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BY EMAIL

11 January 2013

Dear Committee Secretary,

Migration Legislation (Regional Processing and Other Measures) Act 2012
and Related Bills and Instruments

Thank you very much for the opportunity to provide a written submission in lieu of oral evidence to the Committee.

In addition to the submission below, which addresses a number of the specific questions raised by the Committee, I am *enclosing* two further submissions which are relevant to the issues before the Committee:

- A submission by 17 Australian refugee law academics to the Expert Panel on Asylum Seekers (11 July 2012), endorsed by a number of international refugee law scholars (Professor Deborah Anker, Dr David Cantor, Professor Geoff Gilbert, Professor Guy S Goodwin-Gill, Professor Elspeth Guild, Professor Kate Jastram, Professor Hélène Lambert, Professor Audrey Macklin: http://expertpanelonasylumseekers.dpmc.gov.au/published-submissions);

- Annexed to the above, a submission of 14 Australian refugee law academics to the Senate Inquiry into the Agreement between Australia and Malaysia on the Transfer of Asylum Seekers to Malaysia (15 September 2011).

Please do not hesitate to contact me if I can be of further assistance.

Yours sincerely,

Professor Jane McAdam

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SUBMISSION TO THE JOINT PARLIAMENTARY COMMITTEE ON HUMAN RIGHTS

A Introductory remarks on the human rights implications of Australia's regional processing regime, including State responsibility[1]

1. Australia's regional processing regime raises a number of serious human rights concerns.[2] In particular, by virtue of the statutory bar regime, asylum seekers who arrive at excised places (which will include mainland Australia, if the 2012 Bill is passed) are unable to submit a valid visa application under the Migration Act unless the Immigration Minister exercises his or her discretion to allow it. This discretion is non-compellable and is only exercised where the Minister believes it is in the 'public interest' to do so. This undermines the normative protection of the Refugee Convention.[3]

2. Individuals whose protection claims are assessed offshore do not have access to the same procedural protections that are available to those whose asylum claims are lodged on the Australian mainland. They do not have recourse to the Refugee Review Tribunal or the Australian courts for review of negative refugee status determinations. Furthermore, access by lawyers, NGOs and others is severely impeded owing to the remote locations of the centres (and the fact that other sovereign countries may refuse access to non-nationals).

3. Although the Refugee Convention itself does not stipulate how refugee status determination should take place, UNHCR's Executive Committee (comprised predominantly of States parties to that treaty, including Australia) has set out minimum standards that States should observe. For example, Executive Committee Conclusion No 93 (2002) requires *inter alia* that asylum seekers have access to assistance for basic support needs, such as food, clothing, accommodation, medical care and respect for privacy; that reception arrangements are sensitive to gender and age, in particular the educational, psychological, recreational and other special needs of children, and the specific needs of victims of sexual abuse and exploitation, of trauma and torture; and that family groups be housed together. Executive Committee Conclusion No 8 (1977) stipulates *inter alia* that recognized refugees be issued with documentation certifying that status, and that those not recognized as refugees have a reasonable time to appeal. Numerous conclusions emphasize that UNHCR should be given access to asylum seekers, and asylum seekers should be entitled to have access to UNHCR.[4] Above

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[1] Some of the material here is based on previously published work, and I acknowledge my co-authors of that work, Kate Purcell and Tristan Garcia.

[2] Although the Migration Amendment (Unauthorised Maritime Arrivals and Other Measures) Bill 2012 refers to 'regional processing', the process in Nauru and Papua New Guinea is nothing of the sort. This is simply a revitalization of the Pacific Solution whereby asylum seekers are transferred to a third country and processed there, pursuant to bilateral agreements. True regional cooperation is built on shared goals, concerns and responsibility, not one country seeking to outsource refugee status determination elsewhere.

[3] Convention relating to the Status of Refugees (adopted 28 July 1951, entered into force 22 April 1954) 189 UNTS 137, read in conjunction with the Protocol relating to the Status of Refugees (adopted 31 January 1967, entered into force 4 October 1967) 606 UNTS 267.

[4] UNHCR Executive Committee Conclusions Nos 33 (1984), 44 (1986), 48 (1987), 75 (1994), 82 (1997), 93 (2002), 101 (2004).

all, treatment must not be inhuman or degrading.[5] The regional processing arrangements are sub-standard when assessed against these benchmarks (and the human rights provisions on which they are based).

4. International standards require that individuals have access to legal advice and representation; access to up-to-date, authoritative, and public country of origin information; written reasons for decisions; and an opportunity for appeal on matters of fact and law. Decisions that have been made according to such practices are defensible and can withstand public scrutiny and questioning, whereas decisions that have (or which appear to have) been made without proper regard to due process and impartiality remain open to criticism.

5. Nauru acceded to the Refugee Convention in 2011 but has only recently sought to establish national refugee status determination procedures. As such, there is no expertise within that country for determining refugee claims. Nauru is not a party to the International Covenant on Economic, Social and Cultural Rights (ICESCR),[6] International Covenant on Civil and Political Rights (ICCPR) or the Convention against Torture (CAT). This means that it has not agreed to respect the human rights set out in those instruments, including *non-refoulement* obligations based on the right to life and the right to be free form torture or cruel, inhuman or degrading treatment or punishment.

6. Although Papua New Guinea is a party to the Refugee Convention, it has made a significant reservation. This provides that Papua New Guinea does not accept the obligations set out in articles 17(1) (work rights), 21 (housing), 22(1) (education), 26 (freedom of movement), 31 (non-penalization for illegal entry or presence), 32 (expulsion) and 34 (facilitating assimilation and naturalization). This means that there is a significant curtailment of the rights of refugees and asylum seekers in Papua New Guinea, which is at a much lower standard than the obligations that Australia has accepted under that treaty. Again, this means that asylum seekers transferred there are receiving different treatment than asylum seekers processed in Australia or even on Nauru, which may amount to discriminatory treatment.

