



ANALYSIS

# Australia and the 1951 Refugee Convention

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## EXECUTIVE SUMMARY

The international refugee regime is failing Australian national interests; the interests of the international community; and the interests of refugees themselves. But contravening international commitments is not the most effective way to remedy these failures, or to provide a lasting solution to Australia's asylum crisis. Instead Australia should lead a reform of the international system for assisting and protecting refugees, which currently places an unreasonable burden on destination states, and has the perverse consequence of promoting people smuggling.

Australia has one of the strongest track records in promoting the new approaches that are now required, including intervening to prevent atrocities, enhancing protection in regions affected by displacement, and combatting people smuggling. There is support for reform across the political spectrum in Australia, unlike in Europe. And Canberra has already demonstrated its willingness to reject the status quo, albeit controversially. Australia should take the lead now before its credibility to do so disappears.

Australia's signature on 22 January 1954 brought into force the 1951 UN Convention relating to the Status of Refugees. It is now time for Australia again to take the lead, by pressing for a review of the 1951 Convention and the international protection system of which it is a cornerstone. While the Convention itself has, by and large, stood the test of time, its implementation is failing: failing Australian national interests; the interests of the wider international community; and the interests of refugees themselves. Indeed, one of the primary beneficiaries of these failures is people smugglers.

Australia has already demonstrated its impatience with the status quo and its appetite for a new paradigm. Offshore processing as currently enacted by the Australian Government may have served its national interests better than the current international protection system; but is still in violation of the Convention to which Australia is a signatory. The *Migration and Maritime Powers Legislation Amendment Bill 2014* deliberately removes most references to the 1951 Convention from the *Migration Act 1958*. And yet, in other ways, Australia continues to adhere to the Convention, directly through its refugee resettlement program, and indirectly through its ongoing support for the UN High Commissioner for Refugees (UNHCR).

The Australian Government's current approach may be working in the short term, but it is unlikely to diminish Australia's asylum crisis in the long term, and it is damaging Australia's international reputation. The Government needs to look beyond its current policies and lead an international debate on reforming the protection system.

This Analysis lays out the case for reform: why it is preferable and more effective than the current Australian approach; how Australia is uniquely placed to lead an international debate on reform; and what the focus of that debate should be. First, it clarifies that what is required is not a revision of the 1951 Convention itself, but an overhaul of the way it is implemented through the international protection system.

## SHOULD THE 1951 CONVENTION BE REVISED?

The UN Convention relating to the Status of Refugees is the key international legal document relating to refugee protection. It defines who is a refugee and outlines the rights of refugees and the legal obligations of states towards refugees. It also underpins the work of UNHCR. There are currently 144 States Parties to the 1951 Convention and 145 to its 1967 Protocol, with 142 States Parties to both the Convention and Protocol.<sup>1</sup>

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Some commentators argue that the Convention is so dated as to no longer apply to the current realities of those in need of international protection. One point concerns the Convention's definition of a refugee as a person who:

Owing to (a) well-founded fear of being persecuted for reasons 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, is unwilling to avail himself of the protection of that country.<sup>2</sup>

This definition reflects that the Convention was drafted specifically to find solutions for those who had been displaced across Europe by Nazism and the Second World War. Hence, as originally drafted, it covered only those who were refugees as a result of "...events occurring before 1 January 1951..." and focused on "...events in Europe." These geographical and time constraints of the 1951 Convention were lifted by its 1967 Protocol, thus broadening its applicability. The definition of a refugee was further expanded in two regional complements to the 1951 Convention, the 1969 OAU Convention and the 1984 Cartagena Declaration, to cover particular circumstances in Africa and Central America respectively.

Nevertheless, significant gaps remain in the definition as it applies to contemporary circumstances.<sup>3</sup> In particular, there is a growing consensus that over the next decade or so, the effects of environmental change are likely to compound other drivers of displacement, increasing migration pressures globally including in Australia.<sup>4</sup> It is clear that the definition of a refugee provided in the 1951 Convention does not refer to environmental causes for flight; but that at least some people forced from their homes principally by the effects of environmental change will cross borders and require protection and assistance in 'refugee-like' situations.<sup>5</sup>

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The 1951 Convention specifies three durable solutions for refugees: to return to their own country voluntarily ("voluntary repatriation"); to integrate in the country where they find themselves ("local integration"); or to resettle in another country ("third country resettlement"). Its focus on solutions is among the Convention's strengths, but also reflects the situation of the refugees for whom it was established — people who had already been forced from their homes. Another critique is that neither the Convention nor UNHCR were originally envisaged to deal with new refugees after solutions had been found for those displaced across Europe after the Second World War.

