

AUSTRALIA-PACIFIC

Offending human dignity - the “Pacific Solution”

I INTRODUCTION

A year ago on 26 August 2001, the Norwegian freighter *MV Tampa* rescued 438 people from a dilapidated Indonesian fishing boat in distress off Australia’s Christmas Island in the Indian Ocean. Most of them were Afghan and Iraqi asylum seekers. When some of them insisted upon being taken to Australia, first the Australian and then the Indonesian governments denied them permission to land, although the *Tampa*’s crew sent medical distress messages. As the two governments and Norway argued about their fate, they spent eight days in hot, crowded conditions on the *Tampa*’s deck. Their widely-reported ordeal and subsequent changes in Australian refugee policy illustrated a serious disregard for human dignity by governments. At the same time, the *Tampa* incident highlighted the ruthlessness of people smugglers who exploit the desperation of asylum seekers and economic migrants alike by sending them on unsafe boats with false promises of acceptance by wealthy countries like Australia.

The Australian authorities sent the *Tampa* asylum seekers on an odyssey of fear and uncertainty which for many continues to this day. In addition to the diplomatic standoff about which government was responsible for their situation, their treatment became a topic of political debate during the lead-up to Australian national elections.

In response to the *Tampa* incident, the government in Canberra resolved to no longer permit anyone to reach the Australian continent to exercise their right to seek and enjoy asylum in Australia unless they were carrying valid travel documents. Two Pacific countries, the Republic of Nauru and Papua New Guinea (PNG), as well as the International Organisation for Migration (IOM) quickly accepted Australia’s financial and aid incentives to detain asylum seekers in improvised, isolated camps run by the IOM. Australia has been meeting virtually all costs of establishing and maintaining detention camps in these countries, and of processing applications for refugee status. This new approach has become known in Australia as “the Pacific Solution”.

Today, at least 1,834 asylum seekers¹ from the *Tampa* and other boats subsequently intercepted by Australia are dispersed across the Asia-Pacific region. Of the 2,436 potential asylum seekers who reached Australian offshore islands by boat from Indonesia since the *Tampa* rescue, Australia has sent back about 600 on the boats they arrived on. Another 1,834 were taken to remote locations in Nauru, PNG and to

¹ Australian Immigration Fact Sheet 70 “Border Control” as of 10 August 2002.

Australia's Christmas Island.² While procedures to determine refugee claims are still continuing, at least 580 have already been found to be refugees³. Of those rescued by the *Tampa*, only 130 have found permanent protection in New Zealand, seven Afghans recently returned to Afghanistan from detention camps in Nauru⁴, and almost all others are detained and awaiting final decisions on their future in Australia, Nauru and Papua New Guinea or on temporary visa in Australia⁵. All of them, including scores of children, have already spent between three and 12 months in detention which was arbitrary, a form of state-controlled custody without charge, trial or independent review of whether detention is necessary in the individual case, appropriate and otherwise meets international human rights standards.

Amnesty International opposes Australia's punitive measures to deter unwanted asylum seekers by treating others harshly even though they committed no crime. Specifically, the organization objects to the use of detention of unspecified and potentially unlimited duration without judicial review, to the automatic detention of children, and to detention in conditions which may be considered degrading or inhuman. Such violations of human rights cannot be justified as a method of deterring potential asylum seekers. Addressing the problem of international people smuggling requires an increase in international cooperation targeting the root causes of both refugee movements⁶ and of the people smuggling market, rather than in punitive measures against those they exploit.

² Under new legislation introduced in the wake of the *Tampa* incident, Christmas Island and some 3,000 other islands off the coast of mainland Australia are no longer considered to be part of Australia for the application of migration laws covering refugee rights. As a result, people arriving there are denied the right to claim asylum in Australia. See Migration Amendment (Excision from Migration Zone) Bill 2001, and "New Regulations to Fight People Smugglers", Minister for Immigration Media Release 7 June 2002.

³ The precise number is unclear; by 28 June 2002, Australian government statements suggested between 450 and 520 positive decisions on refugee claims in the Nauru and "Manus Island" (Papua New Guinea) facilities alone, with hundreds more pending. At that time, another 130 people had been recognized as refugees by New Zealand.

⁴ Australian Department of Immigration letter to the editor of the Sydney Morning Herald regarding "Life in Australia worse than Afghan prison" - 14 August 2002.

⁵ So far, those with close family links were given temporary visa in Australia.

⁶ For example, persecution on religious, ethnic or political grounds, and armed conflict.

The organization is further concerned that the *Tampa* precedent may lead other governments to evade their shared responsibilities to find effective protection and durable solutions for people fleeing countries where they are at risk of serious human rights violations. Australia's unilateral action undermines international efforts aimed at persuading other countries to respect the needs and rights of refugees and asylum seekers.

This document examines some of the developments since the *Tampa* incident, which coincided with a global backlash against asylum seekers following the 11 September 2001 attacks in the USA. It calls for government resources in refugee host countries to be concentrated on sharing - not shifting - responsibilities for refugee movements, on addressing their root causes and not just the symptoms, and for an end to the arbitrary detention of asylum seekers and refugees as practised or funded by Australia. Amnesty International is concerned about a detention regime which takes no account of the effect of prolonged detention on the mental health and well-being of detainees, particularly vulnerable groups such as children. The "Pacific Solution" approach itself raises a number of issues under international law, such as the links between human rights, refugee and maritime law, which cannot be addressed in this document.

II BACKGROUND

The "Pacific Solution"

Australia's response to the *Tampa* incident illustrates what the government subsequently described as a "deliberately tough" approach to asylum seekers and refugees, aimed at "attacking smuggling practices and sending the strongest possible message to smugglers and their clients [mostly asylum seekers]".⁷ The government thus intentionally treats harshly any unwelcome asylum seekers in order to deter others from trying to reach Australia with the assistance of smugglers.⁸ It claims this helps maintain Australia's capacity to select recognized refugees from among those "most in need" overseas. However, critics argue that "[i]t is misleading to claim [such refugees] are the ones who happen to be at the head of a queue of persons ranked according to greatest need. They are the lucky ones in a lottery where some connection with Australia or greater

⁷"Principled Observance of Protection Obligations and Purposeful Action to Fight People Smuggling and Organised Crime - Australia's Commitment", background paper circulated by the Australian government in September 2001, p. 4.

⁸ "Physically disrupting the work of people smugglers and only providing temporary protection for unauthorised arrivals is working." Minister for Immigration media release MPS 16/2002, 21 March 2002

compatibility with Australia usually counts for something.”⁹ The Australian response to the *Tampa* has reinforced existing trends in government policy and added new, more extreme measures.

The *Tampa* incident occurred at a time when international people smuggling syndicates were sending increasing numbers of asylum seekers and migrants to Australia by boat with false promises of eventual permanent residence. The smugglers exploited the fears and desperation of asylum seekers and migrants mainly from Iraq and Afghanistan, who no longer felt safe in host countries increasingly unwilling to provide care and protection. While overall arrival figures in Australia were small in comparison with other countries (4,137 people arriving in the 12 months to 30 June 2001), the Australian government was concerned about the failure of previous policies aimed at stopping their arrival.¹⁰

⁹ Fr Frank Brennan, “Developing just refugee policies in Australia”, University of Sydney lecture, 7 August 2002. Section C of Australian refugee visa application forms seeks information about an applicant’s links to Australia.

¹⁰ It is important to note that these policies do not seek to deter applications for resettlement lodged overseas. However, for many refugees this is not a safe or realistic option, for example because they cannot contact Australian diplomatic representatives without risks, or because there is no Australian embassy in their country.

For example, the government has claimed that restricting refugee benefits in Australia and its 10-year-old practice of automatic detention of asylum seekers¹¹ were essential elements in an approach aimed at "doing everything possible to fight people smuggling"¹²; however, this did not discourage asylum seekers from trying to reach the country on dangerous boat trips arranged by smugglers.¹³ Unlike most European countries receiving tens of thousands of asylum seekers each year, Australia's geographical situation meant that authorities were used to an average of no more than 1,000 asylum seekers arriving without visa by boat each year over the past 13 years.¹⁴ Prime Minister Howard also suggested that detention facilities had reached capacity under Australia's mandatory detention system: "I have to say that we are reaching a situation where our capacity physically, through detention facilities and otherwise, without massive additional expenditure to erect new facilities, that capacity is reaching the ceiling, it is reaching breaking point."¹⁵ This comment fails to consider whether it is necessary and appropriate to detain all asylum seekers, including for example, families with babies, who arrive without visas.

The *Tampa* incident also gave further momentum to steps by Australian Prime Minister John Howard to develop a "whole-of-government approach" to deter asylum seekers arriving without travel documents. Led by the Office of the Prime Minister and Cabinet, a people smuggling task force was established in August 2001 which soon controlled a major operation with the mission "to deter (arrival) and deny (access into Australia's migration zone where asylum rights apply)".¹⁶ By September, it involved

¹¹ and others who arrive without valid travel papers.

¹² Australian Government background paper on the *Tampa* issue, circulated September 2001.

¹³ No boats have reached the Australian mainland this year; however, various factors may have contributed to this situation, including stricter controls in international travel following the events of 11 September 2001, subsequent political change in Afghanistan, increased international attention to the situation of refugees in the region, and the publicity impact of the drowning of 353 asylum seekers whose Indonesian boat sank heading for Australia.