7. As a matter of international law, Australia cannot contract out of its international legal obligations either by excising parts of its territory from its domestic migration zone, or by delegating processing to other States.[7] Australia is responsible for the actions of its officials both within and outside of Australian

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[5] Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (adopted 10 December 1984, entered into force 26 June 1987) 1465 UNTS 85 (CAT) art 3; International Covenant on Civil and Political Rights (adopted 16 Dec 1966, entered into force 23 March 1976) 999 UNTS 171 (ICCPR) art 7.

[6] International Covenant on Economic, Social and Cultural Rights (adopted 16 December 1966, entered into force 3 January 1976) 993 UNTS 3 (ICESCR).

[7] UN Human Rights Committee 'General Comment 31 on Article 2 of the Covenant: The Nature of the General Legal Obligation Imposed on States Parties to the Covenant' (29 March 2004) UN Doc CCPR/C/21/ Rev.1/Add.13 (26 May 2004) para 10; UN Human Rights Committee 'Concluding Observations of the Human Rights Committee: Israel' UN Doc CCPR/C/79/Add.93 (18 August 1998) para 10; UN Human Rights Committee 'Concluding Observations of the Human Rights Committee: United States of America' UN Doc CCPR/C/79/Add.50 (6 April 1995) para 284. The *non-refoulement* obligation under article 33 of the Refugee Convention applies to actions taken 'in any manner whatsoever'.

territory, including within the territory of other sovereign States, such as Nauru and Papua New Guinea.[8]

8. Liability for breaches of international law can be both joint and several.[9] Any State that aids or assists, directs or controls, or coerces another State to commit an internationally wrongful act is also responsible if it knows the circumstances of the wrongful act, and the act would be wrongful if that State committed it itself. Furthermore, an internationally wrongful act is attributable to a State if it is committed by a legislative, judicial or executive organ of government, or a person or entity which, although not a government organ, has nonetheless been delegated certain aspects of governmental authority (even if that person or entity exceeds the actual authority they have been given or goes against instructions). In other words, States cannot 'contract out' of their international responsibilities. This was recently emphasized by the Grand Chamber of the European Court of Human Rights in respect of Italy's transfer of irregular migrants to Libya, where it stated that Italy could not contract out of its international obligations via a bilateral agreement with another State.[10]

9. Given Australia's involvement in the transfer, management and possible processing of the asylum seekers to be held in such places, it remains responsible for any violations of international law relating to their treatment under the Refugee Convention, general international law, and human rights law. This is a consequence of the general law on State responsibility, as well as deriving from Australia's obligations under article 2(1) of the ICCPR, which requires States parties to 'respect and ensure the rights laid down in the Covenant to anyone within the power or effective control of that State Party, even if not situated within the territory of the State Party.'[11]

10. On the issue of State responsibility in the present context, I refer the Committee to the oral evidence presented to it by Professors Joseph, Kneebone and Triggs on 19 December 2012 and by UNHCR on 17 December 2012. I also refer the Committee to UNHCR's public statement of 31 October 2012 that 'under international law any excision of territory for a specific purpose has no bearing on the obligation of a country to abide by its international treaty obligations', and that if asylum seekers are transferred to other States, then 'the legal responsibility for those asylum-seekers may in some circumstances be shared with that other country, but such an arrangement would not relieve Australia of its own obligations'.[12]

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[8] Ian Brownlie, *System of the Law of Nations: State Responsibility, Part I* (Oxford University Press, Oxford, 1983) 135–37, 159–66.

[9] See generally articles 16–18 of the International Law Commission, Articles on Responsibility of States for Internationally Wrongful Acts, with Commentaries (2001).

[10] *Hirsi Jamaa v Italy* (App No 27765/09, European Court of Human Rights, Grand Chamber, 23 February 2012) para 129. See further Guy Goodwin-Gill, 'The Extraterritorial Processing of Claims to Asylum or Protection: The Legal Responsibilities of States and International Organisations' [2007] 9 *UTS Law Review* 26, 33; Violeta Moreno-Lax, '*Hirsi Jamaa and Others v Italy* or the Strasbourg Court versus Extraterritorial Migration Control?' (2012) 12 *Human Rights Law Review* 574.

[11] UN Human Rights Committee, 'General Comment 31' (n 7) para 10.

[12] UNHCR, 'UNHCR Statement: Migration Amendment (Unauthorised Maritime Arrivals and Other Measures) Bill 2012' (31 October 2012)

B Specific questions raised by the Committee

(a) The objective(s) of the legislation and evidence that the measures are likely to be effective in achieving the objective(s) being sought

11. On this point, I draw the Committee's attention to the 'Conclusion' of the Refugee Law Academics' submission to the Expert Panel on Asylum Seekers (*enclosed*, pages 6–7).

(b) The nature and scope of Australia's obligations under the seven human rights treaties listed under the definition of human rights in the *Human Rights (Parliamentary Scrutiny) Act 2011* with regard to individuals who are removed to regional processing countries

12. Refugees and asylum seekers are entitled to enjoy the full range of civil, political, economic, social, and cultural rights set out in international and regional human rights treaties and customary international law. With very few exceptions (relating to the right to vote, the right to stand for public office, and the expulsion of aliens), the international human rights instruments make no distinction between the rights of citizens and (forced) migrants. Indeed, the principle of non-discrimination mandates that States respect and ensure human rights 'without discrimination of any kind as to race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status'.[13] That is not to say that all differential treatment amounts to discrimination, but rather that it will only be justified if the criteria for such differentiation are 'reasonable and objective' and the overall aim is 'to achieve a purpose which is legitimate' under human rights law.[14]

13. A fundamental point to note in the context of both excision and regional processing is that Australia cannot relieve itself of its international obligations – whether by excising territory from its 'migration zone' or by sending asylum seekers to other countries for processing.[15]

14. First, Australia may violate human rights law if it sends asylum seekers to countries where they are at risk of *refoulement* – for example, because of second-rate refugee processing systems which cannot adequately assess protection claims. As noted in paragraphs 20–28 below, there is a particular concern that asylum seekers sent offshore will not even have their claims considered against the complementary protection criteria, based on *non-refoulement* obligations under

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http://unhcr.org.au/unhcr/index.php?option=com_content&view=article&id=277&catid=35&Itemid=63.

