestic strength, the Keating years represented a tightening of controls that resulted in both a loss of avenues for appeal and an increased likelihood of detention for refugees and asylum seekers.[21]

In early 1996, Australia's Refugee Review Tribunal (RRT), an independent Administrative body, ruled that Australia need not grant refugee status to East Timorese asylum seekers. The tribunal reasoned that because Portugal considered East Timorese to be Portuguese citizens, East Timorese could not legally argue that they needed protection as refugees (since a person claiming to be a refugee must show a well-founded fear of persecution in each country of which he or she is a national). More than 1,600 East Timorese had sought asylum in Australia during the years of Indonesia's occupation, particularly following the Santa Cruz massacre in East Timor in 1991. Opponents of the ruling argued that it was hypocritical for Australia to recognize Indonesia's sovereignty over East Timor—which the United Nations (UN) still considered a UN trusteeship under Portuguese administration—and yet not recognize East Timorese as Indonesian when they apply for asylum.[22]

B. Refugee and Asylum Policy Changes Under the Howard Government

A coalition government led by John Howard came to power in 1996 and was re-elected in 1998 and 2001. During this time, Prime Minister Howard and his immigration minister, Philip Ruddock, made the unauthorized arrival of asylum seekers a front-burner political issue, enacting numerous legislative and regulatory changes.

In 1996, the government announced a reduction in both refugee and immigrant admissions to Australia. Later that year, the government decided that rejected asylum seekers who appealed their negative decisions would no longer be eligible for assistance under the Asylum Seekers Assistance Scheme.[23] (The government reversed this policy change in July 1999).

In 1997, refugee and human rights advocates criticized the RRT for being politicized, asserting that the RRT had lost much of its independence and that government policy influenced its decisions.[24] The criticism intensified when the government shortened the refugee review process. Starting in July 1997, asylum seekers were required to apply for protection visas within 45 days of arrival in Australia in order to obtain work authorization. In addition, persons who filed unsuccessful asylum appeals with the RRT were henceforth required to pay a retroactive $1,000 fee.[25]

Also in 1997, Australia's Full Federal Court ruled that the RRT had made no legal error in its decision that certain East Timorese were Portuguese nationals for purposes of the UN Refugee Convention. However, the court also concluded that nationality must be "effective" for purposes of the Convention, and remanded the case to the RRT to consider the effectiveness of the applicant's Portuguese nationality. The government said it would consider appealing

the ruling, and threatened to deport the East Timorese.[26] It later decided that no East Timorese would be returned while court cases were pending.

In 1998, the government said the number of protection visa applicants had jumped from 500 per year in the late 1980s to about 11,000 in 1998. Ruddock asserted that many of the claims were "manifestly unfounded."[27] That same year, Ruddock sought to limit further the judicial review of RRT decisions. He accused federal court judges of deliberately searching for loopholes to undermine the government's refugee policies.[28]

In May 1998, the RRT affirmed the government's denial of asylum to the East Timorese applicant, determining that Portugal did afford the applicant effective protection. The next month, Portugal blocked Australia's attempt to deport 1,600 East Timorese to Portugal, saying Portuguese nationality laws were "not designed to force the assimilation of East Timorese people into the Portuguese state but to positively provide them with a free choice."[29]

Indonesians of Chinese descent sought asylum in Australia in record numbers during 1998. Most claimed persecution stemming from the country's worsening economic and political crisis. Australia overwhelmingly denied their claims. Asylum seekers from mainland China also had little success seeking protection in Australia. Boat arrivals were promptly deported under an agreement between Chinese and Australian authorities.[30]

In October 1999, Australia significantly changed its asylum system. The government issued regulations dividing protection visas into two subclasses: permanent visas and temporary visas.[31]

Under this system—which was further amended in September 2001—successful asylum applicants who entered Australia legally can receive permanent visas. "Unauthorized" arrivals seeking asylum can, if found to be refugees, be granted only temporary visas, valid in most cases for three years. Temporary visa holders are permitted to work, but are not permitted to apply for their immediate family members to join them. After 30 months, the holder of a three-year temporary visa may be granted a permanent protection visa (he or she may file the application earlier, but DIMA will not adjudicate it until the 30th month), although the individual will again have to prove a well-founded fear of persecution if returned home.[32] Under the September 2001 amendments, however, it is unlikely that most TPV holders will meet the criteria for grants of permanent protection (which now requires that the individual not have resided for seven continuous days in a country, such as Indonesia, where he or she could have found protection either from that country or from UNHCR).

In November 1999, Australia enacted the Border Protection Legislation Amendment Act, which instituted restrictive "forum shopping" provisions similar to those in place in much of Europe. Under those provisions, the government can deny refugee status to any applicant, including a legal arrival, who has not taken "all possible steps" to enter and reside in "any country apart from Australia" where the applicant has the right to enter.[33] DIMA justifies this provision by stating, "[P]ersons who are nationals of more than one country, or who have a right to enter and reside in another country where they will be protected, have an obligation to avail themselves of the protection of that other country… Australia does not owe protection obligations to [such persons]."

The 1999 legislation also amended the "safe third country" provisions of the Migration Act. Under the amendments, the immigration minister can designate certain countries that fulfill "relevant human rights standards" and to which the applicant "has a right to re-enter and reside" (if the applicant previously resided there for at least seven continuous days).[34]

Human rights and church groups said that the law contravened the UN Refugee Convention and would prevent some refugees from obtaining protection. Ruddock said the legislation was needed to stem the surge in undocumented migration to Australia, particularly the organized smuggling of persons from China and the Middle East. He warned that "whole villages in Iran" were on their way to Australia.[35]

In contrast to its increasingly restrictive asylum policy, or perhaps more in line with its new emphasis on temporary protection, Australia twice during 1999 provided temporary safe haven to certain people "displaced from their homelands by violence." The government created a special category of visa for this purpose, consisting of two subclasses: Kosovar Safe Haven, and Humanitarian Stay. Applicants for this visa category must sign a declaration that they understand and agree to the Australian government's offer of temporary safe haven for a limited period, and will leave when the government requires. Holders of these visas are legally prevented from applying for any other kind of visa unless the immigration minister decides it is in the public interest for them to do so.[36]

The government used the new visas to provide temporary safe haven for nearly 4,000 Kosovars admitted between May and June 1999, and about 1,800 East Timorese evacuated during the September 1999

violence following East Timor's vote for independence from Indonesia. While both programs were deemed a success by the government, they were not without controversy. When the government began cutting services in an effort to convince the Kosovars to repatriate during the harsh Kosovo winter, press reports accused the government of "applying a blowtorch" to convince the refugees to go home.[37] Similar actions and criticisms occurred later in the year when Australia began repatriating the East Timorese.

The Howard government also put more focus on sea and air surveillance, in response to increased boat arrivals. Following a review of coastal surveillance in April 1999, Howard allocated new resources to Coastwatch (a division of the Australian Customs Service) in order to beef up Australia's capacity to "detect and deter illegal arrivals." New Coastwatch resources included additional aircraft and the establishment of a National Surveillance Center with electronic links to defense agencies.[38]

Despite the increased resources, many still view Coastwatch as overburdened and only intermittently effective. The Howard government has dismissed Labor Party recommendations that a consolidated U.S.-style Coast Guard be established to take on not only surveillance but also search and rescue functions. According to *The Australian* newspaper, the government ridicules the idea as too costly and duplicative. Customs Minister Chris Ellison has said the answer is to continue to beef up Customs and Coastwatch with more surveillance cameras on the wharves, new screening methods at airports, and more dogs.[39]

In February 2000, Ruddock temporarily suspended processing "offshore" refugee visas (for persons being resettled from overseas). This was necessary, he said, because the number of unauthorized arrivals granted asylum had increased sharply and threatened to exhaust the combined ceiling for overseas admissions and asylum. Australia allowed some 3,000 available offshore visas to carry over into the 2000-2001 program year, in anticipation of a large number of onshore visa grants to arrivals from Afghanistan and Iraq (who had more than a 90 percent approval rate).[40]

In announcing the suspension, Ruddock said, "It is grossly unfair to people who are refugees outside Australia in the most vulnerable situations that their places may be taken by people in Australia who may be able to establish claims… I'm very upset about it, I don't like it, but it's the only way in which we can ensure the system will function effectively."[41]

An Australian NGO representative noted, "The only visas issued onshore are temporary visas, so by not issuing offshore visas, which are permanent, [Mr. Ruddock] is cutting Australia's refugee program."[42] The government responded by noting that temporary visa holders could subsequently be eligible for permanent visas.

Throughout 2000 and much of 2001, as boats continued to arrive, Australia explored ways to prevent such arrivals. It implemented "cooperative arrangements" in Indonesia and proposed new legislation to address perceived "loopholes" in Australia's asylum system. Yet its overall approach would remain largely unchanged until late August 2001, when it refused entry to the *Tampa.*

C. Unauthorized Arrivals: The Numbers in Context

The asylum policy changes since 1996, including the dramatic changes of August and September 2001, have been a response to what the government—and much of the Australian public—views as a massive surge in the number of unauthorized arrivals to Australia, as well as a significant shift in the characteristics of such arrivals.

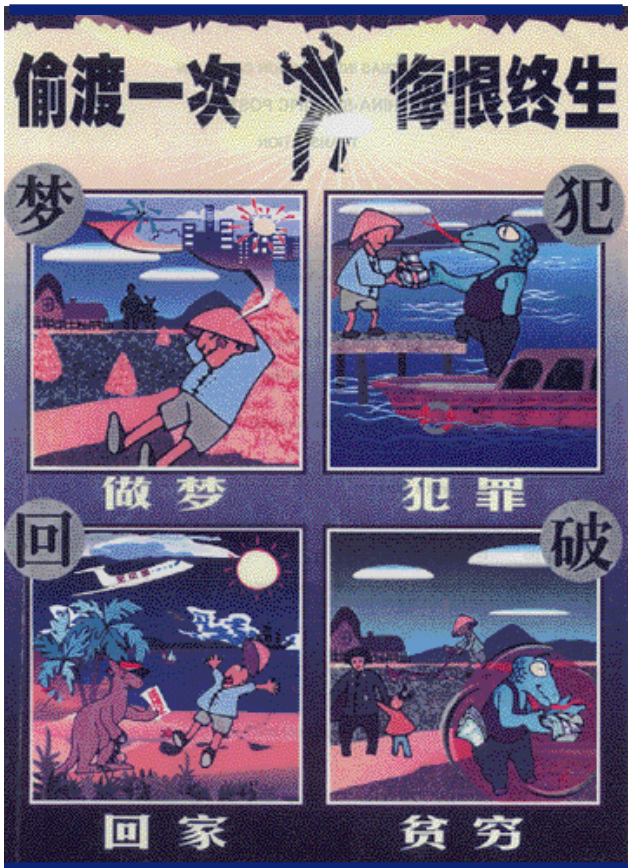
Prior to mid-1999, most asylum seekers arrived in Australia by plane. The majority arrived on valid documents, which allowed them to remain lawfully in Australia while their asylum claims were being assessed. Most applicants were from countries that had relatively low asylum approval rates. Annual arrivals had stabilized at around 8,000 to 9,000, and overall approval rates were between 15 and 20 percent.

In 1999, conditions began to change. More asylum applicants began arriving by boat, usually through the aid of organized smugglers. Contrary to earlier boat arrivals, which were mostly from China, Cambodia, and Vietnam, these newer arrivals have mostly been from the Middle East and South Asia, particularly Afghanistan and Iraq. Most have not come directly from their home countries, but have transited through countries of first asylum, primarily Pakistan and Iran (both of which have adopted increasingly harsh policies toward the asylum seekers). Because the asylum seekers arrive without authorization, the government is required by law to detain them. Yet when their claims are adjudicated, the vast majority—as many as 80 to 90 percent—are approved.

In FY 1998-1999, more than 2,100 people arrived without authorization by air, compared with 920 by sea. In FY 1999-2000, by contrast, 1,695 people

arrived without authorization by air, while 4,174 came by sea. The trend continued in FY 2000-2001, with 1,508 unauthorized arrivals by air and 4,141 by sea.[43]

The increase in the number of asylum seekers reaching Australia's shores—if measured in a percentage jump from previous years—is clearly significant. However, the raw numbers, even when added to the numbers of asylum seekers who arrive lawfully and the number of refugees admitted from overseas, pale in comparison to the numbers of persons seeking safety in other "western" nations, as well as in many desperately poor countries throughout Africa, Asia, and the Middle East. For example, the ratio of refugees and asylum seekers to total population at the end of 2000 was 1:1,130 in Australia, compared with 1:588 in the United States, 1:572 in Canada, 1:117 in Switzerland, and 1:456 in Germany.[44] The vast majority of the world's refugees are hosted—often for years or even decades—by developing countries. At the end of 2000, Tanzania hosted well over half a million refugees. Even before the crisis in Afghanistan precipitated by the September 2001 terrorist attacks in the United States, Pakistan hosted more than two million Afghan refugees, with Iran hosting close to the same number of Afghans and Iraqis.



This poster, aimed at potential "unauthorized migrants" from China, depicts the futility of paying money to "snakeheads" (smugglers). The poster is part of Australia's overseas information campaign.

III. AUSTRALIA'S RESPONSE TO UNAUTHORIZED MIGRATION

A. Overseas Information Campaign

In 1999, Australia's immigration department initiated its "overseas information campaign" designed to discourage unauthorized migration to Australia. In addition to discussing the penalties for smuggling, the campaign materials—distributed in Middle Eastern countries and elsewhere—portray Australia as a dangerous destination for would-be migrants, especially for those arriving by boat. The tag line of videos showing crocodiles and sharks: "It's not worth the risk."

Ruddock launched the information campaign in October 1999 as part of a four-pronged strategy against human smuggling (consisting of cooperation, prevention, interception, and reception).[45] The campaign includes both domestic and international dimensions.

In response to critics who claimed the video component utilized "shock tactics," Ruddock said, "You might think they are a little sensational… [But] the information in all these videos is based on fact. These are very powerful weapons against a criminal trade in human misery."[46] According to DIMA, the shark/crocodile video component of the campaign was "short lived."

Internationally, the campaign targets persons in three categories of countries (source, first asylum, and transit) who may be considering entering Australia illegally. Ruddock initially specified "high-risk" source countries including China, Iraq, Sri Lanka and Turkey, and transit countries including Thailand, Indonesia, Malaysia, and Papua New Guinea.[47] According to DIMA, materials have been tailored for individual countries to ensure they are "culturally appropriate." The materials include video releases, radio news clips, posters, storyboards, and information kits translated into 12 languages.[48]

In the earliest stages of the campaign, four information leaflets were translated into Chinese, Arabic, and Bahasa Indonesia. Ruddock personally traveled to China to consult with authorities in Beijing and Fujian Province, and provided 5,000 anti-smuggling posters for distribution.

Domestically, Ruddock asked all Australians to inform their overseas friends and relatives that Australia "takes a tough stand against people smuggling." He similarly requested that migrants to Australia "spread the message in their country of origin."[49]

Although the Australian campaign has garnered much attention, Australia is not the only industrialized nation to engage in such efforts to discourage unauthorized migration. The United States, for example, has also engaged in what some observers view as sensational tactics to turn would-be migrants away from the services of smugglers, including showing slides and videos on the American Embassy TV Network. While the message and the elements of the U.S. and Australian campaigns are very similar, the Australian media and public appear far more aware of their government's efforts in this arena than do their American counterparts. This is possibly due to Ruddock's high profile in promoting those efforts, intense scrutiny by Australian media, and the longstanding "invasion mentality"—as one Australian told USCR—inherent in "a western country in the midst of underdeveloped Asia."

B. Bilateral and Multilateral Talks

During the Howard years, Australia has taken an aggressive and global approach toward enlisting other countries in its effort to stop unauthorized migration. According to a DIMA background paper, Ruddock met with officials from more than 40 countries between September 1996 and September 2001 to discuss smuggling and related issues. Australia has also promoted its views, and often led the discussions on smuggling, at regional and international gatherings such as the Inter-governmental Consultations on Asylum, Refugees, and Migration Policies in Europe, North America, and Australia (IGC); the Inter-governmental Asia-Pacific Consultations on Refugees, Displaced Persons, and Migrants (APC); and the Executive Committee of UNHCR.

C. Cooperative Arrangements with Indonesia

Australia has worked more closely with Indonesia to stem migrant smuggling than with any other country. One glance at a map of the region reveals Indonesia's importance to Australia's efforts to curtail unauthorized boat arrivals. Indonesia is a vast archipelago of 13,000 islands (about half of them inhabited) stretching over 3,000 miles, mostly to the north and northwest of Australia.[50] Of particular significance is Indonesia's proximity to two Australian territories off the Australian mainland. Australia's Christmas Island is more than 900 miles (1,440 km) from the mainland but only 210 miles (336 km) south of Java, Indonesia's most densely populated island.[51] Australia's Ashmore Reef is 192 miles (307 km) from the mainland, but only 90 miles (144 km) south of the Indonesian island of Roti, near West Timor.[52]

Although some boats carrying asylum seekers have arrived directly on the Australian mainland (particularly those carrying Chinese in previous years), the vast majority of recent boats have arrived—intentionally—at Christmas Island or Ashmore Reef. Nearly all have departed from Indonesia.

What Australia views as an "influx" of asylum seekers from the Middle East and South Asia began in late 1997. The reasons for the increased migration likely include conditions in the countries of origin (such as Taliban rule in Afghanistan, which was secured in 1996) and hardening attitudes in countries of first asylum (such as Pakistan), along with shifting strategies of the smugglers (e.g., moving their routes and destinations in response to demand and government crackdowns). Australia also believes that its "generous treatment" of asylum seekers, including high approval rates, access to family reunion, and an extensive array of integration services, sent the message that it is open to further arrivals.

