# AUSTRALIA AND INTERNATIONAL REFUGEE LAW: AN APPRAISAL

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## INTRODUCTION

*'What is needed is a renewal of political efforts to find solutions to refugee-related problems ... and we must ensure that the solutions we offer as short-term remedies are not compounding or evading the basic issues.'*

(Frederick Cuny, UN High Commissioner for Refugees, December, 1979)

The modern refugee problem is both complex and immense. At the beginning of the decade, official estimates of refugee numbers throughout the world totalled some 10 million men, women and children, although unofficial estimates by well-informed refugee organisations put the figure between 14-18 million.[1] The magnitude of the problem was first brought home to Australia with the arrival on its shores of thousands of Vietnamese 'boat people'[2] after the end of the Vietnam War in 1975. Since then Australia has made significant contributions towards the international protection of refugees.

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[1] Minority Rights Group, *The Refugee Dilemma: International Recognition and Acceptance*, Report No. 43, Rev. Ed. (1981) 5; Patrnogic and Meriboute, *Movement of Refugees*, International Institute of Humanitarian Law, Collection of Publications - 4.

[2] This expression simply distinguishes those Indo-Chinese people who left the Indo-Chinese Peninsula (comprising Kampuchea, Laos and Vietnam) in small boats rather than by other means, eg overland. See M Tsamenyi, *Vietnamese Boat People and International Law*, Centre for the Study of Australian-Asian Relations, Research Paper No 14, 1980; Chooi Fong, 'Some Legal Aspects of the Search for Admission into Other States of Persons Leaving the Indo-Chinese Peninsula in Small Boats', *BYBIL* 52 (1981) 53.

While the humanitarian objectives of Australia's refugee policy have met with international praise[3], they have been the subject of debate and criticism at home as part of the inevitable clash between international humanitarian policies and national socio-political and economic realities.[4]

The general trend of the debates is an obvious indication that it will, if it has not already, become necessary for Australian governments to take account of specific domestic political, social and economic constraints in formulating and pursuing refugee policies. Indeed, given such constraints, it is doubtful whether Australia can successfully pursue its current humanitarian policies over an extended period. In any case, given the international dimensions of the refugee problem, any realistic Australian policy on refugees will need to be formulated and pursued within or as part of a well co-ordinated international framework. Up till now, Australian governments have correctly addressed the refugee problem in the international context with propositions in international fora calling for international solidarity and burden-sharing in alleviating the problems of large-scale influx in the South-East Asia region.[5] They have also initiated the development of the concept of 'temporary refuge' to try to circumvent the reluctance to provide asylum to refugees with the hope that the international community will assist in the search for more durable solutions.[6] Australia has further joined in international efforts to ensure that refugees who risk death from drowning or pirate-attacks in their attempts at escape in unseaworthy boats will not be refused rescue or entry into the ports of neighbouring countries in the fear that international assistance will not be forthcoming.[7] Laudable as these measures are, the Australian, and indeed international, efforts have tended to be reactionary rather than preventive. It is the thesis of this article that, in formulating its refugee policies, Australia should go beyond the international co-ordination of relief for refugees with a view to initiating the development

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[3] For example, UN Secretary-General, Mr. Perez de Cuellar recently praised Australia's efforts to assist refugees in *News Release* 13 February 1985, *Australian Foreign Affairs Record (AFAR)* 1985 at 143.

[4] See the divergence of views in R Birrell, L Glezer, C Hay, M Liffman (Eds) *Refugees, Resources, Reunion: Australia's Immigration Dilemmas* (1979); and the more recent criticism in Blainey G, *All for Australia* (1984); Barnett D, 'How the Bloated Ethnic Industry is Dividing Australia', Cover Story, *The Bulletin* 18 February 1986, 58-62, and research rejoinders in *Multiculturalism for All Australians*, Aust. Council on Population and Ethnic Affairs, (1982). *The Economic Effects of Immigration on Australia*, Committee for the Economic Development of Australia (CEDA) Study, (1985), *Australians and Asian-Born 'Good Neighbours'*, Aust. Dept Immigration and Ethnic Affairs Research Survey 7 August 1986 reported *Backgrounder*, 13 August, 1986.

[5] The Australian propositions in this regard are well explained and summarised in J P Fonteyne, 'Burden-Sharing: An Analysis of the Nature and Function of International Solidarity in Cases of Mass Influx of Refugees', Aust *YBIL* Vol 8 (1983) 162.

[6] Coles G J L, 'Temporary Refuge and the Large Scale Influx of Refugees', Aust *YBIL* Vol 8 (1983) 189.

[7] Schaffer R P, 'The Singular Plight of Sea-borne Refugees', Aust *YBIL* Vol 8 (1983) 213.

of effective international procedures for reducing or limiting the causes of the refugee problem. This necessarily involves a move away from the traditional humanitarian premise of refugee law which, as will be shown, centres on the development of a legal relationship between the State and the individual. Instead, it requires a focus on the relations and obligations among States. It is becoming increasingly evident that the mass exodus common to the modern refugee problem is often the result of the deliberate policies of the States of origin. The burden that is cast on other States by mass expulsion or the encouragement of mass migration is undeniable, yet modern international law in general and refugee law in particular have tended to ignore the normative relationship of responsibility between the state of origin of the refugee and the prospective state of refuge. It is, therefore, proposed to argue in this work that the international articulation of State responsibility for the creation or encouragement of refugee flow should now be the primary focus of international refugee law. The humanitarian perspective which has hitherto typified the historical development of refugee law is now proving to be inadequate as the problem becomes increasingly one of international responsibility and obligation.

This is not to say that 'traditional' refugee law is irrelevant; on the contrary, it will still be vitally important to establish a legal and moral relationship of obligation between the State and the individual once the primary international responsibilities are created. State practice in the implementation at the national level of the obligations owed to refugees will probably always suffer contradictions because of the difficulties in reconciling humanitarian objectives with national economic and political realities. However, it is submitted that States may not be so reluctant to identify and implement their obligations towards refugees if they are at least able to exercise some control, through international leverage, on the source of the refugee problem.

This article is divided into three main parts. The first part examines the historical development of refugee law and demonstrates its individual-based human rights perspective as well as the extent of Australia's legal and moral obligations in this regard. The observations in the second section represent an attempt to assess how Australia, in practice, has lived up to its obligations on both the national and international levels. In this part the emphasis will be on Australian practice in the last decade since it was in this period that Australia became a State of 'first refuge'.[8] The final part of the article discusses the view that as the nature of the refugee problem and the attitudes to it are changing, the law on refugees requires reconstruction. It will be suggested in this section that what is required is international articulation that the problem of mass refugee flow is primarily one of international relations and obligation. It is further intended to advance the view that as Australia has successfully initiated an

[8] This is simply the first country a fugitive reaches in the flight from persecution. It does not necessarily imply the fugitive will be granted asylum.

international response to the refuge problem in terms of international burden-sharing and solidarity, it may now be time for it to take the lead in encouraging the international legal system to do what it can to address the source of the contemporary refugee problem in terms of State responsibility and obligation.

# THE DEVELOPMENT OF INTERNATIONAL REFUGEE LAW

## WHO IS A REFUGEE?

In everyday parlance, refugees are people who leave their homes to seek sanctuary and protection elsewhere. They have existed since historical records began and these massive population movements have changed the demographic maps of the world during every century. The traditional causes are well documented: war, intolerance and persecution of ethnic, religious or political minorities.[9] Previously, these mass movements have paid little attention to the boundaries of sovereign States. Finding a place of sanctuary or asylum did not necessarily require formal permission as it does today. The development of fixed and closed State frontiers have effectively barred the traditional escape routes of those fleeing oppression.[10]

In addition, by the twentieth century, the possession of particular documentation became, in most countries, essential in order to conduct the normal transactions of life, such as marriage or obtaining employment. The provisions of this necessary documentation did not only signal the first international legal response to refugees, but also led to a specific legal regime on refugees which, in itself, was later to result in the development of a specific and quite technical meaning of the term 'refugee'.

As will be shown, the inability to bring oneself within the technical definition of a refugee for the purposes of refugee law means that an individual or group, although in a refugee-like situation, would be unable to claim sanctuary or protection in the State where refuge is sought.

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[9] *Study on Human Rights and Massive Exoduses*: Report by Sadruddin Aga Khan, Special Rapporteur, 38 UN ESCOR Commission on Human Rights UN Doc E3 cn 4/1503 (1981).

[10] Minority Rights Group, *op cit*, note 1, 5.

Today, international Conventions provide the main source of refugee law.[11] Initially, the role of such conventions was to provide refugees with travel and identity documents.[12] Examples are the Convention dealing with those persons leaving Russia after the Bolshevik Revolution in 1917[13], and later the Convention concerning 'Assyrian Assyro-Chaldean and assimilated' refugees.[14] Under these arrangements a group or category approach to the definition of refugee was adopted. The only necessary conditions were (a) membership of a particular nationality group which no longer enjoyed the protection of its nationality State for whatever reason, and (b) presence outside one's country of origin.[15] However, the 1938 Geneva Convention on the Status of Refugees Coming from Germany[16] excluded persons leaving Germany for purely personal convenience.[17] After the Second World War, stress was laid on more precise criteria, and the term 'refugee' came to be used as a term of art[18], that is, one with some verifiable content according to the principles of general international law.[19] Early evidence of this development can be seen in the constitution of the International Refugee Organization (IRO).[20] A much more defined criteria was later to be adopted in subsequent international instruments such as the Statute of the United Nations High Commissioner for Refugees (UNHCR)[21] and the 1951 Convention Relating to the Status of Refugees[22] (hereinafter cited as the

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[11] *Ibid.* See also P Hyndman, 'Refugees Under International Law With a Reference to the Concept of Asylum', 60 *Australian Law Journal* (1986) 148.