[13] ICESCR, art 2(2); see also ICCPR, art 2(1).

[14] UN Human Rights Committee, 'General Comment 18: Non-Discrimination' (10 November 1989) para 13.

[15] See eg Vienna Convention on the Law of Treaties (adopted 23 May 1969, entered into force 27 January 1980) 1155 UNTS 331, arts 27, 29. See eg *Amuur v France* (1996) 22 EHRR 533; Ian Brownlie, *System of the Law of Nations: State Responsibility, Part I* (Clarendon Press, Oxford, 1983) 135–37, 159–66; *MSS v Belgium and Greece* (App No 30696/09, European Court of Human Rights, Grand Chamber, 21 January 2011); *NS v Secretary of State for the Home Department*, Joined Cases C-411/10 and C-493/10 (Court of Justice of the European Union, Grand Chamber, 21 December 2011).

human rights law. This automatically heightens the risk of *refoulement* on account of arbitrary deprivation of life or the infliction of torture, or cruel, inhuman or degrading treatment or punishment. As the European Court of Human Rights stated in 2012 in *Hirsi Jamaa v Italy*, '[i]t is a matter for the State carrying out the return to ensure that the intermediary country offers sufficient guarantees to prevent the person concerned being removed to his country of origin without an assessment of the risks faced.'[16]

15. Secondly, Australia may violate human rights law if it knowingly sends asylum seekers to conditions which do not meet minimum human rights guarantees. For example, the European Court of Human Rights found that Belgium violated its *non-refoulement* obligations by returning an asylum seeker to Greece, because it 'knowingly exposed him to conditions of detention and living conditions that amounted to degrading treatment.'[17] The conditions of detention in Greece 'were well known before the transfer of the applicant and were freely ascertainable from a wide number of sources'.[18] Australia may violate the international law prohibition on return to cruel, inhuman or degrading treatment if the living conditions for asylum seekers in Nauru/Papua New Guinea fall below a minimum standard.

16. Thirdly, as noted in paragraphs 7–10 above, States retain responsibility over persons within their territory or jurisdiction, which includes situations where one State uses another as its agent.[19] Liability for breaches of international law can be both joint and several. This means that human rights violations in regional processing countries (including *refoulement*) will remain attributable to Australia, as well as to Nauru/Papua New Guinea.

17. The *enclosed* submissions to the Expert Panel on Asylum Seekers and the Inquiry into the Malaysia Arrangement articulate the application of certain human rights treaties to asylum seekers removed to third countries, and I refer the Committee to those submissions for further analysis.

(c) **Whether Australia's obligations under the 1951 Refugee Convention and 1967 Protocol are relevant to the interpretation of Australia's obligations under the seven human rights treaties; and the extent to which the provisions of the seven human rights treaties may overlap with the rights and protections provided for under the Refugee Convention and Protocol**

18. Refugees are entitled to the rights set out in the Refugee Convention and its Protocol, *as well as* those contained in the universal and specialist human rights treaties. Asylum seekers benefit from some (but not all) Refugee Convention rights, such as the principle of *non-refoulement*, the principle of non-

[16] *Hirsi Jamaa v Italy* (n 10) para 147.
[17] *MSS v Belgium and Greece* (n 15) para 367.
[18] Ibid, para 366.
[19] *Banković v Belgium* (2001) 11 BHRC 435; Articles on Responsibility of States for Internationally Wrongful Acts (n 9); Guy S Goodwin-Gill, 'Offshore Processing Won't Let Australia Off the Hook', *Sydney Morning Herald* (24 August 2012) http://www.smh.com.au/opinion/politics/offshore-processing-wont-let-australia-off-the-hook-20120823-24ob4.html.

discrimination, the right to religious freedom, the right to elementary education, and access to the courts.

19. As a human rights treaty itself, the Refugee Convention must be read in conjunction with other human rights instruments. Refugee law is not intended to restrict human rights law; rather, the various treaties should be read in such a way as to provide refugees and asylum seekers with the fullest enjoyment of their rights.

(d) The consistency of the measures with Australia's obligations of *non-refoulement* (article 3 of the Convention against Torture and article 7 of the International Covenant on Civil and Political Rights (ICCPR))

20. The regional processing regime does not ensure that Australia's *non-refoulement* obligations under human rights law will be respected.

21. Australia has a duty under article 3 of the Convention against Torture and articles 6 and 7 of the ICCPR (*inter alia*) to ensure that persons are not subjected to *refoulement*. Australia will breach this obligation if it removes a person (or, by its actions and on account of the law of State responsibility, exposes a person to a risk of being removed) to a place where he or she faces a real risk of being subjected to torture, cruel, inhuman or degrading treatment or punishment, or arbitrary deprivation of life (including through the death penalty). This duty is absolute: unlike the exclusion clauses of the Refugee Convention, no exceptions are permitted under human rights law.