¹⁴ "Unauthorised Arrivals by Air and Sea", Department of Immigration Fact Sheet 74. According to the same fact sheet, during the 12 months to 30 June 2001, another 1,508 people (which would include many asylum seekers), were refused entry at Australian airports.

¹⁵ Prime Minister's News Room, "Transcript of the Prime Minister the Hon John Howard MP Television Interview with Fran Kelly, 7.30 Report", ABC 27 August 2001.

¹⁶ The mission objectives were characterized by a commanding Navy officer: "The aim was to deter and deny access to the Australian migration zone. If forced to abandon that aspect of the mission, I was to contain the situation until a decision could be made as to where the [people arriving without valid visa] would be transferred to." Transcript of 4 April 2002 hearing, Official Committee Hansard, Senate Select Committee into a Certain Maritime Incident, p. 31.

federal (national) government ministries and agencies responsible for immigration, defence, intelligence, police, justice, customs, overseas aid and foreign affairs. Several hundred million US dollars worth of funds were made available to close Australia's borders against unwelcome asylum seekers, and the May 2002 government budget sets aside a total of 1.5 billion US dollars for "border protection" and related measures. During the coming four years, nearly 300 million US dollars are budgeted just for activities in other countries to prevent asylum seekers from reaching mainland Australia, which includes funding to the IOM for assistance with their detention, processing and return. This raises questions about Australian government claims that detention and processing facilities in the Pacific are merely "temporary" arrangements.

Under the so-called "Pacific Solution" approach, more than 1,800 asylum seekers have been transferred to Nauru, Manus Island (Papua New Guinea) and Australia's Christmas Island but denied permission to lodge refugee claims in Australia. In Nauru, the United Nations High Commissioner for Refugees (UNHCR) assisted with the processing of more than 560 refugee claims, while Australian officials have so far handled at least a similar number under procedures developed by the Australian government.¹⁷ As of mid-August 2002, refugee determination for many applicants in Nauru and Manus Island was continuing.

"Operation Relex"

The Australian military's "Operation Relex" was supported by civilian efforts to detect, turn back or intercept any vessel suspected of carrying asylum seekers in the seas north of Australia. Between 3 September and December 2001, at least three frigates, a troop carrier, supply vessels and armed patrol boats assisted air force surveillance aircraft and customs boats to create a "thick grey line"¹⁸ around Australia's north coast. Prime Minister Howard introduced draconian new laws which allow Australian warships to shoot at boats refusing to cooperate,¹⁹ and which prevent Australian courts from hearing legal challenges against government actions on intercepted boats.

¹⁷ It is important to note that while Nauru and Papua New Guinea are sovereign countries, they accepted Australian transfers of people escorted and guarded mainly by Australian guards under arrangements funded and initiated by Australia, for processing of refugee claims by Australian officials under procedures developed and controlled by Australia.

¹⁸ "Thick grey line: Patrols aim to deter illegals", Navy News, 17 September 2001.

¹⁹ A Bill to amend existing Border Protection legislation was passed within a day by the House of Representatives but rejected on 30 August 2001 by the Australian Senate. Australian armed forces, police, customs and immigration officials already have far-reaching coercive powers against non-compliant boats. Australian law now provides for effective immunity from prosecution in cases where such powers are being

used.

During "Operation Relex", boats carrying several thousand potential asylum seekers were confronted by patrolling Navy and Customs vessels and prevented from approaching Australia. Even when the asylum seekers' boats were only marginally seaworthy,²⁰ they were usually directed back to Indonesia. Some incidents involved the use of Navy cannon and machine gun warning shots²¹, the burning and sinking of smuggling boats, attributed to sabotage by their crew or passengers, and the use and threat of force by Australian military against individuals resisting their orders.

Two women²² drowned during one incident near Christmas Island on or about 8 November 2001, but the civilian authorities have not yet decided whether to hold a coroner's inquest - a form of judicial investigation required in Australia to determine the cause and circumstances of any deaths during operations involving police or other officials.²³ Apparent delays in procedures leading to this decision give rise to concern that national authorities may be reluctant to have the circumstances of the deaths investigated in court. The families of the two women were informed about their rights regarding the bodies under the Western Australia Coroner's Act; the bodies are buried on Christmas Island.

Statements to Amnesty International by asylum seekers about their treatment by Navy personnel speak of dismay at the orders the armed forces were expected to carry out (to force boats to return to Indonesia). With few exceptions, however, they also expressed gratitude for Navy officers' courage during rescue at sea, and for their compassion in the care of those asylum seekers taken on board Navy ships. Disappointment was expressed about Navy personnel or other officials raising hopes that people would be taken to Australia, when in fact they were taken to Nauru or back towards Indonesia.

Voyage of death

²⁰ "The sea conditions were fine, the vessel was marginally seaworthy but it was still afloat ..."
Commander Norman Bank, HMAS Adelaide, 4 April 2002, during a discussion on whether an Indonesian boat with a crippled engine could be returned safely to Indonesia, at the Australian Senate Inquiry into a Certain Maritime Incident; Official Senate Hansard, p. 33. The issue was earlier discussed at the same inquiry on 26 March 2002, Official Senate Hansard p.51.

²¹ Navy records show that 5.56 mm "cannon" shots were fired as close as 15 metres in front of one boat; in addition, 50 cal machine gun fire (into the water) preceded a Navy boarding operation.

²² Nurjan Hussein, born 1946, and Fatima Hussein, born 1981, believed to be from either Pakistan or Afghanistan.

²³ The Western Australian State Coroner whose territorial responsibility includes Christmas Island has decided to consider the issue on 6 September 2002.

In October 2001, Australian authorities were alerted to the departure from Indonesia of another overcrowded boat unfit to reach Australia. About 400 asylum seekers, including 70 children, were crowded on a leaky, 15-metre vessel. For reasons yet to be explained, no ship was directed to rescue them when their boat sank south of Sumatra on 19 October 2001; at least 353 people drowned. Some survivors taken to Indonesia by fishermen later claimed that people smugglers and corrupt Indonesian police had forced them on board after they realized the boat was unsafe. The husband of Sondos Ismael, a 27-year-old surviving woman whose three young daughters drowned in the incident, was already in Australia on a temporary refugee visa which prevents family members from joining him in the country. As media pictures showing her grief went around the world, he sought exceptional permission to see and comfort his wife in Indonesia without losing his visa, but the Australian government denied the couple the opportunity to see each other until eight months after the deaths of their children.

III RECENT DEVELOPMENTS IN NAURU AND MANUS ISLAND

Reliable and independent information is scarce about the present situation of the remaining detainees in Manus Island and Nauru. The precise numbers of those recognized or rejected as refugees is unclear, as UNHCR has recently been reviewing initial decisions by the Australian authorities. It has been reported, for example, that UNHCR found that 46 out of 83 asylum seekers in Nauru previously rejected by Australian officials were in fact refugees.²⁴ An Australian government announcement of the arrival in Australia by 6 August 2002 of 116 recognized refugees leaves unclear how many came from camps in Nauru and how many from Manus Island, Papua New Guinea. At the time of writing, it appears that at least some 400 recognized refugees remain in detention at both facilities, awaiting government decisions about their future resettlement options. A calculation from UNHCR and Australian government media releases indicates that by 30 June 2002, 644 out of 1609 refugee applicants in Nauru and Papua New Guinea were found to be entitled to international protection.²⁵ Most others were awaiting appeal or review decisions.

The current situation in the facilities cannot be independently verified. Papua New Guinean and Nauruan authorities have generally ignored or rejected requests to visit

²⁴ "More asylum seekers on Nauru have claims rejected", Radio Australia, 17 July 2002.

²⁵ A calculation presented by Oxfam - Community Aid Abroad, in its report "Still Drifting: Australia's Pacific Solution Becomes 'A Pacific Nightmare'", August 2002.

detention camps by independent media, lawyers or human rights organizations. In a letter to Australian immigration minister Philip Ruddock, the General Secretary of Reporters sans Frontières (Reporters Without Borders), Robert Ménard, expressed serious concern about journalists being prevented from reporting about the human rights situation in the Australian-funded detention facilities at Manus Island and Nauru:

“The Australian authorities must cancel the instructions given to Papuan authorities to prevent journalists access to the Manus camp”.²⁶

²⁶ “Journalists prevented from reporting about refugee camp in Papua New Guinea”, Reporters sans Frontières Media Release, 15.03.2002. RSF also quotes an official of the Papua New Guinea Department of Foreign Affairs as saying that Australian authorities “didn’t want anyone going to see them [the asylum seekers in Manus Island], that it was not the business of anyone else.”