The routes taken by asylum seekers are varied and complex, and have changed in response to governmental enforcement of immigration laws. What most recent Australia-bound asylum seekers have in common is transit through Malaysia, which grants visa-free entry to nationals of Islamic countries. Australia has tried unsuccessfully to get Malaysia to change this policy (a potential development that one observer said could be "the one single thing that could change all this"). In any event, however, the geography of Indonesia virtually guarantees that it will remain a transit point.

"Regional Cooperation Arrangements"

For the past few years, Australia has sought to establish a formal mechanism for the interception and processing of asylum seekers in Indonesia and other countries in the region. Discussions have taken place in various international and regional fora on migration and smuggling. In early 2000, the components of the

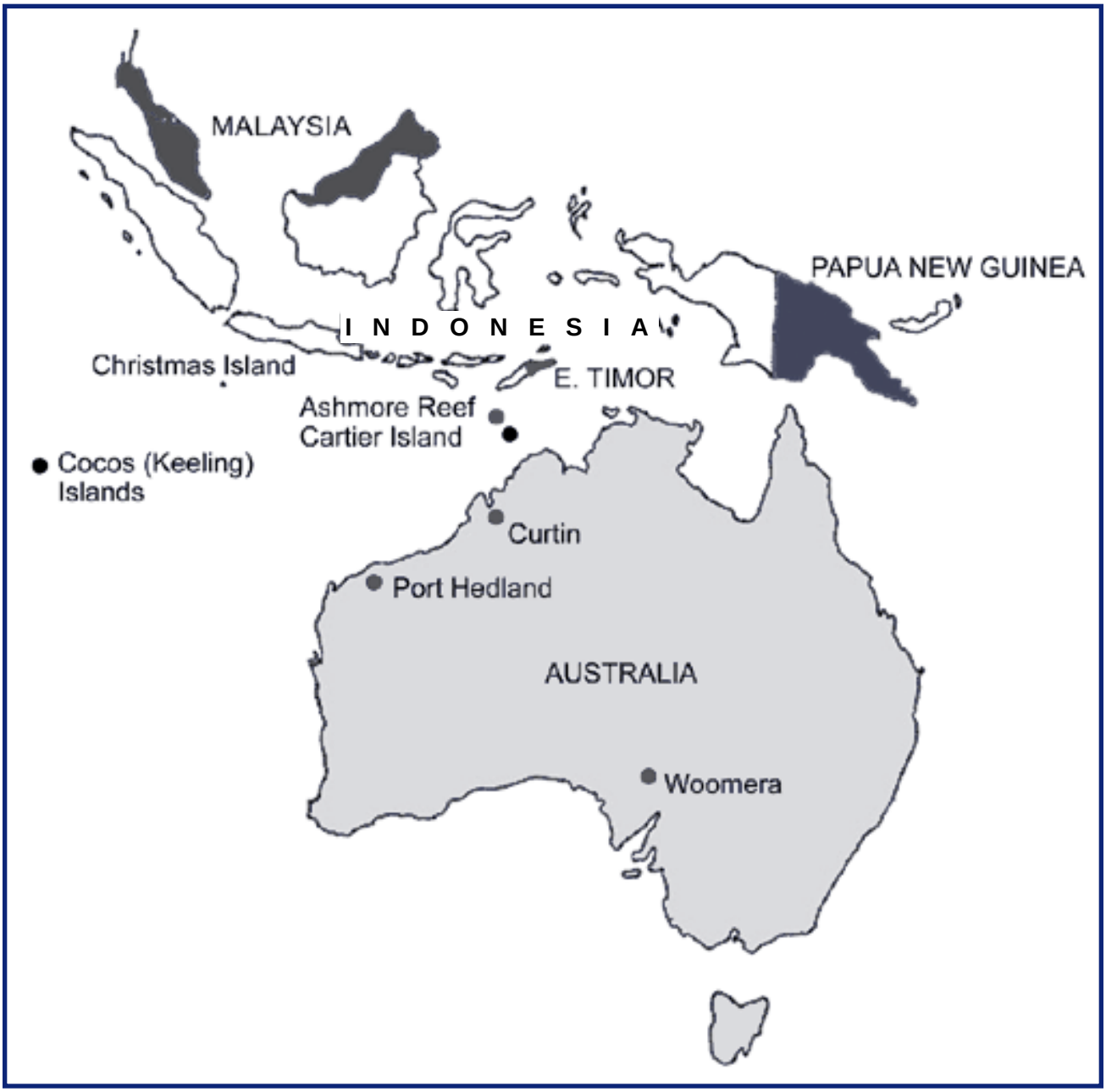
"Regional Cooperation Arrangements" between Indonesia and Australia finally came together.

The arrangements involve four key players: the Indonesian government (both at the central and local levels, including police and immigration officials); their Australian counterparts; UNHCR; and the International Organization for Migration (IOM).

Indonesia is not a signatory to the UN Refugee Convention and has no system for granting refugee status. However, Indonesian authorities permit asylum seekers to remain in Indonesia while UNHCR assesses their claims. Persons recognized by UNHCR as refugees are permitted to remain pending identification of a durable solution.

According to the Australian government, UNHCR declined to play the lead role in the new arrangements as envisioned by Australia. UNHCR said that it assesses the claims of asylum seekers after being approached directly by them, but it does not seek them out. The "compromise" was that IOM would take the lead—consistent with IOM's own view of its mandate.

During USCR's site visit to Indonesia and Australia in June and July 2001, a representative of the Indonesian government told USCR that Australian officials asked Indonesia to make one of its islands, such as Galang (near Singapore), available for the processing of unauthorized migrants. (Galang hosted thousands of Vietnamese refugees during the late 1970s and 1980s.) In October 2000, according to media reports, Indonesia's then-president



Abdurrahman Wahid denied the request, saying Australia should use one of its own islands, such as Christmas Island.[53] The Australian government, however, denies that it ever made such a request.

IOM's Lead Role

IOM identifies itself as "the leading international organization for migration." Its mission statement notes its commitment to the principle that "humane and orderly migration benefits migrants and society." Among other activities, the agency is involved in refugee admissions and repatriation programs, as well as programs to assist in the return of "irregular migrants." Its lead role in the Australia-Indonesia arrangements, therefore, is unsurprising.

The arrangements work as follows: When Indonesian authorities first encounter a group of unauthorized migrants (e.g., when they become suspicious of their identity and ask to see travel documents, sometimes after having been informed of their presence by hotel staff or other Indonesians), they detain the individuals and contact IOM. IOM staff occasionally place the individuals in immigration "quarantine" or other detention facilities, although the lack of such facilities means that the migrants usually remain in hotels or other similar accommodation.

The "interception" of asylum seekers, therefore, virtually always occurs on land. Increasingly, persons are being detained following an unsuccessful attempt to leave Indonesia by boat (e.g., after experiencing distress at sea and returning to land). In no case, according to Indonesian officials, has the Indonesian navy or coast guard intercepted unauthorized migrants in Indonesian waters or on the high seas.

As soon as possible, IOM, which maintains offices in Jakarta (the Indonesian capital) and two other locations in Indonesia, sends its staff to where the "irregular migrants" (as IOM calls them) are located. After conducting an initial assessment, IOM staff inform the migrants that the organization can assist with voluntary return to their home countries (or to another country where they have a right to enter). They also tell the migrants that they may contact UNHCR if they have any fears of returning home. According to IOM staff, the vast majority of the migrants interviewed want to see UNHCR. Most, in fact, are already aware of the refugee agency and ask to see UNHCR without being prompted.

IOM subsequently notifies the Jakarta office of UNHCR about those migrants who request refugee status determination interviews. In some cases, UNHCR is already aware of the group, having been informed by the Indonesian authorities or by the Australian embassy. IOM also provides medical assistance and arranges longer-term accommodation for the migrants (usually in hotels), if needed.

IOM makes travel arrangements for any persons who elect voluntary return (IOM's constitution prohibits it from participating in involuntary return). According to IOM staff, approximately ten percent of the migrants choose voluntary return. Those most likely to do so, IOM staff said, are Iranians and Pakistanis, although many from those countries also elect to see UNHCR.

IOM officials said they ensure that returns are voluntary not only through conversations but also by having the individual sign a "Declaration for Voluntary Return," written in both English and the signatory's language. The declaration says in part that the migrant desires "to return peacefully and voluntarily" to his or her own country of origin and that "after due consideration and entirely of my own free will," he or she wishes to be assisted by IOM to return.

According to another IOM document, the agency considers that returns are voluntary when "the migrant's free will is expressed at least through the absence of refusal to return, e.g., by not resisting to board transportation or not otherwise manifesting disagreement."[54] The document continues, "From the moment it is clear that physical force will have to be used to effect movement, IOM would have no further involvement." IOM staff in Jakarta told USCR, however, that all returns from Indonesia have been positive decisions on the part of the migrants.

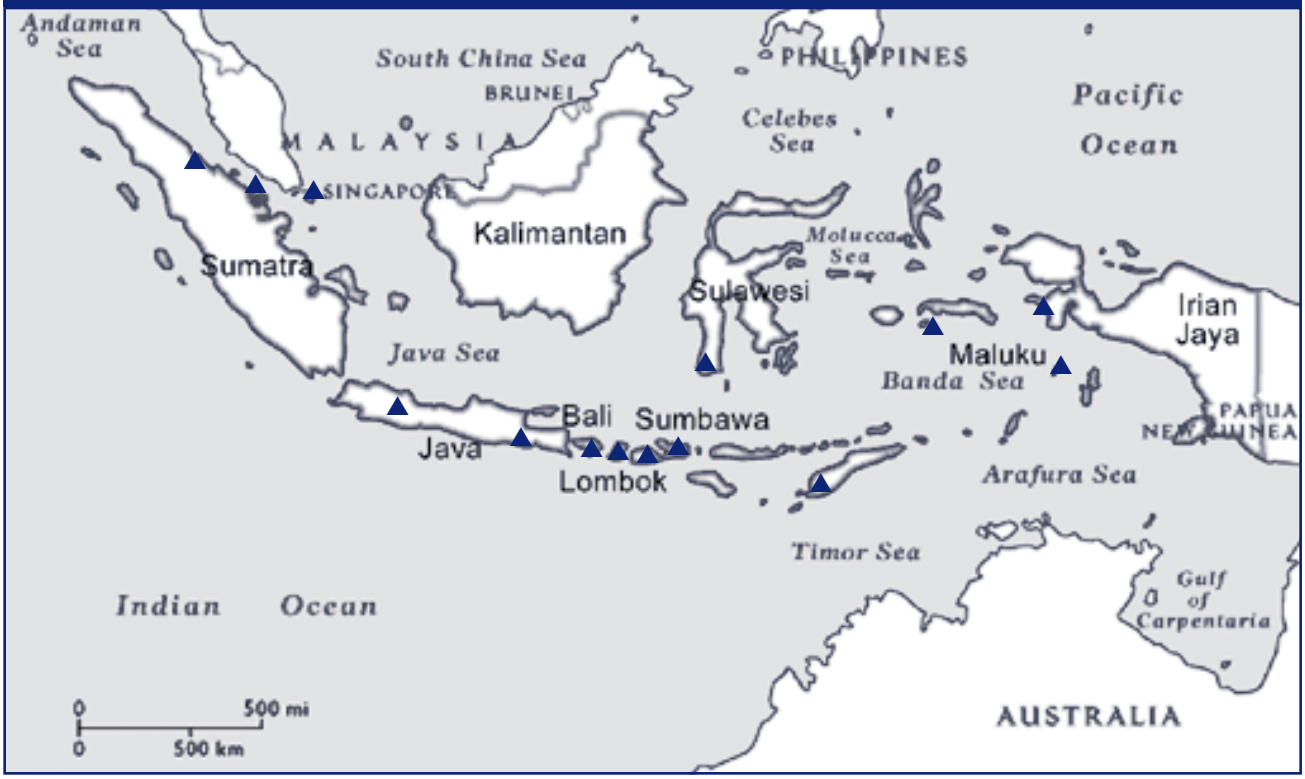
In some cases, voluntary return is difficult to organize because some countries will not accept the return of their nationals and others will not accept non-nationals for the purposes of transit. In other cases, travel documents are difficult to obtain.

The Australian government believes that IOM is in the best position to play the lead role in these arrangements because, as an Australian official told USCR, "IOM is able to quickly—usually within 72 hours—provide necessities, such as medical services and food. At this point, the individuals are illegal immigrants and not of interest to UNHCR until they have sought protection."

UNHCR Refugee Status Determination

Once notified by IOM, UNHCR staff in Jakarta travel to the asylum seekers' locations throughout Indonesia and conduct refugee status determinations. Because UNHCR has only three staff to conduct these inter-

LOCATIONS OF ASYLUM SEEKERS IN INDONESIA DURING 2001



views, asylum seekers must often wait weeks or even months for a UNHCR interview. Further delaying the process is UNHCR's difficulty in finding interpreters for certain languages, particularly Kurdish (spoken by some Iraqis), a problem encountered by IOM as well.

In some cases, IOM relocates asylum seekers to Jakarta prior to UNHCR screening. This generally happens on the few occasions when the asylum seekers' presence causes tension with the local community or when Indonesian authorities ask that the migrants be relocated.

After UNHCR makes a decision on the claim (which may also take weeks or longer), those asylum seekers granted refugee status are relocated to Jakarta. At that point, they become UNHCR "cases" and are no longer under IOM's care. UNHCR, through a local contractor, finds them temporary housing in the Jakarta area. Subsequently, UNHCR provides cash assistance to the refugees, who must then arrange and pay for their own accommodations.

As of the end of October 2001, UNHCR had recognized as refugees 566 asylum seekers apprehended under the Regional Cooperation Arrangements. Another 898 persons were pending UNHCR decisions (including, in some cases, pending appeal), while hundreds more were not yet registered with UNHCR. UNHCR's overall refugee recognition rate was 56 percent. The recognition rate was roughly 27 percent for Afghans, 70 percent for Iraqis, and 7 percent for Iranians.

Once the asylum seekers are recognized as refugees, they await a "durable solution." For nearly all of the refugees, voluntary repatriation is not likely in the near term, given the situations in their home countries. Local integration in Indonesia is not possible for any of them, since Indonesia lacks an asylum system and has no other mechanism to grant residence to such persons. Therefore, resettlement in a third country has become the only available solution and is being pursued by UNHCR.

Conditions for Asylum Seekers in Indonesia

As of August 2001, IOM was assisting nearly 1,000 asylum seekers in 15 locations throughout Indonesia. UNHCR was caring for another 500. By late November, as a result of new arrivals, estimates of the total

number of refugees and asylum seekers in Indonesia had grown to as many as 4,000.[55] The Australian and Indonesian governments noted that many more could be clandestinely residing in Indonesia.

Many of the persons under IOM's care are awaiting UNHCR screening. Others await UNHCR's decision, and still others have been denied refugee status and are either in the process of appeal or, having exhausted their appeals, remain in Indonesia because they have not elected voluntary return.

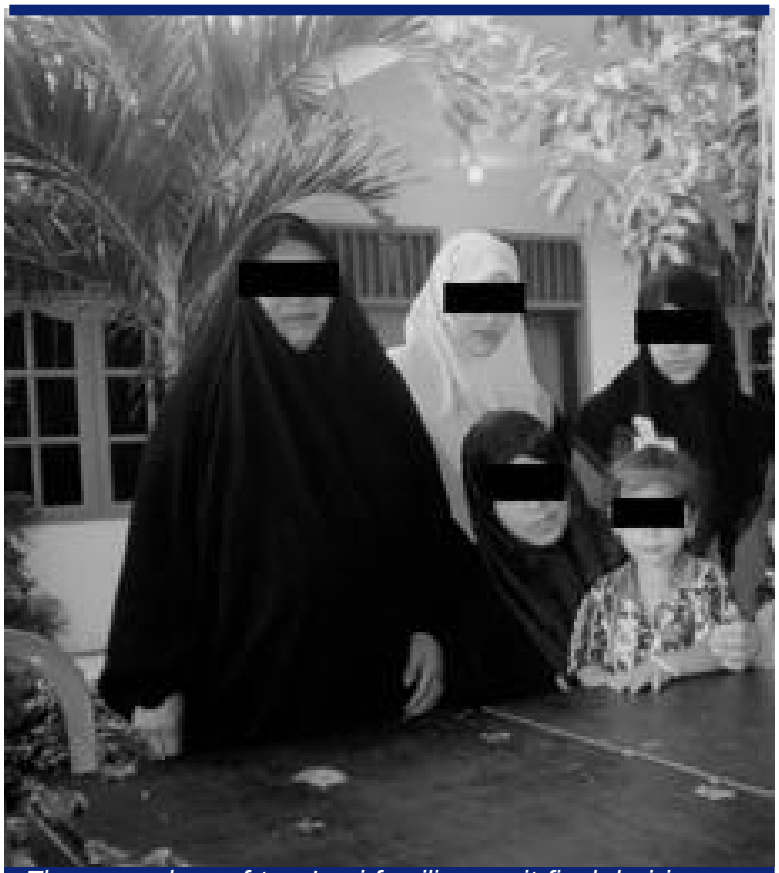
Although the "screened-out" individuals are subject to deportation by Indonesia, the government is not known to have deported any unauthorized migrants. This may be due to a lack of sufficient resources on Indonesia's part, as well as a preoccupation with its own internal difficulties. Indonesia has experienced widespread political strife, separatism, and ethnic and political violence since 1998. At the end of 2001, there were more than 1.3 million internally displaced persons throughout Indonesia, in addition to as many as 100,000 East Timorese refugees in Indonesia's West Timor.

The number of persons under IOM care fluctuates often, not only as a result of new arrivals, but because many asylum seekers "run away." According to the Indonesian government, unauthorized migrants are subject to detention (although the official status of those who submit asylum requests is less clear). In reality, "they're quite free," said an IOM official. According to the Australian government and IOM, some asylum seekers, even some approved as refugees by UNHCR, decide to continue their journey to Australia by boat. In up to 30 percent of the cases, persons who have "run away" have later been apprehended in another part of Indonesia.

