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The Transfer of Asylum Seekers in Australia to Third Countries: A Case Study of Sovereignty versus International Law

Hugh S. Tuckfield¹

Asylum is an issue equally central to refugee law and human rights. Generally, they are protected under the 1951 Refugee Convention, but asylum cases are largely state regulated affair, subject to state legislations, policies and guidelines, which certainly do not preclude the applicability of international obligations directing the conduct of state towards the asylum seekers, which emanate from the recognized international human rights principles such as right to seek asylum and right against refoulement and right not to be arbitrarily detained. Contracting parties to international conventions such as the 1951 Refugee Convention, ICCPR, ISESCR, CAT, CRC, CEDAW and CERD among others acquire the responsibility to respect, protect and fulfill the obligations adducible in treatment of asylum seekers. In this regard, Australia was one of the earliest state parties to the 1951 Refugee Convention and is also a party to the relevant human rights treaties. However, it is determined to adhere to its conventional understanding of sovereignty and nationalism, at the cost of comprising the minimum protection of the rights of those who seek asylum in it.

Introduction

This essay sets out to examine the human rights norms, standards and mechanisms that apply to asylum seekers that arrive in Australia territory by maritime vessels and are liable to or the subject of transfer to a third country for their claims to be processed.² It will explore the mechanisms under refugee

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² Unauthorised maritime arrival' is the new term proposed by in *Ahani v Canada*, *Legal Consequences of the Construction of a Wall in the Occupied Territory*, 1951 Refugee Convention, Vienna convention on the Law of Treaties, Snyder, Goodwin-gill, Migration Act 1958 (Australia), Migration Amendment (Unauthorised Maritime Arrivals and Other Measures Bill 2012 (Australia) to replace the existing term in the Migration Act 1958 of 'offshore entry person' to apply to those persons if they entered Australia by sea at an excised offshore place at any time after the excision time for that place or at any other place at any time on or after commencement date, and became an unlawful non-citizen because of that entry.

law and international human rights law available to protect their human rights as it applies to asylum seekers liable to transfer to a third country.

This essay will argue that Australia is breaching its international human rights obligation to respect, protect and fulfill the human rights of asylum seekers when it subjects them to transfer to a third country for the purpose of detention and processing of their claims. Since 1992, Australia has invoked its sovereignty to justify an absolute authority over asylum seekers, independent of any other authority including international human rights and refugee law. This invocation of sovereignty is based upon an argument that asylum is a right granted by the State, not a duty or an obligation; where the sovereignty of the State is viewed as indivisible, not to be limited by international law.³ Australia's concept of sovereignty enables it to control its immigration policy with impunity and to defeat the purpose and objects of international human rights treaties to which it is a signatory.⁴ This is the critical and emerging human rights issue in Australia.

The rationale behind Australia's immigration policy is a complex mix of politics, xenophobia and nationalism. Nationalism is a corollary of sovereignty, which restricts areas of human freedoms, rather than enlarging them.⁵ Australia's fervent determination in the past 30 years to exercise its sovereignty in relation to immigration is arguably a product of the country's rising sense of nationalism.⁶

Asylum seekers derive minimal protection of their human rights from the 1951 Convention beyond the prohibition against refoulement, the prohibition against discrimination and the prohibition against penalizing asylum seekers because they are unlawful entrants.⁷ However, international human rights law

³ G. Goodwin-Gill, *The Refugee in International Law* (2nd edn, Oxford University Press 1996) 172-173.

⁴ Australia is arguably in breach of the Vienna Convention as regards the duties and obligation under the 1951 Convention, ICCPR, ICESCR, CAT and CRC. Vienna Convention on the Law of Treaties (adopted 23 May 1969, entered into force 27 January 1980) 1155 UNTS 331 arts 26, 31.

⁵ Nationalism is initially observed as a unifying force that subsequently develops into a clamour for international independence then aggressive imperialism. Nationalism is a product of political, economic, social and intellectual factors at a certain stage in history, a condition of the mind, a feeling, or sentiment of a group of people living in a well defined geographical area, speaking a common language, possessing a literature in which the aspirations of the nation have been expressed, attached to common traditions, common customs, venerating its own laws, and in some cases having a common religion. See Louis L Snyder, Chapter II, 'The Concept of Nationalism' in Snyder, *The Meaning of Nationalism* (Rutgers University Press 1954) 196-197.