While Amnesty International was allowed to visit camps in Nauru in November 2001, the Papua New Guinea government has not responded to a proposal for a joint visit by Amnesty International and Human Rights Watch to the remote asylum detention camp at the Lombrum military base on Manus Island. In the absence of independent local human rights monitoring, the lack of transparency about the detainees' circumstances raises international concern about their conditions and treatment.²⁷

John Hodges, a former Australian immigration minister, accompanied by an Iraqi doctor²⁸, visited the camps in Nauru and Manus Island in March 2002 in his capacity as Chair of the Australian government's Immigration Detention Advisory Group. He compared the situation in Nauru and Manus Island with Australia:

"Nauru is by far the worst of the detention centres; it is hot. Both camps [in Nauru] are built on areas that have been extensively mined, many years ago, and the facilities are just not as good as they are in Australia."²⁹

His statements to an Australian Senate inquiry also confirm concerns about drinking water supplies in Nauru and the Australian immigration department's awareness of them:

"Water supply is not a problem on Manus—there is an abundance of good, clean, fresh water—but there are some deficiencies on Nauru. The department know of them. They are moving to rectify some of those deficiencies. For instance, fresh water is a problem on Nauru. Their desalination plant breaks down. Their power breaks down too frequently. They are using a mixture of brackish water and fresh water. There is a plan—I do not know whether it is to be implemented; it was going to cost a lot of money—to supplement the freshwater supply with a further desalination plant."³⁰

²⁷ In Nauru, UNHCR staff assessing refugee claims have had daily access to the detention facilities and have been consulting with the IOM, Australian and Nauruan authorities about specific concerns regarding conditions at the camps. On Manus Island UNHCR has no refugee determination role and no staff.

²⁸ Dr. Mohammed Alsalami.

²⁹ Transcript of 1 May 2002 hearing, Official Committee Hansard, Senate Select Committee into a Certain Maritime Incident, p. 121.

³⁰ Also p. 121 of the same transcript.

On 25 July 2002, the new Afghan Ambassador to Australia, Mahmoud Saikal, announced that Afghan President Karzai instructed him to visit the Nauru detention facilities after more than 20 remaining Afghans in Nauru sent letters to the president complaining of conditions there.³¹ At the time of writing, the visit had apparently yet to take place.

From 8 April 2002, Australia and UNHCR began to announce decisions on refugee status determination among asylum seekers in Papua New Guinea and Nauru. However, the asylum seekers continued to be held in detention,³² and were not free to leave the camps. Following expressions of concern by Amnesty International, other human rights organizations and the UNHCR that recognized refugees were effectively detained in violation of international law, 59 people on Nauru who have been recognized by UNHCR as refugees were accepted by New Zealand for resettlement. The Australian government has also begun to grant protection in Australia to some of those held in Nauru and Papua New Guinea who were found meet refugee criteria and had some links with Australia. Most have close relatives in Australia, such as children or a spouse, from whom they have often been separated during their flight for many months or even years.

Under Australian temporary visa conditions,³³ however, many will never receive permanent residence rights in Australia or be reunited with members of their families not already accepted in Australia as refugees, including children and spouses. If they visit relatives abroad they cannot return to Australia. From November 2002, the temporary visa of those who arrived in Australia before the *Tampa* incident will begin to expire. Australian temporary visa conditions can split children from their parents and husbands from their wives permanently or for long periods.

³¹ "Afghan envoy to visit asylum-seekers on Nauru", PACNEWS 25 July 2002

³² See section IV which refers to UNHCR guidelines on detention of asylum seekers.

³³ Australian Immigration Fact Sheet 70 "Border Control".

Among those taken to Australia from detention camps in Nauru and Manus Island, the Australian government has apparently discriminated between groups of refugees on a number of grounds. These appear to include whether they had reached Australia before being intercepted, or how close they came to Australia. According to the Immigration Department, 56 refugees with immediate family members in Australia arrived from Nauru by 6 August on *five-year* temporary visas,³⁴ while another 42 arrived earlier from Manus Island on *three-year* temporary visas.³⁵ Under Australia's "new humanitarian visa system", those given three-year temporary visas will never be eligible for permanent residence, essentially because they left a country of first asylum where the Australian authorities consider they enjoyed effective protection.³⁶ Those given five-year temporary visas may be granted permanent visa after four and a half years "if there is a continuing need for protection".³⁷ This "hierarchy of benefits" and deliberate "disincentives" effectively rewards those asylum seekers who happen to be intercepted in the seas off Australia's coast, while those who reach Australian territory will never be able to call Australia "home".³⁸

The future of the detention and processing facilities in Nauru and Papua New Guinea remains unclear, as both governments have repeatedly stated that the asylum seekers cannot stay indefinitely. Following a change of government in Papua New Guinea, newly elected Prime Minister Sir Michael Somare said he would prefer the arrangements with Australia to be phased out in October 2002 -- the end of the period agreed with Australia for the processing of asylum seekers in Papua New Guinea.³⁹

³⁴ "Refugees Arrive in Australia from Nauru", Australian Immigration Media Release DPS 55/2002.

³⁵ Of these 42 from Manus Island, 38 had immediate families members in Australia. "Refugees Leave Manus for Australia", Australian Immigration Minister Media Release MPS 70/2002.

³⁶ In most cases, these are countries where certain refugees did not feel safe, or did not enjoy effective and durable protection, for example because they were at risk of human rights violations such as forcible return to where they fled from.

³⁷ Australian Immigration Fact Sheet 65 "New Humanitarian Visa System" (revised 19 July 2002). Five-year temporary visas are available to refugees who left a country of first asylum but who did not reach Australian territory.

³⁸ Australian Immigration Fact Sheet 65 "New Humanitarian Visa System" (revised 19 July 2002).

³⁹ Transcript of press conference with Australia's Prime Minister Howard, Port Moresby, 13 August 2002. See also "Somare to dump Australian asylum deal", Sydney Morning Herald, 10 August 2002. It now appears the two Prime Ministers merely agreed to keep detainee numbers below 1,000 and to leave open the possibility of again extending Australia's use of the facilities on Manus Island.

The Australian government has also announced that seven Afghan asylum seekers from the detention camps in Nauru have recently returned to Afghanistan. It expects further movements of asylum seekers currently detained on Nauru and Manus Island "to Australia and other countries ... over the next few months". It claims that a "number of countries have indicated a willingness to consider cases for resettlement".⁴⁰ However, efforts to find resettlement places for refugees from camps in Manus Island or Nauru have so far made little progress. In addition, there is no evidence of an exit strategy for hundreds of people not determined to be refugees which would respect their rights. Australian construction plans for a large new detention facility on Christmas Island indicate that they may be transferred and detained there once agreements with Nauru and Papua New Guinea expire.

IV DETENTION IN INTERNATIONAL HUMAN RIGHTS INSTRUMENTS

⁴⁰ "Refugees Arrive in Australia from Nauru", Australian Immigration Media Release DPS 55/2002, 6 August 2002.

International human rights instruments refer to detention as a deprivation of liberty distinct from incarceration resulting from criminal charges or sentencing.⁴¹ Under its guidelines on the detention of asylum seekers, UNHCR considers detention as: "confinement within a narrowly bounded or restricted location, including [...] closed camps, detention facilities or airport zones, where freedom of movement is substantially curtailed, and where the only opportunity to leave this limited area is to leave the territory."⁴² The guidelines state that in the view of UNHCR, the detention of asylum seekers is "inherently undesirable", and that "[a]s a general principle asylum-seekers should not be detained" (Guideline 2). The Guidelines require that any "permissible exceptions to the general rule that detention should normally be avoided must be prescribed by law," and that such exceptional detention should be "for a minimal period", and only

- * to verify the identity of an asylum seeker where it is "undetermined or in dispute",
- * to determine the main elements on which a refugee claim is based (as distinct from finalizing procedures on refugee claims which can take years),
- * to "protect national security and public order", and
- * in cases where asylum seekers destroyed their travel or identity documents with "an intention to mislead", or a refusal to co-operate with, the authorities.

The Guidelines also explicitly declare detention "as part of a policy to deter further asylum-seekers ... is contrary to the norms of refugee law" (Guideline 3 (iv)).

⁴¹ International law generally uses the terminology of the "Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment", adopted by United Nations General Assembly resolution 43/173 of 9 December 1988: "'Detained person' means any person deprived of personal liberty except as a result of conviction for an offence; [...] 'detention' means the condition of detained persons as defined above" (see introductory section on "Use of terms"). As a result of adoption by the UN General Assembly, all states are called upon to abide by these principles.

⁴² UNHCR Revised Guidelines on Applicable Criteria and Standards Relating to the Detention of Asylum Seekers, February 1999.

Under international human rights law, the rights to liberty and freedom from arbitrary detention have been a core element of formal human rights standards since they were enshrined in Articles 3 and 9 of the 1948 Universal Declaration of Human Rights. Subsequent international standards, notably the International Covenant on Civil and Political Rights, recognize that the right to liberty is linked to freedom from arbitrary detention.⁴³

The prohibition of arbitrary detention has long been recognized to mean not only detention "against the law", but also detention which is not just, appropriate and necessary in all the circumstances of the case: "Cases of deprivation of liberty provided for by law must not be manifestly unproportional, unjust or unpredictable".⁴⁴ In interpreting such requirements, the United Nations Human Rights Committee has found that "every decision to keep a person in detention should be open to review periodically so that the grounds justifying the detention can be assessed."⁴⁵

Protection in international law against arbitrary detention is particularly strong in relation to children. Australia, Nauru and Papua New Guinea have voluntarily entered into obligations under the Convention on the Rights of the Child which permits detention of a child only "in conformity with the law [...] as a measure of last resort and for the shortest appropriate period of time".⁴⁶ Children, like adults, also have the explicit right to prompt legal assistance and to challenge the legality of their detention before a court or other independent and impartial authority – rights which have been effectively denied to child asylum seekers held in Australian-funded detention facilities.⁴⁷

⁴³ Article 9. Nauru signed the Covenant on 12 November 2001. Although it has yet to formally ratify the treaty to give full effect to the rights enshrined in it, Nauru is already obliged not to do anything which would undermine the object and purpose of the Covenant, such as permitting arbitrary detention in its territory.