According to persons interviewed by USCR, the percentage of asylum seekers who "run away" is not surprising. Many noted the high level of corruption in Indonesia and said that some local officials were likely being paid by smugglers to "look the other way" when the asylum seekers left for Australia. Others noted that, because many Indonesians harbor a lingering resentment toward Australia for its role in securing East Timor's independence (Australia led the multinational force sent to East Timor in the wake of the Indonesian military-backed militia violence following the independence vote), Indonesians may have little incentive to help Australia achieve a goal that could place a burden on Indonesia.

Australia's Role: Money and Training

Australia's role in these arrangements comes primarily in the form of funding. The Australian government pays for all of the following: IOM expenses for accommodation, food, and other assistance to third-country nationals who are "detained" (i.e., those not yet approved as refugees by UNHCR); IOM's costs for the voluntary removal of those who choose to depart Indonesia; and UNHCR's costs associated with refugee status determination. While Australia does not pay UNHCR's costs of assistance to approved refugees, Australia pays the accommodation costs of persons who have been denied refugee status by UNHCR and who elect to remain in Indonesia without status.



These members of two Iraqi families await final decisions from UNHCR on their refugee claims. In the meantime, they and about 120 other Iraqi asylum seekers reside in a hotel in Bogor, near Jakarta. "Saddam will kill us if we go back to Iraq," said one man. "If the UN says we're not refugees, where can we go?" Photo: USCR/J. Mason

Australia has also offered to pay UNHCR to return approved refugees to "countries of prior protection," such as Pakistan, if such arrangements can be made. UNHCR has thus far declined to pursue such returns.

Australia also provides training and equipment to its Indonesian police and immigration counterparts, in order to "increase [Indonesia's] capacity to deal with irregular migrants and people smugglers."[56] The training includes instruction in detecting document fraud.

According to a government background paper, "The cooperative arrangements with Indonesia and the key roles of IOM and UNHCR are in the interests of both countries. Sovereignty is being breached in both instances and unlawful acts are being performed to bypass established immigration systems. Through the arrangements, there has been a reassertion of sovereignty and control of who enters and remains, while recognizing and dealing with the protection needs of those who seek asylum."[57]

Resettlement

When it initiated the Regional Cooperation Arrangements, Australia said that it would not accept for resettlement any persons intercepted under the arrangements and approved as refugees by UNHCR. This stance, they said, was to avoid "rewarding these people with an outcome they have sought, and possibly giving rise to further irregular people movement into Indonesia." Instead, Australia hoped other resettlement countries would admit these individuals as part of an international "burden sharing" arrangement.

U.S. officials reportedly took issue with Australia's position, believing that Australia should participate in the resettlement effort, at least by reuniting refugees with family members in Australia. Subsequently, Australia agreed to resettle those refugees with "family links" in Australia, saying it did so "in accordance with the principle of burden sharing." The United States then began resettlement interviews in Jakarta, as did a number of other countries.

As of October 31, 2001, UNHCR had submitted the cases of 498 recognized refugees to at least twelve resettlement countries, including the United States, Canada, Sweden, and Australia. The resettlement countries had collectively issued resettlement decisions for 172 persons, with 93 persons being accepted (primarily by Sweden, Canada, and the United States). Australia had accepted one person. Thus far, 39 persons had departed Indonesia during 2001, including the one accepted by Australia.

Although the resettlement countries had yet to decide on most cases, the approval rates, particularly for the United States, were much lower than anticipated by the Australian government and UNHCR. The United States had approved only 36 percent of the cases it had decided, with indications that the vast majority of remaining cases would likely be denied. These results prompted complaints by the Australian government that the United States was not adequately participating in the effort to find durable solutions for the refugees.

One reported reason for the low U.S. approval rate is that UNHCR granted refugee status to a significant number of Iraqis on the basis of *sur place* considerations. Under the concept of refugee *sur place*, an individual can become a refugee, regardless of the reasons for leaving his or her homeland, on the basis of events subsequent to departure. While the classic example is a *coup d'etat* in the individual's home country, the triggering event can also be the act of seeking asylum or of publicly speaking out against his or her home country while abroad.

In the case of the Iraqis in Jakarta, the *sur place* factor was the publicity surrounding some of the asylum seekers, including a visit by officials from the Iraqi embassy in Jakarta to two locations where the asylum seekers were being housed. The purpose of the visit, and who invited them, is unclear; some sources believe the Indonesian government brought them there to convince the asylum seekers to return home, while others speculate that the smugglers arranged the visit to manufacture a *sur place* claim. The officials reportedly took photos, and the visit resulted in press reports not only in Jakarta but also in Iraq. A news article in the Iraqi press referred to the asylum seekers as "apostates," since many of them claimed to be members of persecuted religious minorities in Iraq.

Although the United States has previously recognized refugees based on *sur place* grounds, the low approval rate in Jakarta reportedly reflects a discomfort with granting refugee status on such grounds. While the actual *sur place* determination applies only to a small percentage of the refugees, one source told USCR, "It's as if the *sur place* issue has tainted the whole caseload in Jakarta as far as the U.S. is concerned."

Further complicating matters was the complete suspension of the U.S. refugee admissions program following the September 11 terrorist attacks. As of mid-December 2001, the admissions program was just begin-

ning to resume, at a slow pace and with enhanced security measures.

Thus, as one observer noted, a "tug of war" has developed in Jakarta. While the United States may agree with Australia's goal of discouraging unauthorized migration, the U.S. inclination not to "reward" such migrants found to be refugees with resettlement has annoyed the Australian government, which fears that asylum seekers left in Indonesia will eventually find their way to Australia. "More importantly," said an Australian official, "it undermines the signal that those with protection needs will be provided for but that they won't get the migration outcome sought and may be resettled elsewhere."

This young ethnic Hazara man from Afghanistan waits with about 65 other Afghans at a hotel in Tretes, East Java, for UNHCR to interview them. "The process takes so long," he told Refugee Reports, *"but if UNHCR approves us as refugees, we'll wait. We'll go to any country that accepts us and where there is peace." Photo: USCR/J. Mason*

D. OTHER COOPERATION IN THE REGION

The arrangements in Indonesia were the first of what the Australian government hopes will be many in the Asia/Pacific region. Australian officials are in various stages of negotiation with a number of countries, but have only concluded arrangements with Indonesia. Another country being pursued is Cambodia.

UNHCR staff in Phnom Penh, Cambodia's capital, said the agency had not entered into any regional cooperative arrangements with the Cambodian and Australian governments and IOM, and that it has no plans to do so. They said they were aware, however, that the other parties were actively negotiating such an arrangement. In the meantime, as with the parties in Indonesia, a less formal arrangement already seemed to be taking shape.

In July 2001, Cambodian authorities seized an Indonesian-owned logging vessel and arrested more than 240 Afghans, Pakistanis, and at least one Iranian on board as the group left Sihanoukville, southwestern Cambodia, en route to Australia. The would-be migrants had reportedly arrived in Phnom Penh on flights from Karachi in southern Pakistan and entered Cambodia on tourist visas. They were charged with departing Cambodia illegally and were detained pending resolution of their status in Cambodia.[58]

Authorities also arrested twelve Indonesians suspected of being part of a smuggling syndicate. The effort was believed to be the first recent attempt by people-smugglers to use Cambodia as a transit point to Australia.[59] An IOM spokesperson said Cambodia's emergence as a transit point reflected some success in the Australia-Indonesia cooperation.[60]

Australian Ambassador to Cambodia Louise Hand praised the Cambodian government's "prompt response" in helping to effectively "shut down a whole new route" for the smuggling of persons from the Middle East and South Asia into Australia.[61]

Unlike Indonesia, Cambodia is a signatory to the UN Refugee Convention. However, like Indonesia, it has no domestic law on refugees and no process for assessing asylum claims. Therefore, it allows UNHCR to conduct refugee status determinations and permits UNHCR-recognized refugees to remain in

Cambodia indefinitely. According to UNHCR, resettlement to third countries is a "very limited" option for refugees in Cambodia.

UNHCR staff in Cambodia told USCR that the refugee agency has had "full access" to the group arrested in July. In a series of meetings with the entire group, as well as separate sessions for females, UNHCR "advised all members of the group regarding the current protection situation in Cambodia and their option to apply for asylum in Cambodia with the assistance of UNHCR and the Cambodia authorities." Those wishing to return were told that they could apply to IOM for assistance.

As of late August 2001, according to UNHCR, 15 persons—all Afghans—had sought asylum in Cambodia with UNHCR's assistance. UNHCR screened out three cases as "manifestly unfounded," leaving 12 cases open and awaiting decisions.

UNHCR also reported that 177 persons had voluntarily returned, almost all to Pakistan. An additional 24 had volunteered to return, but lacked current visas or other travel documents. The remaining 26 had neither volunteered to return nor applied for asylum.

E. AUSTRALIA: THE PROCESS ON ARRIVAL

Until August 2001, asylum seekers arriving by boat at Australia's territories had been allowed onto the mainland and, though subject to detention, were permitted to apply for asylum. Much of this process remains in place for unauthorized airport arrivals and may still be used for some boat arrivals, subject to the minister's discretion.

Arrival at the Territories

As a DIMA official told USCR in July 2001, very few arrivals "achieve mainland Australia" by boat, although some have done so. The vast majority seeks to arrive at the island territories because of the islands' proximity to Indonesia.

Of the territories, Ashmore Reef has seen the most arrivals, although several factors affect the choice of destination. Christmas Island is larger than Ashmore Reef but represents a more risky journey, as it is farther from Indonesia and difficult to find without sophisticated navigation equipment. In addition, it has only one or two safe landing sites. Ashmore Reef, by contrast, is a much quicker trip and is heavily patrolled by the navy and Coastwatch, which, according to DIMA, makes it more appealing to the asylum seekers. Nevertheless, weather conditions and other factors have made Christmas Island the destination of choice for a significant number of boats.

The Australian navy or Coastwatch interdict most of the boats, calling these operations "rescue at sea," because many of the boats are unseaworthy. Most migrants readily identify themselves as wanting to be picked up, according to DIMA. Upon seeing the arriving boat, officials warn the crew and passengers of Australia's laws against unauthorized entry and the penalties for smuggling, but they also inform them that they will be rescued if they are in distress.

The policy regarding what happens next has changed since the *Tampa's* arrival. Prior to that time, immigration officers or members of the navy, Coastwatch, or police conducted "border interviews," either on land or at sea, to determine whether the migrants had visas to enter Australia. The officers did not ask the asylum seekers any questions, and rarely found any to have valid visas. The officers informed the migrants that they would be placed in detention if they had no visa to enter Australia. "It's pretty mechanical," said a DIMA official, who also noted that no one had ever been deported directly from these territories.

Once on land, officials provided medical attention to arrivals with serious health needs. From Ashmore Reef, authorities ferried the arrivals to the mainland and flew them to detention centers in Western Australia or Woomera. If officials had advance warning of a boat's arrival, the ferries would be waiting; otherwise, the migrants would have to wait one or two days, in which case authorities provided them with tents and other provisions.

From Christmas Island, Australia flew the migrants to various mainland detention centers, depending on where space was available. There was often a delay of a few days, due to the limited number of flights. In those cases, the migrants usually stayed in a school or a gym.

The Asylum Application Process

Under Australia's Migration Act, every non-citizen who is unlawfully on the Australian mainland must be placed in detention. (Prior to September 2001, the law required that persons on the territories be detained as well, which meant bringing them to the mainland; the detention of such "offshore" arrivals is now discretionary.) This includes persons who arrive by air or sea

without authorization and request asylum, as well as persons who arrive legally but overstay their visas (although the latter, if they apply for asylum on their own, are usually granted temporary "bridging visas" and are not detained while their claims are being decided).

While this policy, which has been maintained by successive Australian governments, is sometimes referred to as the "mandatory detention of asylum seekers," the government emphasizes that "mandatory detention is the result of unlawful status, not the seeking of asylum." The government also notes that, since asylum seekers who arrived lawfully are usually not detained, "the majority of asylum seekers are free in the community while they pursue their claims." [62] As of the end of October 2001, according to DIMA, 14 percent of asylum seekers were in detention, while 85 percent resided in the community, with 1 percent unrecorded. (The percentage in detention was down by 6 percent from April 2001, likely due in part to the policy shift beginning in August 2001, whereby new arrivals at the territories are no longer brought to mainland detention facilities).

Prior to the *Tampa*, most persons arriving by boat at one of Australia's territories would be taken to one or more of the mainland detention facilities. Upon arrival, they would initially be placed in "separation detention," unable to contact family, friends, members of the community, or even the other asylum seekers in the center. DIMA would then send a "take force"—comprised of DIMA officers and legal representatives—to the detention facility to conduct the asylum adjudication process. The policy shift of late August 2001 obviated the need for such a large-scale response. However, the adjudication process is still used for unauthorized air arrivals. It may also be used if, in immigration ministers' discretion, any future boat arrivals are brought to mainland detention facilities.

Two or three days after an unauthorized arrival is placed in detention, a DIMA officer gives each person an "entry interview" to determine identity and to decide whether the person triggers Australia's "protection obligations" under the UN Refugee Convention.[63]

Lawyers or other representatives are not present for the entry interviews. According to DIMA, the officer asks three questions of all interviewees: why they left their country, why they came to Australia, and if there are any reasons why they do not want to return home. "It's a low threshold," a DIMA official told USCR. "It's just prima facie, because we're not looking at credibility, just whether the elements are there." DIMA case officers are instructed to "pursue any hesitancy, any ambiguity" concerning whether the individual is willing to return home. Thus, the person need not affirmatively request asylum.

A senior DIMA officer on site makes the final assessment of whether Australia's protection obligations are engaged. If the decision is negative, a more senior DIMA officer in Canberra, the capital, reviews the decision, based on a record of the interview.

Several asylum lawyers told USCR that some entry officers are low-level officials who appear to lack adequate training. DIMA officials denied this, saying the entry officers are not low-level and that all receive extensive training.

Lawyers also said that during the task force process the entry interviews were often held late at night, under hurried conditions. They also noted that, while lawyers were not present, the contents of the interview could be used against the asylum seeker later in the process (e.g., if the applicant failed to mention something that he or she later claimed was important).

If DIMA determines through the entry interview that Australia's protection obligations are not engaged, the individual is subject to removal. However, at any time before deportation, the individual can ask for asylum or request legal representation. In such a case, deportation will not occur, and the individual follows the same process as if the entry interview had revealed Australia's protection obligations, according to DIMA. (Some legal representatives contest this assertion and claim that such persons must still demonstrate a prima facie case for protection.) Similarly, says DIMA, an applicant initially screened out at the entry interview can subsequently provide additional information that might result in him or her being screened in.

If DIMA determines that Australia's protection obligations are engaged, the individual is eligible for an "onshore protection interview," a substantive interview assessing the applicant's claim for refugee protection. Each applicant is assigned to a DIMA protection visa officer as well as to a registered "migration agent" who represents the client. DIMA pays the migration agents through its Immigration Advice and Application Assistance Scheme (IAAAS).

Australia is unique—and many say progressive—among "western" nations in providing government-funded representation to asylum applicants. Migration agents—whether funded by DIMA or not—may be lawyers but usually are not. Under Australian law, any person wishing to provide immigration assistance must be registered. To do so, all persons, including

lawyers, must undertake a course of study in order to be registered. Non-lawyers must also take a written exam, and all registered agents must undergo continued annual professional education.

DIMA awards IAAAS contracts based on a competitive bid process. Several entities have won successive contracts since IAAAS began in 1977. According to DIMA, it gives such repeat business to contractors who demonstrate understanding of the protection assessment process and an ability to respond quickly to high volume workloads.

However, some observers, even some migration agents, say that DIMA has developed too close a relationship with certain law firms, migration agent firms, or community legal centers that rely on DIMA for a significant portion of their business, causing agents to hesitate to criticize DIMA or to "make waves" while representing clients. Some migration agents, they say, lack creativity and aggressiveness in performing their work.

IAAAS services are available to all asylum seekers in immigration detention and to prospective asylum applicants in the community who are experiencing financial hardship and are unable to afford a migration agent.[64] Because DIMA gives priority to detained applicants, those not in detention are often unable to receive such assistance. (Given the lower numbers of new detainees since the *Tampa*, this situation may change.)

The migration agent visits the asylum seeker at the detention center, explains the application process, interviews the person, and completes the protection visa form. The process is often hurried, as Peter Mares, author of *Borderline: Australia's Treatment of Refugees and Asylum Seekers*, explains:

> *A detail missed at this initial stage can prove disastrous, but there is pressure on migration agents to get the job done quickly because applications made from detention must be completed within three working days. The three-day rule is usually enforced strictly with "airplane people" who arrive at major city airports, although, with DIMA's agreement, it has been relaxed at times with mass boat arrivals, when the very numbers render such a rule impractical.*[65]

A few days after the migration agent completes the protection visa form (usually between 14 and 28 days after the applicant's arrival), the DIMA protection officer interviews the applicant. This usually occurs within days of the applicant's detention. The migration agent must attend the interview, but whether he or she has any role in the interview is at the discretion of the protection officer. Often, the migration agent's only chance to confer with the applicant is during a break. In many cases, according to one migration agent, a different agent attends the interview than the one who helped complete the applicant's visa form. "DIMA thought we were getting too close to the applicants, so they began re-arranging schedules," the agent said.

DIMA provides interpreters for the interview. One NGO representative said that DIMA sometimes relies, informally, on these interpreters to make credibility assessments, particularly to confirm applicants' places of origin (for example, whether applicants claiming to be from Afghanistan or Iraq are in fact from Pakistan, Jordan, or elsewhere). DIMA, however, asserts that the interpreters are independent of DIMA and are not used to make assessments of applicant credibility.

Applicants bring their belongings to the onshore protection interview, after which they are moved out of "separation detention." In the main section of the detention center, they have access to telephones and mail, and may receive visits from family and friends.