In particular, the 1951 Convention does not refer to asylum seekers — although it promotes the right to asylum — and this is one of the main reasons why the Convention has proved so hard to implement in contemporary circumstances. In contrast to the already displaced individuals that the Convention was established to cater for, an asylum

seeker is someone who has left their country in search of international protection, but is yet to be recognised as a refugee. According to Article 14 of the Universal Declaration of Human Rights everyone has "...the right to seek and to enjoy in other countries asylum from persecution."<sup>6</sup>

In other ways, though, the 1951 Convention is valid and applicable to current circumstances. First, it enumerates a set of rights for refugees, albeit relatively narrowly defined. In recognition of the fact that they have fled their home countries and no longer enjoy the legal protection afforded to citizens of a state, the Convention provides access to national courts for refugees, the right to employment and education, and a series of other social, economic, and civil rights on a par with nationals of the host country. The 1951 Convention also stipulates rights specific to refugees, including protection from penalties for illegal entry. As a signatory to the 1951 Convention Australia is not permitted to treat refugees arriving illegally differently from those arriving legally.

Second, the Convention is underpinned by a number of fundamental principles, most notably non-discrimination, non-penalisation, and 'non-refoulement'. The last is perhaps the most significant: it refers to the right of refugees not to be returned to a country where they risk persecution. 'Non-refoulement' remains the fundamental provision of international refugee protection, and is now considered a provision of customary international law, binding even on states not party to the 1951 Convention.<sup>7</sup> Third, the Convention lays down basic minimum standards for the treatment of refugees, without prejudice to states granting more favourable treatment.

To be sure, there has been a gradual decline in the authority of the 1951 Convention. National and regional jurisdiction has been applied to overcome some of the stipulations of the Convention in law; and where these cannot easily be overcome legally, Australia has not been alone in flouting the Convention to try to reshape it to contemporary settings. This decline means that standards are no longer applied consistently.

Nevertheless, there is a strong argument that revising the Convention may jeopardise the rights, principles, and standards that it enshrines. In the current political climate, states would be inclined to negotiate a more restrictive Convention, rather than expanding the current refugee definition or reinforcing access to asylum systems for those arriving without authorisation. Opening up the Convention may also have implications for other treaties where the rights of refugees have their origins, for example the Universal Declaration of Human Rights. More prosaically, one of the great strengths of the 1951 Convention is its widespread ratification: it would likely take another half century to ratify a new Convention so completely.

The time is not right to revise the 1951 Convention, although that time must come one day. For now, it should remain the cornerstone of refugee protection, and renewed efforts are required to defend its rights,

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principles, and standards. Where reform is urgently required, however, is in its implementation, which is failing both states and refugees.

### FAILING STATES...

One of the main concerns about the 1951 Convention from the point of view of states is the obligation it places on them to consider any application for asylum made on their territory, however ill-founded the application may be and even if the applicants enter without authorisation. In 2013, there were 1.2 million new asylum applications worldwide. Recent UNHCR estimates are for as many as 700 000 asylum claims in industrialised countries alone during 2014, a 24 per cent increase on the previous year's total across these countries, and the highest in at least two decades.<sup>8</sup> According to UNHCR statistics, in Australia asylum applications have also increased significantly over the last decade; although they have decreased over the last year. In the first six months of 2014, Australia received 4589 asylum applications; a 20 per cent decrease on the numbers over the same period in 2013.<sup>9</sup> Of particular concern in the Australian context is the obligation to consider applications from people entering in an irregular manner — at the peak in 2013, there were between 3000 and 4000 illegal maritime arrivals each month in Australia.