⁶ Ibid.

⁷ Article 31 of the 1951 Convention provides that asylum-seekers should not be penalized or exposed to unfavourable treatment solely because their presence in the country is considered unlawful. Article 3 of the 1951 Convention prohibits against discrimination of refugees on the grounds of

converges with refugee law to create a broad framework that strengthens the protection of asylum seekers against arbitrary detention, physical harm, threats to life and security, separation from family members as well as ensuring access to health, education, food, and shelter, including those of unaccompanied children and those that are considered vulnerable.⁸ These human rights obligations are also subject to four main principles of international law that strengthen the protection of rights of asylum seekers, including those liable to, or the subject of a forced transfer to a third country.⁹

Asylum seekers are entitled to the full universe of human rights. The rights most relevant to asylum seekers in Australia include: the right to seek asylum, the right not be refouled, the principle of non-refoulement, the right against arbitrary detention, the right to due process and the rights of children. This essay will discuss the right to enjoy and seek asylum, and the prohibition against arbitrary detention in the context of asylum seekers in Australia and those liable to or subject of transfer to a third country.

Refugee Law and International Human Rights Law

a. The Right to Seek and Enjoy Asylum: Principle of Non-Refoulement

'race, religion and country of origin'. Convention Relating to the Status of Refugees (adopted 28 July 1951, entered into force 22 April 1954) 189 UNTS 137 (1951 Refugee Convention) art 31.

⁸ Australia has ratified (with some reservations) all the major international human rights treaties relevant to the rights of asylum seekers and thus has obligations to *respect, protect and fulfill* the human rights of asylum seekers. Australia has ratified the following conventions: International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171 (ICCPR); International Covenant on Economic, Social and Cultural Rights (entered into force 3 January 1976) 999 UNTS 3 (ICESCR); Convention against Torture, and Other Cruel, Inhuman, Degrading Treatment or Punishment (entered into force 26 June 1987) 1465 UNTS 85 (CAT); Convention on Elimination of Racial Discrimination (entered into force 4 January 1969) 660 UNTS 195; Convention on Elimination of Discrimination against Women (entered into force 3 September 1981) 1249 UNTS 13 (CEDAW); Convention on Rights of the Child (entered into force 2 September 1990) 1577 UNTS.

⁹ The first principle relevant in the context of asylum seekers being transferred to third countries is that Australia's human rights obligations extend to acts done outside its territory. This was the decision of International Court of Justice (ICJ) in its advisory opinion in the *Israel Wall* case. *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* [2004] ICJ Rep 136 (*the Israel Wall Case*). The second principle relevant to asylum seekers is that States are obliged to treat people it has transferred to third countries and has effective control over, in a manner consistent with the human rights obligations it has agreed to be bound by. See (decisions of the European Court of Human Rights) *Banković v Belgium et al* [GC] no. 52207/99, [2001] ECHR 890 and *Al-Skeini v United Kingdom* [GC] no. 55721/07, [2011] ECHR 1093. The third principle holds that where there is alleged serious threats to physical security, a state is to exercise due diligence to determine whether the requisite level of risk exists. See *Ahani v Canada*, Communication No.1051/2002, UN Doc CCPR/C/80/D/1051/2002 (2004) 10.7. The fourth principle is that States have a responsibility to implement their treaty obligations in good faith. This principle obliges states, to not by act or mission or combinations thereof to render the fulfilment of treaty obligations obsolete, or defeat the object and purpose of a treaty. Vienna Convention on the Law of Treaties (n 4) arts 26, 31.