⁴⁴ Manfred Nowak, *Commentary on the U.N. Covenant on Civil and Political Rights*, 1993, p. 173.

⁴⁵ Views of the Human Rights Committee in the case of *A v Australia*, Communication No 560/1993 of 30 April 1997.

⁴⁶ Article 37 (b). The obligations include that every child "deprived of liberty shall be treated with humanity and respect for the inherent dignity of the human person, and in a manner which takes into account the needs of persons of his or her age." (Article 37 (c)).

⁴⁷ Article 37 (d). Child asylum seekers detained in Australia have only a theoretical right to challenge their detention, because the courts are in general not allowed to order their release.

To Amnesty International's knowledge, no court or independent tribunal in Nauru has been asked to determine whether it is lawful and appropriate to hold children, women and men in detention on Australia's behalf for an unspecified period, currently up to 11 months. The practice of prolonged detention adopted in Nauru and Papua New Guinea closely resembles the Australian mandatory detention regime which violates human rights law because it is arbitrary -- specifically as it fails to ensure that detention is independently and periodically reviewed.⁴⁸

The International Organisation for Migration (IOM), as administrators of the Nauru and Manus Island facilities and managers in charge of safety, has effectively become the detaining agent on behalf of the governments involved. The absence of basic safeguards to prevent arbitrary detention raises questions about the IOM's responsibility for ensuring that its activities are not in violation of international human rights and refugee law.

A related issue is the question whether the detention of asylum seekers and refugees is compatible with human rights guarantees in the laws and constitutions of Nauru and Papua New Guinea. The constitutions of both countries include various safeguards against arbitrary detention, including the requirement for detainees to be informed of the reasons for the detention, the right to consult a lawyer of their own choice, and the right to seek a court decision on the lawfulness of their detention. In both countries, the courts are required, in cases of complaints by detainees, to determine whether detention is lawful, and have the power to order the release of the detainee.⁴⁹ Papua New Guinean and Australian lawyers took action in April before the Papua New Guinea National Court seeking a decision whether the detention of asylum seekers in Manus Island is unreasonable and unlawful; at the time of writing, a decision remained pending.

V OFFICIAL DENIALS THAT ARRANGEMENTS CONSTITUTE DETENTION

⁴⁸ The Australian authorities usually point to the existence of review mechanisms in tribunals or courts, but these bodies can only consider refugee claims and have no powers to determine whether detention itself is necessary and appropriate while refugee claims are being processed. On the contrary, the Australian Migration Act 1958 explicitly prohibits the courts from ordering the release of people in Australian immigration detention while their refugee claims are being considered.

⁴⁹ The Constitution of Nauru, section 5 (2) and (4); The Constitution of the Independent State of Papua New Guinea, section 42 (2) and (5). The latter also empowers the courts to determine whether a complainant may be unreasonably detained.

In recent months, the Australian government has begun to change its use of language regarding the detention of asylum seekers in Australian-funded facilities in the Pacific. After earlier Australian government references to "detention" of asylum seekers in Nauru and Manus Island, the authorities are now disputing that their "accommodation" in camps outside Australia constitutes detention. According to various sources, the Australian Department of Immigration, Multicultural and Indigenous Affairs (DIMIA) has removed from a fact sheet published on its website a previous reference to the number of asylum seekers "detained" on Nauru and Manus Island.⁵⁰

During Amnesty International's November 2001 visit to Nauru, Australian and IOM officials denied that the asylum seekers in their care were being detained and emphasized that the camp guards were "safety", not "security" officers. The Australian immigration minister's office later insisted that the asylum seekers in the IOM-managed facilities on Nauru and Manus Island were not being detained, and the minister expressed the same view in meetings with Amnesty International.⁵¹

However, the information available about the facilities and procedures applying in Nauru and Manus Island clearly show that the asylum seekers have been held in detention.

* On arrival, they were escorted under guard from Australian military ships and aircraft into the facilities through cordons of local police, Australian immigration and private security officers. In some cases during disembarkation in Nauru, asylum seekers were forcibly transferred from the HMAS Manoora into the camps.

* The Camp Committee of the first group of asylum seekers to arrive on Manus Island also reported the use of force during transfer from the aircraft to the camp. They claimed that

⁵⁰ Oxfam & Community Aid Abroad, "Still Drifting: Australia's Pacific Solution Becomes 'A Pacific Nightmare'", August 2002, p.18.

⁵¹ In a letter to Fr Frank Brennan quoted during a lecture in March 2002, the immigration minister's office argued that the "IOM do not run and manage detention centres. There is a fence around the compound but it is a single strand in most cases and ringlock in others. You may wish to consider this detention - however it most clearly is not, either technically or practically." Fr Brennan has pointed out in response that the then current version of an Immigration Department Fact Sheet actually confirmed in the government's own wording that "[a]t December 31, 2001, 1118 unauthorised arrivals were detained in Nauru" and that "Currently 216 people are detained at Manus Island". (quoted from "'Pacific Solution' Unconstitutional", JRS Report 27 March 2002)

"there were a lot of soldiers and police cars used to escort us to the gates of the camp. Then the whole force separated around the camp with the cars facing the fences aiming their lights toward the inside of the camp and the police and policemen and soldiers rising up also towards us as if they were into some kind of exhibition or a film well done to scare and terror us."⁵²

* Facilities chosen for their processing are in extremely isolated and remote locations from where undetected escapes would be most unlikely.

* Facilities are fully enclosed by high fencing, with access gates controlled by private security guards (at least initially sent from Australia) and, at least temporarily, by local police.

⁵² Submission to the Australian Senate Select Committee on a Certain Maritime Incident from Iraqis detained Lombrum detention centre, Manus Island (PNG), 21 October 2001; as published by the Australian Senate.

- * People have not been allowed to leave the camp unescorted and without specific permission, for example for medical purposes.⁵³ Visa regulations in Nauru and procedures agreed between the IOM, local and Australian authorities and private security guards establish the limited conditions and purposes under which anyone may be allowed to temporarily leave the camp.
- * At least in Nauru, visitors like the Amnesty International delegate have been required to report to the guard house on arrival and upon leaving the camps. All visitors require prior permission to enter a camp from local authorities.
- * Permission to visit the Manus Island facility has been effectively denied by the Papua New Guinea authorities to various independent media and human rights groups including Amnesty International and Human Rights Watch.
- * Australian lawyers with expertise in international refugee law seeking to visit Nauru have had their requests for visits rejected or ignored by the Nauru government.⁵⁴
- * In Nauru, children between the age of seven and 15 have been permitted to attend local Nauruan schools but otherwise have remained at the camps where their relatives have been held.
- * The terms of reference published on 13 February 2002 for an Australian Senate committee inquiry into the interception of an Indonesian boat off Australia's coast direct the inquiry to investigate

"the Agreements between the Australian Government and the Governments of Nauru and Papua New Guinea regarding the *detention* within those countries of persons intercepted while travelling to Australia, publicly known as the 'Pacific Solution'." (emphasis added)

- * The June 2002 Australian Senate Legal and Constitutional Committee "Budget Estimates 2002-2003 Report" states that "members of the Committee sought information and statistics in regard to Christmas Island and Nauru *detention* centres." (emphasis added)

⁵³ "Fence poles are locking us [in] and we are not allowed to go outside from [sic] the camp." Letter to Amnesty International from "Group 1" of the *Tampa* asylum seekers held in Nauru at the "Topside" camp; Translation from the Dari language, November 2001.

⁵⁴ There are no Nauruan lawyers with experience in refugee issues who could assist detainees. The Australian lawyers volunteered to provide free assistance to detainees which was welcomed by UNHCR.

* A paper prepared by the Australian Department of the Parliamentary Library for debate of new legislation, introduced 13 March 2002, makes various references to the detention of asylum seekers in Nauru and Manus Island, such as "all asylum seekers who currently are detained in another country (ie Nauru or Papua New Guinea) as part of the 'Pacific Solution'".⁵⁵ When passed, the legislation explicitly provided for power to Australian officials, including the armed forces, dealing "within or outside Australia" with an asylum seeker from the *Tampa* or other boats taken to Nauru or Papua New Guinea to "restrain the person on a vehicle or vessel" and to "use such force as is necessary and reasonable" for transfer purposes to Australia (for example transfer for specialist medical care not available in Nauru or Manus Island).⁵⁶

* In November 2001, a Nauruan lawyer critical of local authorities reportedly asked of the asylum seekers "[u]nder what law are they held in a compound from which they are not permitted to leave except for medical and like reasons and then under guard?"⁵⁷

In Nauru, the authorities have arranged for escorted excursions, for example to the beach, where asylum seekers can spend time under guard. On Manus Island, however, Amnesty International is not aware of such attempts to relax conditions of detention, which, according to the Australian government, would be "more difficult" to arrange. Neither the asylum seekers nor the recognized refugees in Nauru and Manus Island are free to leave the camps at any time without restrictions.