The reason for separation detention, notes Mares, is DIMA's fear that "if new arrivals mix with longer-term residents, they will be 'coached' on their rights—rights of which they are not otherwise informed." As he explains:

> *Section 193 of the [Migration] Act effectively removes any obligation on an officer of the Commonwealth to inform a detainee of his or her legal rights, if that detainee has not successfully cleared immigration. Boat people seeking asylum fall into this category and since late 1994 it has become routine departmental practice not to advise them of their right to seek a lawyer or of their right to apply for refugee status.*[66]

As to coaching, Mares adds, "DIMA also fears that they may be 'coached' on how to handle the interview section of the asylum process… DIMA's preoccupation with 'coaching' suggests that there is little official confidence in Australia's much-vaunted refugee determination procedures."[67]

Thus, asylum applicants screened out at the entry interview are kept in separation detention and may

ultimately be deported, with their relatives in Australia never having known they were in the country. This causes tremendous anxiety among many asylum seekers and their families, as the families are often aware that their relatives have left Indonesia by boat and fear they are missing at sea.

According to DIMA, as of July 2001, each task force sent to a detention center—the entry officers, migration agents, and protection visa officers—were taking from five to seven days to complete about 100 asylum applications.

Most applicants who enter Australia lawfully receive a bridging visa upon filing an asylum application. (In addition, persons not in detention must pay an asylum application fee of $30 Australian, or about $15 U.S.). In most cases, the bridging visa allows the applicant to remain lawfully in the country until the application is finalized. Persons who apply for asylum within 45 days of their arrival in Australia may receive work authorization.

For eligible applicants not in detention, financial assistance is available to those unable to meet their most basic needs for food, accommodation and health care through the Asylum Seeker Assistance Scheme (ASA). DIMA administers ASA through contractual arrangements with the Australian Red Cross. Eligibility requirements include: having filed a valid asylum application at least six months previously; not being in detention; holding a bridging visa; not being eligible for either Australian or overseas government income support; and not being a spouse or fiancé of a permanent resident.[68]

The asylum decision takes from two weeks to several months. At the time of USCR's site visit, DIMA said the average processing time was 66 days (9-10 weeks) from application to primary decision. DIMA noted that 80 percent of asylum seekers in detention who applied for asylum between January and March 2001 received their primary decision within 18 weeks. Where applications are "straightforward," they said, decisions can be made within 2-3 weeks.

As of June 2001, less than 100 asylum seekers in detention had been awaiting their decision for more than 14 weeks, according to DIMA. Where delays occur, DIMA said, they are usually caused by the need for overseas police clearances.

If the asylum decision is positive, the applicant is granted a temporary protection visa—a visa introduced in October 1999—prior to which all successful applicants were granted permanent visas.

If the asylum decision is negative, the applicant may appeal to the Refugee Review Tribunal (or in some cases the Administrative Appeals Tribunal, depending on the basis for refusal). DIMA pays migration agents to complete the appeals forms. Although the RRT may approve the appeal "on the papers," it usually holds a hearing.

While a small number of hearings are held in person, most are held via video conference. The migration agent is not required to attend the hearing, but most do so. The hearing is "de novo," meaning that the RRT conducts a fresh hearing on the merits of the case. It is non-adversarial; there is no opposing attorney. The applicant may request the RRT to call witnesses, but only the RRT member can question them. Where a migration agent does attend, the RRT often invites the agent to address the tribunal at some point. A decision to grant asylum may be rendered orally at the conclusion of the hearing; otherwise, the decision usually takes two to four weeks.

If DIMA denies asylum and the RRT upholds the rejection, the applicant must pay a fee of $1,000 Australian (about U.S. $500). Applicants rejected by the RRT who have no other legal reason to be in Australia have 28 days to depart voluntarily. If they stay beyond this 28-day period, they may be removed from Australia.[69]

After an RRT rejection, the applicant has further avenues of relief. Such requests for relief do not in themselves prevent removal, but persons are not generally removed while the request is pending. The applicant can make a request to the immigration minister on humanitarian grounds or can seek judicial review, on very limited grounds, in the Federal Magistrates Court, the Federal Court, or the High Court.

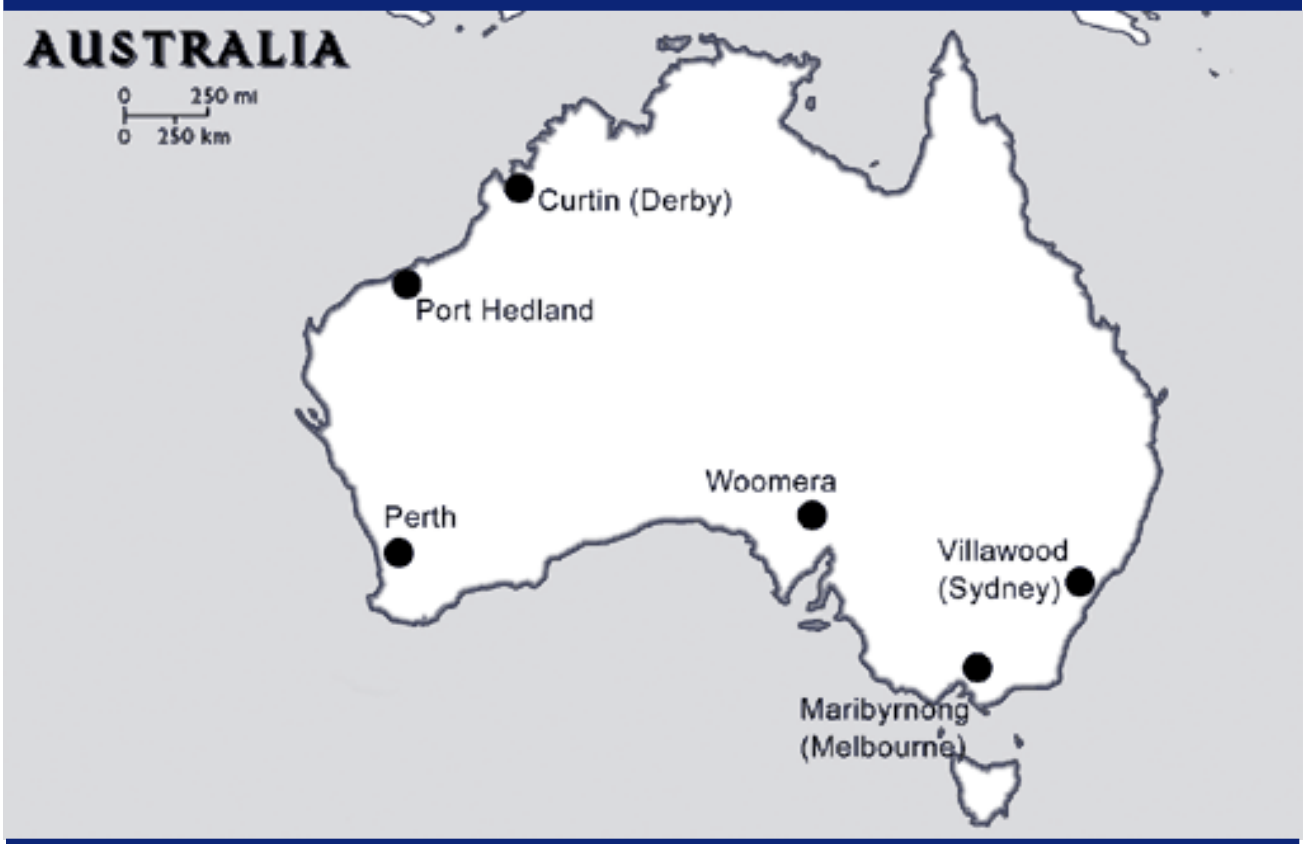
Likewise, the immigration minister can seek judicial review of a positive RRT decision, on limited grounds.

Persons granted asylum are eligible for a range of services, as are refugees admitted from overseas, through the Integrated Humanitarian Settlement Strategy (IHSS) model. Services include: information and orientation; accommodation support (asylees are helped in finding long-term accommodation and, if required, are provided interim accommodation); early health assessment and intervention; and social support.[70]

F. Detention

Prior to the August 2001 policy shift, detention generated the most media attention of any asylum issue. The media and other investigative bodies scrutinized and criticized the locations and conditions of detention

IMMIGRATION PROCESSING/DETENTION CENTERS



centers, and the frequent riots and breakouts the centers generated. The government firmly maintains that its detention practices are humane, appropriate, and effective. Others disagree. As Chris Sidoti, Australia's former human rights commissioner, notes:

> *Since Europeans arrived in Australia in 1788, they have had two obsessions. The first obsession is with locking people up. All the Australian colonies except South Australia were founded as penal colonies. Perhaps that explains the origins of this obsession… The second obsession is with the hordes from Asia, the yellow peril. At least since the 1860s, Australians have feared that people from Asia would come here in very large and uncontrollable numbers… Locked in camps far removed from population centers, the detainees have no individual identity in the public mind. They are part of the hordes from Asia. No more than that. But they are not nameless… They are men, women and children, hundreds of children, the human sacrifices to our twin obsessions.*[71]

As of early October 2001, more than 2,800 asylum seekers, including 500 children, were being held in Australia's immigration detention centers.[72] While the numbers may not seem large compared to the immigration detainee population in the United States, it should be noted that Australia only had about 6,500 pending asylum cases at the end of 2000, compared with 385,000 in the United States.

Locations

Non-citizens without permission to be in Australia are detained in one of six mainland immigration detention facilities maintained by DIMA and, since 1997, operated by Australasian Correctional Management (ACM), a private company. ACM is a wholly owned subsidiary of the U.S.-based Wackenhut Corrections Corporation. The six detention centers are:

1) Villawood Immigration Detention Center (IDC) in Sydney
2) Maribyrnong IDC in Melbourne
3) Perth IDC, in Perth, Western Australia
4) The Immigration Reception and Processing Cen-

ter (IRPC) in Port Hedland, Western Australia
5) Curtin IRPC near Derby, Western Australia
6) Woomera IRPC in Woomera, South Australia

The vast majority of unauthorized boat arrivals have been housed at Woomera, Port Hedland, or Curtin. These facilities have drawn the most attention and criticism, particularly for their remote locations. As the *Times* of London has noted, "While all the detention centers have recently caused outrage because of the harsh conditions in which detainees are held, the outback centers—which, with their razor wire, guards, and isolation cells (for troublesome inmates), have been likened to concentration camps by inmates and human rights visitors—have come in for the most bitter condemnation."[73]

Woomera, the largest and probably most "infamous" of the detention centers, is in the remote desert of South Australia. During the 1950s and 1960s, the town of Woomera was a rocket-launching and testing site that provided employment for thousands of people. Later, a nearby satellite tracking station sustained the town, with U.S. involvement.

By the late 1990s, the town, now with a population of less than 300, was left with virtually nothing and needed a new industry. As Peter Mares explains, "When there was a sharp increase in arrivals of boat people on Australia's northern coasts, it appeared to offer a nice fit with the town's under-utilized facilities and its isolation."[74] The Woomera IRPC was commissioned in November 1999. Journalist Terry Plane describes the area and the center:

> *The road to Woomera, in outback South Australia, rises from low salt lake country to the plateau of the Wirrappa Hills. A traveler standing in these hills at night will see, to the north, a bright glow on the horizon. Here, the lower sky is turned into a harsh dawn by spotlights that illuminate the grounds and high-security barbed wire fencing of the detention center that has become a hellish kind of "home" to thousands of asylum seekers. Woomera, a former air force barracks set in the middle of the Australian desert, is for the thousands of refugees fleeing murderous regimes across the world, their first introduction to what they had thought would be a new life of security and hope in Australia.*[75]

One NGO representative, who described Woomera as a "galvanized cage in the middle of the desert," told USCR, "Woomera is basically not redeemable as a facility, but [the government] has poured millions of dollars into it, so they're not going to close it."

The first remote immigration detention center was Port Hedland, established in 1991. Although Port Hedland is a busy port on Australia's northwest coast, it is generally isolated from the rest of Australia. One NGO official said of the town, "It's a frontier town with an industrial landscape." The detention center, however, is in the middle of a residential area, having been a former transit center for people working in the mines. This, and its proximity to schools, has caused unrest among local residents, who have expressed concern over the number of riots at the center and the risk of breakouts. In June 2001, Port Hedland residents told Ruddock that they wanted the center moved.

The Curtin detention center is also on Australia's northwest coast. Established in 1999 on the Curtin air force base, it is about 25 miles (40 km) outside the town of Derby. The journey to Curtin from most places in Australia requires connecting flights and a two-hour drive. As with the detainees at Woomera and Port Hedland, detainees at Curtin have "complained about being cut off from the rest of Australia and the rest of the world,"[76] not only because of the center's location but because of its conditions, including the lack of access to the media and, at certain times, no access to telephones or ability to send mail. ACM staff open all incoming mail.

DIMA maintains that the remoteness of these facilities is not meant to be a deterrent to unauthorized arrivals. These locations, they say, were selected because time was of the essence and facilities were available. Yet, it appears no accident that the video spots used in the overseas information campaign emphasized the likelihood of detention in the middle of the desert, where snakes are a real threat.

By contrast, Maribyrnong and Villawood, established in 1966 and 1976 respectively, are located in Australia's two largest cities, both on the east coast. These centers are rarely used for boat arrivals, but house other asylum seekers, as well as undocumented workers and others subject to deportation. The detainees there have good access to migration agents, given their urban location. Although both centers, particularly Villawood, have experienced breakouts and protests, the security at these centers has traditionally not been as high as at the remote facilities.

The detention center at Perth, established in 1981, is rarely used for asylum seekers, unless one is moved there pending a federal appeal or for other purposes.

Prior to August 2001, DIMA had announced plans for the construction of three new emergency detention centers to cope with the "massive surge of boat people" in recent weeks. Defense sites at Darwin (in northwest Australia), Singleton (in New South Wales), and Port Augusta (in South Australia) would, according to Ruddock, almost double Australia's immigration detention capacity. The plan, however, sparked protests from some of the communities close to those facilities.[77]

The plan was put on hold after the August 2001 policy change, since few if any boat arrivals were henceforth expected to reach the Australian mainland. The government shifted its attention to building a detention facility on Christmas Island, where asylum seekers can reside pending their removal to other Pacific locations.

Conditions

According to DIMA, under its service agreement with ACM, the government and its contractor seek to achieve "quality outcomes in the standard of service delivery and a high level of accountability for the delivery of these services."[78] However, despite this worthwhile goal—and the existence of detailed immigration detention standards—the result has been quite different, at least in the eyes of the many critics.

In one of many reports issued on the detention centers, a parliamentary committee composed of both government and opposition members found in June 2001 that, according to one press report, "the government's policy of detention of refugees is a disgrace verging on the inhuman." The report "found some asylum seekers were cooped up in filthy cells with overflowing toilets. It found asylum seekers spending months in detention centers with nothing to do, wandering aimlessly through the camps."[79]

The committee called for a 14-week cap on processing the claims of asylum seekers before their release into the community.

Howard and Ruddock immediately criticized the report and rejected its key findings and recommendations. Ruddock said the committee members had spent too much time traveling to Geneva and developed countries to understand the realities of detention centers and refugee camps.[80]

Yet, this committee was hardly the first to make such charges. As Peter Mares notes, one visitor to Curtin, a Muslim community leader invited by DIMA to defuse tensions there, said conditions at the facility were "subhuman." He noted, "People complained about finding snakes in the camp, about the shower facilities being inadequate, about queuing for hours in the hot sun to wait for meals."[81]

Other frequent complaints by detainees concern overcrowding, inadequate medical care, abuse by guards, extreme heat or cold, lack of information on the status of their cases and, as previously mentioned, isolation from the outside world. Among the most serious concerns, however, are charges of sexual abuse at some of the facilities. In November 2000, medical officers claimed that sexual abuse of children at Woomera was "rampant."[82] In response, Ruddock announced an inquiry into child abuse allegations. In his report, Philip Flood, former head of the Department of Foreign Affairs, concluded that in all but one case "allegations or incidents involving a reasonable suspicion of child abuse were handled in accordance with relevant legislation and departmental procedures."

In addition to breakouts, detainees have used a variety of protest methods to demonstrate dissatisfaction at the centers, including a high profile hunger strike at Curtin, in February 2000, during which a group of male detainees sewed their lips together.[83]

Some independent observers have noted an improvement in conditions since ACM took over the running of the centers from Australian Protective Services—a government agency—in 1997. In a report published in early 2000, Australia's Human Rights and Equal Opportunity Commission said it was impressed with the efforts of DIMA and ACM to improve a variety of detention conditions, including physical conditions, the opportunities for activities, and support services. The Commonwealth Ombudsman, in his 1998-1999 annual report, said the transfer of management has improved the standard of care in several areas.[84]

One NGO representative, disagreeing with this assessment, told USCR that little had improved since ACM took over, noting in particular that cost-cutting measures threatened to prevent improvements in conditions.

As a result of the ongoing controversy, and particularly following the June 2001 parliamentary report, a number of observers—human rights and refugee advocates as well as politicians—have called for a judicial inquiry into the detention system. Such an inquiry would, among other things, have the power to subpoena documents and witnesses. However, the government would need to initiate or approve any such inquiry, and Ruddock has thus far rejected the requests.