22. In late 2011, the Australian Parliament passed the Migration Act (Complementary Protection) Act 2011 which entrenched these protection grounds as part of domestic law. They came into effect on 24 March 2012. Since that time, asylum seekers applying for protection within Australia have their applications assessed in a two-pronged process:

- Is the person a refugee, within the meaning of the Refugee Convention and its Protocol?
- If not, is the person at real risk of being arbitrarily deprived of his or her life, having the death penalty carried out, or being subjected to torture or cruel, inhuman or degrading treatment or punishment?

Subject to certain exceptions, anyone found to be in need of protection on any of these grounds is entitled to a protection visa.

23. One of the main reasons why the Australian government introduced complementary protection was because it could not guarantee that Australia was abiding by its human rights-based *non-refoulement* obligations without a case-by-case assessment of individual claims. During Parliamentary debate, it was noted that without such an assessment, Australia could 'not provide a sufficient

guarantee of fairness and integrity for decisions in which a person's life may be in the balance'.[20]

24. However, the regional processing model does not reflect this. In determining which countries Australia will engage for regional processing, the only criterion that the Immigration Minister need consider is whether he or she thinks it is in the 'national interest' to designate a country as a 'regional processing country' (proposed new section 198AB(2) of the Migration Act 1958 (Cth)). Proposed new section 198AB(3) provides that in considering the 'national interest', the Minister must have regard to whether the country has given Australia any assurances that it:

    - 'will not expel or return a person … to another country where his or her life or freedom would be threatened on account of his or her race, religion, nationality, membership of a particular social group or political opinion'; and
    - will enable an assessment to be made of whether or not a person taken to the designated country under that section is a refugee in accordance with article 1A of the Refugee Convention.

25. These two elements reflect only the *non-refoulement* obligation arising under refugee law. There is *no* requirement for the Minister to seek assurances that the designated country will respect human rights-based *non-refoulement* obligations, such as refraining from returning a person to a place where he or she faces a real risk of arbitrary deprivation of life, the death penalty, torture, or cruel, inhuman or degrading treatment or punishment.[21]

26. Furthermore, as noted above, Nauru is not a party to the ICCPR or the CAT. It has therefore not assumed obligations under international law to respect the principle of *non-refoulement* arising under these treaties, and there is no other evidence to suggest that it would carry out individual status determination with consideration of the complementary protection grounds. Nauru's implementing legislation, the Refugees Convention Act 2012, provides in section 4 that:

    > The Republic must not expel or return a person determined to be recognised as a refugee to the frontiers of territories where his or her life or freedom would be threatened on account of his or her race, religion, nationality, membership of a particular social group or political opinion except in accordance with the Refugees Convention as modified by the Refugees Protocol.

27. Papua New Guinea still has no effective domestic framework or institutional capacity to conduct refugee status determination.[22]

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[20] Commonwealth, *Parliamentary Debates*, House of Representatives, 9 September 2009, 8988 (Laurie Ferguson, Parliamentary Secretary for Multicultural Affairs and Settlement Services); see generally 8987–89; Commonwealth, *Parliamentary Debates*, House of Representatives, 24 May 1977, 1713–16 (Hon Michael Mackellar MP, Minister for Immigration and Ethnic Affairs).

[21] For the lack of reliability of such assurances in the human rights context, see eg Martin Scheinin, 'Report of the Special Rapporteur on the Promotion and Protection of Human Rights and Fundamental Freedoms while Countering Terrorism, Martin Scheinin: Addendum: Mission to Spain': Addendum: Mission to Spain', UN Doc A/HRC/10/3/Add.2 (16 December 2008) para 40.

[22] UNHCR, '2012 Regional Operations Profile: East Asia and the Pacific' http://www.unhcr.org/pages/49e488e26.html (accessed 10 December 2012).

28. Thus, there is a significant risk of *refoulement*, and Australia could be found jointly or severally liable for this.

(e) The consistency of the measures with the 'best interests of the child' principle in the Convention on the Rights of the Child (CRC), and other provisions of the CRC, including the rights it guarantees in relation to children who are refugees or seeking refugee status (article 22) and family rights (including in articles 17 and 23 of ICCPR)

29. It is very difficult to see how the regional processing scheme is consistent with article 3 of the CRC, which requires that the best interests of the child are a primary consideration in any decision taken by the authorities in a case involving a child. This includes cases where the asylum seeker is an unaccompanied minor, *as well as* cases where there children are part of a family group of asylum seekers.

30. I refer the Committee to the discussion on children in the Refugee Law Academics' submission on Malaysia (*enclosed*, pages 25–26) and oral evidence to the Committee on 17 December 2012 by Professor Mary Crock.

(f) The consistency of the underlying 'no advantage' test with the prohibition against arbitrary detention (article 9 of ICCPR). The adequacy of provisions for reviewing the detention, including the ability for persons detained under these measures to able to access a court to challenge substantively both the lawfulness and the arbitrariness of detention; and the consistency of the measures with the right to a fair hearing (article 14 of ICCPR)

31. The 'no advantage' test is being used by the government to justify a subsidiary form of treatment for asylum seekers who arrive by boat. As noted below (paragraphs 51–54), this contravenes provisions on non-discrimination and the non-penalization of asylum seekers.

32. By delaying processing times and entrenching a lengthy waiting period before any durable solution will be forthcoming, asylum seekers are subject to arbitrary detention that cannot be reviewed.

