

Uncharted Waters by David Manne*

Refugee protection in Australia remains in uncharted waters. With the advent of political regime change after a decade of substantial departures from past practice and accepted international principles of refugee protection, some notable reforms – including the end of the 'Pacific Solution' and Temporary Protection Visas – have been introduced by the new Government. But just how much has changed and what remains uncertain?

As a lawyer who has been directly involved in providing legal assistance and advocacy for many refugees seeking protection in Australia, these questions appear particularly pertinent in relation to Australia's future approach relating to 'effective protection elsewhere' or 'safe third countries'.

Australia has been a key regional exponent of the global trend by states to devise sophisticated strategies aimed at preventing refugees from accessing protection in the territory in which they are seeking it. A core element of this 'protection elsewhere' policy seeks to transfer refugees to third countries where they already have obtained or could seek protection.

Central to this policy has been an attempt by Australia to reduce its responsibility for refugee protection to those who claim protection within its territory, and to risk circumventing obligations owed under the Refugees Convention and other treaties.¹

In February this year, the new Government dismantled the so-called 'Pacific Solution', which had formed a crucial foundation of the architecture of

Australia's deflection policies for some time. It had represented a radical departure from mainstream principles of domestic and international human rights law, principally by: 'excising' Australian territory to preclude refugees who arrived in Australia informally by boat from equal access to legal rights, such as making refugee protection claims in Australia under Australian law; and by transferring them to Nauru or PNG to have their claims assessed under inferior status determination processes outside the rule of law.

The reform resulted in seven Burmese and 82 Sri Lankan refugees in Nauru being promptly resettled to Australia, and the abandonment of efforts seeking third country resettlement under the policy, as well as attempts to first seek the readmission of the seven Burmese to their former 'transit' country of Malaysia.²

However, what does the end of this policy mean in practice? The new Government has retained the excision law and a policy which condemns informal boat arrivals to remote and inaccessible detention in Australian territory on Christmas Island in circumstances which remain unclear. There remains the risk of replicating the core features of the 'Pacific Solution' – with the exception of foreign warehousing and possibly of pursuing third country resettlement – albeit on Australian soil. Depending on where asylum seekers arrive and what rights they have in Australia, we still end up with two classes of refugees. Those arriving in excised territory risk being denied: (1) equal rights, such as access to Australian law for and independent review of refugee status determinations; (2) adequate access to legal assistance, which can

prove critical to a refugee's ability to properly present their case. And it remains completely uncertain what will happen to those found to be refugees under whatever process is adopted, including whether they will automatically be granted protection in Australia.

Another policy which remains unclear is whether Australia will turn back boats of asylum seekers to third countries such as Indonesia, as was attempted by the former Government in relation to the arrival of 83 Sri Lankans in Australia by boat from Indonesia. To do so would raise serious legal and practical issues. Like the regional cooperation arrangements involving interception of asylum seekers in Indonesia, it would effectively treat Indonesia *de facto* as a 'safe third country'. While protection 'elsewhere policies' may not be prohibited per se under the Refugees Convention, they should only be utilised in confined circumstances and under stringent conditions.³

It is far from clear that such circumstances would exist under these arrangements. Indonesia is not a signatory to the Refugees Convention and does not otherwise in practice, respect the full suite of rights afforded by the Refugees Convention. Although Indonesia may allow for status determination to be conducted by the UNHCR, this alone does not equate to effective protection.⁴ Further, by law, Australia cannot subcontract its obligations under the Refugees Convention to Indonesia and thereby avoid liability under that instrument.

Moreover, returning boats to Indonesia would appear to involve a blanket assumption of effective 'safety' without any prior consideration of an individual's

claims. It also appears unlikely that a person would be able to contest the legality of their transfer; a problem which has previously occurred in a number of cases of actual or proposed third country transfers by Australia.

In both scenarios, serious and unresolved problems persist. In this context, it is important to recognise the role of 'regional protection and co-operation mechanisms' in managing refugee flows and global responsibility sharing. While there may be some constructive aspects to this model,⁵ it is flawed in many respects. Many hundreds

of refugees (or other people of concern) have been stuck for protracted periods in Indonesia without access to third country resettlement options. Other concerns include Indonesia's limited capacity and interest concerning practical protection of refugees, and the real risk of orbit and refoulement situations. Australia may well be complicit in any such dangerous departures from Convention obligations.