[12] M Tsamenyi, *op cit*, note 2, 19-24.

[13] Arrangement relating to the issue of identity certificates to Russian and Armenian refugees, 12 May 1926: 89 *League of Nations Treaty Series* (LNTS) No 2004.

[14] Arrangement of 30 June 1928: 89 *LNTS* No 2006.

[15] Presence outside the country of origin was not explicitly required, but was implicit in the objectives of the arrangements, namely, the issue of identity certificates for the purpose of travel and resettlement. G S Goodwin-Gill, *The Refugee in International Law* (1983) 2-3.

[16] 192 LNTS, 59.

[17] M Tsamenyi, *op cit*, note 2, 20.

[18] Hathaway, James C, 'The Evolution of Refugee Status in International Law: 1920-1950', *International and Comparative Law Quarterly* ICLQ (1984) 348; G S Goodwin-Gill, *International Law and the Movement of Persons Between States*, (1978) 138.

[19] Goodwin-Gill, *op cit*, note 15, 1; J Simpson, *Refugees - A Preliminary Report of a Survey* (1938) stressed the importance of the 'essential quality' of the refugee as one 'who has sought refuge in a territory other than that in which he was formerly resident as a result of political events which rendered his continued residence in his former territory impossible or intolerable' at 1.

[20] 18 United Nations Series (UNTS) 3 (1946).

[21] In Resolution 319 (IV) of 3 December 1949, the UN General assembly decided to establish the United Nations High Commissioner of Refugees (UNHCR) as of 1 January 1951. The Statute of the Office of UNHCR was adopted by the General Assembly on 14 December 1950 as Annex top Resolution 428 (V).

[22] 189 UNTS No 2545. On the Convention generally see P Weiss 'Legal Aspects of the Convention of 25th July 1951 Relating to the Status of Refugees', *British Yearbook of International Law (BYBIL)* vol 30, (1953) 478.

1951 Convention) as supplemented and updated by its 1967 Protocol.[23] Australia was a founding member of the now defunct IRO; it also acceded to the 1951 Convention in 1954 and ratified the Protocol in 1973.

Together, the 1951 Convention and the Statute of the UNHCR constitute the fundamental basis of modern refugee law. A brief examination of both instruments is thus necessary for a proper appreciation of Australia's practice with regard to refugee law.

## THE 1951 CONVENTION

This Convention has three main features. First, it provides a general definition of 'refugee' without geographical limitations.[24] Second, it states the basic Charter of rights afforded to persons who have been granted refugee status under the Convention. Third, it contains provisions for the implementation of these rights.[25] In specific terms Article 1A of the Convention provides that the term refugee shall apply to:

(a) Any person who has been considered a refugee under the Arrangements of 12 May 1926 and 30 June 1928, or under the Convention of 28 October 1933 and 10 February 1938, the Protocol of 14 September 1939 or the Constitution of the International Refugee Organization;

(b) A person who 'as a result of events occurring before 1 January 1951 and owing to well-founded fear of being persecuted for reason of race, religion, nationality, membership of a particular social group or political opinion is outside the country of his nationality and is unable or, owing to such fear, unwilling to avail himself of the protection of that country, or who not having a nationality, and being outside the country of his former habitual residence as a result of such events, is unable or owing to such fear is unwilling to return to it'.

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[23] 606 UNTS No 8791.

[24] The 1967 Protocol removed the original Convention requirement of acquiring refugee-status as a result of events occurring ... before 1 January 1951.

[25] Strictly speaking the use of the word 'rights' is incorrect. States, not individuals, are the traditional subjects of international law and, *generally,* individuals do not have the direct capacity to enforce their rights before international tribunals. Consequently, although 'rights' is used as a matter of convenience, it would be more accurate to say 'the rights declared on behalf of refugees'. P Hyndman, *op cit*, note 11, 151. But *cf* G S Gilbert, 'Right of Asylum: A Change of Direction', 32 *ICLQ* (1983) 633, 636.

*The Convention Refugee*

All persons who fit in the foregoing criteria are classified as Convention Refugees.

The Convention's definition of a refugee is quite broad. It was recognized that a new criterion adopted may not necessarily cover existing refugees. It was then specifically provided that those persons given refugee status under the earlier Conventions are still to be regarded as refugees.[26] Secondly, it also appears that Recommendation 'E' in the Final Act[27] of the Conference of Plenipotentiaries may be invoked to support extension of the Convention to groups or individuals who do not fully satisfy the definitional requirements. However, it is conceded that this is beyond the strictly contractual scope of the Convention.[28] As the Convention now stands, Convention Refugees are identifiable by four basic characteristics:[29] (1) they are outside their country of origin; (2) they are unable or unwilling to avail themselves of the protection of that country, or to return there; (3) such inability or unwillingness is attributable to a well-founded fear of being persecuted; and (4) the persecution feared is based on reasons of race, religion, nationality, membership of a particular social group, or political opinion.[30]

There are a number of limitations inherent in this definition. For example, people in refugee-type situations may have fled considerable distances but if no border has been crossed, they are not 'outside' their country of origin[31] and will not be considered to be refugees.[32] However,

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[26] Article 1A(1).

[27] A Final Act may be defined as a formal statement or summary of proceedings of a Congress or Conference, enumerating the treaties or Conventions drawn up as a result of its deliberations. Signature of the Final Act does not, however, indicate acceptance of the instruments so enumerated and these require separate signature; McNair A D, *The Law of Treaties* (1961) 24.

[28] Goodwin-Gill, *op cit* (1983) 15. *Cf* the declaration on territorial asylum adopted by the Committee of Ministers of the Council of Europe, 18 November 1977, by which the right to grant asylum is reaffirmed in respect of Convention refugees 'as well as to any other person [member States] consider worthy of receiving asylum for humanitarian reasons'.

[29] *Ibid* at 13.

[30] Article 1A(2) of 1951 Convention as amended by Article 1(2) of 1967 Protocol.

[31] If they are 'stateless persons', they must be outside the country of habitual residence. Refugees deprived of their nationality by their country of origin are regarded as *de jure* stateless persons. Those who no longer enjoy the protection and assistance of their national authorities while nevertheless maintaining their nationality have been regarded as *de facto* stateless persons. See UN Department of Social Affairs, *A Study of Statelessness* (1949) 156-7.

[32] An example of people in this situation would be the many displaced persons in Vietnam during the 1970s. Many people within some African countries at present would also fall into this category. (Hyndman P, *op cit*, note 11, 149)

if for any reason a person is outside his country and the situation changes so that due to a 'well-founded fear of persecution', he is unable to return to his country, he will be a refugee within the definition.

Second, there is no generally accepted delimitation of the scope of the term 'persecution'. It clearly covers loss of life or imprisonment[33] for reasons specified in the definition (element 4).[34] Beyond this the matter is highly controversial.[35] A more liberal view interprets 'persecution' broadly to cover any kind of acts perpetrated on the person, whether psychological, physical or economic, which are themselves severe enough to cause displeasure to the person concerned.[36] Vernant argues that 'persecution' covers severe, arbitrary measures contrary to the Universal Declaration of Human Rights.[37] However Fragomen argues that as persecution is a factual issue, 'the official must have broad latitude in making the determination as to whether the person claiming the benefit is in fact persecuted'.[38] It has been held in the US[39] that economic measures so severe as to deprive a person of all means of earning a livelihood can constitute persecution. However, the potential of experiencing economic difficulties and physical hardships in a State has been held not to constitute persecution.[40]

The requirement of a 'well-founded fear' must be both subjectively held and have the objective requirement of being reasonable. This requirement can be very restrictive. In the American case of *Immigration and Naturalisation Service v Stevic*[41] it was held that aliens bear the burden of proving that they would personally be subject to persecution if deported. The court stated that this requires the applicant to demonstrate he was 'more likely than not' to suffer persecution but declined to offer a precise definition of 'well-founded fear of persecution'.[42] This is hardly surprising; there is no set definition as such

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[33] But this might depend on whether the term of imprisonment is very short or long term, according to Grahl-Madsen A, *The Status of Refugees in International Law,* Vol 1 (1966) 193.

[34] Tsamenyi M, *op cit,* note 2, 64.

[35] *Ibid,* 64-67.

[36] Weiss P, 'The Concept of the Refugee in International Law', *Journal du Droit International,* (1960) 1, 22.

[37] Vernant J, *The Refugee in the Post War World,* (1953) 7-8.

[38] Fragomen A, 'The Refugee: A Problem of Definition', *Case Western Reserve J International Law,* (1970) 45 at 54.

[39] *Dunat v Hurvey* 297 F 2d 744 (1961).

[40] *Cheng Kai Fu v Immigration and Naturalisation Service,* 386F 2d 750 (1967), 390 US 1003 (1968).

[41] 104 Sup Crt 2489 US (1984).

[42] See Hecht J 'Political Asylum for Deportable Aliens', *Harvard J Int'l Law,* Vol 26 (1985) 225; Helton A C casenote, *West Virginia L Rev* Vol 87 (1985) 787; Cox T 'Well-Founded Fear of Being Persecuted: The Sources and Application of a Criterion of Refugee Status', *Brooklyn J Int'l Law,* Vol 10 (1984) 333.

for a 'well founded fear of persecution' and it is doubtful whether it is prudent to insist on a precise definition. A determination that a person's fear of persecution is well founded is easily open to political and other subjective considerations; *a fortiori* such a determination can also be seen as a negative political comment on the internal affairs of the country from which the refugee has fled. Because of a possible detrimental effect upon the relationship between the country of refuge and that of origin, many States have been hesitant to grant refugee status.[43]

The 'well-founded fear of persecution' must also be linked to the specific causes in the definition - ie persecution by reason of race, religion, nationality, membership of a particular social group or political opinion. People may be unable or unwilling to return to their own country because life has been rendered impossible by natural or man-made disasters, armed conflict, famines, floods or earthquakes. These circumstances are, however, outside the Convention definition and will not be sufficient for designation as a refugee in order to claim protection under this instrument.[44] The Convention definition is thus cast in terms of individuals and really represents a response to the situation of displaced persons after the Second World War. Although it was hoped States would apply it flexibly, it appears that acceding States were anxious to make their obligations specific in order to avoid indefinite extension.