⁵⁵ Bills Digest No. 113 2001-02, Migration Legislation Amendment (Transitional Movement) Bill 2002.

⁵⁶ Migration Legislation Amendment (Transitional Movement) Act 2002, No. 10, 2002, Schedule 1—Amendments to Migration Act 1958, section 198B.

⁵⁷ The Visionary, No 11-01, 9 November 2001.

Amnesty International therefore considers that asylum seekers and refugees taken to Manus Island and Nauru have been restricted in ways which clearly amount to detention as defined in international human rights instruments. This view has been shared by a senior UNHCR officer who visited Nauru: "Certainly, the asylum-seekers in Nauru are in detention centres."⁵⁸ Relaxed conditions in Nauru for those found to be entitled to international protection cannot detract from the fact that they remain under the effective control of the authorities which determine the limits of their freedom.

VI CONCLUSIONS

Australia's refugee policy – or specific practices by the authorities – have been subject to criticism by its domestic courts, legal, medical, church and human rights bodies, parliamentary inquiries, international human rights organizations and United Nations bodies. The government has faced a raft of legal challenges under Australian law despite efforts at averting legal scrutiny of its actions. Its reaction has been to further restrict the ability of the courts to make decisions which would uphold human rights or in any way limit the government's far-reaching powers to repel or divert unwelcome asylum seekers. Beyond issues of law, the so-called "Pacific Solution" has created new misery for individual refugees.

The evidence clearly shows that the arrangements for asylum seekers in Manus Island and Nauru constitutes a form of detention. In the absence of fundamental human rights safeguards – such as independent periodical judicial review of detention in individual cases – such detention is arbitrary and violates international law.

Detaining children and whole families, including recognized refugees, for unspecified periods of time in remote facilities often barred to independent human rights monitors are not acceptable by-products of border protection. The effects on vulnerable individuals of such a punitive refugee policy demonstrates a reprehensible disregard for the object and purpose of international human rights standards which are designed to preserve the inherent dignity of the human person. While there are basic human rights safeguards for immigration detainees in Australia itself – however limited the capacity of independent bodies to provide effective monitoring – hardly any such safeguards exist in Nauru and Papua New Guinea.⁵⁹

⁵⁸ UNHCR Regional Representative Michel Gabaudan, quoted from Radio Australia "Pacific Beat", 8 May 2002, by Oxfam & CAA in their report "Still Drifting: Australia's Pacific Solution Becomes 'A Pacific Nightmare'", August 2002, p. 18.

⁵⁹ For example, the Australian Ombudsman and national human rights commission regularly visit

detention facilities, even if government funding usually only permits one or two visits per year. There is no such capacity, and no such commission or similar body in Nauru and Papua New Guinea, where lawyers do not seem to have been given the opportunity to bring complaint cases to the courts which could fulfil an important role in safeguarding human rights.

Events during the past 12 months have shown that international human rights standards were often ignored or only selectively taken into account during the Australian government's development of its "Pacific Solution". This policy is based on a minimalist and misguided interpretation of international human rights obligations:

"We looked at our [Refugee] Convention obligations. We wanted to be generous, but since we provided more than what's required by the Convention, we asked, what is the minimum that's required?"⁶⁰

The Australian immigration minister has said that no person intercepted by Australia under the "Pacific Solution" approach will be denied access to refugee determination procedures, "[b]ut there is nothing in the Convention that directs where those procedures take place."⁶¹ Such an interpretation of the Refugee Convention, if left unchallenged, would allow wealthy countries like Australia to shift responsibility, an option which is not available to developing nations receiving far larger numbers of refugees and struggling to support them. It is noteworthy that Australia was recently ranked fifth in the world on UNDP's Human Development index.⁶² It is from such countries that desperate refugees have often fled seeking a durable solution to their plight in Australia. The minister's view of the Refugee Convention as an "enabling tool of organised crime"⁶³ is a perverse description and is not likely to encourage international cooperation efforts to increase respect among other states for their obligations under the convention.

Restricting the application of Australian refugee law to certain asylum seekers, and by taking them to Pacific countries, does not relieve Australia of its responsibilities towards the asylum seekers. By taking control of boats carrying asylum seekers, transferring them to an Australian vessel and transporting them to another country where their safety and well-being is largely subject to Australian control, the Australian government remains responsible for the protection of affected asylum seekers.

⁶⁰ U.S. Committee for Refugees, "Sea Change: Australia's new approach to asylum seekers", February 2002, p. 4. It is a regrettable fact that consideration and debate of Australia's protection obligations has been focussed on the 1951 Refugee Convention. This tendency ignores the fact that various international human rights treaties ratified or signed by Australia, Nauru and Papua New Guinea, as well as other international human rights instruments adopted by the UN General Assembly include provisions granting further protection against human rights violations – complementing those in the Refugee Convention.

⁶¹ Philip Ruddock, "Australian Government position on the MV Tampa refugees", 15 October 2001, published in On Line Opinion (www.onlineopinion.com.au).

⁶² See website at http://www.undp.org/hdr2002/presskit/HDR%20PR_HDI.pdf

⁶³ Ibid.

Amnesty International believes that the Australian government should grant protection to those people recognized as refugees who remain on Nauru and Manus Island and who are not offered resettlement by another country. It appears that efforts at finding resettlement places for them have been ongoing for months with limited success suggesting that this may be a view shared by a number of governments.⁶⁴

Amnesty International is also concerned that the human rights of those rejected asylum seekers who are currently unable to return home, even "voluntarily" must be respected.⁶⁵ The Australian government's unwillingness to express a commitment on their future raises questions as to their fate. A large new detention and processing facility is in the process of being built by Australia on Christmas Island, and there has been speculation about whether the rejected asylum seekers may be housed there.⁶⁶ Christmas Island is an excised offshore island/place. Amendments to the Migration Act 1958 passed in April 2002 already severely restrict the rights of anyone transferred to Christmas Island from countries like Nauru or Papua New Guinea. They are not entitled to claim asylum in Australia or to file certain legal proceedings against Australian authorities, for example to complain about their treatment, and may be detained in, and removed from, Australian territory at the discretion of the government.⁶⁷

⁶⁴ In May 2002, the New Zealand government announced it would accept 140 recognized refugees living in Indonesia, Thailand, Malaysia and Nauru. The Australian government has stated that 59 refugees from the "Pacific Solution" camps have since been resettled by New Zealand. Further transfers to New Zealand are expected during 2002.

⁶⁵ for example, because conditions in their home country remain unsafe or because of a reluctance to accept them back into their home countries.

⁶⁶ "Contract Signed for Christmas Island Detention Facility", Media Release DPS 37/2002, 17 June 2002.

⁶⁷ Migration Legislation Amendment (Transitional Movement) Act 2002.

In view of previous practices to detain asylum seekers, including families with small children, for as long as five and a half years,⁶⁸ there are legitimate concerns about the future of these rejected asylum seekers. Another concern is the long-term effect of detention of unspecified and potentially unlimited duration on the mental and physical health of detainees. As the Chair of the Australian government's Immigration Detention Advisory Group, John Hodges, explained:

"After there is a slowdown of their processing, there is the feeling of hopelessness that creeps in to a lot of people. You are going to have problems in detention centres whether they are in Woomera or Curtin or Port Hedland or the Hilton Hotel because they are confined and their liberty is restricted."⁶⁹

A broad spectrum of evidence and concerns by medical professionals has been emerging in recent years on the effect of mandatory detention for unspecified periods on the health of detainees inside Australian mainland detention facilities, particularly on children.⁷⁰ Children in such detention have, for example, been found to experience trauma and stress from witnessing behavioural and psychological distress in adults, witnessing violence and self-harm, and being separated from one or both parents and from the security and protection provided by relatives and familiar social groups.

⁶⁸ Chen Shi Hai, born in Australian immigration detention, was more than three and a half years old when released after the Australian High Court decided the Australian authorities had erred in law to deny him eligibility for refugee status (*Chen Shi Hai v The Minister for Immigration and Multicultural Affairs* [2000] HCA 19 (13 April 2000)). His parents and older brother had been in detention for more than five years.

⁶⁹ Transcript of 1 May 2002 hearing, Official Committee Hansard, Senate Select Committee into a Certain Maritime Incident, p. 119. Woomera, Curtin or Port Hedland are mainland Australian detention facilities which have seen frequent disturbances and attempts of self-harm during recent years.

⁷⁰ See for example, "Mental Health Impact of Detention on Asylum Seekers", Media Release of the Australian Medical Association, 9 December 2001; "The Untold Story of Parents in Detention", The Royal Australian and New Zealand College of Psychiatrists College Statement 16 June 2002; "The Effect Of Detention Centres On The Health Of Children", Position paper adopted May 2002 by the Medical Association for the Prevention of War (MAPW Australia); "Seeking refuge, losing hope: parents and children in immigration detention" *Australasian Psychiatry* Vol 10. No 2, June 2002; Submissions to the National Inquiry into Children in Immigration Detention by, for example, the Mental Health Council of Australia, the Royal College of Nursing (Australia), the Australian Association for Infant Mental Health (AAIMH), and the Australian Nursing Federation (Vic), published on the National Inquiry into Children in Immigration Detention website of the Australian Human Rights and Equal Opportunity Commission: http://www.hreoc.gov.au/human_rights/children_detention/submissions/index.html#health.