This forms part of Australia's recent, broader strategy of seeking to shore up regional cooperation arrangements in South East Asia. Under this emergent 'South East Asian Solution', Australia is seeking – whether through transfer or interception measures - to use regional transit countries such as Malaysia to host refugees. A case in point was the recent attempt by the former Government to transfer our eight Burmese Rohingya clients from Nauru to Malaysia. Malaysia's agreement to readmit was procured. In a contortion of protection principles, Australia asserted, on the one hand, that the Burmese could obtain 'effective protection' in Malaysia, and on the other, that their claims for refugee protection in Australia would only be assessed once they were back in Malaysia, but not if they remained in Nauru. No individualised assessment of their submitted claims of past or prospective persecution in Malaysia was undertaken.

It is highly questionable whether such practices are permissible under 'protection elsewhere' principles, and the risk of dangerous orbit and chain refoulement is evident. Malaysia is not a signatory to the Refugees Convention, it does not in law or practice provide for acceptable protection of refugees, and it has a poor human

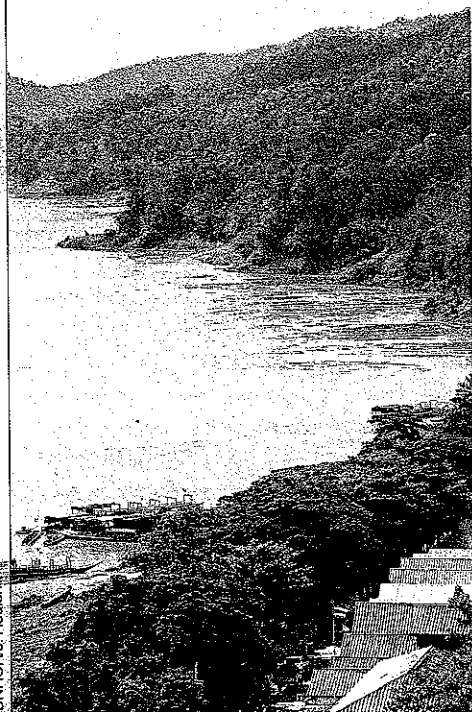
rights record, including in relation to refugee rights.⁶

The situation of our Burmese clients points to the pitfalls of Australia's 'protection elsewhere' policies on this front. For many years, they were unable to achieve third country resettlement and, despite seeking UNHCR help, were subjected to systematic mistreatment at the hands of Malaysian authorities, including extortion, beatings, arbitrary detention, denial of access to employment, education and health services, and deportation to Thailand where they faced the real risk of refoulement to Burma.

For regional protection mechanisms to properly serve their purpose, the commitment of participating states – particularly wealthy, industrialized states like Australia – in providing meaningful protection and resettlement of a reasonable number of refugees, as compared to merely prioritising preventing flows of irregular movement of asylum seekers, is critical.⁷

Similar questions arise in relation to the use by Australia of certain Memorandums of Understanding (MOU) with Papua New Guinea (PNG) and South East Asian countries, such as Malaysia. Under an MOU between Australia and PNG in effect since 2003, an asylum seeker can be returned to PNG if they had been in PNG for more than seven days. Their refugee claims are to be assessed and protection provided there if recognised as a refugee.⁸

This scheme also contains a blanket, automatic assumption of 'safety'. However, there are compelling reasons in principle and practice for requiring question and challenge of any transfer. For instance, Indonesian nationals of West Papuan



This part of the Salween River, near the Thai village of Mae Sam Laep, has been a popular point of entry for refugees fleeing human rights abuses in Myanmar.

ethnicity can carry a pro-Independence profile which involves genuine protection fears within PNG, including targeting by Indonesian-sponsored state and non-state agents, and ineffective state protection. Generally, independent evidence indicates that PNG has a problematic human rights record in which its ability to provide enduring refugee protection is unclear.⁹

Other concerns include whether sufficient 'connections' with PNG exist, and the absence of a formal bilateral agreement requiring compliance with full refugee rights and monitoring of protection.¹⁰

Another interesting question is: what are the moral and legal implications for Australia, particularly regarding arrangements where Australia exercises influence or control, financially and otherwise?