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[43] It has been said, for example, that this is why Haitans in the US have experienced difficulties with their applications for refugee status made there. P Hyndman, *op cit* note 11, 149, citing J Tenkula, 'Boat People Flee Haiti to US', *World Refugee Survey* (1980), US Committee for Refugees, New York, pp 52-54. Similar statements concerning Australia and Indonesia are made by the International Comm of Jurists, Aust Section, in *The Status of Border Crossers from Irian Jaya to Papua New Guinea* (1985) at 22. Another example is also cited in recent US attitudes to the refugee status of Salvadorans and Guatemalans, see E Helton, 'Ecumenical, Municipal and Legal Challenges to US Refugee Policy: The Sanctuary Movement', *Harvard Civil Rights - Civil Liberties Law Rev*, Vol 21 (1986) 493.

[44] Compare the OAU definition of a refugee which adds 'or ... every person who, owing to external aggression, occupation, foreign domination or events seriously disturbing public order ... ' Art 1(1) and (2) OAU Convention on Refugees, 8 *Int'l Legal Materials* (1969) 1288. Tsamenyi, *op cit* note 2 at 30, notes that while this definition is considerably broader, it still only relates to political events which would also serve to exclude factors like famine and natural catastrophes.

*The Definition under the Statute of the Office of UNHCR*[45]

The Office of the UN High Commissioner for Refugees (UNHCR) is a United Nations organ set up under Article 22 of the UN Charter in a manner similar to established bodies like United Nations International Children's Emergency Fund (UNICEF) and United Nations Relief and Works Agency (UNRWA).[46] It superseded the IRO and was designed to assist States in the application of the 1951 Convention. Although the terms of the definition of refugee status under the UN statutory body are virtually identical to those of the 1951 Convention, it is pertinent here to mention one important distinction. Chapters 1(2) of the UNHCR Statute[47] authorises the High Commissioner to act in relation to *groups* of refugees. Also the General Assembly has authorised the High Commissioner to assist refugees who do not come within the statutory, and thus the 1951 Convention, definition. The first authorisation, in 1957, concerned large numbers of mainland Chinese in Hong Kong whose status was complicated by the existence of two Chinas, either of which might have been called upon to exercise protection.[48] Authorisations for other groups outside the definitions have included Algerians fleeing to Tunisia and Morocco to escape the effects of the struggle for liberation[49] and people fleeing the Angolan war.[50]

The General Assembly has also developed the notion of the High Commissioner's 'good offices' function as an umbrella arrangement to cater for refugees who do not come within the 'immediate competence'[51] of the UN, nor at the UNHCR and Convention definitions. For example, the Convention requirement that a refugee be 'outside' his country[52] would preclude assistance to refugees who had agreed to voluntary

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45 See note 21.

46 For an interesting comparison of the functions of the UNHCR and the UN Relief and Works Agency (UNRWA) and how the latter can be improved, see J Garvey, 'Rethinking Refugee Aid: A Path to Middle East Peace' Texas Int L J Vol 20 (1985) 247.

47 The UNHCR Statute outlines its functions and confers upon it a non-political and protective role. Its protective activities concern the rights conferred on the refugee under the 1951 Convention as well as protection generally regarding basic human rights including, for example, non-discrimination, liberty and security of the person. For a good summary of its protective function see G S Goodwin-Gill, 'Entry and Exclusion of Refugees: The Obligations of States and the Protection Function of the office of UNHCR', *Michigan YB Int Studies*, (1982) 291 at 294.

48 The same problem is discussed by Tsamenyi M *op cit* note 2 at 53-57 regarding the conflicting claims between Vietnam and China concerning the nationality of the Hoa, or ethnic Chinese People leaving Vietnam.

49 G A Res 1286 (XIII) 5 Dec 1958; 1387 (XVI) 20 Nov 1959; 1500 (XV) 5 Dec 1960; 1672 (XVI) 18 Dec 1961.

50 G A Res 1671 (XVI) 10 Dec 1961.

51 The term is employed but not defined in G A Res 1499 (XV) 5 Dec 1960.

52 Or if they are stateless (n 31) their place of habitual residence.

repatriation to their homeland. This was the case in the 1970s when ten million people left Bangladesh fleeing to India. They were persuaded to return to their homes under a protection arrangement between the Bangladesh and Indian Governments. In this way the UNHCR has been able to assist in many repatriation programmes, particularly on the continent of Africa. People may fall within the UNHCR mandate or its 'good offices' function and thus qualify for its protection even though they are in a country which is not a signatory to the Convention, although the UNHCR's presence in this case is entirely dependent on the goodwill of the non-signatory country.[53]

*The Relationship Between the Statute of UNHCR and the 1951 Convention.*

There is also a close relationship between the operation of the Statute of the UNHCR and the 1951 Convention provisions. Under Art. 35 of the 1951 Convention contracting States undertake to co-operate with the UNHCR, not only to 'facilitate its duty of supervising the application of the provisions of the Convention' but also 'in the exercise of its functions'. However, at times individual governments have demurred to the UNHCR's extension of its protection and assistance functions. In a discussion of the High Commissioner's Report in the Third Committee in 1979, for example, the representative of Afghanistan referred to UNHCR's 'assistance to fugitive insurgents in Pakistan'.[54] He argued pursuant to Art IF of the Convention[55] that assistance to those 'committing acts of aggression' against Afghanistan contravene the UNHCR Statute, the 1951 Convention and the UN Charter. In similar vein, the representative for Ethiopia, commenting on assistance in Somalia to Ethiopian refugees, considered that UNHCR's resources should not be 'over-extended to cover groups of people conveniently labelled as refugees

[53] This is the case, for example, regarding the 270,000 Kampucheans in border camps in Thai territory. The UNHCR is restricted to working in the Khao-I-Dang refugee camp holding some 25,000 refugees and the only camp from which the Thais allow resettlement into third countries. The UN Border Relief organisation (to which Australia contributes) provides assistance to the displaced persons camps in which the bulk of Kampucheans in Thailand reside, but it does not deal with resettlement. (Editorial, the *Australian* December 6-7, 1986).

[54] UN Doc A/c 3/34/SR 46, para 58f.

[55] Article IF provides: 'The provisions of the Convention shall not apply to any person with respect to whom there are serious reasons for considering that:

(a) he has committed a crime against peace, a war crime, or a crime against humanity, as defined in the international instruments ... ;

(b) he has committed a serious non-political crime outside the country of refuge prior to his admission to that country as a refugee;

(c) he has been guilty of acts contrary to the purposes and principles of the United Nations.

who in most cases are either instruments of aggression and disruption or are nomadic groups on their seasonal movements ...'.[56]

To summarize, the Statute of the UNHCR is more extensive in its operation and in several respects supplementary to the Refugee Convention. However, the Statute does not necessarily make up for the deficiencies in the Convention. For instance, the determination of refugee status in the terms of the Convention is a matter a State may interpret for itself without the assistance of the UNHCR.[57]

There is also no obligation under the Convention to set up procedures for the determination of refugee status and many countries have not done so. Where they have, practice has varied widely.[58]

On the issue of Convention Refugees, many commentators have argued that the Convention definition should be reformulated to encompass more people in refugee-like situations.[59] However, even if it were possible to obtain agreement with sufficient ratifications[60] on a more general definition, one wonders what practical difference this would make given the varied interpretations of the criteria individual States may make and the generally accepted attitude that the determination of refugee status is declaratory and not constitutive.[61] As mentioned, the wording of the Convention definition is in terms of individuals, so that an individual determination must be made in each case before a country decides whether or not to grant refugee status. However, once that status is granted, contracting States, such as Australia, have agreed to a comprehensive set of obligations concerning the protection of Convention refugees.

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[56] Note 56. Compare G A Res 35180, 15 Dec 1980 and G A Res 36/153, 16 Dec 1981, on assistance to refugees in Somalia: 'Human Rights, War and Mass Exodus' *Transnational Perspectives* (1982) at 26-30.

[57] Fragomen, A *op cit* note at 54.

[58] Goodwin-Gill G S *op cit* note 15 pp 167-203 for a resume of the practice of 28 States including Australia.

[59] Most suggestions envisage a definition in more general humanitarian terms: eg Tsamenyi *op cit* at 31-32; or some sort of general criterion such as lack of State protection, eg Goodwin-Gill *op cit*, note 15 at 10.

[60] Compare, for example, the abortive attempts to reach agreement on a Convention on Territorial Asylum in Grahl-Madsen A, *Territorial Asylum* (1980) and for a note on the abortive Geneva Conference in 1977 on Territorial Asylum, see 51 *ALJ* (1977) 330.

[61] This means that the legal effect of a decision as to refugee status is merely a formal recognition that the criteria for refugee status are satisfied. The decision does not itself confer that status. Weiss P *op cit*, note 36 at 10; P Hyndman *Op cit*, note 11, 151; *cf Minister for Immigration and Ethnic Affairs v Mayer* (1985) 55 *ALR* 587. 'Thus, the determination with respect to refugee status is a decision which has legal effect ..., while not determining that a permanent entry permit will be granted, ... ' per Davies J at 592.