In November 2001, the Australian Human Rights and Equal Opportunity Commission began a major National Inquiry into Children in Immigration Detention⁷¹ - however, it cannot take into account the situation of children in the Nauru and Manus Island detention camps because it lacks jurisdiction outside Australia. Amnesty International is concerned about the lack of monitoring of the impact of detention on both adults and children in Nauru and Manus Island as they are likely to be affected in the same manner as those held in Australia.

⁷¹ For information, see the inquiry website on http://www.hreoc.gov.au/human_rights/children_detention/index.html.

The Australian Government has indicated that the asylum seekers it took to Nauru and Papua New Guinea will not be returned against their will to a place where they may face persecution. However, in view of Australia's narrow interpretation of its obligations under the Refugee Convention, it remains unclear how this assurance is to be met. Amnesty International is concerned that the lack of transparency of the refugee status determination procedures in Nauru and Manus Island, plus the lack of access to independent legal counsel, heightens concern that the implementation of the refugee status determination process may not be fair. This is especially so, in light of a recent decision of the Australian High Court, where the court found a systemic failure of Australia's mainland refugee status determination process to accord procedural fairness.⁷² Australia's mainland refugee status determination procedure is widely recognised as being considerably more rigorous than its Nauru or Manus Island procedures which do not, in particular, include access to independent merits review or judicial review procedures.

The development of Australian refugee law, and domestic Australian debate on its new refugee policy has focused almost entirely on the Refugee Convention, effectively ignoring Australia's obligations under other international human rights instruments, such as the Convention against Torture, the International Covenant on Civil and Political Rights, and the Convention on the Rights of the Child. If Australia is to address fully and comprehensively the human rights implications of its refugee policy, it is imperative that the full spectrum of its human rights obligations are honoured.

In summary, Amnesty International believes that the motivation and rationale for the "Pacific Solution" is inherently flawed because, purportedly to combat the crime of people smuggling, it spends more time and money punishing asylum seekers (many of whom have been found to be refugees) rather than smugglers themselves. Some of the penalties for such asylum seekers include arbitrary and indefinite detention, effectively a custodial sentence without charge, trial or other safeguards.

⁷² *Muin v Refugee Review Tribunal; Lie v Refugee Review Tribunal* [2002] HCA 30 (8 August 2002).

RECOMMENDATIONS:

The Australian Government should:

- Urgently review the "Pacific Solution" policy, with particular emphasis on all of Australia's obligations under international human rights and refugee law;
- Urgently review the detention element of the "Pacific Solution", particularly as it relates to children, and having regard to findings relating to Australia's mainland detention policy, including the recent report of the UN High Commissioner for Human Rights Special Envoy, former Chief Justice Bhagwati, reports and findings of the UN Human Rights Committee, and reports of the Australian Human Rights and Equal Opportunity Commission;
- Expand the mandate of the Immigration Detention Advisory Group to include independent monitoring and scrutiny of Australian run and/or funded offshore processing facilities;
- Ensure that all laws and regulations which may, directly or indirectly, be used to combat people smuggling contain explicit safeguards to ensure that adequate provision is made for the protection of the human rights - including, but not limited to, the right to international protection - of smuggled persons, recognising in particular their vulnerability to abuse, exploitation and trauma;
- In the event that measures to combat people smuggling result or may have resulted, directly or indirectly, in the violation of the human rights of smuggled persons, that legislative provision is also made to ensure prompt, thorough, transparent and effective investigation and reporting, and provision of adequate reparations;
- Review the fairness, quality and accuracy of the refugee status determination procedures being implemented in Nauru and on Manus Island, having regard to recent findings regarding procedural fairness in the context of Australia's mainland refugee status determination procedures;
- Ensure that adequate and effective safeguards are put in place to ensure protection under other international instruments, such as the UN Convention against Torture, for those entitled to it;
- Ensure that decisions to grant protection to refugees in Australia or to resettle recognised refugees in other countries are made in an open and transparent way with full respect for the human rights of the refugees concerned, including the right to family unity;

The Governments of Australia, Nauru and Papua New Guinea should:

- Ensure that all current detention practices are in conformity with international human rights standards, including in particular UNHCR's Revised Guidelines on Applicable Criteria and Standards Relating to the Detention of Asylum Seekers;

-
- Take immediate steps to release all persons whose detention cannot be justified under international human rights and refugee law standards, including recognised refugees;
 - Take immediate steps to ensure that all persons whose continued detention is found to be justified under international human rights and refugee law standards, have access to independent judicial review procedures to determine the lawfulness of their continued detention;
 - Ensure that all asylum seekers making refugee applications are given, at all stages of the refugee status determination process, a reasonable opportunity to have access to legal advice, and that they are informed of their right to such legal representation under both national and international law;

The Governments of Nauru and Papua New Guinea should:

- Seek the advice of UNHCR and the Office of the UN High Commissioner for Human Rights about their obligations under international human rights law to prevent arbitrary detention or other human rights violations taking place against asylum seekers on their territory;
- In light of that advice, to make all necessary legislative amendments to ensure that each country's national laws are in conformity with international human rights and refugee law standards;
- Give active consideration to extending an invitation to the UN Working Group on Arbitrary Detention to visit and report on incidence of arbitrary detention.

The International Organisation for Migration should:

- Make public its official position or policies regarding the scope and content of the organisation's obligation to comply with international human rights and refugee law standards, in particular with regard to
 - Arbitrary detention;
 - Unlawful detention;
 - Conditions of detention, including the Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment and the Standard Minimum Rules for the Treatment of Prisoners
 - Safeguarding the principle of non-refoulement.
- Make public its position or policy regarding whether it will accept funding and/or undertake projects which may, directly or indirectly, be giving effect to government policies or practices which do not comply with international human rights and refugee law standards;

Appendix I

The Republic of Nauru

Reportedly the world’s smallest republic, Nauru is a remote Pacific island about 4,000 kilometres northeast of Sydney. The population is estimated at about 12000, of whom ca 5-6,000 are migrant workers and (in May 2002) 1,103 asylum seekers transferred by Australia. The entire land area is only 21 square kilometres, much of it uninhabitable due to phosphate mining.

There are two Australian-funded facilities for the processing and detention of asylum seekers. One is known as “topside camp” and is located in the barren interior, surrounded by the remains of phosphate mining; the other, known as “State House camp”, has been established in a former government residential complex away from the main areas of settlement.

Manus Island

Manus Island is the main island in Manus Province, northern Papua New Guinea. On the eastern-most tip of the island is the Lombrum Naval base of the Papua New Guinea Defence Forces – built in the grounds of former US military installations established during the Second World War, and maintained with Australian assistance for the use of patrol boats donated by Australia.

The extensive, mostly disused facilities have been partly converted into a processing and detention camp for asylum seekers under arrangements agreed between the then Prime Minister of Papua New Guinea, Sir Mekere Morauta, and Australian Prime Minister John Howard.

Appendix II

THE TAMPA INCIDENT - A CHRONOLOGY

On 26 August 2001, the Norwegian-registered container ship *MV Tampa* responded to a radio request relayed by the Australian Search and Rescue authority to assist a distressed Indonesian ferry or fishing boat in international waters about 75 nautical miles (140 Kilometres) north-west of Christmas Island, an Australian off-shore territory in the Indian Ocean. The Australian Coast Guard guided the *Tampa* to where an Australian surveillance plane had earlier identified an emergency SOS message displayed on board the Indonesian boat.

After rescuing 433 passengers and their Indonesian crew⁷³, the *Tampa*, originally bound for Singapore, sailed towards the Indonesian port of Merak – much further away than Christmas Island but big enough for the *Tampa* to dock.⁷⁴ At this stage, the *Tampa* apparently had Indonesian permission to go to Merak. It soon became clear that the Indonesian fishing boat crew were employed by people smugglers who took large sums of money to ferry asylum seekers to Australia. Their passengers were mostly from Afghanistan and Iraq, countries notorious for persistently grave human rights violations.

⁷³ The crew were later arrested, transferred directly to Australia and charged with people smuggling offences under Australian law.

⁷⁴ Merak is on the northwest coast of the Indonesian island of Java, an estimated 14 hour journey for the *Tampa* which was close enough to Christmas Island for the asylum seekers to see the island.

The crew of the *MV Tampa* faced a major humanitarian challenge. The ship was not equipped or licensed to carry more than 50 people, let alone cater for 70 children, several pregnant women and people with medical problems. The 433 asylum seekers were forced to stay on the open deck which was piled with containers, leaving little room or protection from the elements. With no doctor on board and no sanitation, food, shelter and medical supplies for more than 50 people, the *Tampa*'s crew said it struggled to assist more than 100 people suffering diarrhoea and about 10 with dehydration. The ship's medical supplies ran out fast, and Norwegian doctors consulted by satellite telephone advised the ship's medic to seek expert medical assistance.⁷⁵ A fax sent to the Australian government by James Neill, the solicitor acting for the *Tampa*'s shipping line, expressed the captain's concern "that if he sailed to Indonesia he would expose the vessel and those on board to a number of dangers in the open ocean which could have resulted in massive loss of life".⁷⁶

In the morning of 27 August, James Neill advised the Australian government that

"the medical situation on board is critical. **If it is not addressed immediately people will die shortly.**

At this time, four people on board are unconscious, 1 Broken leg and 3 women are pregnant. Additionally diarrhoea is severe and a number of people are in a dangerously dehydrated condition. The ship has now run out of the relevant medical supplies and has no way of feeding these people.