In late October 2001, less than two weeks before the national election, the Inspector of Custodial Services in Western Australia, Richard Harding, said the immigration detention centers were unacceptably overcrowded, posed hygiene and health risks, and had "disgracefully" inadequate medical and dental services. He said he found these conditions when he visited Curtin in June. Charging that it was no coincidence that riots occurred in a system that lacked accountability, he added, "We do not have riots in our detention centers because we have a riotous group of refugees; we have them because we run appalling systems."[85]

Harding called for an independent inspectorate to be set up to improve conditions. Ruddock, in response, admitted that the centers could be overcrowded but denied that conditions were "disgraceful." He also said the government had reduced the overcrowding by not allowing people to reach the Australian mainland.[86]

Just three days later, the Commonwealth Ombudsman, Ron McLeod, released his annual report to parliament on detention. Noting evidence of self-harm by detainees at every detention center, and little distinction between the way woman, children, and single men are treated, McLeod said, "Immigration detainees have lesser rights than convicted criminals held in jails and… [are] held in an environment that appeared to have a weaker accountability framework."[87]

Access

Virtually no journalists are allowed into Australia's detention centers, and many of the persons who are permitted access—including attorneys, doctors, and service providers—are, according to Peter Mares, "reluctant to speak to the media for fear that it may jeopardize their future access to the detainees or their future contacts with either DIMA or ACM."[88]

DIMA, however, maintains that the level of access to the centers is quite high, as numerous official bodies have unrestricted access. Such agencies include the Immigration Detention Advisory Group (comprised of individuals selected by DIMA for their "individual expertise and commitment to immigration and humanitarian issues") and other special groups and commissions. UNHCR, said DIMA, has access on request and has visited detention centers on a number of occasions. UNHCR confirmed that they have a standing agreement with DIMA that they can visit the centers at any time.

DIMA denied USCR's request to visit one or more of the centers. The written response quoted from Australia's policy on access to detention centers:

> *The Department receives many requests for access to detention facilities, including many from media organizations. In providing access to detention facilities, DIMA has to consider various important factors. These factors include DIMA's obligations to protect the privacy and dignity of detainees, as well as a cognizance of serious protection elements, such as* sur place *considerations. While anxious to ensure appropriate external scrutiny of detention operations, this must be balanced with respecting the rights of detainees living within the facilities. Of course, DIMA facilitates visits to detention facilities by Commonwealth and State parliamentarians, and other bodies with statutory authority to monitor and report on detention activities.*

DIMA officials told USCR that detainees had recently complained that too many outside visitors violated their privacy.

DIMA also noted the consultative process on detention, known as the Inter-governmental/Non-government Organizations Forum (IGNGO). Established in 1993, the forum includes UNHCR, the Refugee Council of Australia, Amnesty International, the Australian Council of Churches, the Red Cross, and others. IGNGO provides a formal mechanism for those organizations to raise issues of concern with senior DIMA officials. Certain members of these organizations have also visited detention facilities. "So, even at that level, it's highly scrutinized," said a DIMA officer. "Add to that the parliamentary process, the ombudsman, all the reports, etc."

Some of the organizations with official access to the detention centers told USCR that in practice their access was quite limited, particularly to the remote centers, given the high travel costs. One NGO with a major focus on detention said its staff had never been to Woomera or Curtin because "it's just too expensive." In addition, they said, the procedures and logistics mean that rarely, if ever, could an unannounced visit occur.

Another NGO representative said the detention centers "have been assessed by a lot of groups, but never properly. The assessments are only done at a particular point of time, not over the long term."

Early Release

In very limited cases, detained asylum seekers may be released prior to being granted asylum. Conditions for such early release include old age, ill health, or having suffered torture or other trauma.[89] The immigration minister personally decides on such requests, and his decision is not subject to appeal. The vast majority of detained asylum seekers remain in detention for the length of the asylum adjudication process.

Although Australian NGOs have proposed alternative detention models, DIMA has thus far rejected those proposals. DIMA staff told USCR that they had carefully examined U.S. practices for the "parole" of detained asylum seekers and had found them unworkable in Australia. "First, our decisions are quick," a DIMA official said. "Second, [an early release program] would involve a type of full review, with right of appeal. Since more resources would be put into deciding who gets released, we would actually increase the time others spend in detention, including real refugees."

The official also said that large numbers of asylum seekers in the United States abscond upon release from detention. DIMA noted that a parliamentary committee had examined alternatives to detention and had expressed doubt that any alternative could ensure that unauthorized arrivals would not abscond during the processing of their applications. DIMA staff also said they doubted the ability of community groups to adequately provide services under the proposed alternative models.

In May 2001, however, DIMA launched a "trial of alternative detention arrangements" for women and children at Woomera. The test was to involve a maximum of 25 volunteers who would be permitted to live in houses in Woomera Township.[90]

The women and children were required to have a family member (usually the husband/father) remaining in the detention center. They would also need to undergo health assessments and be determined to pose "no character or management risks." Participants in the trial would be under 24-hour supervision by ACM officers, who would accompany them for any movement outside the perimeter of the house and yard. Visits to the main detention center would be arranged and groceries supplied.[91]

The trial did not get underway until early August, when five women and five children moved out of the detention center into a cluster of four three-bedroom houses leased from the defense department.[92]

Some refugee and human rights groups sharply criticized the trial program for failing to respect the principle of family unity. The Refugee Council of Australia said it gave children two unacceptable options: either to remain in the detention center or be separated from their fathers. Ruddock conceded that there had been a lack of interest in the trial because families did not want to be separated.[93]

G. Temporary Protection Visas

Although DIMA officials often deny that Australia's detention policies and practices are intended as a deterrent to unauthorized arrival, they freely admit that the temporary protection visa is intended as such. Indeed, prior to the August 2001 policy shift, the temporary protection visa was the centerpiece of the deterrent strategy. Even under the new policy, it remains a key component of the strategy.

Australia introduced the temporary protection visa in October 1999 as part of a reform of its asylum system. The reforms divided protection (asylum) visas into two kinds, permanent and temporary. Asylum applicants who enter Australia legally and are found to meet the "well founded fear of persecution" standard are eligible for permanent protection visas. Asylum seekers who arrive in an unauthorized manner, whether by air or sea, can, if found to be refugees, be granted only temporary protection visas (TPV).

When initiated in 1999, the TPV was valid for three years. A TPV holder could be granted a permanent visa after 30 months, or could be granted successive three-year visas. Legislation enacted in September 2001 amended the TPV system. Under the new law, which is discussed in detail below, persons who enter Australia unlawfully via specified parts of its territories, such as Christmas Island, are not eligible to apply for a visa of any kind unless the immigration minister exercises his discretion to allow such applications—in which case the individuals may receive three-year temporary visas. They will never be eligible for permanent visas. By contrast, persons who apply from a "second safe country" (one other than the country of first asylum) for visas under Australia's offshore refugee and humanitarian program may be granted temporary visas but will not be eligible for permanent visas for four and a half years. Only persons applying from countries of first asylum will be immediately eligible for permanent visas.

TPV holders are eligible to work and to receive some, but not all, of the medical and other services provided to permanent visa holders. They are not eligible for English language training.

Persons granted three-year visas prior to the enactment of the September 2001 legislation are still eligible to apply for permanent visas. However, such persons who apply after September 27, 2001 must satisfy new statutory criteria, including that they must not, since leaving their home countries, have resided for at least seven continuous days in a country in which they could have sought and obtained effective protection, either through the government of that country or through a UNHCR office in that country. The minister may waive this requirement in the public interest. According to one observer, of the 6,600 TPV holders in Australia as of the cut-off date, more than 3,000 had not applied in time and would be left in "legal limbo."[94]

Many asylum lawyers and advocates interviewed by USCR expressed deep concerns over the restrictions imposed on temporary visa holders. Chief among these is the restriction on family reunion. TPV holders may not apply for their families to join them unless and until they are granted permanent visas. Many persons granted temporary visas under the September 2001 legislation will never be eligible for permanent visas or family reunion, unless the immigration minister waives the new criteria.

In addition, TPV holders cannot leave Australia without abandoning their visas (in which case they would have to apply anew for protection visas). This prevents even short visits with families abroad. UNHCR has noted that this restriction on re-entry violates the UN Refugee Convention's requirement on the granting of travel documents.

According to numerous refugee advocates, lawyers, and service providers interviewed by USCR, the lack of family reunion has created tremendous stress and anxiety for the temporary visa holders, leading in many cases to clinical depression and preventing the refugees' adjustment to life in Australia. As one mental health provider noted, "This is probably the only substantive deterrent, because it's crushing people."

Another provider noted that many TPV holders experience renewed anxiety when they once again have to recount the stories of their persecution.

Amid numerous complaints about the temporary visa regime, the Australian government has remained firm in its commitment to maintaining, and even strengthening, the system. Noted one observer, "The temporary protection regime here is all about smuggling. So the government won't develop alternative protection statuses, because an outcome that lets more people in, through whatever status, is the outcome the smugglers seek, and which the government wants to discourage."

H. The Impact on Resettlement

Australia's response to the unauthorized arrival of asylum seekers has had an unfortunate impact on the resettlement of refugees from overseas. The problem results from Australia's combined ceiling for the "offshore" (resettlement) and "onshore" (asylum) programs.

The most direct impact came with the temporary suspension of overseas admissions in FY 1999-2000 to allow for an increase in grants of asylum. For the first time, the government's rhetoric of "good" vs. "bad" refugees (i.e., those who wait in line to be admitted to Australia vs. the "queue jumpers" who break Australia's laws to get there) translated into action with a direct impact on the offshore program. As Mares observes:

> *The notion of a "queue jumper" is largely something manufactured by government. Mr. Ruddock has given new impetus to the term by collapsing Australia's onshore and offshore refugee programs into one category. This means that every "boat person" who is granted refugee status in Australia denies a visa to a refugee applying from offshore, from one of those overworked posts such as Islamabad or Nairobi; each one of them denies a visa to a refugee waiting patiently, in the minister's mind at least, in some squalid and crowded camp.*[95]

Many refugee advocates say this link—which did not exist under Ruddock's predecessor—has created predictable tensions within ethnic communities, pitting those whose members traditionally come to Australia through the offshore program, such as Africans, against those who often come as boat arrivals, such as Iraqis. Some say Ruddock has exploited these tensions to garner support among the "offshore" communities for his policies against unauthorized arrivals.

Ruddock has repeatedly noted the amount of money that Australia and other industrialized nations spend on asylum adjudication processes, comparing it with the much smaller sums spent by those countries on assistance to refugees overseas. Yet, his commitment to increasing such assistance, or to raising the offshore ceiling, should the number of unauthorized arrivals decrease, remains vague. "This is a finance-driven program," one NGO worker told USCR. "The bean counters have said you have 12,000 spaces [for the entire humanitarian admissions program] and X amount of money, and that's it."

A service provider predicted that "DIMA won't raise the 12,000 limit while the smuggling is happening, because they say that if we go up to 20,000, that's a message to the smugglers that there's another 8,000 places."

Another observer explained it this way: "Ruddock doesn't like the decision about Australia's refugee places being determined by someone else—the smugglers. [Government officials] have 12,000 places and have to choose among millions, so they want them to go to the ones who are in the greatest need. We know it doesn't necessarily work that way in the refugee camps, but this is what's driving them."

I. Rhetoric

"Sink all the boats" is a phrase that rolls off the tongues of many Australians when discussing Australia's response to unauthorized arrivals. Even some politicians have used the slogan. The phrase does not necessarily mean that those who use it advocate for the drowning of innocent persons; rather, it is primarily an emotional reaction that demonstrates the level of rhetoric surrounding the asylum debate.

Most persons interviewed by USCR during the site visit, regardless of their perspectives on Ruddock's policies, his motives, or his sincerity, said the government had not helped to tone down the rhetoric, and indeed has been responsible for much of it. As one NGO representative said, "There's a real exploitation of xenophobia by those in public office." Another noted, "Despite their beliefs, the government's rhetoric is terrible, and it undermines the integrity of their argument. They get in UN circles and aren't taken seriously at all."

According to one lawyer, the rhetoric began in earnest in the fall of 1999, when the government was pushing its temporary protection visa legislation through parliament and when larger numbers of boats started arriving. Now, she added, "the issue of refugees is in the papers every day." For the most part, the domestic media coverage represented a success for the Howard government, as it made the refugee question a front-burner political issue.

Another advocate said that refugees are considered a useful political tool, especially given the longstanding "fear of the outsider" within the Australian psyche. Many observers explained that Pauline Hansen, the leader of Australia's controversial One Nation Party, which promotes severe restrictions on immigration and asylum, came onto the political scene at a time of economic downturn and that she exploited community fears. Hansen's support showed that a segment of the population, as much as 10 to 15 percent, shared her views. In response, the political parties have jockeyed for the votes of that segment, at times even catering to One Nation sentiments. "They used the boat arrivals to get people riled up," said one refugee advocate. "If the government can then ride in on the white charger to protect the public, it gets the public's gratitude."

IV. EVENTS OF AUGUST 2001 AND THE SUBSEQUENT POLICY SHIFT

A. The Christmas Island Standoff

At the time of the USCR visit in July 2001, Australian officials said it was still too soon to assess the impact of the Indonesia-based regional cooperation arrangements, which had been operational for less than 18 months. Some officials, however, said anecdotal evidence—including indications that people-smugglers were moving their operations elsewhere—suggested that the arrangements were beginning to reduce the number of boat arrivals.

The actual number of unauthorized arrivals by boat, however, fell by only 34 from 4,175 in fiscal year 1999-2000 to 4,141 in the year 2000-2001, which ended June 30.[96]

In August 2001, however, Australia experienced a sudden upsurge of arrivals, with more than 1,500 persons landing on Australia's island territories within 11 days.[97] One boat carrying about 360 persons, which landed on Christmas Island on August 22, reportedly represented the "biggest boatload of asylum seekers ever to reach Australia."[98]

A spokesperson for Ruddock said that even more migrants were preparing to leave Indonesia and that Australia was rushing to put contingency plans in place, such as increasing its detention capacity by readying unused military bases across the country.[99] In response, the opposition party's immigration spokesperson, Con Sciacca, said the Australian government had "lost control over people smuggling" and that "we need to have a fresh approach."[100]

On August 27, the government may have demonstrated such a fresh approach. For the first time, Australia refused entry to a ship carrying unauthorized migrants—in this case a Norwegian freighter, the

Tampa, carrying some 430 persons, mostly claiming to be Afghans. The freighter, en route to Singapore, had rescued the migrants from a sinking Indonesian ferry the previous day. The migrants demanded that the captain take them to Christmas Island.[101] Australia, however, refused to allow the freighter to dock, saying that under international law the migrants should have been taken to the nearest port of call—a statement disputed by some legal scholars.[102]

Following complaints by the freighter's owners that there were not enough provisions on board to allow the migrants to get to the nearest Indonesian port, Howard said that his government would provide food, water, and medical supplies, but that the governments of Norway and Indonesia would then need to resolve the question of responsibility for the migrants.[103]

The Norwegian foreign affairs ministry said Australia had a moral obligation to allow the ship to dock.[104] A UNHCR spokesperson warned that Australia's actions could lead ships to ignore distress calls rather than rescue people.[105]

Indonesia at one point said it would allow entry to the *Tampa*, but then reversed position, even saying that it would take military action to prevent the boat from arriving.[106] New Zealand, however, said that it would consider examining the passengers' asylum claims, as long as other countries would do the same.[107]

While the *Tampa* remained in international waters 30 miles north of Christmas Island, UNHCR urged Australia, Indonesia and Norway to "work this out as soon as possible." The agency also said Australia should "act according to humanitarian principles."[108]

Howard maintained his tough stance despite a flood of international criticism, saying he hoped to send a clear message to unauthorized migrants. Australia intensified that message on August 29, when the *Tampa's* captain took the boat into Australian waters and Australian troops prevented the ship from reaching land.[109]

Two days later, while scrambling for a solution to the stalemate, Australian Foreign Minister Alexander Downer asked the United Nations, currently administering the tiny territory of East Timor in preparation for independence, to allow the asylum seekers to land in East Timor to have their refugee claims processed there. Downer later retracted the request.[110]

On September 1, as the *Tampa*'s passengers prepared to spend their sixth night aboard the ship, a break in the stalemate occurred. New Zealand and the tiny Pacific island nation of Nauru offered to house the asylum seekers while their refugee claims were being processed, and Howard agreed. Under the plan, New Zealand would take 150 of the asylum seekers—mainly women, children, and families—from the *Tampa*. The remainder, mostly men, would go to Nauru.[111] Just 25 miles (41 km) south of the equator, Nauru has a population of less than 12,000 and a land mass of 12.6 square miles.[112]

New Zealand would assess the asylum claims of those brought there, and would permanently accept persons found to be refugees. The government of Nauru asked UNHCR to screen the asylum seekers taken there, and the refugee agency said it would consider the request. Australia said it would meet all of Nauru's costs for transportation and housing. Howard stressed that the asylum seekers would not be allowed to land on Australian territory.[113]

The Australian government subsequently agreed to provide Nauru with an aid package worth $20 million Australian (about U.S. $10 million) to help improve power, communications, and medical services on the island, in return for allowing the asylum seekers to enter.[114]

On September 3, the Australia navy transferred the *Tampa's* passengers to one of its troopships, the *Manoora*, to take the migrants to Papua New Guinea and then immediately transfer them to New Zealand and Nauru.[115] Papua New Guinea's opposition party warned that the migrants might claim asylum there. "If Howard fears allowing Australia's territory to be used [as a processing point], why should we allow ours?" said an opposition spokesperson.[116]

The journey to the Papua New Guinea capital of Port Moresby was expected to take about a week. While on board, IOM recorded the biographical data of the asylum seekers.[117] However, all parties were bracing for a possible change in plans, as an Australian court was considering a challenge by civil liberties groups to the legality of the government's refusal to allow entry to the asylum seekers. The court had previously issued, then lifted, a temporary injunction preventing the removal of the *Tampa's* passengers from Australian territory.[118]

Reacting to the developments, a UNHCR spokesperson said, "UNHCR would have preferred another solution to this. Our option would have been first to put them ashore on Christmas Island, at least temporarily." He added that Australia's actions could send a negative message to impoverished nations closer to conflict zones, which often take in hundreds of thousands of refugees.[119]

Justifying its actions, the Australian government said there were now an estimated 5,000 people in the Indonesian archipelago preparing to enter Australia

illegally.[120] Howard said it was up to the United Nations to take a tougher line on nations such as Indonesia and Malaysia, which allowed people-smugglers to operate in their countries.[121] On September 5, three Australian ministers arrived in Jakarta for renewed talks with the parties to the regional cooperation arrangements.[122] The Indonesia government, however, balked at suggestions that it was responsible for the recent saga.[123]