## AUSTRALIAN PRACTICE IN REFUGEE LAW

Successive politicians over the years have consistently affirmed that Australian practice in refugee law in based on the 1951 Convention and that they regard refugees in that context. The following statement by Senator Same Margaret Guilfoyle in 1980 on behalf of the then Minister for Immigration and Ethnic Affairs is typical:

> Australia recognises the international definition of a refugee, which can be paraphrased as being a person who, owing to a well-founded fear of persecution, is outside his country of origin or habitual residence. Members of minority groups who are still in their country of origin or citizenship cannot be regarded as refugees under the international definition.[62]

Australia has not incorporated the Convention nor its Protocol into national legislation. Admission of refugees into Australia is governed by the broad discretionary provisions of the *Migration Act*, 1958-1980.[63]

Australia's criteria for admitting refugees are not restricted to the provisions of the 1951 Convention. As Mr. MacPhee, then Minister for Immigration and Ethnic Affairs, noted in February 1980 in the Senate:

> While Australia accepts the international definition of a refugee enunciated in the Convention Relating to the Status of Refugees and the related Protocol, Australian refugee policies provide also for the admission of persons outside this definition but in circumstances of such a nature as to justify special humanitarian consideration for their entry.[64]

The admission of the non-Convention refugees is based on what has come to be called the Special Humanitarian Program (SHP). The SHP is designed to help people who face human rights or some other difficulties, but who, for various reasons, do not meet the Convention criteria for refugee status. Applicants under the SHP thus fall under these broad categories:

1. Those who do not quality as refugees because their human rights difficulties in their countries of origin amount to discrimination rather than persecution.

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[62] Parl Rep, Senate Deb (23 May 1980) Vol 85, 2768.

[63] For comments on this issue see Schaffer R P 'South East Asian Refugees: The Australian Experience', *Australian Yearbook of International Law*, vol 7, (1981) 232; Goodwin-Gill *op cit* (1983) 167; *Simsek v Minister for Immigration and Ethnic Affairs* (1982) 40 ALR, 61.

[64] Parl Rep, Senate Deb (19 February 1980) Vol 84, 65-6.

2. Those who do not meet the Convention definition of refugees because, although suffering persecution, they are not 'outside' their country of origin. These cases are, however, exceptional, and are treated as such.

In all cases, applicants under the SHP must have close ties with Australia - eg family sponsors or having studied in Australia.

The SHP in effect is used to broaden the Australian perspective of the criteria for refugee status determination. While it may not offer a definition as broad as that under the Organisation of African Unity's Refugee Convention[65], the SHP provides a broad scope and flexibility well beyond the 1951 Convention definition.

## INSTITUTIONAL STRUCTURES FOR DETERMINING REFUGEE STATUS.

Even though the 1951 Convention defines a refugee, it does not provide the mechanism for determining refugee status as such. The actual process of determination is left to each State signatory. Thus the identification of refugee situations and the evaluation of the merits of applications for refugee status is solely the prerogative of a receiving State. In 1977, the Australian Government established two bodies to advise the Minister of Immigration and Ethnic Affairs on refugee matters. These bodies are The Standing Inter-Departmental Committee on Refugees (SICR) and The Determination of Refugee Status (the DORS) Committee.

The SICR advises the Minister on the designation by Australia of refugee situations and Australia's response to them.[66] The actual determination of refugee status in each case is, however, the function of the DORS Committee. The Committee comprises representatives from the Departments of Foreign Affairs and Trade, Attorney General, Immigration and Ethnic Affairs, the Prime Minister and Cabinet. The UNHRC's representative in Australia has observer status on the Committee, and usually plays an advisory role on individual cases. This function derives from the UNHRC's supervisory role in the implementation of the 1951 Convention and the 1967 Protocol. At the meetings of the Committee, the UNHRC is thus principally concerned:

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[65] The OAU Convention, Governing Specific Aspects of Refugee Problems in Africa, has a very broad definition of 'refugee'. In addition to the formulation on 'persecution', Article 1 provides that the term also applies to 'every person who, owing to external aggression, occupation, foreign domination or events seriously disturbing public order in either part or the whole of his country of origin or nationality was compelled to leave his place of habitual residence in order to seek refuge in another place outside his country of origin or nationality.

[66] The SICR is no more in operation. The DORS Committee is now the principal body that advises the government on refugee matters.

1. to offer an assessment of the applicant's credibility in the light of the conditions known to exist in his or her country of origin;

2. to provide information on the treatment of similar cases or similar legal points in other jurisdictions;

3. to represent the international community's interest by providing its interpretation of fundamental concepts such as 'well founded fear of persecution'; and

4. to promote a liberal application of humanitarian instruments ... as well as a generous policy on asylum.[67]

Application for refugee status in Australia may be made upon arrival at any Australian port of entry. Following special guidelines established in 1977, applicants first complete forms indicating their personal particulars and, more significantly, the basis of the claim for status. Applicants are then interviewed and the results referred to the DORS Committee.

As a rule, applicants do not appear before the DORS Committee when it meets to consider the applications. Even though the Committee applies the Convention and the Protocol definition of refugee, it does not sit as a judicial body or any form of administrative tribunal seeking to apply the full breadth of the rules of natural justice to applicants. As was noted in *Simsek v Minister for Immigration and Ethnic Affairs*, any attempts to 'apply anything like the full content of the maxim *audi alteram partem* to cases before the Committee, which may have to consider a wide range of confidential information about conditions overseas and whose conclusions might, if made public, affect good relations with other countries, might well stultify its operations and would not serve the best interests of applicants.[68]

There is no right of appeal against an adverse determination by the DORS Committee. The Minister, however, has the power to remit for reconsideration cases on which new information may be submitted.

[67] Goodwin-Gill 'UNHCR in Australia' *AFAR* (1982) Vol 53, 264, 267.
[68] *ALR* (1982) 40, 61.

## CONSTRAINTS ON AUSTRALIA'S REFUGEE POLICIES

For the period 1975-87 alone, Australia admitted and resettled about 168,000 refugees.[69] Given the size of Australia and its relatively small population, there is a tendency among outsiders to regard Australia as a nation with virtually unlimited capacity to admit refugees. But the reality is that 'Australia cannot take all refugees, nor even a large proportion, because this is simply not possible in domestic political terms. Nor can Australia take no refugees [at all] because international pressures will not allow this, and as the boat people incidents indicate, refugees will come anyway'.[70] The scope of Australia's refugee policies is thus determined by the constraints and stresses of its domestic socio-political conditions and international relations.

### DOMESTIC CONSTRAINTS

Since 1975, the regular arrival of boat people on Australia's Northern shores, and the government's apparent liberal attitude in admitting and resettling them, seem to have created a backlash which now threatens to divide Australians.[71] In their opposition to the influx of refugees into Australia (mainly from Indo-China) some people argue that Australia is predominantly Caucasian with a cultural heritage which is predominantly European; the great influx of refugees of Indo-Chinese origins could reduce the dominance of Caucasians in Australia and destroy the nation's cultural heritage. The basis of this argument is false. Given that Australia has a population of about 15 million, even if it accepted 30,000 Indo-Chinese refugees each year over a twenty year period, Australia would still be predominantly Caucasian.[72] This notwithstanding, the reality of the situation is that many Australians firmly believe the influx of Indo-Chinese refugees would affect the racial balance in Australia and perhaps provide the basis for social disharmony. It is a belief which has been seized upon by some Australian politicians and extremist racist groups as the basis of the current immigration debate in Australia. Even though the fears held are largely unfounded, the Australian government is nonetheless forced to take account of community sentiments in the administration of its refugee policies.

Australia's immigration policy places emphasis on family reunion. Under the Family Reunion Program, immigrants admitted into Australia

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[69] Australian Department of Immigration, Local Government and Ethnic Affairs, *Australia's Refugee Resettlement Programs: An Outline* (1988), 1.

[70] Nancy Viviani, *The Vietnamese in Australia: New Problems in Old Forms*, Griffiths University Research Lecture No 11, (6th August 1980), 7.

[71] Geoffrey Blainey, *All for Australia* (1984); Birrel, Glezer, Hay and Liffman (eds) *Refugees, Resources and Dilemmas* (1979) (hereinafter cited as Refugees).

[72] For similar comments on this issue, see Viviani, *op cit*, note 70, 7.

may sponsor close relatives abroad to join them in Australia. Ironically, the nature of the Family Reunion Program also tends to limit the number of refugees Australia may be willing to accept. This is because the greater the number of refugees, the greater the number of immigrants who qualify to bring relatives into Australia under the Family Reunion Program. For example, the influx of Indo-Chinese refugees from the 1975 period meant an increase in the number of Asian immigrants who qualified to sponsor relatives under the Program and, of course, a concomitant increase in the number of Asian immigrants in Australia. Even though such an increase was the logical outcome of a policy, the execution of which was not meant to favour any ethnic or racial group, many have construed the current Australian immigration policy as favouring Asians and have called for a restriction on Asian migration. Given the racist undertones of such a call and the potential damage it could do to Australia's image and interests in Asia, the Hawke administration has been quick to condemn any criteria for, or restriction on, immigration based on race. The government has also affirmed its commitment to its immigration policy. But these factors notwithstanding, the reality of the situation is that the government can simply not ignore the anti-Asian sentiment that appears to be building up in Australia as a result of the country's immigration policy. The current anti-Asian sentiment is likely to influence Australia's refugee policies given the relationship between such policies and immigration policy.