It is a simple matter to send a boat from shore to collect the sickest people, supply food and medical assistance. It could be alongside in 30 minutes.

At the request of the Australian Government the vessel is currently just off shore of Christmas Island. If the situation is not resolved soon more drastic action, may have to be taken to prevent loss of life." [bold in original]⁷⁷

⁷⁵ "To deter and deny", ABC Four Corners, 15 April 2002; and "Rescuing the Truth", The Bulletin, 20 February 2002.

⁷⁶ As summarized by justice French, Federal Court of Australia, Ruddock v Vadarlis [2001] FCA 1329, at 132. Amnesty International understands that at this stage, private boat operators on Christmas Island were standing by to go out to the *Tampa* and provide any assistance necessary. They were later prevented from doing so by the Australian government's closure of the harbour.

⁷⁷ As quoted in Federal Court of Australia, Ruddock v Vadarlis [2001] FCA 1329, at 135.

By the evening of 27 August, most of the male asylum seekers on board the *Tampa* -- reportedly fearing reprisals if returned to Indonesia⁷⁸ -- refused to eat and according to a spokesman threatened to jump overboard if not taken to Australia. The *Tampa* crew turned the ship towards nearby Christmas Island,⁷⁹ while its captain requested permission from the Australian authorities to enter Australian waters around the island, apparently the nearest opportunity for disembarkation by small boats.

The Australian Cabinet closed the Christmas Island harbour both to the *Tampa* and to prevent local boats from reaching the *Tampa*. The authorities refused the *Tampa*'s request to disembark its passengers, claiming that Indonesia was responsible for accepting them and should negotiate with Norway. Indonesia rejected the Australian position, and UNHCR attempts at negotiating a diplomatic solution failed. The Norwegian Foreign Minister said it was the first time

⁷⁸ Asylum seekers have reportedly been increasingly detained by Indonesian authorities after returning from unsuccessful attempts to reach Australia by boat.

⁷⁹ According to a memo sent by the Australian government to the *Tampa* on 27 August 2001, the ship's position at this stage was 13.5 nautical miles from Christmas Island, just outside Australian territorial waters.

“that a Norwegian ship in distress has been met with the threat of use of force, rather than assistance from the nearest harbour and the coastal nation, which are obliged to give assistance.”⁸⁰

The *Tampa* also again requested urgent medical assistance, reporting that several people were unconscious. The Australian Flying Doctor Service conducted distance medical examinations by radio but concluded there was no need for any urgent evacuation.

Australian Prime Minister Howard claimed on national television “[w]e are making arrangements to get as quickly as we can any medical assistance that might be required.”⁸¹ However, his officials refused to accept offers by the international organization Médecins Sans Frontière and by the Australian Red Cross to send readily-available medical emergency teams to the *Tampa*.

Early on 28 August 2001, the *Tampa* radioed the highest priority medical distress signal, indicating it would proceed to Christmas Island if no medical assistance was made available later that day. The Australian government warned the *Tampa* in the strongest terms against entering Australian waters without authority. It claimed there was “no basis for a distress call” but told the *Tampa*’s crew it was “working with all possible speed to get medical supplies and a doctor to the vessel”⁸². In a letter to Amnesty International in November 2001, some of the Afghan asylum seekers later claimed that “it was the crew of the *Tampa* who provided the sick people with their own personal medicines and injections”.

⁸⁰ ABC 7.30 Report, 29 August 2001.

⁸¹ ABC 7.30 Report 27 August 2001.

⁸² “Chronology of the Tampa and subsequent vessels”, in Australian government information materials distributed in September 2001.

Despite Australian threats to "take whatever action was necessary to prevent" the *Tampa*'s entry into Australian waters, the ship then moved into the 12 nautical mile zone that defines Australian territorial waters around Christmas Island. In response, armed Australian Special Air Service (SAS) troops boarded the *Tampa* to take control of the ship. The elite SAS soldiers, at the Australian Prime Minister's orders, ordered the *Tampa*'s captain to sail into international waters away from Australia, but the captain refused. They also brought medical and humanitarian assistance.⁸³ According to media reports based on interviews with the *Tampa* crew, it took a doctor and the medical team several hours to treat the patients.⁸⁴ On 30 August 2002, the Australian Prime Minister told parliament that

"the Australian Defence Force doctor [reported later] that there were four people suffering dehydration, some eight to 10 people with sprained ankles, and one person described as having a mild or soft fracture."⁸⁵ Again, there was no independent medical assessment, and the Australian Prime Minister claimed that no passenger required emergency medical care or evacuation.

The diplomatic stalemate continued; Norway argued that Australia had at least a moral, if not legal responsibility to take any rescued people to a "place of safety",⁸⁶ having requested and coordinated the rescue and then seized control of the ship by force. Australia argued that its obligations did not specifically include disembarkation *in Australia*, and that it would provide humanitarian assistance but not accept people who had put pressure on the *Tampa* captain to be taken to Australia.

On 29 August, the Australian Government introduced legislation in parliament to provide it with express powers to expel ships from Australian territorial waters, including by military force.⁸⁷

⁸³ "Chronology of the *Tampa* and subsequent vessels" in Australian government information packages distributed in September 2001.

⁸⁴ "Rescuing the Truth", *The Bulletin*, 20 February 2002.

⁸⁵ "Illegal Immigration: *MV Tampa*", *Questions without Notice*, as published by Australian Department of Foreign Affairs and Trade.

⁸⁶ The 1979 International Convention on Maritime Search and Rescue defines "rescue" as: "An operation to retrieve persons in distress, provide for their initial medical or other needs, and deliver them to a place of safety" (article 1.3.2).

⁸⁷ See the Australian parliamentary library Bills Digest No 41 2001-02 Border Protection Bill 2001.

When the Australian Senate on 30 August rejected Prime Minister Howard’s proposed legislation permitting tough action on the *Tampa* and other “boat people”, his government asked various countries, including East Timor⁸⁸, to accept the *Tampa* asylum seekers “on humanitarian grounds”.

On 31 August, the Melbourne-based Victorian Council for Civil Liberties filed a court challenge against the Australian government’s action. The court granted permission to Amnesty International to advise the court on relevant international human rights and refugee law.

On 1 September, Australian Prime Minister John Howard announced that 150 of the *Tampa* asylum seekers would be taken to New Zealand and the remaining 283 to Nauru. Unlike New Zealand, Nauru had no available facilities or mechanisms to accommodate so many people for the processing of refugee claims, and suffered chronic shortages of drinking water and electricity. The Nauru government agreed to allow processing of the asylum seekers’ claims for an initial six month period in return for Australian assistance estimated at 15 million US dollars. Those eventually assessed as refugees in Nauru would be granted “access to Australia and other countries willing to share in their resettlement”. The New Zealand government promised to process the asylum claims of about 150 and to accept those among them found to meet refugee criteria. At this stage, Australia planned to transfer the *Tampa* passengers to the Australian Navy’s troop ship, *HMAS Manoora*, which would take them to Papua New Guinea (PNG) for transfer by aircraft to Nauru and New Zealand. Human rights lawyers then pointed out that the asylum seekers would be entitled to seek refugee protection during transit in PNG which is a state party to the 1951 Refugee Convention.

⁸⁸ Then under United Nations administration.

On 3 September, Australian soldiers transferred the asylum seekers from the *Tampa* to the *HMAS Manoora* which had capacity for 450 soldiers⁸⁹, and the government invited four officers and three Dari and Pashto interpreters of the International Organisation for Migration (IOM)⁹⁰ to board the *Manoora* to register them. The *Manoora* started a journey of more than 7,000 kilometres towards Nauru.

Before the *Tampa* left Christmas Island for its original destination, Singapore, the Australian SAS troops reportedly presented the *Tampa*'s captain, Arne Rinnan, with a collage of photographs taken during their operation, along with the elite unit's highest honour, a mounted crest bearing the regiment's motto.⁹¹

On 4 September, the Nauru government requested UNHCR assistance to determine refugee claims of the people from the *Tampa* and to find "recipient countries" for them. UNHCR largely agreed to the request because of the special international circumstances of the asylum seeker's rescue.

On 6 September, the Nauru government requested the assistance of the IOM in the creation, administration and management of a "transit facility" for the asylum seekers, as well as with the resettlement of those accepted as refugees and the "voluntary repatriation of rejected cases". The IOM agreed and also accepted responsibility for security (subcontracted to Chubb Australia) and medical services.

⁸⁹ "Full house for Manoora", Navy News, 17 September 2001.

⁹⁰ IOM Press Briefing Notes, 4 September 2001.

⁹¹ "Rescuing the Truth", The Bulletin 20 February 2002.