33. On numerous occasions, international and domestic bodies have found that Australia's system of mandatory detention breaches the right to freedom from arbitrary detention contained in article 9(1) of the ICCPR.[23] From a human rights

[23] See the Report of the *UN Working Group on Arbitrary Detention: Visit to Australia*, UN Doc E/CN.4/2003/8/Add.2 (2002) http://www.unhchr.ch/Huridocda/Huridoca.nsf/0/6035497b015966fec1256cc200551f19/$FILE/G0215391.pdf. See, for example, the views of the Human Rights Committee in the following cases: *D & E v Australia*, UN Doc CCPR/C/87/2D/1050/2002 (25 July 2006); *Baban v Australia*, UN Doc CCPR/C/78/D/1014/2001 (6 August 2003); *Bakhtiyari v Australia*, UN Doc CCPR/C/79/D/1069/2002 (6 November 2003); *C v Australia*, UN Doc CCPR/C/76/D/900/1999 (28 October 2002); *A v Australia*, UN Doc CCPR/C/59/D/560/1993 (3 April 1997); *Shams et al v Australia*, UN Doc CCPR/C/90/D/1255 (11 September 2007); *Shafiq v Australia*, UN Doc CCPR/C/88/D/1324/2004 (13 November 2006). See further the comments made by the UN Committee against Torture, *Concluding Observations of the Committee against Torture: Australia* (22 May 2008) UN Doc CAT/C/AUS/CO/3. See also UN

perspective, the following features of mandatory immigration detention may give rise to the conclusion that it is arbitrary:

- it is a blanket policy and, as such, there is no consideration of the particular circumstances of each detainee's case;
- it cannot be demonstrated that with regard to each individual, there are no less restrictive means of achieving the government's desired outcome;
- the length of detention, particularly in circumstances where it could continue indefinitely, cannot necessarily be justified by reference to a detainee's particular circumstances; and
- the opportunities for review of the lawfulness of the detention are either non-existent or inadequate.[24]

34. UNHCR's Guidelines on Detention suggest that detention ought only to be used:

- on grounds prescribed by law to verify identity;
- to determine the elements on which the claim to refugee status or asylum is based;
- to deal with cases where refugees or asylum seekers have destroyed their travel and/or identity documents or have used fraudulent documents; or
- to protect national security or public order (and justified in the individual case).[25]

35. The lack of judicial oversight of Australia's detention regime, and in particular the inability of detainees to challenge the legality of their detention, also breaches the right to an effective remedy under the ICCPR.

36. Australian law requires unlawful non-citizens to be kept in immigration detention until removed from Australia, deported, orgranted a visa. The detention of unlawful non-citizens is therefore prescribed by the operation of law and not by an order of a court or administrative authority. Article 9(4) of the ICCPR requires that a person be able to challenge the legality of his or her detention before a court, and in *A v Australia* the UN Human Rights Committee noted that '*every* decision to keep a person in detention should be open to review periodically so that the grounds justifying the detention can be assessed.'[26]

37. The fundamental importance of individual liberty entails that the right to challenge the lawfulness of one's detention is itself an essential human right.

Committee on Economic, Social and Cultural Rights, 42nd session, *Concluding Observations* (22 May 2009), UN Doc E/C.12/AUS/CO/4, para 30; Committee on the Rights of the Child, *Concluding Observations: Australia* (2005), UN Doc CRC/C/15/add.268, para 64. The Australian Human Rights Commission has also released numerous reports dealing with issues of detention.

[24] See also the Report of the UN Working Group on Arbitrary Detention following its visit to Australia (n 23); *A v Australia* (n 23). See further HRLRC, *Freedom Respect Equality Dignity: Action*, *NGO Submission to the Human Right Committee: Australia's Compliance with the International Covenant on Civil and Political Rights* (September 2008) http://www.hrlrc.org.au/files/5DNAGO4XRH/NGO%20Report%20on%20Australia%20to%20HRC%20-%20Final.pdf, 125 and the references cited therein.

[25] UNHCR, *Revised Guidelines on Applicable Criteria and Standards Relating to the Detention of Asylum Seekers* (February 1999) Guideline 3.

[26] *A v Australia* (n 23) para 9.4 (emphasis added).

Judicial oversight of detention is a fundamental guarantee of freedom and liberty from arbitrariness.[27] However, Australian law does not permit the courts to review decisions to detain unlawful non-citizens, nor to order their release on the grounds that continued detention is arbitrary.[28]

38. In order for detention to be consistent with international human rights law – that is, not arbitrary – it must be necessary in the individual case (rather than the result of a mandatory, blanket policy); subject to periodic review by the judiciary or another authority, with the power to release detainees if detention cannot be objectively justified; be reasonably proportionate to the reason for the restriction (eg national security); and be for the shortest time possible.

39. The adverse effects of children being in kept in immigration detention centres, in some cases for up to five years, have been well-documented. In 2004 the Australian Human Rights Commission released a comprehensive report examining Australia's compliance with the CRC, finding that the system of mandatory detention breached children's human rights. The report detailed countless disturbing stories of the impact that prolonged detention had on children's physical and mental well-being.[29] It found that children in immigration detention suffered from anxiety, distress, bed-wetting, suicidal ideation, and self-destructive behaviour, including attempted and actual self-harm (through hunger strikes, attempted hanging, slashing, swallowing shampoo or detergents, and lip-sewing). Furthermore, some children were also diagnosed with psychological illnesses, such as depression and post-traumatic stress disorder.[30]

40. The Australian Human Rights Commission has also reported on the adverse psychological effects that detaining children in immigration residential housing and immigration transit accommodation can have.[31] Professor Mary Crock has compiled a comprehensive report on unaccompanied children seeking asylum in Australia, which provides additional evidence of ill-treatment.[32]

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[27] ICCPR, art 9(4).

[28] Joint Standing Committee on Migration, Submission of the Human Rights and Equal Opportunity Commission, paras 30–32 http://www.aph.gov.au/house/committee/mig/detention/subs/sub099.pdf 13. As to the permissible length of time before bringing a person before the Court, see Human Rights Committee, *General Comment No.8: Right to Liberty and Security of Persons (Art.9)* (30 June 1982) para 2. See further, Joint Standing Committee on Migration, *Immigration Detention in Australia: A New Beginning— Criteria for Release from Detention*, (1 December 2008), Dissenting Report: Mr Petro Georgiou MP, Senator Dr Alan Eggleston and Senator Sarah Hanson-Young http://www.aph.gov.au/house/committee/mig/detention/report/dissent.pdf.