It is difficult to draw a line between refugee policy and migration policy. Indeed, no meaningful refugee policy can be developed in isolation from other policy areas; nor can one ignore the extent to which prevailing public perceptions and attitudes, however ill-founded, impinge on the government's policy on refugees. As one author notes in his description of what he sees as the 'refugee conundrum'.[73]

> As individuals we may feel compassion towards a group of refugees and be willing to receive them into our midst even if it means that we must make sacrifices. However, those individuals who react exclusively on these terms, and who do not consider whether resettlement in Australia under the conditions available is in the refugees' best interests, are more concerned with personal emotional reactions than with the refugees' real needs. ... we are naive if we ignore the realities of foreign relations, a government's political survival at home, and the responsible handling of economic and demographic development which must be part of any government's concern.[74]

It is concerns such as these which explain some of the contradictions in Australian practice relating to refugees. For example, as mentioned,

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[73] Cox, David 'Australia's Immigration Policy and Refugees', *Refugees* pp. 7-20, 13.

[74] *Ibid.*

Australia's Special Humanitarian Program provides for some broadening of the refugee-definition where fear of persecution amounts more to discrimination than political persecution as such. However, this is only applied where the applicant has close family or other ties with Australia. Thus the number of Indo-Chinese arrivals, for example, under SHP represents a tiny proportion of the arrivals under the Refugee Program.[75] On the issue of the definition of refugee status, Australia has repeatedly announced that it would be willing to accept only 'genuine boat-people', However entry would be refused to those individuals who fall into the category of the highly organised exodus involving many thousands of people on foreign registered boats.[76] This is so whether or not the fear of persecution held by those individuals is both sincere and reasonable.[77] This attitude has spilled over into Australia's participation in rescue programs such as Rescue at Sea Resettlement Offers (RASRO). In April 1986, a boat with 144 Vietnamese on board was rescued by a Greek commercial vessel and taken to Singapore. About 80 of the refugees had relatives in the United States and were resettled there without any problem. However, although about 60 had relatives in Australia, it accepted only six of them. The Immigration Department said it became suspicious of the bona fides of the refugees because of 'the quality of the vessel, the apparent well-organised departure procedure which brought people from widely scattered areas of Vietnam to a central departure point at the same time, and because some 90 per cent of the group were found to have relatives already living in the United States or Australia'.[78] This position was taken despite pleas from the UNHCR in Sydney that whatever their mode of transport these people were still without the protection of the Government of Vietnam which had refused to take them back even if they were willing to return.[79]

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[75] In 1982-83, 11 out of 12,295 and in 1983-84, 23 out of 9,907, *AFAR*, April 1985 at 332.

[76] See Milliken, 'Why Immigration's Cracking Down', *The National Times*, 8 Jan 1979, quoting officials from the Australian Department of Immigration and Ethnic Affairs.

[77] Schaffer R P, *op cit* note 63 at 210.

[78] Sheridan, Greg 'The Politics of Immigration', *The Weekend Australian*, 27-28 September 1986 at 23. The Minister, Mr C Hurford, made similar comments earlier in September on ABC-TV '7.30 Report', of the incident (3 Sept 1986).

[79] In 1980 the 'defensive' *Immigration (Unauthorised Arrivals) Act* legislation was enacted. One of its objectives is to prevent and punish the act of carrying to Australia large numbers of asylum-seekers in boats specially fitted out for that purpose. Provision is made for penalties up to $100,000 and ten years' imprisonment. The Act is also capable of applying to those who, having rescued refugees at sea, arrive at an Australian first port of call. It appears, however, that prosecutorial discretion would be exercised favourably on behalf of ships' masters responsible for purely humanitarian actions. Goodwin-Gill, *op cit*, note 15 at 167, Schaffer, *op cit*, note 63 at 226. The Act was proclaimed and came into force on 30 Sept 1981, shortly before a bogus refugee boat carrying illegal immigrants arrived in Darwin. Those on board, though originally from Vietnam, had been lawfully resident in Hong Kong and Taiwan. They were subsequently deported to those countries. Goodwin-Gill, *op cit*, note 15 at 167 n 5.

These examples of the contradictions in Australia's refugee practice are not given as a criticism of what, on the whole, has been a generous attitude. They are submitted merely to illustrate the conundrum which epitomises the modern refugee problem - how to resolve the negative tension between international humanitarianism and the socio-economic realities which limit national action. Like many other aspects of international relations, Australia's inconsistencies in this area ought not to be considered in isolation. Indeed they may well be regarded as part of a general international problem requiring international solidarity and a sharing of the burdens.

## INTERNATIONAL CONSTRAINTS

The international limitations on the scope of Australia's refugee policies are equally complex. On the one hand, Australia's relationship with a given State may prevent it from accepting refugees from that country; on the other hand, Australia's obligations under the 1951 Convention may enjoin it from turning away refugees from its shores. The acceptance of a refugee involves the making of a political comment on or an indictment of the country of origin in that it implies an acknowledgement of persecution as envisaged under the Convention. The admission of refugees could thus entail making politically sensitive decisions. This could well be a principal reason for a State to reject an application for refugee status. In the case of Australia, this is well demonstrated in its treatment of refugees from Indonesia. Indonesian refugees are mostly activists of the *Frente Revolucionaria de Timor Leste Independente* (FRETILIN) from East Timor[80] or the *Organisasi Papua Merdeka* (OPM) from Irian Jaya.[81] Despite Australia's liberal refugee policies it has been generally reluctant to admit Indonesian refugees. The general position adopted regarding the refugees from East Timor is well summed up in this statement by Mr. MacPhee, Minister for Immigration and Ethnic Affairs, in 1981:

> People from East Timor being resettled in Australia are not refugees and are not considered so by the Australian Government. The ... Convention definition of a refugee which is used as a guideline in Government decisions on designation requires that a refugee must be outside his or

[80] The FRETILIN is a liberation movement fighting for the independence of the former Portuguese colony of East Timor. For a discussion of the activities of FRETILIN and a background to the conflict see J Jolliffe, East Timor: *Nationalism and Colonialism* (1978); Lawless, 'The Indonesian Take-Over of East Timor, *Asian Survey,* Vol 16 (1976) 948-64; S Blay 'Self-Determination *versus* Territorial Integrity in Decolonization' *New York University Journal of International Law and Politics,* Vol 18 (1986) 441, 455-58.

[81] The OPM is the liberation movement engaged in a separatists conflict over West Irian or Irian Jaya. See generally, van der Kroef, 'The West New Guinea Settlement: It's Origins and Implications', *Orbis*, Vol 7 (1969) 121; Blay *ibid*, 450-455.

> her country and unable or unwilling to return for fear of persecution. Timorese leaving Indonesia have automatic right to Portuguese nationality and are readily accorded this status by the Portuguese authorities on request. As a consequence, they have a country which is willing to accept them. There is also the issue of return to Indonesia. As all Timorese leaving Indonesia do so legally under normal exit arrangements, the possibility of return to Indonesia is always available to them.[82]

Australia has, in fact, admitted about 6,300 East Timorese refugees to date.[83] However it is significant to note that out of this figure 650 were admitted as a result of a special agreement between Australia and Indonesia. The rest were accepted either under the SHP or through normal family reunion migration.[84] In other words, none of the East Timorese was accepted into Australia as a Convention refugee, which could have indicated Australia's tacit acknowledgement of Indonesian persecution of East Timorese.

Australia's response to Irian Jayan refugees has been even stricter. Despite the obvious fact that the conflict between the OPM and Indonesian forces has displaced many Irian Jayans, forcing them to cross the border into Papua New Guinea,[85] and the fact that sections of the OPM's leadership face possible persecution in Indonesia, Australia has been keen only to offer aid to the border-crossers into Papua New Guinea.[86] It has positively discouraged any applications for refugee status from Irian Jayans. Thus in June 1985, when eleven Irian Jayans turned up in Australia and sought refugee status, despite a recommendation from the DORS Committee that they be accepted as refugees, the Government rejected all except two applicants.[87] In spite of protests from several pressure groups, the then Minister for Immigration and Ethnic Affairs declared quite bluntly:

> [t]he Government's decision that all persons arriving in Australia from our near neighbours, in circumstances such

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82 Parl Rep, Senate Debates (1981) Vol 90 2914-2915.

83 Australian Department of Immigration and Ethnic Affairs, *Refugees: Questions and Answers* (1988 official pamphlet) Col 2.

84 See note 83 *supra*.

85 On the Irian Jayan border crossers, see generally The International Commission of Jurists (Australian Section) *The Status of Border Crossers from Irian Jaya to Papua New Guinea* (1985).

86 Since 1980, Australia has donated up to $4 million dollars in aid to help the Irian Jayan refugees and border-crossers into Papua New Guinea. (Department of Immigration, Local Government and ethnic Affairs Australia's *Refugee Resettlement Programs: An Outline* (1988) 1).

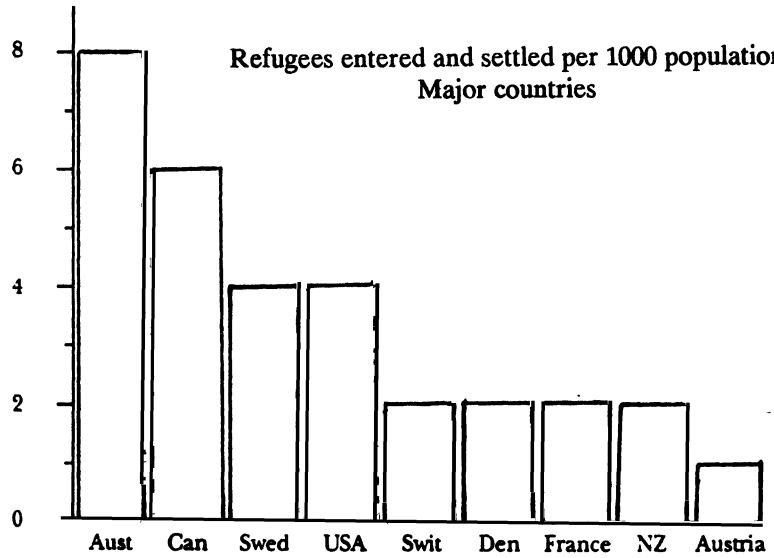
87 For a discussion of the handling of these Irian Jayans, see Parl Debates, House of Reps (1986) 1719.