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The scale of asylum seeking worldwide is compounded by the reality that a significant majority of those seeking asylum are found not to be legitimate refugees. Data on refugee status determination is hard to access and hard to interpret as in most countries there is a significant backlog between applying for asylum and receiving a final decision. But as an indicator, UNHCR reported that worldwide decisions were made on close to 700 000 asylum applications in 2012, of which 210 900 (about 30 per cent) were recognised as refugees and a further 51 000 given complementary forms of protection. Historically, Australia has granted refugee status to a higher proportion of asylum seekers than most other industrialised countries (although the proportion recognised as refugees varies considerably across nationalities). Furthermore, both Australia and European states have largely failed to deal with rejected asylum seekers. Returning them has significant financial, logistical, and political costs, and all too often rejected asylum seekers simply stay on to become irregular migrants.

The main reason so many asylum seekers do not receive refugee status is that their claims are unfounded, at least as assessed against the 1951 Convention definition. They are not facing persecution in the countries from which they arrive and, by and large, could safely be returned. The contemporary reality is that an increasing number of people are on the move for an increasing range of reasons, and the asylum channel provides one of the only legally-guaranteed channels to access the industrialised countries that are the target destinations for many migrants today. What is more, these 'mixed migration' flows, that see people

moving for broadly different motivations, have in many of the parts of the world come to be facilitated by people smugglers, who know full well that it is unlikely that asylum seekers will be returned, whatever the outcome of their asylum request.

Another striking feature of statistics on refugee status determination is that outcomes vary significantly between countries, even for asylum seekers from the same origin country. This is because the 1951 Convention is often interpreted and applied differently even by signatory states. In migration as well as other fields, national legislation is increasingly at odds with international law. Australia's current *Migration and Maritime Powers Legislation Amendment Bill 2014* is a good case in point. Its explanatory memorandum ensures

...that the exercise of a range of powers cannot be invalidated because a court considers there has been a failure to...comply with Australia's international obligations or the international obligations or domestic law of any other country.<sup>10</sup>

The lack of any provisions or mechanism for 'burden-sharing' increasing asylum numbers between signatories is an additional concern for many of them. This means that more prosperous states, or those perceived as most generous, are generally the most targeted. It also means that it is asylum seekers (and the people smugglers they often pay), rather than destination countries, that determine where the asylum burden falls. In the European Union (EU), the Dublin Convention was designed to reduce this phenomenon of 'asylum shopping' by stipulating that asylum claims have to be processed in the first EU country where asylum seekers arrive; but people smugglers have found ways around this rule.

While the 1951 Convention is widely ratified (and this is a powerful argument not to amend it), it is not universally ratified. India, for example, is a non-signatory. The obligations of the 1951 Convention that apply to signatories do not apply to non-signatories, the customary law provisions relating to 'non-refoulement' notwithstanding. This serves only to exacerbate the burden on signatories. It has been a particular challenge for Australia in recent years. Its standing as one of the few rich states that is also a signatory to the 1951 Convention in the Asia-Pacific region has helped make it a target for asylum seekers.

For states there is one more glaring gap in the implementation of the 1951 Convention, which is its 'exilic bias'. That is, it places obligations on destination states that are increasingly onerous to fulfil; but none on the states that refugees are fleeing. Consider that Syria faces no legal censure for the displacement of millions of its citizens; but Turkey does if it fails to uphold the rights of just one. In this sense, the 1951 Convention is a reactive rather than proactive instrument: it provides protection after flight but does not address the initial causes for flight. The Convention does refer to durable solutions for refugees, one of which is voluntary repatriation, and, indeed, seeking solutions is part of the core mandate of

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UNHCR. But there are no obligations on countries of origin concerning the rights of returnees. By definition once they cross the border back home they are no longer refugees. Yet it is very clear that, for many, return opens up a new set of challenges, from compensation and restitution, through reclaiming property and land, to finding employment; and the failure to resolve these challenges may lead to new exoduses and even the renewal of conflict.<sup>11</sup>

### ...AND FAILING REFUGEES

*The increasing prevalence of national legislation to reinterpret the 1951 Convention risks triggering a 'race to the bottom'...*