The Universal Declaration of Human Rights (UDHR) enshrines the right to seek and enjoy asylum in article 14. However, the UDHR is non-binding upon the signatories and other international human rights treaties are silent on the right to seek asylum. ICCPR contains no provision equivalent to UDHR article 14. The 1951 Refugee Convention and the 1967 Optional Protocol (1967 Protocol) are also silent on the right to seek asylum, but importantly establish the principle of non-refoulement whereby protection against refoulement is available to asylum seekers whose claims are still pending and to those that are yet to make a formal application for refugee status. The Australian Government however holds that the 1951 Convention only applies to persons within Australia's territorial boundaries, thus taking asylum seekers transferred to third countries outside of their realm of responsibility. This is contrary to the principle of extraterritorial responsibility established by the ICJ in the *Israeli Wall Case*.¹⁰

Australian legislators have also revoked the positive obligation under international law to assist any person seeking protection against persecution. The 1958 Migration Act (Migration Act) provides that those persons that arrive in Australia by boat seeking protection are deemed 'unauthorised' and the right to seek asylum is only given effect if the Minister exercises his discretionary powers to intervene to prevent transfer to a third country and allows an application for protection to be made. Australian law thus eliminates what was a claimable right to asylum to a 'discretionary grant' and thus 'undermine[s] the normative status and legal protection of refugees' on which the 1951 Refugee Convention is based.¹¹

International human rights law however expands the protection against refoulement beyond the five grounds of persecution provided in the 1951 Convention. ICCPR, articles 6 and 7 provides that the principle of non-refoulement applies to rejected asylum seekers where there exist substantial grounds for believing that there is a 'real risk of irreparable harm'.¹² CAT, article 3 protects asylum seekers from refoulement when there are 'substantial grounds for believing that he or she would be in danger of being subjected to torture' if refoulement were to occur.¹³ CRC, articles 3, 10, 20, 22, 24, 28 and 37(b) set an array of protections against refoulement of children including that

¹⁰ See *Israel Wall Case* (n 9); request and summary of the advisory opinion of 9 July 2004.

¹¹ Professor Ben Saul submission to the Senate Legal and Constitutional Affairs Committee inquiry into the Migration Amendment (Unauthorised Maritime Arrivals and Other Measures) Bill 2012 (4 December 2012).

¹² ICCPR (n 8) arts 6, 7.

¹³ CAT (n 8) art 3.

Australia act in the ‘best interests of children’.¹⁴

There are limited mechanisms available to asylum seekers liable to or the subject of transfer to a third country to protect them from non-refoulement.¹⁵ The 1951 Convention and 1967 Protocol fail to provide any mechanisms that would protect an asylum seeker from non-refoulement. Australia has erected procedures to make remedies available under the Migration Act that generally comply with article 3(a) of the ICCPR, but has specifically excluded unauthorized maritime arrivals from accessing these remedies and procedures, a direct breach of its obligations under the ICCPR.¹⁶ Under article 1 of the First Optional Protocol to the ICCPR, complaints may be filed by individuals subject to the jurisdiction of a State Party to the Optional Protocol ‘who claim to be victims of a violation by that State Party of any of the rights set forth in the Covenant’. According to Article 22 of the CAT, complaints may be filed by or on behalf of individuals subject to the jurisdiction of a State Party who claim to be victims of a violation of a provision of the Convention. There are no complaint mechanisms available to children under the CRC.¹⁷

In practice however asylum seekers in Australia rarely employ these complaint mechanisms. Asylum seekers held in detention are geographically isolated from legal services, have language barriers, and are ill informed about the complexities of the immigration system and their human rights. In any event, the asylum seekers want to seek refuge in Australia and are reluctant to complain for fear of reducing their prospects of approval by the authorities.

b. Right not to be Arbitrarily Detained

Australia has one of the strictest immigration detention regimes in the world. Detention is mandatory for maritime arrivals, it is not subject to a time limit and asylum seekers arriving by boat are unable to access the courts to

¹⁴ CRC (n 8).

¹⁵ Such as the Ministers discretion to exempt classes of persons from offshore processing under s. 198AE of the Migration Act or to allow protections visas to be issued under s.46. See Department of Immigration & Citizenship Departmental, *Guidelines for Assessment of Persons Prior to Transfer pursuant to section 198AD(2) of the Migration Act (October 2012) (the DIAC Guidelines)* < http://www.immi.gov.au/visas/humanitarian/_pdf/s198ad-2-guidelines.pdf> accessed 1 April 2013.