The moral dimensions may be described as the 'ethics of proximity' –

that is, certain obligations to assist and protect arise from the close presence of an individual whose plight we have been made aware of, and who we have the capacity to assist.¹¹ Choosing to act, as Australia has, in ways which affect peoples' rights abroad could also contribute to this obligation.¹²

Legally, not only is Australia unable to subcontract its protection obligations to another state by human transfer, but arguably, in financing, if not controlling, interception and hosting arrangements in Indonesia and elsewhere, it could assume legal obligations to guard against deprivations of social and economic rights which occur there.¹³

Another concern relates to restrictions regarding onshore asylum applications. Australian legislation has modified 'effective protection' principles to exclude an applicant from protection if s/he has "a right to enter and reside" in a third

country.¹⁴ This has precluded Australian protection to people with little or no link, let alone recognition as a refugee, in third countries, and often on dubious and generalised assumptions of status and safety there.¹⁵

While ending the 'Pacific Solution' may be welcome, Australia's current policy trajectory seems to perpetuate many of its most troubling aspects, albeit one step removed. In sponsoring protection arrangements where refugees are held in transit countries which do not provide effective protection and where refugees are likely to languish in limbo for prolonged periods, experience indicates that far from offering adequate 'solutions', these situations commonly re-traumatise people. They are often at fundamental odds with the core aim of securing durable solutions.

To fix the fundamentals of the post-'Pacific Solution' policy, reform needs to return to the assessment of asylum claims in Australian territory to ordinary approaches under the mainstream of Australian and international law, which involve equal access to and adjudication under the rule of law, with the right of independent review, removal of obstacles to access full legal and other assistance, and guaranteed, durable protection in Australia for recognised refugees.

More broadly, 'protection elsewhere' policies, including regional co-operation arrangements, need to ensure application of minimum standards. Serious questions of compliance arise concerning certain Australian practices. Regional arrangements must also be coupled with more expansive responsibility sharing measures, which not only involve sufficient funding, but also resettlement or relocation



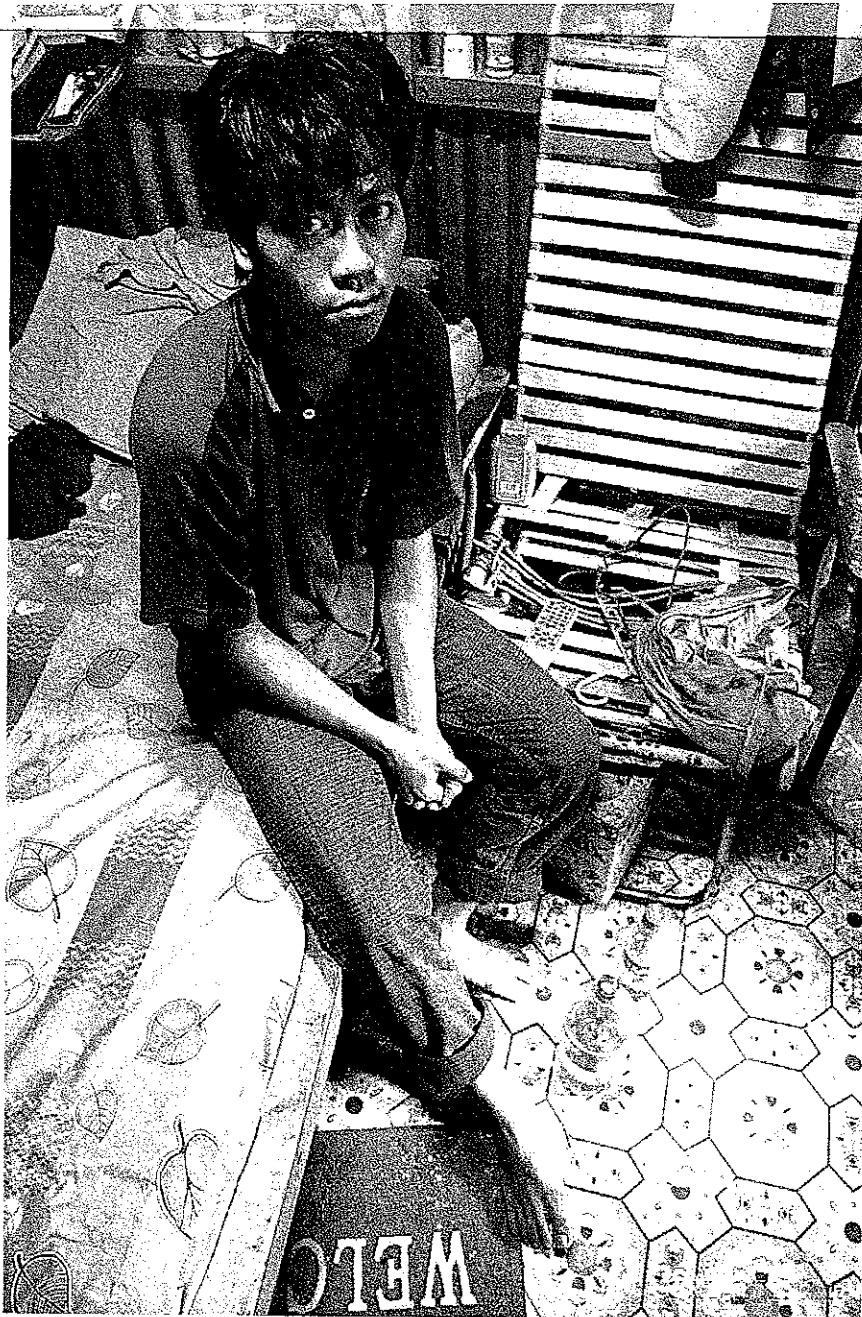
This sparsely furnished room is school for these Rohingya children, in an area outside of Kuala Lumpur. Refugee children have no access to formal education and the adults frequently set up spaces like these to teach their children, though classes are limited by lack of books and qualified teachers.