> as those of the Irian Jayans, will not be allowed to stay in Australia permanently, remains in force.[88]

Australia's strict position on Indonesian refugees is quite understandable. Given the sometimes tense relations between Australia and Indonesia, it does not seem prudent, from an Australian point of view to admit refugees who may well pose problems between the two States in future by using Australia as a base for insurgency against Indonesia.

## AUSTRALIA'S REFUGEE EFFORTS WITHIN THE INTERNATIONAL CONTEXT

Despite the constraints on Australia's ability to admit refugees, its assistance to refugees on a comparative basis has been very impressive. Since World War II, Australia has accepted some 450,000 refugees and provided some $159.55 million for refugees and displaced people.[89] In 1982 Australia was listed as the fourth highest contributor to the UNHRC.[90] Even though it is now the ninth highest contributor, Australia's efforts are still laudable and compares favourably with the efforts of other nations, as this graph demonstrates:




Note: Excludes Namibia
Source: US Committee for Refugees, World Refugee Survey, 1986

[88] *Ibid.*
[89] *Ibid.*
[90] *AFAR* (1982) 251.

During the period 1975-80, nearly a million Indo-Chinese from Vietnam, Kampuchea and Laos sought refuge abroad. This exodus reached its peak in 1979, creating severe difficulties for most of the countries of first refuge. The burden fell most heavily on the developing States of South East Asia which were least able to cope with such massive inflows. As a result, most of these countries were unwilling to provide a durable solution for even a limited number of these refugees. They were concerned that their admission, even on a temporary basis, would leave most of the refugees within their territory with little effective international assistance in finding durable solutions.[91] More significantly most of these States have not ratified the 1951 Convention, precisely because they do not have the resources to be able to guarantee refugees the rights the Convention provides. The exact scope of their obligations under international refugee law was, and still is, uncertain. In appreciation of the problems of large-scale influxes, Australia took the initiative in proposing the wider acceptance of a concept of 'temporary refuge'. This would oblige States to admit all refugees, at least on a temporary basis, while a more durable solution is found. Such solutions may include settlement in third countries or voluntary repatriation.[92] The concept lays stress on the need for greater international solidarity in bearing the financial and other burdens now inequitably shared between a number of developing countries and an even fewer number of developed States, including Australia, willing to resettle large numbers of refugees.

Much the same problem has arisen with regard to the rescue of refugees on the high seas in unseaworthy boats.[93] Although these refugees faced drowning, shark attacks and pirates, many ships passed them by, afraid of not being able to land these people in Asian ports, or of losing time and money by rescuing them. Several international programs have been designed to overcome this problem. Australia participates in these programs, including the Rescue at Sea Resettlement Offers (RASRO) program. RASRO provides that resettlement countries such as the USA, Canada and Australia will resettle a certain number of people rescued in this way.[94]

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[91] Coles G J L, *op cit* note 6 at 193 notes that this attitude was not simply a lack of humanity, as can be judged from the fact that at this time, Malaysia, for example, had provided asylum for 90,000 Moslems from the Southern Philippines.

[92] *Ibid* at 261-262.

[93] See Schaffer R P, 'The Singular Plight of Sea-borne Refugees', Aust. *YBIL* Vol 8 (1983) 213.

[94] News release issued 3 June 1985 - Mr C Hurford, Immigration Minister, *AFAR*, June 1985; The Weekend Australian, 27-28 Sept 1986 at 23; Australia also participates in the Disembarkation Resettlement Offers (DISERO) Scheme, see *ibid* at 232-3, however it seems that there is still a reluctance to rescue refugees. It was reported in 'The Mercury' (Hobart, Tas) by K Stafford of *Reuters*, 16 Sept 1986, that 'Last month more than 70 men, women and children sat helplessly aboard a boat for five days in the South China Sea and

THE INTERGOVERNMENTAL COMMITTEE FOR MIGRATION

Another facet of Australia's refugee practice involves Australia's participation in the Intergovernmental Committee for Migration (ICM). The Government of Belgium, acting upon a suggestion of the United States, convened an international conference in 1951, whereupon its founding members, including Australia, decided to create a Provisional Intergovernmental Committee for the Movement of Migrants from Europe (PICOMME), open to membership by governments attracted to the principle of free movements of persons. By 1952 it had adopted a new name - The Intergovernmental Committee for European Migration (ICEM). By 1980, in recognition of the now global scope of ICEM's activities, the governing bodies resolved that the organisation would henceforth be known as the Intergovernmental Committee for Migration (ICM). The Director-General of the Geneva-based ICM, James L Carlin, writes:[95]

> Thus, whether as PICOME, ICEM or ICM, the organisation, since its inception, has borne the same broad mandate to assist in the processing and movement of migrants without distinction as to their legal status - whether refugees, displaced persons, asylum seekers or nationals - in the countries in which they found themselves. The sole limitations imposed were that such assistance be provided only to persons whose needs in this regard were not already being met by other international organisations, and that ICM's actions be consonant with the policies of the countries concerned. It is within this framework that ICM has operated for 35 years, assisting over 3.6 million persons, including some 2.6 million refugees, to settle in 126 countries around the world.[96]

This statement highlights the essential difference between the UNHCR and ICM, although the two organisations are complimentary. That is, ICM, within its own particular terms of reference, is able to provide assistance to persons not within the High Commissioner's mandate, but who are nevertheless considered to be of humanitarian concern by governments within the framework of their *own* national policies. UNHCR, of course, has no mandate to implement or promote the policies of any government. It must, at all times, remain neutral.[97]

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watched 38 commercial ships pass by until the Cap Anamur II appeared (A West German rescue vessel). This is notwithstanding that there is a duty placed on the masters of all passing ships to render all practicable assistance to vessels in distress.' Schaffer, *op cit* note 93 at 23.

95 Carlin J, 'The Intergovernmental Committee for Migration (ICM): 35 Years of Assistance to Refugees and Migrants', *AFAR*, May 1986, 398 at 399.

96 *Ibid.*

97 Goodwin-Gill, *op cit* note 15 at 81.

Also, unlike the UNHCR, the ICM is an operational agency employing a permanent staff for its operations. Even though the UNHCR has the task of seeing to the protection and resettlement of refugees, it relies on operational agencies such as the ICM, the Red Cross and similar institutions to implement most of its programs.[98]

As a founding member of the International Refugee Organisation (IRO), Australia has played an equally active role in the creation of its successor organisations - UNHCR and the ICM. In the early years, nearly one-third of the national migrants, and one-fifth of the refugees, processed for movement by ICM were destined for Australia. By 1973, well over 600,000 new Australians, whether refugees or migrants, had received ICM assistance at a cost of over $US200 million. Much of this, particularly prior to 1968, was funded from multilateral sources.[99] However, at the end of 1973, Australia withdrew its membership, deciding that henceforth it would make all its migration arrangements itself. But Australia had reckoned without the changing conditions and the mass movements in its region produced by the South-East Asian conflicts. Australia reconsidered its position and made application for observer-status in 1977 and resumed full membership in 1985. The processing and movement of Indo-Chinese refugees accepted for resettlement is, today, ICM's single largest program. Australia's participation in this organisation is important, as many of the countries which are not signatories to the 1951 Convention are members of or hold observer status in ICM.[100] Australia's membership of this intergovernmental organisation, as well as its interests in ASEAN, may very well place it in a strategic position to take again the initiative, as it did with the concept of temporary refuge in the UN, to encourage the development of reformulation and reconstruction of international refugee law.

## A NEW PERSPECTIVE ON INTERNATIONAL REFUGEE LAW

An essential feature of modern refugee law is its emphasis on the humanitarian aspects of refugee problems. As Professor Garvey notes, the present 'humanitarian premise of refugee law seriously limits, and

[98] At present, ICM employs some 800 persons worldwide in its network of 40 offices located on five continents. A total of 131 persons are based at ICM's Geneva Headquarters. Finance is by assessed contributions from member States. (See Carlin, *op cit* note 95, 400).

[99] *Ibid* at 406.

[100] As at 28 May 1985, 31 countries were members of ICM. *Ibid* 407.

even undermines, constructive response to the problem of the refugee.[101] This is because the humanitarian perspective necessarily focuses upon the relationship between the individual and the State. It thus glosses over the rather important fact that the problem of the refugee is in the ultimate analysis a problem of relations and obligations among States given the effect of refugee influx on other States. The current practice of acknowledging refugee problems more in humanitarian terms tends to confine debates on refugee issues to the moral condemnation of the States of origin rather than their legal responsibilities. This practice requires a re-appraisal because it often exacerbates the refugee crises since it diminishes the opportunity of gaining the co-operation of the source-State. On the other hand, the management of refugee problems premised on State responsibility will focus not on the plight of the refugees with all its humanitarian undertones, but on the conduct of the source States and the effects of their conduct (ie refugee exodus) on other States.