¹⁶ Article 3(a) of the ICCPR provides that States Parties are to ensure that any person whose rights or freedoms enshrined in the Covenant are violated has available to them an effective remedy and any person claiming that remedy have the right determined by an appropriate authority. ICCPR (n 8) art 3.

¹⁷ Complaint mechanisms are provided for in the Optional Protocol to the *Convention on the Rights of the Child*, to which Australia has not acceded. See UN Human Rights Council, *Optional Protocol to the Convention on the Rights of the Child on a Communications Procedure* (adopted on 14 July 2011) UN Doc. A/HRC/RES/17/18 <<http://www.refworld.org/docid/4e72fbb12.html>> , accessed 21 April 2013.

challenge their detention. All non-citizens that arrive in Australia by boat are subject to the regional processing framework in third countries on Nauru and Manus Island.¹⁸ Conditions on Manus Island and Nauru are extremely harsh; both are isolated with small populations, minimal infrastructure and limited or no community services.

The Australian regime of mandatory detention exhibits all the elements of a violation of the prohibition against arbitrary detention provided for in international human rights law: the UDHR prohibits arbitrary detention under article 9; the ICCPR under article 9(1) prohibits the use of arbitrary detention to deprive a person of their liberty except on such grounds as provided for by law; article 9(4) of the ICCPR empowers a judicial body to release an asylum seekers wrongfully detained; and the CRC under article 37(b) provides that children shall only be held in detention as a measure of last resort, for the shortest appropriate period of time and taking into account the best interests of the child (article 3).

Arbitrary detention is broadly interpreted to include the elements of inappropriateness, injustice and lack of predictability. International human rights bodies, refugee advocates, scholars and lawyers argue that Australia's system of mandatory detention fails the tests of reasonableness, proportionality, inappropriateness, injustice and lack of predictability.¹⁹ The detention is not subject to any time limits nor is there any mechanism for judicial review. Immigration detention is mandatory for non-citizens that arrive by boat who do not hold a valid visa and must be held in detention until issued a visa, removed or deported from Australia.²⁰

Australia conclusively fails the tests of reasonableness, proportionality and inappropriateness on the basis that over 88% of irregular maritime arrivals seeking asylum are granted protection visas suggesting only a very small percentage pose a risk and should be held in detention.²¹ A statistically significant number of asylum seekers, men, women and children alike, are therefore being held in detention for prolonged periods of time and denied their right to liberty and freedom, education, family, physical and mental health.

¹⁸ MA (Migration) Bill (Australia) sch 1, item 8; See also Commonwealth, House of Representatives (Parliamentary Debates) 31 October 2012, 8 (Chris Bowen, Minister for Immigration and Citizenship).

¹⁹ Where detention complies with national law, the 1951 Convention and international human rights law and satisfies the test of reasonableness and is proportional to the objectives to be achieved and on a non-discriminatory basis, it is considered to be lawful and not arbitrary.

²⁰ Migration Act 1958 (Cth), s 196.

²¹ This is to be compared to 25% to 35% of non-irregular maritime arrivals being granted protection visas. See *Report of the Expert Panel on Asylum Seekers* (August 2012) table 15 (finally determined rates for key IMA caseloads in Australia) 98

Even more disconcerting fact is that the asylum seekers in detention are forcibly exposed to a high risk of developing severe psychological disorders including depression and anxiety, leading to self-harm and suicide. Critical incidents including violent protests, high rates of self-harm including lip sewing, self-laceration, hunger strikes and suicide have been directly attributed to the extended periods in detention, coupled with overcrowding.²² The transfer to a regional processing framework in a third country will only exacerbate these critical incidents and result in greater suffering, further escalating the failure of Australia to protect, respect and fulfill the rights of asylum seekers.