From a state perspective, then, implementing the 1951 Convention today presents significant challenges. But these also translate into failures for refugees too, some of which have already been alluded to. There are no obligations on states to address the conditions that cause refugees to flee their homes in the first place, and no obligations on their treatment after return other than to readmit them. The increasing prevalence of national legislation to reinterpret the 1951 Convention risks triggering a 'race to the bottom', where the 'winner' is the country that can interpret the Convention most restrictively, reducing its appeal for asylum seekers. As a result, asylum seekers are increasingly moving to signatory countries that do not have the capacity to assist and protect them; or to non-signatory countries, which are not formally obliged to assist them. In the EU context, asylum advocates have argued that the Dublin Convention has placed an unreasonable burden on poorer countries in the south and east of the EU, which are ill-equipped to cope, as illustrated by several recent reports on the rights and conditions of asylum seekers in Greece, for example.<sup>12</sup>

Another important outcome of the current asylum regime is the uneven allocation of resources. Like data on refugee status determination, expenditures on asylum are also hard to access. It has been estimated that, in 1990, the European OECD states plus Canada were spending \$US5 billion annually on the processing of refugee applications: ten times the UNHCR budget in that year. In 2000, it was reported that the United Kingdom spent more on asylum seekers (\$US2.2 billion) than the total UNHCR budget of \$US1.7 billion. Similarly in 2000, Australia spent as much on the Refugee Review Tribunal alone as it donated to UNHCR.<sup>13</sup> These figures are dated, and in some cases the number of asylum seekers has dropped, but it is clear that industrialised states now spend far more money on their asylum systems, in many cases on people with unfounded claims to refugee status, than UNHCR spends to support the vastly more numerous and needy refugees in camps and cities in poorer countries around the world. While there were 1.2 million asylum seekers in 2013, there were 16.7 million refugees, and in total UNHCR reported over 50 million people of direct concern, including stateless people and internally displaced persons (IDPs).<sup>14</sup>

Indeed the scale of contemporary displacement has already outgrown the provisions and assumptions of the 1951 Convention. Guaranteeing

refugee rights to such a large number of people, especially in poor countries, is becoming impossible. It has been argued that UNHCR has moved away from its primary task of protection to focus more on assistance.<sup>15</sup> But even here it is failing. In a growing number of situations, UNHCR can do no more than provide shelter and basic support to refugees ‘warehoused’ for increasing periods of time in refugee camps.

Another unintended consequence is the growth in people smuggling, which exposes migrants, asylum seekers, and refugees, to risk and vulnerability.<sup>16</sup> In just one week in February this year, over 300 migrants are reported to have drowned in the Mediterranean, and a further 3800 were saved in just five days between 13 and 17 February.<sup>17</sup> In 2013, it was estimated by the International Organization for Migration (IOM) that 3072 migrants drowned while trying to cross the Mediterranean, out of a total of 4077 who lost their lives during ‘fatal journeys’ worldwide.<sup>18</sup> These are crisis figures, and one of the main reasons for the crisis is that the international protection system is under increasing pressure and parts of it are failing.

The 1951 Convention no longer provides protection for a sizeable proportion of those in need. Instead, it is increasingly a matter of who can pay, and one of its greatest beneficiaries is the people smuggling industry. Along the Mediterranean Sea route alone, some analysts estimate that smugglers extracted up to \$US1 billion from migrants during the record high year of 2014.<sup>19</sup>

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## TIME FOR A MORE SUSTAINABLE APPROACH

It should not be surprising that a Convention drafted over 60 years ago, against a particular historical and geographical background, is no longer fully relevant. Both advocates and critics recognise the challenges associated with implementing the Convention today. Where they differ is in how to respond.

UNHCR, the guardian of the 1951 Convention, has recognised the changing realities of displacement, as well as of state interests, and has continually adapted. While insisting that the 1951 Convention remains the cornerstone for refugee protection, largely because of concerns that its core principles may be renegotiated, it has, at the same time, demonstrated flexibility in filling some of the gaps. It has continually broadened its remit; for example, with a consistent focus on the rights of women (there is still a debate about whether the 1951 Convention definition covers gender-based violence) and children. In 2014, it put a particular emphasis on protection at sea.