[29] See Human Rights and Equal Opportunity Commission, *A Last Resort? National Inquiry into Children in Immigration Detention* (2004), chapter 9 and the case studies set out therein.

[30] Ibid. See also Derrick Silove, Philippa McIntosh, and Rise Becker, 'Risk of Retraumatisation of Asylum-Seekers in Australia' (1993) 27 *Australian & New Zealand Journal of Psychiatry* 606; Zachary Steel and Derrick Silove, 'The Mental Health Implications of Detaining Asylum Seekers' (2001) 175 *Medical Journal of Australia* 596; Zachary Steel and others, 'Impact of Immigration Detention and Temporary Protection on the Mental Health of Refugees' (2006) 188 *British Journal of Psychiatry* 58; Louise Newman, Michael Dudley and Zachary Steel, 'Asylum, Detention and Mental Health in Australia' (2008) 27 *Refugee Survey Quarterly* 110.

[31] See Australian Human Rights Commission annual reports on detention.

[32] Mary Crock, *Seeking Asylum Alone: A Study of Australian Law, Policy and Practice regarding Unaccompanied and Separated Children* (Themis Press, Sydney, 2006).

(g) The consistency of the measures with the right to health (article 12 of ICESCR); the right to humane treatment in detention (article 10 of ICCPR); and the right to work (article 6 of ICESCR)

Offshore

41. Article 10 of the ICCPR stipulates that all those deprived of their liberty are to be treated with humanity and respect for the inherent dignity of the human being.[33] Within Australian detention facilities, there have been numerous occasions when this has been breached,[34] and the lack of safeguards in place in offshore facilities suggests that similar breaches may occur there, especially while people are accommodated in temporary shelters.

42. Once people are determined to be refugees, they must have access to the rights set out in the Refugee Convention. As noted above, Papua New Guinea does not respect certain rights in that instrument including freedom of movement or the right to work. In both Nauru and Papua New Guinea, there are real doubts as to whether there will even be opportunities for gainful employment given the generally high levels of unemployment in those countries.

43. In terms of the right to health under article 12 of the ICESCR, it should be noted that Manus Island has among the highest number of malaria cases in Papua New Guinea[35] and a strain of malaria that is resistant to chloroquine.[36] The last time that asylum seekers were housed on Manus Island, the President of the Royal Australasian College of Physicians, Professor Richard Larkins, said that 'the responsible course of action is to immediately evacuate the detention centre. This is the only truly effective way people at risk can be protected'.[37]

44. While deprivation of each of these rights may violate the human rights treaty provisions, they may also (individually or cumulatively) amount to inhuman or degrading treatment contrary to article 7 of the ICCPR. This is analysed further below.

In Australia

45. Within Australia, the 'no advantage' concept is being used to create a two-tier system of asylum seekers in community detention. Asylum seekers who arrived post-13 August 2012 may receive bridging visas without work rights, and will be expected to survive on very limited funds ($440 per fortnight). As previous experience with Bridging Visa E (BVE) shows, survival is exceptionally difficult without considerable support from charity. BVEs were given to asylum seekers

[33] ICCPR, art 10.
[34] *A Last Resort?* (n 29) 14.
[35] World Health Organization, World Malaria Report 2012 (2012), map 161. See further Alexandra Phelan, 'Malaria on Manus Island: A Threat to Human Rights', *The Drum* (ABC online, 20 August 2012) http://www.abc.net.au/unleashed/4209230.html.
[36] See Alexandra Phelan, 'Malaria on Manus Island: A Threat to Human Rights', *The Drum* (ABC online, 20 August 2012) http://www.abc.net.au/unleashed/4209230.html and references therein.
[37] Cited in Alliance for the Health of Asylum Seekers and Their Children, Submission to the Human Rights and Equal Opportunity Commission Inquiry into Children in Immigration Detention (May 2002) http://www.cpmc.edu.au/docs/hreoc_submission.pdf, 32.

who had arrived lawfully and permitted them to reside in the community pending the determination of their protection claim. Many asylum seekers on BVEs faced poverty and homelessness and were entirely dependent on community services for their basic subsistence.[38] The new two-tier system raises concerns about discrimination (discussed further in paragraphs 51–54) and other substantive human rights, including the right to work under article 6 of the ICESCR.

46. The UN Committee on Economic, Social and Cultural Rights in its 2009 report card on Australia drew attention to the difficulties faced by asylum seekers who are not able to enjoy the right to work. It noted the high rates of poverty experienced by asylum seekers in Australia[39] and recommended that 'special programmes and measures be designed to address the significant barriers to the enjoyment of the right to work' faced by asylum seekers and other marginalized groups.[40]

47. A 2006 Senate Legal and Constitutional Affairs Committee inquiry expressed concern about the financial hardship faced by asylum seekers on BVEs, 'particularly those with families and children, who are granted a BVE with no work rights and inadequate access to basic services'.[41] The Committee went on to state that: 'A policy which renders a person destitute is morally indefensible and an abrogation of responsibility by the Commonwealth.'[42]

48. The Committee took note of the *Limbuela* decision of the Court of Appeal of England and Wales.[43] In that case, the court held that the removal of subsistence support from asylum seekers resulting in their destitution was a breach of their right not to be subjected to inhuman or degrading treatment under article 3 of the European Convention on Human Rights (equivalent to article 7 of the ICCPR). The Committee contrasted this with the position in Australia, where no such challenge could be brought before the courts. It noted:

> In the absence of a constitutional or statutory bill of rights, such issues cannot be tested in the courts. Primary responsibility for ensuring that minimum standards essential to the survival and wellbeing of all people in Australia rests with the Government and the Parliament.[44]