Preventive in character, this approach is likely to be more effective because the source States are likely to be co-operative when faced with justiciable issues of State responsibility rather than moral condemnation. For instance, in the case of Indo-Chinese refugees, even though the Vietnamese government denied allegations of mass expulsions, it was common knowledge that the government had, in some cases, encouraged ethnic Chinese, who were regarded as 'unpatriotic parasites' to leave after paying sizeable exit taxes.[102] In return, that government is said to have supplied boats and other transport.[103] A conservative estimate put the receipts of the Vietnamese government from the refugee 'traffic' at $A109 million in the year 1979.[104] The sheer weight of numbers and the extent of human tragedy at the height of the Indo-Chinese crisis brought the UNHCR to conclude a Memorandum of Understanding on the Orderly Departure of Persons from Vietnam with the government of Vietnam in 1979.[105] In that same year a UN convened conference at Geneva of concerned governments put pressure on the government of Vietnam to alter its policy. Thus although protection and relief were organized only after the occurrence of large-scale tragedy, international leverage focusing primarily on the conduct of the source-State was used with some degree of effectiveness as a vehicle for managing the Indo-Chinese refugee crises.

The point needs to be stressed that neither the UNHCR nor the group of concerned governments purported to base their dealings with Vietnam on any notion of State responsibility as such. But the fact remains that it is the closest the international community has come to using the conduct

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[101] J. Garvey 'Toward a Reformation of International Refugee Law', *Harvard Int'l Law Journal,* Vol 26 (1985) 483, 484.

[102] Richardson, 'Hanoi's Vast Trade in Lives', The Age, (19th June 1979).

[103] C. Hay, 'Moral Dilemmas and Population Fallacies: The Case for Population Stabilisation in Australia', *Refugees*, 175.

[104] Note 102 *supra.*

[105] UN Document A/C 3/34/7 (1979).

of the source-State and the notion of state responsibility for that matter, to manage a refugee crisis in modern refugee law. The question is, given its potential should Australia and the international community not develop a new perspective of refugee law based on State responsibility?

## STATE RESPONSIBILITY AND THE INFLUX OF REFUGEES

State responsibility implies the responsibility of a State under international law for its internationally wrongful conduct. The responsibility arises when an act or omission of that state constitutes a breach of an international obligation incumbent on it.[106] In traditional terms, the general view is that for a state to be liable for breach of its responsibility there has to be an act or omission imputable to that State against another State to which it owed a duty in law. The act or omission must be a breach of international law and, finally, it must result in a loss or damage. On the issue of refugee exodus, it has been suggested that it is probably not correct in terms of traditional law to speak of the active encouragement of people to leave their country as a breach of international law.[107] Indeed, in the specific case of Indo-Chinese refugee influx into Australia, it might be difficult to argue that Vietnam made unlawful incursions into Australian territory by allowing or assisting departees to set forth on the high seas. On the other hand, it is submitted that it cannot be denied that the practice of mass expulsions or the encouragement of mass migration does have a bearing on State to State relationships. Professor Garvey argues that at the very least, massive refugee flows inevitably assume the proportions of an international delict because of the burden imposed on neighbouring States.[108] The lack of a precisely pre-determined destination of the departees, it is submitted, should not make any difference.

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[106] ILC Draft Articles on State Responsibility, Art 3. See generally, I Brownlie, *State Responsibility* (1982) Pt 1; *Principles of Public International Law* (1979), 431-441; Greig *International Law* (1976) 521-550

[107] D H N Johnson, 'Refugees, Departees and Illegal Migrants', *Sydney L Rev* Vol 9 (1981) 11, 17.

[108] Garvey, *op cit* note 101 at 495. But see Brownlie, 'The Relations of Nationality in Public International Law', *BYIL* vol 39 (1963) 284, 324; Skubiszewski, 'Le Transfer de la population allemande etait-il conforme an droit international', *Cahiers Pologne-Allemagne* (1959), 42, 51-52; Doehring, 'Die Rechtsnatur der Massenausweisung unter besonderer Berucksichtigung der indirekten Ausweisung' *ZaoRV*, Vol 45 (1985), 372, 389; Piotrowicz, 'The Post-War Settlement in Central Europe: Legal Aspects of Frontiers and Citizenship', University of Glasgow Ph.D. Thesis, 396-398 (1987). These writers have suggested that mass expulsion or transfer of populations may be legitimate where the population concerned poses a fundamental threat to the expelling State.

In the *Trail Smelter Arbitration*, the International court of Justice declared: '[n]o State has the right to use or permit the use of its territory in such a manner as to cause injury ... in or to the territory of another or to the properties of persons therein ...'[109] Although this case concerned ecological damage in the US resulting from fumes emanating from Canada, the *Trail Smelter* rule has been extended beyond the matter of pollution to any damage to other States.[110] To compare the flow of refugees with the flow of noxious fumes may appear invidious, but it must be remembered that the basic issue here is the responsibility which derives from the very fact of control over territory.

The *Trail Smelter* principle has also been applied in relation to the launching of objects in one State which may fall on another.[111] Australia argued this very point in the *Nuclear Test Cases*.[112] The submission was that nuclear tests carried out on French Territory in the Pacific region did not entitle France to infringe the sovereignty of other States by the deposit of nuclear fall-out over their territory. Neither Australia nor New Zealand considered it necessary to argue that this fall-out was specifically intended to cause an unlawful incursion into the territory of any particular State. The issue was simply that no State should knowingly allow something which is within its control to adversely affect the territorial sovereignty of other States. In the event, the International Court of Justice held it was not necessary to decide the case on the merits, due to a declaratory undertaking by France that it would no longer conduct nuclear tests in the atmosphere.

Damage and subsequent reparations are the very essence of the State responsibility. The issue is whether the influx of refugees constitutes a form of damage. The transnational impact of refugee flow has, on occasion, been identified by United Nations General Assembly resolutions to be 'immensely burdening' on the receiving States[113] and is capable of monetary quantification.[114] Indeed, Brownlie suggests that the 'expulsion [of aliens] which causes specific loss to the national State receiving groups without adequate notice would ground a claim for indemnity as for incomplete privilege'.[115] De Zayas makes the point that such a claim

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109 *The Trail Smelter Arbitration* (US & Can) 3R Int Arb Awards (1941) 1938, 1965.

110 Von Glahn G, *Law Among Nations* (4 ed) (1987) 175; Note, 'New Perspectives on International Environmental Law' at 123, and George Seddon, 'Population and the Environment' at 129, both in *Refugees* (1979).

111 Garvey *op cit* note 101 at 495. See eg *Treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space, Including the Moon and Other Celestial Bodies*, 27 Jan 1967, Art 7, 18 UST 2410, 2415, 610 UNTS 205, 209. *Cf* Johnson *op cit* at 30, who would only admit a right of self-defence to shoot down a space vehicle which had gone off course.

112 Australia, ICJ Rep 1974, p 253 and New Zealand, ICJ Rep 1974, p 457.

113 G A Res 35/196, UN Doc A/35/48 (1981).

114 Garvey, *op cit*, note 101 at 493.

115 Brownlie, Ian, *Principles of International Law* (3rd ed 1979) 520.

would in principle be stronger where the expulsion is unlawful *ab initio* as in the case of nationals.[116] However, one must be cautious with his argument, because the illegal act which he envisages is one committed against the individual as a violation of human rights, it is thus not the issue in this paper which concerns the question of the responsibility of one State for damage to the material interests of another sovereign State.

## THE DOCTRINE OF ABUSE OF RIGHT AND STATE RESPONSIBILITY

Liability for repercussions which a refugee exodus has on the economic interests of other States was discussed by Jennings, writing as early as 1939.[117] He saw conduct resulting in 'the flooding of other States with refugee populations' as illegal, '*a fortiori* where the refugees are compelled to enter the country of refuge in a destitute condition'.[118] He employed the doctrine of abuse of right as an answer to any argument that a State's treatment of its nationals was not governed by international law. The duty to receive back nationals could not be avoided by denationalization, and a State could not 'evade the duty by the creation of international conditions which make it impossible for a humanitarian government to insist on ... return [of its own nations]. Otherwise the duty to receive back is bereft of all real significance.'[119] The doctrine of abuse of right to which Jennings refers is defined by Lauterpacht thus:

> the essence of the doctrine is that, as legal rights are conferred by the [international] community, the latter cannot countenance their anti-social use by individuals; that the exercise of a hitherto legal right becomes unlawful when it degenerates into an abuse of rights; and that there is an abuse of rights each time the general interest of the community is injuriously affected ... [120]

Thus Jennings was able to argue that: 'domestic rights must be subject to the principle *sic utere tuo ut alienum non laedas*' (ie use not your own in a way which causes injury to another).

For a State to employ these rights with the avowed purpose of saddling other States with unwanted sections of its population is as clear an abuse

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[116] De Zayas, A M 'International Law and Mass Population Transfers', *Harvard* Int LJ Vol 16 (1975) 207.

[117] Jennings R J, 'Some International Law Aspects of the Refugee Question', BYBIL Vol 20 (1939) 98.

[118] *Ibid* at 111.

[119] *Ibid* at 112-3. The abuse of right doctrine was also relied upon by Australia and New Zealand in the *Nuclear Tests Case*.