Because Australia viewed Indonesia as uncooperative, the Australian navy established a "naval picket line" between Indonesia and the Australian territories, sending to the region four missile frigates and the amphibious assault ship *Manoora* (which would later be used to transport migrants). Patrol boats and an "aerial umbrella," including maritime surveillance aircraft, supported the naval barrier. The operation continued at this level for at least the first few weeks following the *Tampa* incident.[124]

On September 7, as the *Manoora* continued toward Papua New Guinea, Australian Coastwatch officials spotted a wooden boat, the *Aceng*, on its way to Ashmore Reef. An Australian navy frigate warned the Indonesian vessel that its passengers would face detention (and the crew 20 years in jail) if it did not turn around.[125] When it failed to do so, navy personnel boarded the *Aceng* in international waters. Australian officials said this was allowed under international law because the boat was displaying no flags or port-of-registry indications and Australia therefore considered it stateless.[126] Earlier, Indonesian authorities had rejected Australian requests to board the vessel while it was still in Indonesian waters.[127]

The *Aceng* subsequently turned around. However, it later reversed course and entered Australia's "contiguous zone," after which a "cat and mouse game" ensued.[128] Eventually, the *Manoora* arrived at the site of the *Aceng*. The Australian naval crew transferred the *Aceng's* passengers—more than 200 persons, most of whom said they were Iraqi—onto the *Manoora*. In joining the roughly 400 *Tampa* passengers already aboard the *Manoora*, the new arrivals brought the total number of migrants (most of whom were believed to be asylum seekers) on the *Manoora* to more than 600.[129]

On September 11, Australia's Federal Court ruled that the government had illegally detained the original group (from the *Tampa*) and that they must be returned to Australia. The government filed an appeal the next day. In the meantime, it had ordered the *Manoora* to proceed directly to Nauru, bypassing Papua New Guinea. Australia's foreign minister said this step would be a less complicated and more timely solution.[130]

On September 17, the day the *Manoora* arrived at Nauru, Australia's Full Federal Court overturned the previous decision and ruled that the government acted legally when it refused entry to the *Tampa* passengers. On September 19, some 100 of the asylum seekers on the *Manoora*, mostly Afghans, disembarked onto Nauru, setting foot on dry land for the first time in nearly a month.[131]

Residents of Nauru greeted the arrivals with a traditional welcome of songs and dances, handing flowers to each asylum seeker.[132] The Afghans held a sign thanking Nauru "for giving protection and shelter for Afghan refugees."[133]

A bus took the asylum seekers to a makeshift refugee camp built by Australian troops in Nauru's barren interior.[134] One reporter said the camp, known as Topside, is "surrounded by a lunar landscape of depleted phosphate mines." There, UNHCR began screening the applicants on September 21, a process that would likely take at least several weeks (and had not been completed by year's end).[135]

Some 120 asylum seekers left the *Manoora* the following day. The plan was to unload similar numbers each day, as facilities on Nauru became available.[136] The plan, however, did not go smoothly. On September 21, more than 200 Iraqi and Palestinian asylum seekers who had been aboard the *Aceng* refused to disembark at Nauru, insisting they be taken to Australia.[137] The standoff lasted nearly two weeks, until October 4, when Australian authorities offloaded the last of the *Manoora's* passengers.[138] Earlier that week, Australian soldiers had forcibly removed 12 Iraqis, despite initial statements by Nauruan officials that they would accept only voluntary arrivals.[139]

The standoff sparked widespread debate. One Australian politician said, "One way, I guess, of convincing them would be to stop feeding them. If they want the food, it's on the beach. It's as simple as that."[140] Prior to the forcible removal of the 12 Iraqis, a UNHCR spokesperson said that "any use of involuntary disembarkation would be regarded as a serious incident."[141] Ruddock said the government had no choice but to resort to force, since the *Manoora* was needed elsewhere. Ruddock said the troops, while wearing full battle dress, had not been armed and that no "undue pressure" had been used. However, the first six Iraqis to be removed said they had been fooled into believing they were to meet with Australian negotiators. They immediately launched a sit-in on the bus transporting them to the refugee camp, and the entire

operation was suspended at the insistence of the Nauru government. It was resolved only after further negotiation.[142]

In mid-standoff, in late September, the Australian government chartered planes and flew 141 Afghans from Nauru to New Zealand.[143] The authorities housed them in a converted World War II army barracks, known as Mangere. New Zealand agreed to screen them for refugee status and to count those granted asylum toward New Zealand's annual refugee resettlement "quota" of 750.[144]

B. A Whole New Approach

Australia's turning away of the *Tampa* and subsequent events signaled a radically different approach toward Australia's handling of unauthorized boat arrivals. As discussed above, Australia had previously permitted arrivals to land on its territory, detained them, and permitted them to lodge asylum claims.

With the attempted arrival of the *Tampa*, following several days of heavier-than-usual boat arrivals, the government took the dramatic step of refusing entry to Australian territory. Perhaps officials felt this was warranted because the *Tampa* was a large seaworthy vessel, registered to Norway, a signatory to the UN Refugee Convention, not a leaking, Indonesian-registered fishing boat, as were most such arriving vessels. Many Australian observers, however, attributed the policy shift to the politically vulnerable Howard government's need to take drastic action to gain public support prior to the November 2001 election. One Australian press article, headlined "*Tampa* crisis could save John Howard," noted:

> *The opposition stood by the government when it refused the* Tampa *permission to dock at Christmas Island and offload its human cargo. It even backed an order to dispatch SAS commandos when the ship steamed into Australian waters. But when the prime minister proposed tough border protection laws allowing boats to be turned around without legal liability, Labor [the opposition party] balked. Mr. Beazley [Labor's candidate for prime minister] said the laws—aimed partly at reinforcing the legality of its military action on the* Tampa*—were draconian, and refused to support them on principle. It was a move that could cost Labor the election.*[145]

The prediction proved prophetic. The day after Australia's November 2001 election, the *Washington Post* noted:

> *Prime Minister John Howard and his conservative government won a third term in national lections, capping a stunning political comeback fueled largely by the Australian leader's efforts to keep refugees out of the country… After lagging in opinion polls all year, Howard's popularity began improving in late August when he vowed that 433 mostly Afghan asylum-seekers rescued from a sinking ferry by a Norwegian freighter would never set foot on Australian soil.*[146]

More Boats

Following the *Tampa* and the *Aceng*—the two ships whose passengers were taken to Nauru aboard the *Manoora*—more boats kept trying to reach Australian territory. With each, Australia took a case-by-case approach with one common theme: at no time would the migrants be taken to the Australian mainland.

A fishing boat with about 130 Afghans ran aground on the outer part of Ashmore Reef (reportedly outside Australia's "migration zone") on September 11.[147] Australian officials transferred its passengers to the now-vacant *Aceng* while the Navy tried to make their original vessel seaworthy so that it could be turned back (although, as with the *Tampa*, Indonesia said it would not accept them).[148] A second boat arrived near Ashmore later that week, again with about 130 persons on board. Passengers thwarted attempts to turn the boat around by threatening to jump overboard.[149]

Next, Australian officials intercepted a leaking boat carrying 65 Sri Lankans off the Australian territory of Cocos Islands on September 15—reportedly the first time asylum seekers had reached those islands, which are 560 miles (900 km) west of Christmas Island.[150] Several days later, officials brought them ashore and housed them in a former animal quarantine station for what officials said could be "an extended stay." The government later began upgrading facilities and flying in equipment, prompting concerns by residents that Australia was building a permanent processing facility there. The arrival of the Sri Lankans nearly doubled the population of West Island, one of the 26 islands of the Cocos. The Cocos have a total population of about 600.[151]

The Sri Lankans were the first group of unauthorized boat arrivals to set foot on Australian soil since the *Tampa* incident.[152] However, their arrival would not trigger Australia's obligations under its domestic asylum system. By this time, Australia had enacted legislation removing the Cocos Islands, Christmas Island, Ashmore Reef, and other territories from its "migration zone"—its immigration and asylum laws no longer apply to unauthorized arrivals there. While Australia's international obligations under the UN Refugee Convention remain, those obligations are not as extensive as its domestic asylum laws, meaning, in particular, that rejected asylum seekers are not entitled to the appeal process that often greatly lengthens their time in Australia (usually in detention).[153]

The government used the September 11 terrorist attacks in the United States as further justification of its policies toward asylum seekers from Afghanistan and Iraq. Australian Defense Minister Peter Reith said on September 13 that the attacks showed the importance of strong border protection. "Otherwise it can be a pipeline for terrorists," he added.[154] Ruddock said the attacks made him "determined to have an immigration program which the government is able to conduct with integrity."[155]

On September 23, Australia transferred the passengers of the two boats off Ashmore Reef, who had been stuck there for nearly two weeks, to the Australian naval ship *Tobruk*. After days of silence on where the group would be taken, Ruddock announced on September 29 that they, like the *Manoora* passengers, would go to Nauru, which had agreed to accept the additional 260 asylum seekers for processing.[156] (The decision reportedly surprised and angered many Nauruans, including members of the Nauru parliament.)[157]

However, UNHCR, which had only reluctantly agreed to process the *Manoora* asylum seekers, said it would not process the *Tobruk* group, noting that Australia was not following normal asylum procedures.[158] UNHCR official Ellen Hansen said, "We consider that the sort of arrangements of basically intercepting asylum seekers on their way to a country and taking them elsewhere for processing is inappropriate and inconsistent with the edifice of asylum that's been built up over years…We think it's more appropriate for them to come to Australia and be processed under Australian law."[159]

Ruddock said that if UNHCR did not agree to process the *Tobruk's* passengers, Australian immigration officials, working under UN guidelines, could do so. However, this would further add to Australia's costs for this offshore processing arrangement, he said.[160]

On October 6, another boat, carrying 187 Iraqis, arrived near Christmas Island and became involved in a standoff with the Australian naval ship *Adelaide.* Naval personnel boarded the migrants' boat and attempted to persuade its crew to turn around.[161] Soon after, a number of the migrants, all wearing lifejackets, jumped off the boat. Others reportedly threw children, also wearing lifejackets, overboard. Navy personnel ensured the safety of all passengers and ordered the boat back into international waters.[162]

Ruddock said the presence of lifejackets suggested the acts were pre-planned, and he reiterated that he would not be "intimidated" into softening his stand on asylum seekers.[163] The prime minister told a radio audience, "Quite frankly, I don't want people in this country, people who are prepared—if those reports are true—to throw their own children overboard… Genuine refugees don't put their own children at risk. They become refugees in the name of the preservation and safety of their children… I don't accept it's a measure of desperation."[164]

The incident later sparked further controversy when the head of the Australian navy raised doubts about the government's claims that children had been thrown overboard. A navy video of the encounter, released by the government, showed the overcrowded boat being tossed by the seas. The video showed at least two people jumping into the water, but the tape was inconclusive as to whether children had been thrown overboard.[165]

The day after the incident, navy personnel found the boat disabled, drifting within the territorial waters off Christmas Island.[166] When the boat began taking on water, the *Adelaide* conducted another rescue, taking all the passengers on board.[167] On October 10, after three days of uncertainty, the *Adelaide* crew took the migrants to Christmas Island and offloaded them there.[168] Like the Sri Lankans on the Cocos Islands, however, these arrivals would be governed by the new legislation and would therefore not be brought to the mainland.

With the legislative change in hand, Australia initiated plans to build a detention center on Christmas Island. The goal was to construct a multi-purpose facility that the island's 1,100 residents would be able to use when the building was not housing asylum seekers. The government said it favored a two-stage process involving an upgrade of an existing sports center, already used to house asylum seekers, and the construction of a new center using "demountable"

"I'm a Refugee, So I Wait..."

Following are excerpts from USCR's interview with a female asylum seeker from Iraq. USCR interviewed her in Indonesia in June 2001.

I had problems in Iraq. My father was put in jail – they took him there at 2:00 am. I'm not sure why. He was in jail one year. One day they took my mother to jail too, so I left to go to my aunt's house. I was studying in college, but I had to stop because of the problems. People said bad things to me because my parents were in jail. Other relatives were killed. The police kept coming to my house. I finally heard that my father was killed…

I moved several times in Iraq, including to a small village. But after a week, the police came and beat me. I went to UNHCR in Iraq, but they couldn't help me, because I'm not a refugee in my own country. I decided to leave Iraq with some other relatives, including some small children. We went by ship to Indonesia. We gave $500 U.S. to the ship's captain for me and two kids – I think it's cheaper when you're young.

I had no passport. The captain told me to hide underneath in the boat. I didn't know if it was night or day because I was underneath, but I could hear people coming on the ship. We changed boats a few times – there were five boats altogether. One was a very small boat – we were on it for three days. There was no water or food, and it was very dirty. Finally we were put on very small boats. Altogether, the trip took two months…

In Indonesia, we got to a village at 5:00 am. Some of my relatives arrived on another boat that night – the smugglers told me to wait. Then we went to a big room in a bus terminal or something. We stayed two nights, then police came and asked for passports. We had none, but the families gave money to them. Then the police caught us again before we could get on a bus. The police handed us over to immigration. Immigration called IOM. We were put in a quarantine station, but some people escaped.

It took a long time to see UNHCR – they're busy. Finally I talked to UNHCR. But there's no answer yet. UNHCR says they need more information. They told me to wait.

In Iraq, the smugglers told me I would go to "another country far from here." I just wanted to escape from Iraq. The destination was not important. I can't go back to Iraq – really. Here, I just want to go to school, like I did in Iraq. I'm afraid that I'll get old and lose my chance to study. Some of the people in my group escaped with the smugglers to go to Australia, but I stayed because I heard UNHCR was good. Also, I had no more money. I can't afford to pay more to the smugglers. I'm a refugee, so I wait for UNHCR…

I don't know if the smugglers are good people or bad people. Probably bad. But maybe good. Good because I escaped Iraq, but bad because they took my money and I wait in Indonesia.

buildings. However, the government said that processing on the territories, even under the new law, would be a "last resort" because it "gives a green light to people-smugglers."[169]

On November 13, Australia deported 33 of the 65 Sri Lankans who had arrived at the Cocos Islands on September 15, along with four other Sri Lankans who had been held in mainland detention facilities after having arrived in April. Australia had assessed their asylum claims and determined that none were refugees. According to an Australian official, the deportation marked the first time that Australia had chartered a special flight for Sri Lankans. At the time of the deportation, DIMA officials were still screening the claims of the remaining 32 Sri Lankans on the island.[170]

The "Pacific Solution"

The October 10 arrivals at Christmas Island were to remain there only temporarily.[171] The following day, the Howard government announced it had signed a memorandum of understanding with Papua New Guinea, under which Australia would provide that country with an initial $1 million Australian (about U.S. $500,000) and unspecified "technical and other assistance to assist them with their own illegal movement of people," in return for establishing a processing

center for "unauthorized boat arrivals" on Papua New Guinea.[172]

Under the agreement, Australia was to cover the costs of establishing the center, which IOM would operate and eventually hand over to the Papua New Guinea government. The plan called for the 187 persons at Christmas Island to be the first to arrive in Papua New Guinea,[173] where they would be held for no longer than six months.[174]

During the previous few weeks, the Australian government also held discussions with the government of Kiribati—another small Pacific nation, northeast of Nauru—about establishing a refugee processing center there. (Australian officials later said Kiribati's lack of infrastructure and distance made it less attractive than Papua New Guinea, but that it could still be useful in the future[175]). Ruddock said the government also continued talks with other countries in the region to secure more offshore sites. The statement prompted an Australian opposition leader to complain that such agreements would greatly increase the costs of Australia's efforts to create an "iron curtain" between Australia and Indonesia.[176]

On October 12, Australia intercepted another Indonesian boat with about 200 migrants near Ashmore Reef. Despite Australian warnings not to enter its territorial waters, the boat stayed in sheltered waters near the Reef. Ruddock said the government had no immediate plans to move the boat and that he was "looking at a variety of options."[177]

The following day, the *Tobruk* arrived at Nauru and offloaded its 260 passengers, who joined the more than 500 asylum seekers already at the Nauru camp.[178] Because of UNHCR's refusal to process this group, Australian immigration officials were to do the job.[179] However, the Australian officials would screen the asylum seekers purely under the minimal requirements of the Refugee Convention rather than under Australian asylum law, which includes the right to appeal to the courts, among other rights.