United Nations bodies have articulated their concerns for Australia's system of mandatory, indefinite detention but these concerns to date have been ignored and even rebuffed by Australian governments that are determined to see sovereignty reign supreme over international human rights law.²³ Asylum seekers will be further subjected to prolonged and indefinite detention by the application of the recently legislated 'no advantage' principle that actively encourages long delays in processing claims for asylum and exploration of re-settlement options, thus failing the requirements of inappropriateness, injustice and predictability.²⁴ The UNHCR has condemned the 'no advantage' test insofar that it relies upon the 'average period for resettlement' as the metric to determine no advantage is derived by asylum seekers arriving in Australia by boat vis-à-vis those that have applied for asylum outside of Australia. The

²² There have been eight deaths in detention centres, six of which have been attributed to suicide.

²³ See, for example 'UNHCR urges Australia to review policy of detaining asylum seekers' (Media Release, 1 February 2002) < www.un.org/apps/news/story.asp?NewsID=2785& > accessed 1 May 2013; 'Changes to Australian detention arrangements' (Media Release, 19 April 2010) <http://unhcr.org.au/unhcr/index.php?option=com_content&view=article&id=175&catid=35&Itemid=63>, accessed 6 February 2013; United Nations Human Rights Committee, Concluding Observations of the Human Rights Committee: Australia UN Doc CCPR/C/AUS/CO/5 (2009) para 23; United Nations Committee on Economic, Social and Cultural Rights, Concluding observations of the Committee on Economic, Social and Cultural Rights: Australia UN Doc E/C.12/AUS/CO/4 (2009), para 25; A Grover, Report of the Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health, 'Mission to Australia' UN Doc A/HRC/14/30/ Add.4 (2010) 21-24; United Nations Human Rights Council, 'Report of the Working Group on the Universal Periodic Review: Australia (2011)' paras 28, 42, 49, 78, 86.123, 86.127, 86.131 and 86.132 < www.ohchr.org/EN/HRBodies/UPR/PAGES/AUSession10.aspx>, accessed 6 February 2013; United Nations Commission on Human Rights, Report of the Working Group on Arbitrary Detention: Visit to Australia (2002) UN Doc E/CN.4/2003/8/Add.2 executive summary; United Nations Committee on the Rights of the Child, Concluding Observations: Australia (2005) UN Doc CRC/C/15/Add.268 para 62.

²⁴ The introduction of the 'no advantage test' contemplates a time frame for the processing of protection claims that is assessed against and consistent with the period a refugee might face had she or he been assessed by the UNHCR 'within the regional processing arrangement'.

UNHCR has categorically stated there is no measure of an ‘average period for resettlement’ in existence.²⁵

Australia’s immigration policy does not distinguish between children and adults. Children arriving in Australia by boat, including unaccompanied children also face mandatory detention and transfer to a third country.²⁶ Australia is breaching its obligations under the CRC to ensure that children are only held in detention as a measure of last resort and for the shortest appropriate period of time.²⁷ These obligations include the requirement to treat the ‘best interests’ of the child as a primary consideration in all actions concerning children,²⁸ to protect against unlawful or arbitrary interference with the family,²⁹ to be treated with humanity and respect for the inherent dignity of the human person;³⁰ and the right to challenge their detention.³¹ The Government policy to submit children to mandatory detention and transfer to third countries violates additional human rights including but not limited to the rights to education, development, an adequate standard of living, and physical and mental health.³²

There are limited mechanisms available to asylum seekers in Australia to protect their right not to be arbitrarily detained. The Australian government has legislated away the right of judicial review of detention by an Australian court or tribunal in breach of its obligations under ICCPR article 9(4). Asylum seekers that have been transferred to a third country are subject to their national laws that either currently make no provision for judicial review, or are in the process of being drafted. In any event, according to the ICJ in its advisory opinion in the *Israel Wall Case*, Australia maintains responsibility for those

²⁵ The no-advantage test has raised concerns among a range of relevant Non-Government Organisations (NGOs), the Australian Human Rights Commission (AHRC) and the UNHCR. The UNHCR has explained that the time it takes for resettlement referrals by the UNHCR in South East Asia or elsewhere ‘may not be a suitable comparator for the period that a Convention State whose protection obligations are engaged should use.’ It has further explained that it is difficult to identify such a period with any accuracy, given that there is no ‘average’ time for resettlement, and due to the fact that the UNHCR seeks to resettle people on the basis of need and special categories of vulnerability, rather than on the basis of a ‘time spent’ formulation. See: Australian Human Rights Commission Human, ‘rights issues raised by the transfer of asylum seekers to third countries’ (AHRC Paper, October 2012) <http://www.humanrights.gov.au/human_rights/immigration/transfer_third_countries.html> accessed 1 May 2013.