[120] H Lauterpacht, *The Function of Law in the International Community* (2nd ed 1966) 286. For a detailed analysis of the doctrine see B O Iluyomade, 'The Scope and Content of a Complaint of Abuse of Right in International Law', Harvard Int LJ Vol 16, (1975) 47.

of right as can be imagined.[121] As Judge Ammoun declared in the *Barcelona Traction Case* '[a]buse of right, like denial of justice, is an international tort ... This is enshrined in a general principle of law which emerges from the legal systems of all nations ... The doctrine cannot but be endorsed'.[122] Such an endorsement is clearly found in the British memorandum submitted for the Draft Declaration on the Rights and Duties of States. The document made refrrence to instances of 'a State acting with utmost barbarity and inhumanity to its own nationals or making preparations which appear to foreshadow a policy of aggression or again of pursuing a course which leads to the economic strangulation of another State'. It then concluded that 'the important doctrine of abuse of right may fall for consideration in this connection'.[123]

Dr Goodwin-Gill contends that the basis for liability of source countries may now lie not so much in the doctrine of abuse of right, because the expulsion of nationals may now be better regarded as an illegal act in itself, rather than an abuse of right.[124] This may well be so, but this concerns the breach of an obligation owed to the individual who may encounter some difficulty in enforcing such a right as a subject of international law. The abuse of right doctrine in the context of State obligation might thus prove to be a more useful determinant of State liability. After all, the right of a sovereign State to non-interference in its internal affairs must be a right which emanates from the respect accorded to this principle by the international community. It cannot therefore be expected to tolerate the abuse of this right if, in the words of Lauterpacht, 'the general interest of the [international] community is injuriously affected'.[125] The doctrine may also prove very useful as a basis of liability where the conduct of the source State does not amount to actual expulsion of nationals, but merely to the active encouragement or financing of mass departures.

Aside from the doctrine of abuse of right, it could be argued that other established rules of international law also permit the conclusion that States are bound by a general principle not to create refugee outflows and to co-operate with other States in the resolution of such problems as they emerge.[126] First, in the *Corfu Channel* case[127], it was held that Albania

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[121] Jennings *op cit* 112-3.

[122] *Barcelona Traction Case* [1970] ICJ 1, 324. After a large number of quotations from members of the ICJ and the acknowledgement that sometimes these have been more in the nature of dicta or guarded warnings to States, Iluyomade, *op cit* at 65 concludes: 'More significantly, however, no member of the Court has ever rejected outright the place of the principle in international law.'

[123] Secretary-General of UN, Preparatory Study Concerning a Draft Declaration on the Rights and Duties of States, UN Doc A/CU 4/2 (1948) 187.

[124] Goodwin-Gill, *op cit*, note 15 at 227.

[125] Lauterpacht, *op cit* at 286.

[126] Goodwin-Gill, *op cit*, note 15 at 228.

[127] (1949) ICJ 2.

had an obligation to notify and warn other States of the existence of a minefield. By analogy, responsibility may be attributed whenever a State, within whose territory substantial transboundary harm is generated, has knowledge or means of knowledge of the harm, and the opportunity to act but fails to act.[128] Second, a State owes to other States at large (and to particular States of refuge) the duty to re-admit its nationals. Thirdly, States are under a duty to co-operate with one another in accordance with the United Nations Charter.[129]

In 1980 the Federal Republic of Germany proposed to the UN General Assembly the development of 'rules governing the conduct of States' as well as 'the prevention of minorities being forcibly expelled by their governments'.[130] However, Professor Garvey argues that this initiative was still only made in the context of States' human rights obligations towards individuals and not vis-a-vis other States.[131] He adds that even the special study commissioned by the UN into the causes of mass exoduses, the much-vaunted and comprehensive Sadruddin Report[132] insists on the principle of non-interference in sovereign affairs without explaining how this principle relates to mass exoduses.[133] It would seem the time has come for Australia to encourage the international community to elucidate principles of State obligation as the basis of international refugee law.

## THE EXTENT OF STATE OBLIGATION

A complete regime of State responsibility might incorporate the delinquent State's obligation to remedy its conduct or omissions, as well as its obligation of reparation, *restitutio in integrum* and satisfaction.[134] But then little is to be gained by the elaboration of principles of reparation for loss suffered by receiving States.[135] Perhaps, initially it might be sufficient if State 'accountability' is restricted to mean only that the source

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[128] *Second Report on State Responsibility*, [1970] *ILCYB* 177. Goodwin-Gill *op cit*, note 15 at 228. See also the Stockholm Declaration: 'States have ... the responsibility to ensure that activities within their jurisdiction or control do not cause damage to the environment of other States or areas beyond the limits of national jurisdiction'. Report of the UN Conference on the Human Environment. UN Doc A/CONF 48/14/Rev 1 and Corr 1, Principle 21.

[129] See the elaboration of this principle in the Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations, annexe to G A Res 2625 (XXV) 24 Oct 1970.

[130] See G A Res 35/124, 11 Dec 1980.

[131] Garvey *op cit*, note 101 at 493, see also 'Refugees: A Major Foreign Policy Concern', *AFAR*, May 1982 at 257.

[132] See note 9.

[133] Garvey, *op cit*, note 101 at 493.

[134] Garcia Amador, Report on State Responsibility, [1960] 2 *International Law Commission Yearbook* (ILCYB) 41.

[135] Goodwin-Gill, *op cit*, note 15 at 227-8.

State is under a duty to refrain from encouraging refugee flow and to guarantee the safety and protection of those nationals who can be persuaded to return to their homes. Regarding those people whose departure cannot be prevented except by force[136], co-operation may take the form, as in the past, of 'orderly departure programs'. For example, orderly departure was proposed as an alternative to the departure of refugees from Vietnam by boat. An agreement on the outlines of such a scheme was reached between the UNHCR and Vietnam in 1979. Receiving countries, including Australia, began to participate only after some hesitation, but the number of departures, particularly for family reunion, increased towards the end of 1981 and 1982.[137]

Some comments made by the representative of the SRV, Mr Vu Hoang, at the Jakarta conference in 1979 where the orderly departure program was discussed, may be of particular relevance in this context. After denying that his government was guilty of collusion, he commented that it must nevertheless be accepted that mass departures were only to be expected after any war or major social upheaval.[138] This does seem to indicate some responsibility for the participants in such events to co-operate in the formulation of contingency plans to avert anticipated refugee flows. For instance, it is reported that the International Committee of the Red Cross in 1978 made contingency plans for 100,000 white Rhodesians when civil war threatened, to facilitate their freedom of movement and promote easier and more rapid acceptance, especially by Commonwealth countries. Australia and New Zealand apparently disclosed a willingness to open their door to the white Rhodesian influx.[139]

In recent times an official of Vietnam, Mr Vu Hoang, has observed that the departure of so many skilled tradesmen and professional people was causing serious hardship to Vietnam.[140] This may well be mere political rhetoric; but if his observations are correct, and they may well be[141], then they provide an additional basis for encouraging Vietnam and other States of origin to co-operate with the international community in

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136 According to Article 13(2) of the Universal Declaration of Human Rights, adopted by G A Res 217(III)A in 1948: 'Everyone has the right to leave any country, including his own, and to return to his country'. State responsibility could not of course be allowed to extend to the derogation of this principle.

137 Goodwin-Gill *op cit* note 15 at 227 n 47. However, Vietnam ceased co-operation in this scheme when aid to Vietnam was curtailed following its prolonged incursion into Kampuchea.

138 Reported in the Sydney Morning Herald, 18 May 1979.

139 Report No 43, Minority Rights Group, *op cit* at 10.

140 See note 134.

141 See for instance the 'Return of Talent' program launched by ICM in 1974 as an example of 'States' capacity to appreciate the deleterious effects of the 'brain drain' on developing countries'. Initially begun as a co-operative effort to encourage qualified Latin American nationals to return, ICM in 1983, embarked on a pilot project to a 'Return of Talent' program for Africa, with the financial support of the EEC and the US.

creating conditions of economic and political stability which will discourage mass outflow of refugees. There seems to be no reason why an international study on State responsibility for refugees should not encompass these positive aspects of State self-interest. In times of social upheaval, the most valuable asset a new regime desires more than any other is respect and acceptance by other States. The assumption of the responsibility to co-operate with the international community in averting or ameliorating the effects of mass departures may be one way a regime (such as in Vietnam) can prove its worthiness and maturity.

## CONCLUSION

The international response to the refugee problem has for the most part been reactive rather than preventative. In addition, the most recent indications are that resettlement countries are suffering 'compassion fatigue'.[142] Having taken numerous refugees over the past ten years, they are becoming less inclined to take more. In the final part of this paper it is suggested that the phenomena of mass influxes demonstrates that the refugee problem has now assumed the contemporary realities of economics and political strategies. The international community is beginning to realise this but there is a need to articulate principles and procedures, both political and legal, for the assumption of State responsibility and accountability for the creation of refugee crises. While not abandoning the indispensable precepts of humanitarian law, its position at centre-stage must be displaced in favour of a reformulation of terms of reciprocal State self-interest and respect for each other's national sovereignty. This is not to argue that traditional refugee law is irrelevant, but simply to suggest that the modern refugee problem might best be addressed on three levels. The primary level should be one of prevention and management in the context of State responsibility. The second level involves the concepts of international solidarity and burden-sharing and respect for the principles of the free movement of persons. The third, but equally important, level encompasses the traditional approach of the rights and duties of States towards refugees as individuals. It is still a priority that the technical definition of a refugee be broadened to encompass more people in refugee-like situations, just as it is important that more States accede to the 1951 Convention. Australia, through its close association with the countries of ASEAN and with ICM members, many of whom have been reluctant to commit themselves on the second and third levels, might well be in a strategic position to initiate a new approach on the primary level of State responsibility. This area of potential State responsibility remains to be fully developed and will of course require a

[142] G Sheridan, 'The Crisis of Compassion Fatigue', The Weekend Australian, 13-14 December 1986 at 23.

great deal of study and refinement. However, in view of the importance of the subject, Australia should encourage the international community to accept this challenge. The guiding principle of such a study should be the belief that 'it is always more profitable to analyse what might be possible than to predict its impossibility'. Above all, the emphasis should be that it is in the interests of every State to work to preserve its most valuable resource - its people.

[143] C Jenks, *The Prospects of International Adjudication* (1964) 759.