Meanwhile, residents of Christmas Island said the migrants there were being held under tight security in an indoor basketball court and had not been allowed outside. According to one local businessman, "I think the reason security is so tight is that I don't think these people are being told they're going to Papua New Guinea because if they know that they might get a bit upset."[180]

Papua New Guinea officials later chose their remote island of Manus—a former World War II air and naval staging point about 217 miles (350 km) from the Papua New Guinea mainland—as the location for an Australian asylum processing center.[181] The Australian government flew the 230 mainly Iraqi asylum seekers from Christmas Island to Manus on October 21 and 22. Papua New Guinea officials accommodated the asylum seekers in unused defense buildings and at a former world kayaking championship site.[182]

UNHCR refused to process the group in Papua New Guinea. "Our view is that Australia's responsibilities were engaged," said UNHCR's Hansen, adding, "Australia should do [the processing] or make arrangement to ensure it is done."[183]

Shortly after their arrival on Manus, groups of asylum seekers were involved in clashes with IOM officials and interpreters at the processing camp, while others staged a hunger strike. A local reporter said the asylum seekers were angry because they weren't informed that they were going to Manus and expected to go to Australia.[184]

Two days before this transfer to Papua New Guinea, the Australian navy intercepted another boat carrying about 200 Afghan asylum seekers. The vessel was moored off Christmas Island after its crew refused an order to return to Indonesia.[185] Australia later transferred more than 90 women and children to the Australian ship *Warramunga*, although it kept the remaining passengers on the leaking Indonesian vessel.[186] On October 31, Ruddock announced that all of the passengers and crew would be transferred to the sports hall on Christmas Island.[187]

Soon after, Australia announced that it was talking with the governments of Fiji, Palau, and Vanuatu about joining Nauru and Papua New Guinea in this new approach to the processing of asylum seekers. To facilitate an agreement, Australia lifted sanctions against Fiji (imposed following the May 2000 coup in Fiji)—a move that drew sharp criticism from Australian opposition leaders.[188]

Despite the continued boat arrivals, Ruddock insisted that his "Pacific Solution" was deterring would-be arrivals. "There is clear evidence emerging now that large numbers intent on traveling from the Middle East through Malaysia to Indonesia are delaying such arrangements, or are looking at other alternative arrangements," he said.[189]

Opposition leader Kim Beazley disagreed, saying the latest boatload proved the government's policy was not working. He added that a Labor government would strengthen the relationship with Jakarta to ensure that asylum seekers were processed there before they came to Australia. "The solution does not lie in Papua New Guinea or Nauru, it lies in Jakarta," said Beazley.[190]

An unidentified Afghan man leans against a chain link fence of a refugee camp after arriving with other asylum seekers on the Island of Nauru, Sept. 19, 2001. Photo: AP/Rick Rycroft

Pushbacks to the High Seas

On October 18, Howard and Ruddock once again appeared to meet opposition criticism with another policy shift. That day, Australia "successfully" pushed back into international waters the Indonesian-registered *Parapaninda*, the boat that arrived near Ashmore Reef on October 12. Australian navy troops boarded the boat, provided it with food and water, and then "escorted" it back into the high seas. Howard said the incident marked the first victory in the campaign begun two months earlier to stem the flow of asylum seekers arriving via Indonesia.[191]

While the "Pacific Solution" was still very much alive—perhaps to be used primarily for asylum seekers arriving on unseaworthy boats—Australia had now shown itself willing simply to push other boats back out to sea. It would be less than two weeks before Australia would force back a second boat. On October 29, the Australian naval ship *Arunta* intercepted a boat carrying more than 220 migrants. The *Arunta* took about half of them aboard, then towed the Indonesian boat to within a few miles of Indonesian waters. Naval authorities then transferred all the passengers back to their vessel and sent it off toward the Indonesian island of Roti.[192]

Drowning off Java

Despite Australia's new multi-pronged strategy, and despite the risks, the boats continued to come. For the passengers of one such boat, the result was tragic. During the weekend of October 20, more than 350 asylum seekers, mostly Iraqis, drowned off the coast of Java. Among the dead were some 300 women and children, who were under the deck of the overcrowded, sinking vessel and were unable to escape. Only 44 persons, mostly men, survived, having been rescued by fisherman after spending up to 20 hours in the sea. UNHCR said that 24 of the persons who drowned and

six of the survivors had earlier been recognized as refugees by UNHCR in Indonesia.[193]

One survivor, a recognized refugee, said he had been living in Indonesia for more than two years waiting to be accepted by a third country for resettlement. "I have proved I am a refugee," he said. "How can I stay in Indonesia without anything? You can see we are desperate." A UNHCR spokesman said, "They decided on the risky trip because they were in depression and they had lost faith in the UNHCR."[194]

Some survivors said they had not wanted to board the rickety boat but that Indonesian police officers had forced them aboard with pistols and automatic weapons. Subsequently, a senior Indonesian police commander said that some "rogue" officers may have taken bribes from the smugglers and helped force people onto the boat. Another commander said members of other forces—such as the navy or the immigration department—might also be taking bribes. UN officials urged the government to look into the allegations.[195]

In response to the tragedy, some members of Australia's political opposition sharply criticized the government for failing to reach an agreement with Indonesia on putting an end to the smuggling.[196] Another, Democratic Party immigration spokesperson Andrew Bartlett, said the fact that some of the people who drowned were recognized refugees shows that the "queue" to enter Australia does not work. "These people joined the so-called queue, these people went to UNHCR and were assessed and they still had no future," he said. "So much for a queue. It's a joke, about time the government recognized it and worked constructively to get a workable queue rather than continuing to demonize innocent and vulnerable people."[197]

In apparent agreement that a new approach should be taken, Indonesia's foreign minister said on October 24 that Indonesia would convene a regional meeting with Australia and other Asian countries to discuss the growing refugee crisis. He warned that the crisis could grow in the wake of the U.S.-led attacks on Afghanistan. Subsequently, Indonesia announced that the meeting would be held in February 2002 in Bali.[198]

Despite the prospect of a meeting, the dispute between Indonesia and Australia continued to grow, with an Indonesian admiral saying that his navy would not stop vessels heading for Australia.[199]

A few days after the sinking, Australia agreed to accept about 40 UNHCR-approved refugees from Indonesia. Ruddock said the group would not likely include survivors from the boat tragedy but that he would consider their cases. He said the government had to weigh the odds, since much of the smuggling is driven by expectations that people will reach Australia.[200] Ruddock also maintained that he would "not be made to feel guilty about people who put themselves in the hands of smugglers and who pay large amounts of money knowing that they're going to break our law."

The following week, Australia intercepted a boat carrying 31 Vietnamese off the coast of Darwin. Howard said the incident was likely a one-time event and that large numbers of Vietnamese were unlikely to come to Australia again.[201] Australia subsequently transferred the Vietnamese to Christmas Island.[202]

New Legislation

In response to the *Tampa* incident—or perhaps using the *Tampa* as a long-sought opportunity—the Australian government in September 2001 enacted a series of new laws designed to "strengthen Australia's territorial integrity and reduce incentives for people to make hazardous voyages to Australian territories."[203] These laws, and their major provisions, are as follows:[204]

1) Migration Amendment (Excision from Migration Zone) Act 2001:

Under this law, certain Australian territories have been "excised" from Australia's "migration zone" for purposes related to unauthorized arrivals. Any unauthorized person who arrives in an "excised offshore place" will not be able to apply for an Australian visa unless the immigration minister exercises his discretionary power. The affected territories are:

- Ashmore and Cartier Islands in the Timor Sea (as of September 8, 2001)
- Christmas Island in the Indian Ocean (as of September 8, 2001)
- Cocos (Keeling) Islands in the Indian Ocean (as of September 17, 2001)
- Offshore resources and other installations

The Australian government notes that it will meet its international protection obligations under the UN Refugee Convention by assessing any refugee claims. The immigration minister may exercise his discretionary power to allow persons found to be refugees to apply for visas. Alternatively, third country resettlement may be the "preferred outcome," according to the government.

2) Migration Amendment (Excision from Migration Zone) (Consequential Provisions Act) 2001:

This legislation introduces a new visa regime "to deter people moving from or bypassing other safe countries where they could gain or seek effective protection," according to the government. It also allows for the detention and removal of unauthorized arrivals and includes powers to remove persons to other countries where their claims, if any, for refugee status may be handled.

The law expands Australia's "forum shopping" provisions by providing that an applicant cannot meet the criteria for a permanent protection visa if he or she, since leaving his or her home country, has resided "for a continuous period of at least 7 days in a country in which he or she could have sought and obtained effective protection" either from that country or from the UNHCR offices located in that country. The immigration minister may exercise his discretion to waive these requirements in the public interest. This provision applies to all visa applications filed on or after September 27, 2001, including applications for permanent visas filed by TPV holders.

Under this new system, persons who attempt to enter Australia via an excised offshore place such as Christmas Island cannot apply for any class of visa. However, such people will be "guaranteed access to asylum determination processes to ensure that any protection needs are identified and addressed." Such persons who are found to be refugees may be permitted to reside in Australia, if the minister exercises his discretion. If, however, they do not meet the new criteria for a permanent protection visa (the 7-day requirement discussed above), they will be eligible only for a temporary protection visa, which is valid for three years. Australia may grant them successive three-year visas if the need for protection is ongoing. They will never be eligible for permanent residence (unless the minister waives the 7-day requirement). They will never be able to bring their families to Australia. If they leave Australia, they will not be allowed to return. They will not receive the settlement services provided to refugees who arrived lawfully, or certain mainstream social welfare services.

This provision applies to persons taken from the excised offshore places to processing locations in Nauru, Papua New Guinea, or elsewhere, (as well as to any persons screened on the excised places themselves). For example, unauthorized arrivals to Christmas Island who are taken to Papua New Guinea may be granted a temporary visa but will not be eligible for a permanent visa if they resided in Indonesia for at least seven continuous days, unless the minister waives that restriction.

Persons who apply for visas to enter and remain in Australia from the "second safe country they enter" (a country other than the country of first asylum) may be granted five-year temporary protection visas that enable them to obtain permanent protection visas after four and a half years if there is a continuing need for protection. Their families will only be able to join them if and when they obtain permanent visas. This provision would affect, for example, persons recognized as refugees by UNHCR in Indonesia whom Australia accepts for resettlement under its "offshore" program.

Only persons who are assessed by UNHCR while in the first safe country they reach after leaving their home country, and who are then selected by Australia for resettlement, will receive a permanent protection visa in the first instance. Their families will be able to join them in Australia.

The system, therefore, sets up a tiered approach under which, for example, Afghans in Pakistan who are accepted for resettlement in Australia would have immediate access to permanent visas, Afghans accepted from Indonesia would have access to temporary visas with the possibility of permanent visas after four-and-a half years, and Afghans who arrive unlawfully at Christmas Island would, if found to be refugees, have access only to three-year temporary protection visas.

Australia maintains that these changes are consistent with Australia's international obligations under refugee-related conventions because they "retain Australia's long-standing commitment to the protection of refugees while they are in need of such protection."

The legislation also prevents the commencement of legal proceedings against the Australian government in relation to the entry, status, detention, and transfer of a person arriving unlawfully.

3) Migration Legislation Amendment Act (No. 6) 2001:

Under this legislation, the UN Refugee Convention will not apply unless a Convention reason (that is, a well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group, or political opinion) is the *essential and significant reason* for the persecution; the persecution involves *serious harm* to the person; and the persecution involves *systematic and discriminatory conduct.*

As the government notes, "This means that people who are not in serious danger do not meet the criteria for refugee status." This step was taken because the Australian government has been concerned that Australian courts have expanded the refugee definition beyond the original intention of the Convention. "The changes to legislation will provide greater consistency in decision-making by government agencies, tribunals and courts. They clarify the meaning of some of the key elements of the Refugee Convention."

The law also requires that one member of a family demonstrate a well-founded fear of persecution on Refugee Convention grounds before any other member of his or her family can be recognized as having a well-founded fear of persecution based on membership in the same particular social group (the family). Human rights and refugee advocates have noted that under this requirement many forms of family-unit-based persecution could fail to be recognized. DIMA, however, justified the provision by noting that a recent Australian court decision held that the sister of a deceased criminal targeted by other criminals for payment of her late brother's debt was a member of a particular social group—that family—for purposes of the Convention. "If not addressed, this could specifically attract persons with criminal associations to seek protection within Australia," said DIMA.

Also under this law, Australia need not take into account a person's conduct inside Australia in determining refugee status, unless the immigration minister believes the person acted in good faith and not to strengthen his or her asylum claim. [This provision is aimed at addressing the issue of refugees *sur place.*] According to the government, one example of such conduct might be where someone in Australia publicly criticizes the government of his or her country of origin and claims protection because the comments could jeopardize his or her safety on return.

This legislation also "addresses the need to act against the increasing incidence of fraud and presentation of claims that lack integrity." Under the new law, the government may require unauthorized arrivals and protection visa applicants to provide information under oath or affirmation, and may draw adverse inferences if they fail to do so.

The government may also draw adverse inferences about the veracity of claimed identity and/or nationality. As DIMA explained in a press release on the new legislation, "This means that people who destroy their documents, like birth certificates or passports, are unlikely to be granted refugee status in Australia."[205] However, DIMA staff explained to USCR that "this provision will not be inflexible or determinative, and the decision-maker is not obliged to draw adverse inferences from the lack of identity documentation."

4) Border Protection (Validation and Enforcement Powers) Act 2001:

This law introduces minimum penalties for people-smuggling of five years for a first conviction and eight years for a second conviction. The legislation also reinforces, retroactively, the legality of governmental actions taken in relation to the *Tampa* and the *Aceng*. It also provides additional statutory authority for future action in relation to vessels carrying unauthorized arrivals and the unauthorized arrivals themselves.

"This puts beyond doubt that decisions about who can and who cannot enter Australia is within the sovereign power of the Australian Parliament," the government stated.

5) Migration Legislation Amendment (Judicial Review) Act 1998:

This legislation "gives effect to the government's long-standing policy commitment to restrict access to judicial review in migration matters in all but exceptional circumstances," according to DIMA.

The law does not bar access to Australia's Federal Court or to the High Court (Australia's highest court). However, the grounds for judicial review are greatly reduced.

6) Migration Legislation Amendment Act (No. 1) 2001:

This law prohibits class actions in migration litigation, but provides an exception by giving the court discretion to consolidate individual matters. It also introduces a 35-day time limit on applications to the High Court.

7) Migration Legislation Amendment Act (No. 5) 2001:

This law allows private sector organizations such as airlines, travel agents, and shipping companies to provide information to DIMA about passengers' travel. However, no organization is compelled to provide such information.

Collectively, these new laws make sweeping changes in Australia's refugee protection system. Australia may indeed be the first "western" nation to

put such broad and significant legal effort behind the rhetoric of discouraging the "spontaneous" arrival of asylum seekers in favor of the more orderly, predictable, discretionary, and political system of selecting refugees for resettlement from overseas. However, the full implications of this new system for refugee protection are yet to be felt.

Post-Election Outlook

Although the partisan rhetoric surrounding the asylum issue has calmed somewhat since the Howard government won re-election on November 10, 2001, the government has not backed off of its "Pacific Solution" or its efforts to spark reform of the international refugee system. The criticism of those efforts, however, has continued.

Just days after the Australian election, Papua New Guinea's prime minister, Mekere Morauta, refuted statements by Howard that Papua New Guinea might be expected to find durable solutions for asylum seekers on its territory who are determined not to be refugees. Mekere maintained that Papua New Guinea was just a processing center. Howard reiterated that Australia would take a share of the persons found to be refugees on Papua New Guinea, Nauru, and other Pacific processing locations, and said, "We will not leave those countries in the lurch" with respect to the screened-out population. However, he predicted that some of the non-refugees "could well remain in those countries." Observers said that possibility violated the spirit of the agreement between Australia and Papua New Guinea.

That same week, Ireland said it was considering taking some of the Afghan refugees refused entry by Australia, in response to a UNHCR appeal. Welcoming the announcement, Ruddock said Australia would take some of the refugees but that it needed other countries to do the same. "We have shared the burden of refugees from the Balkans, Middle East, Africa, and West Asia," he said, "but when it has come to problems in our area of the world, [burden sharing] has been sadly lacking."[206] He noted that the UK and Ireland had not previously been on the list of resettlement countries.

Also in November, the Pacific nations of Tuvalu and Fiji rejected Australia's requests to join Nauru and Papua New Guinea in housing asylum seekers. Kiribati and Palau were reportedly still considering the request.[207]

On December 6, Amnesty International issued a report describing Australia's "Pacific Solution" as "unsustainable and inhumane." The report's author, former UNHCR official John Pace, said that while the world has focused on the humanitarian crisis in and around Afghanistan, "the Australian government has been sending boatloads of Afghans and other asylum seekers around the Pacific." In response, Ruddock said the policy was working because "we haven't had a boat come to Australia in several weeks now."[208] He said the government would only change its policy if so many people arrived that they could not all be housed on the available Pacific islands.[209]

Days later, Ruddock and Howard appeared for the first time to soften their tone on the refugee issue. In apparent acknowledgement that their "Pacific Solution" might not be sustainable, Ruddock said that while it could be maintained if boat arrivals continued to decline, "If you saw a very marked increase in arrivals, one would have to change one's approach, according to those changed circumstances." Howard went so far as to say that turning asylum seekers' boats back to sea was "completely inhuman."[210]

However, at a mid-December UNHCR meeting in Geneva, Ruddock urged reform of the UN Refugee Convention and suggested withdrawing development aid from nations that refuse to take back citizens who had failed to win asylum in other countries. He said there was a real risk that funds earmarked for the United Nations will be diverted as countries struggle to meet the cost of unauthorized arrivals. Ruddock also accused European countries of ignoring "southern hemisphere problems" like East Timor while expecting Australia to share the burden of "northern crises" like Kosovo.[211]

Ruddock's comments drew sharp criticism from other countries as well as human rights groups. A U.S. official said that while he recognized the problems posed by the "irregular movement of people," the United States strongly disagreed with suggestions that this problem required a revision of the Refugee Convention.[212]

As the UNHCR conference was concluding, the Australian navy turned another Indonesian fishing boat back to the high seas—the third such incident since the *Tampa's* attempted arrival.[213] About the same time, Australia transferred another group of Sri Lankans to the Cocos Islands after authorities intercepted their boat in nearby waters. Within the next few days, Australia's Human Rights and Equal Opportunity Commission demanded urgent action to improve living conditions at the new detention facility at Christmas Island, and detainees at Woomera rioted and set fires that destroyed several buildings.[214] In other words, business as usual for Australia.

V. RECOMMENDATIONS

A. To the Government of Australia

1) Refrain from any further pushbacks of boats carrying asylum seekers arriving at Australia's territories.

Although Australia may not technically be violating the UN Refugee Convention's prohibition on *refoulement* when it pushes boats of asylum seekers back into international waters, it is certainly violating the spirit of the Convention—as well as general humanitarian principles—by sending the asylum seekers to unknown dangers on the high seas or to countries that may return them to persecution. While there have not as yet been any known incidents of direct or indirect *refoulement* of persons pushed back by Australia, countries in the region that are not signatories to the Convention, such as Indonesia (which is the likely destination of boats pushed back by Australia), will not guarantee that asylum seekers will be protected from return to countries where they could face persecution.