On 7 September, Australian military forces boarded the *Aceng*, an Indonesian fishing boat carrying about 230 suspected asylum seekers, near Ashmore Reef (about 300 kilometres off Australia's north coast and 140 kilometres south of Roti island, Indonesia). Among them were 10 babies and more than 70 other children of mostly Iraqi families. They were transferred to the *HMAS Manoora* in order to be also taken to Nauru, although the *Manoora* had capacity only for 450 people.⁹²

The Nauru government asked UNHCR for assistance with the refugee processing of the *Aceng* passengers. In response, UNHCR repeatedly requested clarification from Australia about the specific circumstances and location of the *Aceng*'s interception in order to determine whether such circumstances warranted the agency's involvement. Australia never provided the information and proceeded with transporting the asylum seekers to Nauru. UNHCR eventually agreed to process refugee claims from the *Aceng* passengers as well as those from the *Tampa*.

During September, Australian military and civilian personnel in Nauru began to hastily erect improvised huts for accommodation and sanitation of the asylum seekers. Almost the entire infrastructure, including drinking water and electricity supplies, was created from scratch around a disused sports field in the barren interior of the island called "topside". Due to the unexpected increase in the numbers of asylum seekers taken to Nauru after the interception of the *Aceng*, a second camp was later prepared in the grounds of a disused government building called "State House".

Camp conditions in Nauru

In November 2001, an Amnesty International delegate who visited the two camps reported that the camps "are located in isolated areas and are surrounded by a high wire fence. The asylum seekers are housed in 'blocks' measuring some three metres in width and ... up to forty metres [in length], with a corrugated iron roof, and with sides made up of plastic sheeting, up to approximately head height, and completed with green nylon mesh. These are the 'sleeping' areas. ... Conditions are harsh, with the heat and humidity consistently in the upper thirties [degrees centigrade] and health facilities are basic."

⁹² "HMAS *Manoora* arrives at Christmas Island", Media release of the Hon. Peter Reith, MP, Minister for Defence, 2 September 2001. The *Aceng* asylum seekers increased the number of passengers to 633. According to the Navy's official news magazine: "For *Manoora*'s commanding officer CMDR Bob Morrison and his ship's company of 200 sailors and soldiers, the transfer and transport created special problems." ("Can-do ship does it again: Biggest Op since INTERFET" Navy News September 17, 2001).

Afghan women handed a letter to the Amnesty International delegate, stating that “[w]e have a lot of problems here in Nauru Refugee camp. The weather is hot. There are mice and mosquitoes around. As a result we have developed rashes and it lead[s] to infections. We are living in plastic tent[s]. It is dangerous as it may get on fire on stormy nights.”⁹³

On 11 September, the Australian Federal Court ruled that the Australian government had unlawfully detained the *Tampa* asylum seekers and that they should be granted an opportunity to claim asylum in Australia. As a consequence of the decision, the government changed its plans and ordered the *HMAS Manoora* to move directly to Nauru, a voyage which kept the asylum seekers for another week on a military ship equipped to transport soldiers. The government immediately appealed the ruling and argued that the asylum seekers were not in detention, and as they never stepped onto Australian soil, they had no right to claim asylum in Australia.

On 17 September, when the asylum seekers were close to landing in Nauru, the Full Bench of the Australian Federal Court decided two-to-one in favour of the government and ruled that the government’s actions had not amounted to detention.

On 19 September, the detention and processing facilities on Nauru were formally opened with the arrival of the first asylum seekers from the *Tampa* and *Aceng*. A number of mostly Iraqi asylum seekers from the *Aceng* refused to disembark; IOM then engaged in unsuccessful negotiations to ensure their voluntary disembarkation. The Australian government, having committed Naval forces towards the war in Afghanistan, eventually used force to remove the remaining asylum seekers from the *Manoora*.

⁹³ “Statement of Afghan women, State House, Nauru”, dated 12 November 2001.

On 26 September, the Australian parliament passed a package of new laws introduced by the government "to reduce incentives for people to make hazardous voyages to Australian territories" and to combat people smuggling. Among the many points of these laws is the introduction of a "hierarchy of benefits" for recognized refugees depending on where they make their application, denying permanent residence to those arriving from countries where they may have sought prior protection. The laws also prevent court action against detention or transfer, as well as measures "to put beyond doubt the legality of the actions of the Government in relation to the *MV Tampa* and the *Aceng*, and additional statutory authority for future action".⁹⁴

From 7 October, during a national election campaign, the Australian government repeatedly made false claims that asylum seekers intercepted on a boat code-named "SIEV 4"⁹⁵ had thrown children over board when confronted by the Australian Navy. Selected photographs later presented by the government in support of its claim were in fact taken on 8 October when the boat sank and the Navy rescued 223 asylum seekers and five crew, including children with life vests who had gone into the water. No photograph showed anyone throwing, or threatening to throw a child over board; neither did Navy video footage also released by the government. During an ongoing parliamentary inquiry into the incident in 2002 it has become clear that the government was quickly made aware that no asylum seeker from the SIEV 4 boat had thrown any children over board.⁹⁶ In fact, the ship was sabotaged and began to sink after an Australian warship had fired more than 20 warning shots into the water in front of the asylum seekers' boat. Following their rescue, the Australian frigate involved was ordered to await a decision by the Prime Minister's people smuggling task force on where and when to disembark the 223 asylum seekers. They were eventually taken to Christmas Island and detained in a sports hall.

From 21 October, the first 216 of at least 453 mainly Iraqi asylum seekers to stay in PNG arrived at the Lombrum military base on Manus Island, PNG, where Australia had arranged for the IOM to establish an improvised detention and processing camp. The PNG government later agreed that up to 1,000 asylum seekers could be held at Lombrum

⁹⁴ Australian Immigration Fact Sheet 71, "New Measures to Strengthen Border Control".

⁹⁵ "Suspected Illegal Entry Vessel number four".

⁹⁶ On 10 October, the day the photographs were released by the government, Australian Defence officials "became concerned that the photographs being used by the media did not relate to children being thrown overboard from SIEV 4 [and]... passed verbal information to that effect to the Media Advisor to the Minister of Defence." "By 11 October 2001, Defence had concluded that at no time had a child been thrown from the SIEV 4..." Source: "The report of the routine inquiry into Operation Relex: the interception and boarding of SIEV IV by *HMAS Adelaide*", a confidential military report later tabled in parliament, prepared by Major General R.A. Powell, AM, 14 December 2001

for up to 12 months. The Papua New Guinean Foreign Minister expressed reservations about the arrangements and was removed from his post. UNHCR refused to conduct refugee status determination on Manus Island after expressing serious concern about Australia's policy of sending asylum seekers to other countries. As a state party to the 1951 Refugee Convention, the appropriate authority to determine refugee status in PNG is the government in Port Moresby; however, processing at Manus Island is conducted by Australian officials under procedures determined in Canberra.

The "Manus Island" camp at Lombrum next to Manus island, PNG, is located some 3,800 kilometres north of Sydney. Accommodation consists of formerly disused Nissen huts and demountable buildings in an area initially enclosed by an improvised wire fence and flood lights. PNG media reported that conditions on arrival of the first asylum seekers led to immediate protests among them.⁹⁷

One hundred and thirty-one asylum seekers from the *Tampa*, mostly Shiite Hazari Afghan families, were flown to New Zealand for processing of their refugee claims. On arrival, the asylum seekers were taken to the Mangere Refugee Centre in Auckland where they were effectively detained; the government deployed security guards to ensure no-one left the centre without permission. The New Zealand government later indicated it would appeal a court decision that the authorities had unlawfully detained certain asylum seekers following the 11 September 2001 events in the USA.

By January 2002, all but one of the 131 *Tampa* asylum seekers in New Zealand had been granted unrestricted refugee status and the right to remain in New Zealand permanently. They were successively released from the Mangere centre and assisted with employment, housing and education to begin the process of settling into their new home country.

In February 2002, Australian Prime Minister Howard admitted to parliament that he had ordered the Australian intelligence agency, Defence Signals Directorate, to tap phone lines to the *MV Tampa* and provide the government with transcripts of telephone conversations with the ship. The Prime Minister admitted that this was in breach of regulations but suggested his action was "in the national interest".

On 18 February, the Royal Australasian College of Physicians called for the immediate removal of asylum seekers from Manus island, in particular pregnant women and young children, "following recent cases of malaria among asylum seekers detained there, and the fact that chloroquine-resistant falciparum malaria is endemic on the Island

⁹⁷ "Asylum seekers rebel at Manus Island", Post-Courier, 24 October 2001.

in PNG".⁹⁸ The Australian government denied there was any significant incidence of malaria at the facility.

The Australian immigration minister stated his expectation that due to the fall of the Taliban regime in Afghanistan, few of the Afghans taken to Nauru and PNG would be successful with refugee claims based on a fear of persecution by the Taliban authorities. UNHCR maintained its position that due to the difficult situation in Afghanistan, Afghan refugees should not be returned against their will.

By June 2002, 644 people taken to Nauru and PNG under Australia's "Pacific Solution" were reported to have been recognized as refugees; hundreds of Afghans whose claims had been rejected after the end of Taliban rule in Afghanistan, were given the opportunity to provide new information towards their claims in the light of the changing political situation in Afghanistan.

On World Refugee Day 20 June 2002, the UN High Commissioner for Refugees, Ruud Lubbers, awarded the owners, captain and crew of the *MV Tampa* with the Nansen Refugee Award.

⁹⁸ "Health specialists call for immediate removal of asylum seekers at risk of malaria on Manus island", Royal Australasian College of Physicians media release, 18 February 2002.