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[38] Australian Human Rights Commission, *Factsheet: The Impact of Bridging Visa Restrictions on Human Rights* (June 2008) http://www.hreoc.gov.au/Human_Rights/immigration/bridging_visas_factsheet.html.
[39] UN Committee on Economic, Social and Cultural Rights, *Concluding Observations* (n 23) para 24.
[40] Ibid, para 20. For a Report on the potential loss to the Australian economy of not allowing BVE holders to work, see Gwilym Croucher, *A Chance to Contribute: Forgone Gains to the Australian Economy of Disallowing Asylum Seekers the Right to Work*, Network of Asylum Seeker Agencies Victoria, February 2006 http://blogs.victas.uca.org.au/safetynotcharity/downloads/AChanceToContribute-Feb06.pdf
[41] Senate Legal and Constitutional Affairs Committee, *Inquiry into the Administration and Operation of the Migration Act 1958* (2006) para 8.62.
[42] Ibid.
[43] *Secretary of State for the Home Department v Limbuela* [2004] EWCA Civ 540. See also the subsequent decision of the House of Lords in *R v Secretary of State for the Home Department, ex parte Adam* [2005] UKHL 66.
[44] *Inquiry into the Administration and Operation of the Migration Act 1958* (n 41) para 8.64.

49. Following *Limbuela*, the House of Lords in *Adam* said that treatment is inhuman or degrading 'if, to a seriously detrimental extent, it denies the most basic needs of any human being'.[45] While the court noted that there is no general public duty to house the homeless or provide for the destitute, it said that the State would have such a duty if an asylum seeker 'with no means and no alternative sources of support, unable to support himself, is, by the deliberate action of the state, denied shelter, food or the most basic necessities of life'.[46] Relevant factors to be considered include the asylum seeker's 'age, gender, mental and physical health and condition, any facilities or sources of support available to the applicant, the weather and time of year and the period for which the applicant has already suffered or is likely to continue to suffer privation'.[47] In that case, the threshold was met by asylum seekers who, denied State support and the right to work, were forced to sleep outdoors. Factors that contributed to this finding were 'the physical discomfort of sleeping rough, with a gradual but inexorable deterioration in their cleanliness, their appearance and their health', 'the prospect of that state of affairs continuing indefinitely', their '[g]rowing despair and a loss of self-respect', and the fact that they had 'no money of their own, no ability to seek state support and [were] barred from providing for themselves by their own labour'.[48]

50. Based on this analysis above, in addition to violating article 6 of the ICESCR and article 17(1) of the Refugee Convention, Australia's treatment of asylum seekers on the new 'no advantage' bridging visas could violate its obligations under article 7 of the ICCPR.

(h) The consistency of the measures with the right to non-discrimination (article 26 of ICCPR)

51. The 'no advantage' concept may entrench discrimination in two ways. First, stipulating that particular groups of asylum seekers (those who arrive by boat after a particular date) are subject to regional processing may be discriminatory. Secondly, differential treatment between different groups of asylum seekers within community detention in Australia may be discriminatory. As the President of the Australian Human Rights Commission stated in her oral evidence to the Committee, it is the Commission's view that the distinctions in treatment between asylum seekers who arrive by boat and those who arrive by other means constitutes 'differential treatment that does not have a reasonable basis and is not valid.'[49]

52. Article 3 of the Refugee Convention prohibits countries from discriminating between refugees on the basis of race, religion, or country of origin. This provision applies both to asylum seekers and refugees. It is buttressed by anti-discrimination provisions in international human rights law, such as articles 2 and 26 of the ICCPR and article 2 of the ICESCR.

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[45] *R v Secretary of State for the Home Department, ex parte Adam* (n 43) para 7 (Lord Bingham).
[46] Ibid.
[47] Ibid, para 8 (Lord Bingham).
[48] Ibid, para 71 (Lord Scott).
[49] Evidence of the President of the Australian Human Rights Commission, Professor Gillian Triggs, 19 December 2012, proof Hansard, 36.

53. International law permits distinctions between aliens who are in materially different circumstances, but prohibits unequal treatment of those similarly placed. In general, differential treatment between non-citizens is allowed where the distinction pursues a legitimate aim, has an objective justification, and there is reasonable proportionality between the means used and the aims sought to be realized.[50] While Australia may seek to invoke immigration control or 'saving lives at sea' as a 'legitimate aim' in this context, it would be difficult to establish that the means by which that aim is sought to be realized is *proportionate* to the aim itself. In this context, the difference in treatment is based solely on the mode of arrival (boat rather than air) and time of arrival (before or after 13 August 2012). Asylum seekers, whether held onshore or offshore, are otherwise in materially identical circumstances: they are seeking protection from persecution and other forms of serious harm and have an equal need for fair procedures and humane conditions in which to have their protection claims determined.

54. This is emphasized by article 31 of the Refugee Convention, which prohibits States from imposing penalties on asylum seekers who arrive without passports or visas. The very nature of persecution and flight may make it impossible for them to obtain such documents. Indeed, in some cases arrival without documentation may underscore the compelling nature of the refugee claim and add to, rather than detract from, the credibility of that claim. From the perspective of international law, justifying differential treatment solely on the mode or place of arrival is an arbitrary distinction and breaches the principle of non-discrimination.