Outside its direct mandate and beyond the 1951 Convention, it has also supported innovative responses. It has worked to provide ‘protection in the region’, for example, via safe havens, to reduce the need for

refugees to travel long distances. It has acknowledged the value of supplementary forms of protection for people who do not satisfy the 1951 Convention criteria but still would likely be at risk were they to return home. It is operational in non-signatory countries and among populations ‘of concern’ who may not directly fall within its mandate. It has contributed to the development of standards and principles on internal displacement, mixed migration, and environmental migration.<sup>20</sup> It supports other parts of the UN system, as well as agencies outside the system, to try to provide more comprehensive responses. And it continues to cooperate with countries like Australia that have departed from the 1951 Convention, albeit not uncritically.

To some commentators, UNHCR deserves credit for its adaptability. While the asylum and refugee regimes may be buckling under the current pressure of numbers, UNHCR continues to function, and, by and large, the rights of refugees continue to be respected and upheld. For others UNHCR risks betraying its core principles. Some of its compromises — for example, concerning protection in the region and supplementary forms of protection — have been criticised as reducing access for refugees to their rights. While new standards and principles have been effective — in particular the Guiding Principles on Internal Displacement — they still do not provide legal protection or predictable assistance to vulnerable groups such as IDPs or those displaced by the effects of natural disasters or environmental change. The 1951 Convention is no longer applied equally or consistently, and, for refugees, access to protection risks becoming a lottery.

What is needed is an overhaul of the international protection system, to reduce its unpredictable and ad hoc nature, so it genuinely serves the interests of refugees and states. Australia, perhaps surprisingly, is well-placed to launch this process.

### WHY AUSTRALIA?

That Australia might lead on the reform of the international protection system that its signature brought into force 60 years ago (as the requisite sixth state to ratify it) bears a certain symbolic importance. But such a proposal will also generate disdain among some advocates given the Australian Government’s current policies on asylum. Why acknowledge, and even reward, deviancy? The answer is that Australia is not alone in addressing the shortcomings of the system with unilateral and tough responses, as witnessed, for example, by an increasingly hard line on boat arrivals in Europe.<sup>21</sup> And there are sound arguments not only for Australia to take the lead, but also for the international community to let it.

The most powerful reason for Australia to initiate reform is that it will, ultimately, result in a more effective asylum policy. Measured exclusively by the recent decline in boat arrivals, Australia’s current approach has

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been a success. But even those closely involved in the policy are not confident that this outcome is sustainable. Fewer — but still some — boats continue to launch for Australia. At the moment, they are being intercepted. However, as in the Mediterranean, there has traditionally been a seasonal pattern to boat arrivals in Australia, and the ‘boat season’ is nearing. How long will the Government’s tactics manage to outwit those of the people smugglers? A fast boat that cannot be easily intercepted, a deliberate capsizing, or a mass launching that would stretch the current naval safety net, are genuine possibilities. As ‘ghost ships’ and armed responses in the Mediterranean in recent weeks demonstrate, people smugglers are both resourceful and determined.

By most other measures the current approach can hardly be considered a success. It consumes significant resources and will continue to do so. It has strained relations between the executive and judiciary. It has similarly poisoned bilateral and regional alliances. And it has sullied Australia’s standing in the global community. Just as the political significance of asylum outweighs its numerical significance in Australian domestic politics, so too does Australia’s response risk having a disproportionate effect on its international reputation. However gung-ho some of Australia’s politicians may be, international opprobrium is bound to undermine Australia’s claims and ambitions to regional and international relevance and leadership.

How long Canberra can bear these costs is an open question. A reform debate led by Australia should systematically address the current weaknesses in the asylum regime that have made Australia feel obliged to react with such force on asylum; and potentially remove the need for such extreme measures. If the discussion falters or reform fails, Australia can always revert to the current approach. Australia has little to lose and much to gain from advocating for reform.

A second incentive for Australia to promote reform relates to the particularities of Australia’s asylum hinterland. Probably no other country is impacted more directly by the consequences of the stumbling international protection system. The often cited statement that there are no signatory countries lying between some of the main origin countries for asylum seekers in Australia (Afghanistan, Iran, Sri Lanka) and Australia itself is not quite true (Cambodia, China, Papua New Guinea, and the Philippines are all signatories to the 1951 Convention, as are some of the Pacific islands). However, it is true that none of the major transit countries for these asylum seekers — India, Indonesia, Pakistan, Thailand — are signatories. Most analysts agree that being one of the few signatories in the region, combined of course with its wealth and living standards, is an important reason why asylum seekers come to Australia.<sup>22</sup> But this should not be a reason for Australia to lower its standards to those of its neighbours. Rather it is a reason to shape a system that these neighbours would be willing and able to endorse and

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implement, and to exercise regional leadership in achieving this goal and raising standards across the region.