of a reasonable proportion of those needing protection.

The approach adopted by Australia in the 1980s under the Comprehensive Plan of Action (CPA) in response to the Indochinese refugee exodus provides a useful precedent for adaption to the contemporary context. Australia resettled 177,000 Indochinese refugees, many coming from holding camps in countries such as Malaysia and Indonesia by agreement with those countries. Between 1981 and 1987, there were no refugee boat arrivals, partly due to this policy. While potential complications - such as the creation of pull factors - exist, a more principled, rational and expansive management of refugee flows, focused on concrete and meaningful protection solutions, is required by Australia and its regional partners.

If Australia continues on its current course, it will mainly be dealing with the prevention of refugees coming to Australia. The region will be left with an intractable backlog of refugees requiring resettlement from Indonesia, Malaysia and elsewhere. What responsibility Australia will take for this predicament is far from settled. Protection of borders has predominated at the expense of protection of people. A realignment is required so that protection of people can assume its rightful role.

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This Chin man escaped near death when he fell 13 storeys while working on a construction site in Malaysia and steep hospital fees were difficult to meet on his meagre wages. He lives in this shack with other men from his community.

1. Michelle Foster, 'Constraints on Protection Elsewhere Schemes imposed by the Refugee Convention' (prepared for Workshop, Protection Elsewhere: International law and the off-shore processing and protection of refugees, 23 Feb. 2007, Melb. Law School), p 2.

2. My organisation was legal representative for the Burmese and 27 of the Sri Lankans.

3. *Id.*

4. See generally, Foster *supra* n 1 above.

5. For example, discouraging dangerous boat journeys to Australia, encouraging refugees to access UNHCR protection mechanisms, and provision of albeit limited financial aid to host countries.

6. See for example, Human Rights Watch, Malaysia/Burma, "Living in Limbo: Burmese Rohingyas in Malaysia" (August 2000 Vol. 12 No.4 (C)); and USCRI *World Refugee Survey*, Malaysia for 2005, 2006 and 2007.

7. See further, Refugee & Immigration Legal Centre Inc 'Submission Concerning Article 31 of the Refugee Convention - "Non-Penalisation, Detention and Protection"', paper prepared for UNHCR Global Consultations, Macau, May 2001.

8. See Savitri Taylor, 'Effective Protection Under Australia's Regional Cooperation Arrangements with

Indonesia and PNG: Whose Responsibility' (prepared for Workshop, Protection Elsewhere: International law and the off-shore processing and protection of refugees, 23 Feb. 2007, Melb. Law School), pp 13-14.

9. See for example, US Department of State, 'Country Reports on Human Rights Practices - 2007, Papua New Guinea, March 11, 2008. Further, a number of PNG nationals have recently been recognised as Convention refugees by Australian determination bodies.

10. PNG has made reservations in relation to a number of Refugee Convention rights, including to employment (Art 17(1)), housing (Art 21), education (Art 22(1)), and freedom of movement (Art 26).

11. Robert Manne with David Corlett, *Sending Them Home: Refugees and the New Politics of Indifference*, Quarterly Essay, Issue 13, 2004, p 82.

12. J R Lucas, *Responsibility* (1993), cited in Taylor, *supra* n 9, pp 39-40.

13. For example, rights under the ICESCR; See Taylor, *id* at 32-40.

14. *Migration Act 1958* section 36(3).

15. Examples include: Colombians vis-à-vis the US, UK or Argentina; a West Papuan vis-à-vis Japan; and Iraqis vis-à-vis Syria.