C Conclusion: Good faith

55. International law distinguishes between conduct that constitutes a substantive breach of a treaty provision, and conduct that, while technically within the letter of the law, cannot be said to be a good faith interpretation of it.[51] A breach of good faith arises when a State's acts or omissions, either alone or cumulatively, render the fulfilment of treaty obligations obsolete or defeat a treaty's object and purpose. A lack of good faith will therefore arise if a State 'seeks to avoid or to "divert" the obligation which it has accepted, or to do indirectly what it is not permitted to do directly'.[52]

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[50] Guy S Goodwin-Gill, *International Law and the Movement of Persons between States* (Clarendon Press, Oxford, 1978) 78; UN Human Rights Committee, 'General Comment 18' (n 14) para 13; ECOSOC, Commission on Human Rights, 'Prevention of Discrimination: The Rights of Non-Citizens' (26 May 2003), UN Doc E/CN.4/Sub.2/2003/23, para 24; *Belilos v Switzerland* (1988) 10 EHRR 466.

[51] This section draws heavily on Guy S Goodwin-Gill and Jane McAdam, *The Refugee in International Law* (3rd edn, Oxford University Press, Oxford, 2007) 387–90. See Vienna Convention on the Law of Treaties, arts 26, 31; Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States in accordance with the Charter of the United Nations, GA Res 2625 (XXV) (24 October 1970), para 3; see generally Guy S Goodwin-Gill, 'State Responsibility and the "Good Faith" Obligation in International Law', in Malgosia Fitzmaurice and Dan Sarooshi (eds), *Issues of State Responsibility before International Judicial Institutions: The Clifford Chance Lectures* (Hart Publishing, Oxford, 2004) 75; UNHCR's submissions in *R (European Roma Rights Centre) v Immigration Officer at Prague Airport, (UNHCR Intervening)* [2004] UKHL 55, [2005] 2 AC 1: UNHCR, 'Written Case' (2005) 17 *International Journal of Refugee Law* 427, paras 24–38. The House of Lords rejected the issue of good faith on the basis that the 1951 Convention did not apply, as the individuals concerned had not yet left their country of origin: *Roma Rights Case*, para 64 (Lord Hope).

[52] UNHCR, 'Written Case' (n 51) para 32.

56. The overall impact of regional processing does not reflect a good faith interpretation of the Refugee Convention. Even though the Refugee Convention does not contain a provision expressly requiring states to process asylum seekers within their borders,

> the right to seek asylum, when read in conjunction with the right to freedom of movement and the totality of rights protected by the Universal Declaration and ICCPR, implies an obligation on States to respect the individual's right to leave his or her country in search of protection. Thus, States that impose barriers on individuals seeking to leave their own country, or that seek to deflect or obstruct access to asylum procedures, may breach this obligation and, more generally, demonstrate a lack of good faith in implementing their treaty obligations.[53]

57. Thus, States do not have an unfettered sovereign right to frustrate the movement of asylum seekers. Any measures of immigration control must be exercised proportionately and within the confines of international law. This applies not only to refugees within a State's own territory, but also those subject to enforcement action outside its territorial jurisdiction. It requires States to ensure 'that refugees are not returned in any manner to territories in which they face – or risk return to – persecution, torture, or other cruel, inhuman or degrading treatment or punishment; *and*, if sent elsewhere, have access to protection and durable solutions'.[54]

58. Australia's attempt to contract out its obligations to Nauru and Papua New Guinea undermines the multilateral nature of the Refugee Convention regime and frustrates its object and purpose.[55] As UNHCR has observed:

> The 1951 Convention, together with the 1967 Protocol, is framed to apply without geographic restrictions or discrimination. Its efficacy depends on it being global in scope and adherence, and if *inter se* agreements were permitted, the treaty regime as a whole would be rendered meaningless.[56]

59. Bilateral agreements such as those between Australia and 'regional processing countries' may undermine respect for international obligations 'for which a common and coherent international practice is required. Such disparities have the effect of distorting the burden-sharing rationale underlying the 1951 Convention, by shifting the responsibility for examining certain types of asylum claims to other countries.'[57] They also set a poor model for States in other parts of the world.

60. The broader international protection regime, comprising refugee law, human rights law, and more generally applicable rules informed by the principle of good faith, provides a normative and institutional framework for durable solutions.

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[53] Goodwin-Gill and McAdam (n 51) 370 (fns omitted).
[54] Ibid, 389–90.
[55] Ibid, 390.
[56] UNHCR as intervener in *R (European Roma Rights Centre) v Secretary of State for the Home Department* [2003] EWCA Civ 785: UNHCR Skeleton Argument for the Court of Appeal, para 102.
[57] Ibid.

Unilateral or bilateral action on this front such as we have seen may be counter-productive: it may undermine other States' willingness to find solutions jointly, since '[t]he very nature of the international protection regime is premised on States *not* acting unilaterally and in their own self-interest.'[58] As the International Court of Justice emphasised in 1951, in human rights treaties (such as the Refugee Convention), 'the contracting States do not have any interests of their own; they merely have, one and all, a common interest, namely, the accomplishment of those high purposes which are the *raison d'être* of the [Genocide] convention'.[59]

61. The Refugee Convention is premised on the understanding that States will protect refugees in their territories, or cooperate with other States to find durable solutions for them (local integration, voluntary repatriation and resettlement). Transferring asylum seekers to regional processing centres is not a durable solution. It risks contributing to the significant problem of refugee 'warehousing', whereby which refugees are kept 'in protracted situations of restricted mobility, enforced idleness, and dependency – their lives on indefinite hold – in violation of their basic rights under the 1951 UN Refugee Convention'[60] and international human rights law.

[58] Goodwin-Gill and McAdam (n 51) 390.
[59] *Reservations to the Genocide Convention* (Advisory Opinion) [1951] ICJ Rep 15, 23.
[60] Merrill Smith, 'Warehousing Refugees: A Denial of Rights, A Waste of Humanity' in US Committee for Refugees, *World Refugee Survey 2004* (2004) 38; see also Gregory Chen, 'A Global Campaign to End Refugee Warehousing' in US Committee for Refugees, *World Refugee Survey 2004* (2004) 21.