So much for Australia's interest in reform: there may also be compelling reasons for the international community to accede to Australian leadership.

One is Australia's track record — internationally and domestically. Australia has been at the forefront of the debate on the Responsibility to Protect — justifying intervention to prevent the threat of mass atrocities. Australia has also pushed the idea of regional processing — enlisting other countries in the region to share the burden of asylum. Some of its asylum policies notwithstanding, Australia remains a champion of refugee resettlement, having recently upped its annual quota to 20 000, second only to the United States. Protecting people at home so they do not need to flee; promoting protection close to home so that they do not need to pay people smugglers to reach safety; and unlocking durable solutions for refugees are all key components of a better international protection system.

In contrast to most European countries, there are also good grounds to believe that the Australian Government would receive strong domestic support for leading a reform agenda. In recent years, the leaders of both main political parties, as well as the Greens, have proposed reforms to the 1951 Convention. They may differ in their focus and their proposals, but there seems to be political consensus that reform is in Australia's interests. The 1951 Convention is often described as a 'European' Convention, and neither political nor public support for a serious overhaul of its implementation is likely in Europe, despite growing asylum pressures there.

## A COMMITMENT TO CHANGE

What should a review of the international protection system look like?

Any review should be outcome-oriented. This is a necessary prerequisite not just because the international protection system is no longer working; but also because many states would probably not participate in another global process that offers little prospect of achieving what cannot already be achieved through national legislation and policy.

What is not needed therefore is a replay of UNHCR's 'global consultations' through 2001 and 2002 to mark the 50<sup>th</sup> anniversary of the 1951 Convention, which unanimously reaffirmed the commitment of the international community to the Convention and culminated with an 'Agenda for Protection' adopted by the General Assembly in 2002.<sup>23</sup> What is needed is a commitment to change that confronts the weaknesses of the international protection system, including the 1951 Convention, that reinforces the benefits that can accrue from reform; and that highlights the likely consequences of continued failure. Few states

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today would disagree with Australia that the system no longer serves their national interests; many would prefer not to abrogate international responsibilities in order to protect them.

The preceding discussion has already highlighted some of the outcomes that a review should aim for. Paramount should be the rights of refugees — reinforcing the ‘timeless values’ of the 1951 Convention. Ultimately, states are the guarantors of these rights, and so a review should need to respond to the growing concerns of states, in particular around the burden and inequities of the asylum system.

First, an international protection system fit for purpose in the twenty-first century should strive for accountability and impose sanctions on states that cause displacement.<sup>24</sup> The ‘Responsibility to Protect’ paradigm paves the way, although its application is uneven. Equally, it should pay more serious attention to addressing other factors that compound refugee flight, from a lack of development through to climate change. International attention this year on financing for development, the Sustainable Development Goals, and moving forward climate change negotiations are all opportunities in this direction: in each case displacement can be mainstreamed.

Second, it should seek to reduce the need for long-distance asylum seeking. At the moment too many asylum seekers — including genuine refugees — are taking too many risks to travel long distances to reach asylum. It is these journeys that generate business for people smugglers, who arrange transportation, help overcome immigration rules and procedures, and often also insert people in the countries where they go — all illegally, and all heightening the vulnerability of asylum seekers. A more systematic response to protecting and assisting people displaced within their own countries would be one way to anchor them close to their places of origin. This would entail strengthening adherence to the Guiding Principles on Internal Displacement, but also extending existing policies such as ‘safe havens’ that have already been tested in countries such as Iraq. Better regional protection mechanisms, as currently being promoted by the Australian Government, should also reduce the incentive to travel distantly. Again, this is not a new proposal. Development assistance should also target neighbouring asylum countries, to reduce the growing trend of secondary migration, whereby people leave refugee camps for onward journeys. All of these proposals are achievable and Australia already has a strong track record on them. What is more they should strengthen the current global policy emphasis on combatting people smuggling and trafficking.