As a proponent of international "burden sharing" in the protection of refugees, Australia should acknowledge that many countries, including some in the Asia/Pacific region, are hosting far greater numbers of refugees and asylum seekers than is Australia. Others, such as Indonesia, are struggling with significant problems of internal displacement. Australia should therefore do its part by accepting the arrival of such boats and treating them in accordance with the intent of the Refugee Convention.

2) Reverse the policy initiated in August 2001 whereby asylum seekers arriving by boat at Australia's territories are transported to various Pacific nations for refugee processing.

As UNHCR has noted, Australia's "Pacific Solution," which has included intercepting boats on their way to Australia and taking them to other countries, is not in accord with the concept of international burden sharing that has been developed by many signatories to the UN Refugee Convention. Countries with domestic systems to adjudicate asylum claims, and with the resources to do so, should take responsibility for examining asylum claims within their territories and providing refugee protection there.

While Australia's asylum adjudication process is not perfect, it is a sophisticated system that has for years represented an appropriate response to persons fleeing persecution and arriving on Australia's shores. It is inappropriate for Australia to attempt now to meet its humanitarian obligations by paying other countries to host, even temporarily, asylum seekers who had arrived in Australian territorial waters. It is especially inappropriate given that some of these countries are experiencing substantial political or economic hardship and are ill equipped to provide for the needs of the asylum seekers.

3) Revise the migration legislation enacted in September 2001 to ensure that Australia's immigration laws fully comport with its international obligations toward refugees and asylum seekers (including both the letter and the spirit of the UN Refugee Convention) and with its own standards of due process.

Several provisions of the package of migration laws enacted in September 2001 contravene or undermine Australia's refugee protection obligations and should be repealed or amended.

These provisions include: (1) the prohibition on the ability of "offshore entry persons" (those arriving at the territories excised from Australia's "migration zone") to make visa applications, including requests for asylum; (2) the narrowed definition of a refugee, including the new three-step approach to defining persecution; (3) the requirement that before any person can be granted refugee status on the grounds of "membership in a particular social group" because of belonging to a particular family, one member of the same family must already have been deter-

mined to be a refugee on Convention grounds; (4) the ability to draw adverse inferences from an asylum applicant's use of false documents or the destruction of documents; and (5) the expanded "forum shopping" provisions, which require that asylum applicants not have resided for seven or more days in a country in which they could have sought and obtained effective protection.

The Australian government has argued that "effective protection is a concept embodied in the Refugee Convention itself." However, the Convention enumerates specific circumstances with respect to such protection in which the Convention shall not apply or shall cease to apply. Such circumstances include when a person has acquired a new nationality (and enjoys the protection of his or her country of new nationality) or when a person has taken residence in a country in which he or she has the rights and obligations of that country's nationals. Neither of these circumstances, nor any other circumstance enumerated in the Convention, applies to the "forum shopping" situations addressed by the Australian legislation, e.g., when a person arriving at an Australian territory has previously resided in Indonesia for at least seven continuous days. Unauthorized migrants in Indonesia—including those seeking protection from UNHCR or recognized by UNHCR as refugees—have obtained neither Indonesian nationality nor the rights and obligations of Indonesian citizens.

Although Australia may not technically violate the Convention's *nonrefoulement* provisions through its "forum shopping" or "safe third country" provisions, it violates the spirit of the Convention as well as general humanitarian concepts of refugee protection and burden sharing.

As to the restricted refugee definition, DIMA notes, "The term 'persecution' is not defined in the Refugee Convention and is therefore up to each signatory state to define. In addition, over recent years, in the absence of clear legislative guidance, the domestic interpretation of Australia's protection obligations has been expanded by court interpretation of the definition of a 'refugee.'" However, USCR believes that it is indeed the role of the courts to interpret the meaning of "persecution" as it applies in individual cases. Given the centrality of this term, which the Convention drafters intentionally left undefined, governments should avoid imposing legislative restrictions on its meaning.

The UNHCR *Handbook on Procedures and Criteria for Determining Refugee Status* notes that the actions or threats that amount to persecution will depend on the circumstances of each case, including an evaluation of the opinions and feelings of the person concerned. It also states:

> *In addition, an applicant may have been subjected to various measures not in themselves amounting to persecution (e.g., discrimination in different forms), in some cases combined with other adverse factors (e.g., general atmosphere of insecurity in the country of origin). In such circumstances, the various elements involved may, if taken together, produce an effect on the mind of the applicant that can reasonably justify a claim to well-founded fear of persecution on "cumulative grounds."*

Australia's new legislation—which provides that the Convention will not apply unless one or more of the Convention's five grounds of persecution constitute the *essential and significant reason* for the persecution; the persecution involves *serious harm* to the person (examples of which are provided in the legislation); and the persecution involves *systematic and discriminatory conduct*—contradicts the flexible nature of "persecution" as envisioned by the Convention and discussed in the UNHCR Handbook. While these and related provisions may not explicitly breach the Convention, they are nevertheless not in keeping with its generous and flexible spirit and intent.

4) De-link the "offshore" refugee admissions program and the "onshore" asylum program so that increased arrivals in one program will not negatively affect the other.

Because both resettlement from overseas and the granting of "onshore" asylum are important forms of refugee protection, they should be as flexible as possible and should not be mixed either conceptually or in practice. A combined ceiling for these two programs, along with increased

arrivals of asylum seekers and an inability or unwillingness to increase the ceiling, unnecessarily penalizes the resettlement program and unfairly scapegoats legitimate asylum seekers. Another result, as has been seen in Australia, is harmful tensions between ethnic communities.

A refugee protection system that is truly responsive to the intent of the Refugee Convention will recognize that, regardless of the existence of an overseas refugee processing system, some refugees will choose to flee by various routes and seek asylum in other countries. This choice may be made for various reasons, including the limitations of the overseas "queue" (which is available only to small numbers of refugees worldwide), the risk to some refugees in countries of first asylum, and the legitimate desire to join family members. Australia should ensure that its refugee system keeps open both avenues for seeking protection.

While Australia may exercise discretion in setting an annual ceiling for overseas refugee admissions, it should not set a specific ceiling for recognition of refugee status among spontaneous arrivals. Fundamentally, Australia is obliged under the Refugee Convention not to return refugees on its territory to persecution; it cannot set a ceiling on this obligation.

In addition to de-linking the two programs, Australia should increase the ceiling for overseas resettlement. A total humanitarian admissions program of 12,000 places is unacceptable for a country of Australia's size and capacity.

5) Refrain from rhetoric that equates asylum seekers with law breakers.

While Australia has a legitimate interest in protecting the sovereignty of its borders and addressing the issue of human smuggling, the unauthorized arrival of asylum seekers should not, in and of itself, be viewed as a crime.

The UN Refugee Convention, to which Australia is a party, requires that states "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."

While many unauthorized arrivals to Australia do not come directly from their home countries via a single boat trip or a single flight, many of them have undertaken multi-step journeys that take them through countries in which they were not safe from return to persecution or otherwise were not able to find protection. The spirit, if not the letter, of the Refugee Convention requires that such persons be treated with compassion and not viewed as persons seeking to abuse the immigration system. The right to seek asylum, enshrined in the Universal Declaration of Human Rights, should not be viewed as conflicting with the establishment of immigration rules, but rather as a necessary component of such rules.

Throughout history, persons have had to rely on irregular means and false documents in order to escape to freedom. While human smugglers do indeed prey on such persons, often with tragic results, the victims should not be penalized.

6) Provide permanent, rather than temporary, protection visas for all persons found to be refugees.

While the UN Refugee Convention does not require states to provide permanent asylum to refugees, but rather to refrain from returning them to countries where they would face persecution, it does require states to "as far as possible facilitate the assimilation and naturalization of refugees." A multi-year temporary protection visa that does not allow for participation in government-funded English language programs or permit the holders to be joined by their families, and which either explicitly denies the possibility of a permanent visa or gives no guarantee of such a visa, is contrary to the goal of facilitating assimilation and naturalization. In addition, the denial of re-entry rights for refugees with temporary protection visas violates the Convention's requirement that states provide refugees with travel documents for the purpose of travel outside their territories.

Australia may choose to provide alternate, and temporary, forms of protection to persons who do not meet the Convention's refugee definition (although, even in such cases, temporary protection status should, after several years, pro-

vide for the possibility of permanent residence). However, genuine refugees who have found asylum in countries with the means to integrate them should not be further traumatized by years of temporary residence without their families and with no guarantee that they have found permanent and durable protection.

DIMA notes that "TPVs do not seek to penalize refugees. They do, however, seek to remove incentives from asylum seekers who are attempting to misuse Australia's refugee determination process." While this may be the case, USCR believes that providing recognized refugees solely with long-term temporary protection, purely as a result of unauthorized entry, may be viewed as a form of discrimination and even punishment when compared with the treatment of lawfully arriving refugees. As reforms of the U.S. asylum system have shown, the best way to deter misuse of the refugee system is to provide swift and fair adjudication of the applicants' claims, coupled with the removal of non-refugees who have no other legitimate claim for remaining in the country.

DIMA also claims that the temporary protection system provides a disincentive for refugees to abandon or bypass effective protection and travel to Australia unlawfully. As DIMA states, "The further a refugee gets from [his or her] country of first asylum, where that protection continues to be effective, the less benefit in terms of residence outcome [in Australia] will be obtained." This claim fails to note that for many refugees in first asylum countries, protection is far from effective. Many refugees in such countries experience constant harassment and discrimination, while others face threats of serious harm or even forced return to their countries of persecution. Many face years or decades of life in squalid camps or urban centers, with few resources and virtually no prospect of a durable solution. A refugee who flees such conditions in hopes of a more viable future in another country deserves compassion and fair treatment, including the prospect of permanent protection.

7) Do not detain asylum seekers except in exceptional circumstances.

Because many asylum seekers have had no choice but to rely on false documents and irregular means of travel to escape persecution and find durable asylum, their detention upon arrival should last only as long as necessary to verify their identify and determine that they do not pose a security threat to Australia. UNHCR guidelines on the detention of asylum seekers stipulate that, as a general rule, asylum seekers should not be detained.

At a minimum, Australia should adopt alternatives to detention that do not require the separation of families and that allow both adults and children to make productive use of their time pending a decision.

8) Inform all persons in immigration detention of their right to seek asylum and to obtain legal representation. Do not deny such persons the ability to contact friends, family, and community members.

Once unauthorized arrivals have been brought to the Australian mainland and placed in detention, they should be informed immediately of their right to seek asylum and to obtain legal assistance. Because Australia has a longstanding and sophisticated asylum adjudication process, there is ample opportunity to detect unfounded cases. Informing applicants of a right enumerated in the Universal Declaration of Human Rights should not be a threat to countries in which persons seek asylum.

UNHCR's guidelines on the detention of asylum seekers note that minimal procedural safeguards must be maintained. These include informing all asylum seekers of their right to legal counsel. Applicants who are aware of their right to legal counsel will have more confidence in their ability to pursue an asylum claim.

Preventing detained asylum seekers—through the mechanism of "separation detention"—from contacting family and friends, either in Australia or abroad, is inhumane. Many family and friends anxiously await word of the asylum seekers' fate. Asylum seekers' inability to communicate word of their arrival adds to the trauma that many have already endured.

In addition, asylum seekers need objective information, from others in the community, about the asylum process and what is likely to happen to them. Lack of such information can lead to the frustration and despair that causes numerous prob-

lems for asylum seekers and for the detention system. Given the training and experience of Australia's asylum adjudicators, contact with community members should not cause fear that asylum seekers will be "coached" on their asylum claims.

9) Provide more resettlement opportunities for UNHCR-approved refugees in Indonesia.

If Australia is sincere about preventing asylum seekers from using the services of smugglers, it should provide for additional resettlement not only from the countries of first asylum, but from Indonesia. While Australia may contend that such resettlement will give the asylum seekers, and the smugglers, the outcome they desire, Australia should recognize that its policies thus far have not prevented asylum seekers from traveling to Indonesia or from continuing on to Australia. In addition, the system of international "burden sharing," under which Australia has insisted that other countries help resettle the refugees from Indonesia, requires that Australia also do its part. This should be the case not only for refugees with close family members in Australia but for others as well.

B. To the Government of Indonesia:

1) Accede to the 1951 Refugee Convention and its 1967 Protocol.

Although Indonesia is not a party to the UN Refugee Convention, it allows UNHCR to conduct refugee status determinations and generally respects UNHCR grants of refugee status. However, by not being a party to the Convention, Indonesia provides no guarantees that it respects international obligations toward refugees and that it will refrain from returning refugees, or potential refugees, to countries where their lives or freedom would be threatened. Becoming a party to the Convention, and working with UNHCR to develop appropriate policies toward asylum seekers, would send a strong signal that Indonesia recognizes the rights of persons seeking protection from persecution. It would also provide a legal foundation either for the development of an asylum system within Indonesia or for the continuation of UNHCR operations there, which in turn could enhance the options for durable solutions.

2) Work with UNHCR to ensure that Australia's goal of preventing the unauthorized migration of persons to Australia via Indonesia does not prevent genuine refugees from obtaining asylum from persecution.

Many of Australia's policies toward the unauthorized arrival of asylum seekers, particularly those arriving by boat, may discourage or even prevent genuine refugees from obtaining protection in Australia or other countries. Indonesia should not be a party to this.

While all countries have the right to protect their borders, immigration laws must allow for exceptions for refugees forced to flee persecution. Asylum seekers who arrive in Indonesia without authorization should be treated in accordance with international humanitarian principles. They should be provided a full opportunity to make a claim to refugee status and should be guaranteed that they will not be returned to persecution. In addition to becoming a party to the UN Refugee Convention, Indonesia should consult with UNHCR regularly and take other steps to improve the treatment of asylum seekers in its territory. It should not be unduly influenced by Australia's policies and its demands that Indonesia cooperate in ensuring that no unauthorized arrivals reach Australia's shores.

3) Fully investigate all allegations that members of the Indonesian police or other security forces have accepted bribes from people-smugglers in order to coerce asylum seekers to board unseaworthy boats. Prosecute all persons suspected of such offenses.

Given Indonesia's continuing economic problems and the widespread corruption throughout the country—as well as the internal displacement and other problems facing the government—some police officers or other officials may be disinclined to assist Australia in its goal of preventing unauthorized migration and, instead, may seek to benefit financially from such migration. Any collusion with the smugglers, whether or not it includes the taking of

bribes, can put asylum seekers at tremendous risk, as occurred when more than 400 asylum seekers drowned off the Indonesian coast in October 2001. Any allegations of such collusion with smugglers and/or coercion of asylum seekers must be fully investigated, and the guilty brought to justice.

C. To UNHCR:

1) Increase staff size and take other steps to expedite the refugee status determination process for asylum seekers in Indonesia.

While fully recognizing UNHCR's budget constraints, USCR notes the negative impact of UNHCR's limited staff size in Indonesia. Asylum seekers must often wait months to be interviewed by UNHCR, and must then wait additional months for decisions on their claims. This results in many asylum seekers giving up on what they perceive as a prolonged and indeterminate wait, and attempting to reach Australia by boat. Many others are frustrated and anxious by the uncertainty of their fate. UNHCR should seek funding from its donors, and other international support, to increase the number of staff conducting refugee status determinations and to increase access to qualified interpreters.

2) Take further steps to expedite the resettlement of persons found to be refugees.

Thus far, the resettlement countries have done an insufficient job of providing resettlement opportunities for refugees in Indonesia. UNHCR should take aggressive steps to communicate the urgency of this need to resettlement countries. Australia, in particular, should be urged to increase the number of refugees it will resettle from Indonesia.

D. To IOM:

1) Work to obtain additional funding for IOM's Indonesia-based operations in order that the Australian government will no longer be the sole, or even major, funder of IOM's services to asylum seekers in Indonesia.

Despite the fact that no asylum seekers are yet known to have been involuntarily returned under the Australia-Indonesia "regional cooperation arrangements," these arrangements are worrisome in that Australia is financially responsible for much of the treatment of asylum seekers in Indonesia. While IOM, like UNHCR, adheres to its own mandate and policies, Australia's focus on discouraging unauthorized migration, even by asylum seekers, could compromise the protection of asylum seekers in Indonesia. IOM should reduce its dependency on Australia as a source of funding for its services to asylum seekers in Indonesia.

2) Work with the Indonesian government and UNHCR to ensure that asylum seekers in Indonesia are, to the extent possible, housed under conditions that are not likely to cause tensions within the outside community. Work to educate the community on the asylum seekers' situation, to minimize the chance of tension or misunderstanding.

3) Take steps to ensure access to qualified interpreters for asylum seekers in Indonesia.

While generally impressed with IOM's Indonesia-based operation, which is constrained by limited resources and staff, USCR is concerned with IOM's difficulty in obtaining interpreters for particular groups of asylum seekers. The practice of relying on other asylum seekers for interpretation, while perhaps necessary at times, should be discouraged. If adequate in-person interpretation cannot be arranged, telephonic and other forms of interpretation should be explored.

E. To the United States and the International Community:

1) Increase and expedite the resettlement opportunities for UNHCR-recognized refugees in Indonesia.

Persons recognized as refugees by UNHCR in Indonesia should have no incentive to risk their lives by using the services of smugglers in an attempt to

reach Australia on unseaworthy boats. Yet many have done so, resulting in the deaths of at least 30 recognized refugees in October 2001. Approved refugees should be found durable solutions as soon as possible. Given that neither voluntary repatriation nor local integration are viable options for the vast majority of refugees in Indonesia, the international community should resettle these persons as quickly as possible.

2) **Provide increased funding to UNHCR to enable it to increase its staff in Indonesia and expedite the refugee screening process for asylum seekers there.**

3) **Urge the government of Australia to reverse policies that prevent asylum seekers from accessing Australia's refugee determination process, and to refrain from using the focus on human smuggling as a means to discourage genuine refugees from seeking protection.**

ENDNOTES

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