²⁶ In October 2012, seven families, including four children, comprised the first 19 asylum seekers flown from Christmas Island to Manus Island under an agreement the Australian Government signed with the PNG Government in September 2012. See MOU Relating to the Transfer and Assessment of Persons in PNG, and Related Issues (with PNG), 19 August 2011.

²⁷ CRC (n 8) art 37(b)

²⁸ Ibid art 3.

²⁹ ICCPR (n 8) arts 17, 23.

³⁰ CRC (n 8) art 37(c).

³¹ Ibid art 37(d) article 37(d).

³² See CRC (n 8) arts 24, 26, 27, 29, 30.

asylum seekers transferred to a third country. The 1951 Convention provides no mechanisms for asylum seekers to challenge arbitrary detention. Under article 1 of the First Optional Protocol to the ICCPR, complaints may be filed by individuals subject to the jurisdiction of a State Party to the Optional Protocol 'who claim to be victims of a violation by that State Party of any of the rights set forth in the Covenant'. According to article 22 of the CAT, complaints may be filed by or on behalf of individuals subject to the jurisdiction of a state party who claim to be victims of a violation of a provision of the Convention. There are no complaint mechanisms available to children under the CRC. For those asylum seekers transferred to a third country, there will be the complexity of determining whether to complain against Australia or the country in which they are being detained or both.

Notwithstanding the capacity to petition, the asylum seekers are reluctant to complain about detention as they face all the problems associated with their isolation, access to legal counsel, language barriers and their determination is not to jeopardize their desire to seek asylum and be granted refugee status in Australia.

Conclusion

This essay has examined the human rights norms, standards and mechanisms available to protect the human rights of asylum seekers arriving in Australia by maritime vessels. In examining Australia's immigration policy to asylum seekers arriving by boat, one based on the principles of deterrence, detention and deportation it has argued that Australia is breaching its international human rights obligation to respect, protect and fulfill the human rights of asylum seekers when it subjects them to indefinite mandatory detention and they are liable to transfer to a third country for the purpose of processing of their claims.

It has argued that the convergence of refugee law and international human rights law operates to create a broad framework that strengthens the protection of asylum seekers against arbitrary detention, physical harm, threats to life and security, separation from family members as well as ensuring access to health, education, food, and shelter, including those of unaccompanied children and those that are considered vulnerable. Notwithstanding this framework of protection, Australia relies upon its conceptual understanding of sovereignty to deny and flagrantly breach the human rights of asylum seekers.

This essay proposes that Australia has arrived at this position by invoking its sovereignty to justify an absolute authority over asylum seekers, independent of any other authority including international human rights law and refugee

law. This invocation of sovereignty is based upon a fallacious argument that asylum is a 'right granted by' the State, not a 'duty or an obligation'; where the sovereignty of the State is viewed as indivisible, not to be limited by international law. This is argued to be a narrow interpretation of Hobbes original theory of sovereignty and has no place in the modern world.

It has presented a probable cause of Australia's disregard for asylum seekers' human rights arising from an unprecedented escalation of nationalism across a broad spectrum of Australian society, a phenomenon that whilst initially unifying a nation, ultimately leads to a restriction upon human freedoms. Australia's policy of mandatory detention clearly constitutes arbitrary detention and the transfer of asylum seekers to third countries is a 'clever' modus operandi to abrogate its duties and responsibilities to asylum seekers it accepted when it ratified international conventions including the ICCPR, CAT and CRC.

This essay has limited its scope to examining two human rights norms relevant to asylum seekers: the right not to be arbitrarily detained and the right to seek and enjoy asylum. There is a plethora of human rights attributable to asylum seekers that Australia is intentionally failing to respect, protect and fulfill. This is illustrative of the determination of the Australian government to dissuade asylum seekers and its preparedness to breach their human rights.