Third, a renewed international protection system should also reduce the asylum burden on destination countries; for example by conceiving a form of burden sharing, streamlining criteria for refugee status determination, and implementing robust offshore and transit processing. Moving through the ‘refugee cycle’ (indeed, getting the refugee cycle

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moving again), the return of rejected asylum seekers would need to be facilitated, for example, by imposing obligations on countries of origin. Undoubtedly these are challenging policy goals. On what basis should burden sharing take place (national population size and characteristics and national income are often suggested)? Addressing root causes is a long-term challenge and states have short-term goals in this arena. Applying the Responsibility to Protect, protecting IDPs, and returning rejected asylum seekers all intersect with the principles of national sovereignty. But many such proposals have already been considered in detail by experts. The conceptual and legal groundwork is in place.<sup>25</sup>

To be taken seriously, any review should also consider funding and institutional responsibilities. In particular the mandate of UNHCR should be part of a review. A sensible balance would need to be struck in designing the scope of the review: sufficient to achieve concrete outcomes, but targeted enough not to engage in ‘mission creep’ or become unwieldy. Certainly there are wider issues that might be considered; for example, the relationship between UNHCR and other UN agencies and the International Organization for Migration (IOM) in responding to ‘mixed migration’ and people smuggling. Another is the intersection between UNHCR and other institutions dealing with issues that impact the causes of displacement such as trade, investment, development cooperation, security, and international politics.<sup>26</sup> In some circumstances, for example, environmental migration, it has been suggested that UNHCR may be best placed to mobilise action at the international level rather than assume direct responsibility.<sup>27</sup> In others, it may be required to extend — or limit — its mandate.

This, in turn leads to discussion regarding another key parameter for any review process, which is ownership. In particular, there is a strong argument that the review should not become the responsibility of UNHCR. The agency’s vested interests against change are probably too significant to overcome. Instead, this should be a state-led process, including, where possible, non-signatories to the Convention. The requirement for consultation is clear, and certainly should include the UN agencies and NGOs and asylum and refugee representatives. The private sector should be an important addition, as it has become a much more significant actor both in the international protection system and in global governance more widely.<sup>28</sup>

*Australia has reneged on its international commitments.*

## AUSTRALIA AND THE 1951 CONVENTION

This Analysis has argued that the international protection system is failing. Much more controversially, it has suggested that Australia may be well-placed to lead a review of the system.

This is not to excuse or apologise for Australia’s current asylum policy. To be clear: Australia has reneged on its international commitments. The practice of undertaking cursory interviews of asylum seekers on board

ships does not meet the international standard that requires asylum seekers to have access to legal advice and representation.<sup>29</sup> Australia has not extended its human rights guarantees to asylum seekers transferred to other countries as is required by the 1951 Convention to which it is a signatory.<sup>30</sup> And according to the United Nations Human Rights Council, in 2013, Australia violated the International Convention on Civil and Political Rights (ICCPR) by detaining asylum seekers arbitrarily, failing to provide an effective judicial remedy, and subjecting detainees to conditions of detention that are "...cumulatively inflicting serious psychological harm upon them."<sup>31</sup>

A final reason for Australia to propose reform of the international protection system is that soon it will lose the credibility to do so. The instigator of a debate usually gets to set the agenda and the terms for the debate. Australia's current policies may drive either UNHCR or other signatory states to review the international protection system themselves, in which scenario rather than having its finger on the trigger of reform, Australia would be in its crosshairs.

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## NOTES

<sup>1</sup> United Nations High Commissioner for Refugees, States Parties to the 1951 Convention relating to the Status of Refugees and the 1967 Protocol, <http://www.unhcr.org/3b73b0d63.html>.

<sup>2</sup> 1951 Convention Relating to the Status of Refugees, Article 1.

<sup>3</sup> Khalid Koser, *Environmental Change and Migration: Implications for Australia*, Lowy Institute Analysis (Sydney: Lowy Institute for International Policy, 2012).

<sup>4</sup> *Ibid.*

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<sup>6</sup> Amnesty International, People on the Move refugee fact sheet, <http://www.amnesty.org/en/refugees-and-migrants/rights-of-refugees-and-migrants>.

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