FAHAMU
REFUGEE LEGAL AID NEWSLETTER

ISSUE 18 ❖ SEPT 2011

ISSN 2049-2650

A MONTHLY FORUM FOR NEWS AND REFLECTION ON THE PROVISION OF REFUGEE LEGAL AID

Editorial Team: *Themba Lewis, Nora Danielson, Yara Romariz Maasri, Darshini Yoganathan*

Links are marked in blue.

STOP PRESS: Australian High Court strikes down refugee swap deal

In the final hours of preparation of this edition of the Fahamu Refugee Legal Aid Newsletter a resounding rejection of the the Australia-Malaysia refugee swap deal has been passed down by the Australian High Court. In the 6-1 ruling, which can be can be read in full here, the court held that 'under s 198A of the Migration Act 1958 (Cth), the Minister cannot validly declare a country (as a country to which asylum seekers can be taken for processing) unless that country is legally bound to meet three criteria. The country must be legally bound by international law or its own domestic law to: provide access for asylum seekers to effective procedures for assessing their need for protection; provide protection for asylum seekers pending determination of their refugee status; and provide protection for persons given refugee status pending their voluntary return to their country of origin or their resettlement in another country. In addition to these criteria, the Migration Act requires that the country meet certain human rights standards in providing that protection.' This victory for refugee protection was lamented 'profoundly disappointing' to Immigration Minister Chris Bowen, who continues to frame the argument in terms of battling 'people smugglers'. In August Papua New Guinea agreed to host an Australia-run asylum seeker centre within its borders. Certainly, despite the High Court's rejection of the deal, this is not an issue that will go away any time soon.

Australia's 'Malaysian solution'

Contributed by *Dr Savitri Taylor, Associate Professor in the School of Law, La Trobe University, Melbourne, Australia.*

On 25 July 2011 the governments of Australia and Malaysia entered into an Arrangement (Arrangement between the Government of Australia and the Government of Malaysia on Transfer and Resettlement) which provides for the transfer to Malaysia of up to 800 persons arriving irregularly in Australia by boat after the date of signing (clauses 4 and 7). The Operational Guidelines to Support Transfers and Resettlement set out in Annex A of the Arrangement provide that any persistent individual who ends up being transferred to Malaysia more than once will be counted in the quota only once (guideline 6.1). In exchange for Malaysia's assistance, Australia will be resettling, over four years, 4,000 UNHCR recognised refugees living in Malaysia at the time of signing (Arrangement clauses 5 and 7), with the Malaysian government having a say 'regarding the broad composition' of those resettled [Operational Guidelines 4.1(d)]. The Arrangement expressly states that Australia will resettle 4,000 refugees regardless of the number of persons it ends up transferring to Malaysia [clause 7(3)] and that all costs arising under the Arrangement will be met by the Australian government [clause 9(1)]. The Arrangement also expressly states that its content is a record of 'intentions and political commitments but is not legally binding' (clause 16).

Also in this issue:

The Australian government's hope is that the threat of transfer to Malaysia will result in a significant reduction of irregular maritime arrivals in Australia. It is already clear, however, that the Arrangement will not deter such arrivals completely. In the three weeks following the signing of the Arrangement, four boats carrying 54, 50, 102, and 59 passengers respectively were intercepted in Australian waters and the passengers taken to the Australian territory of Christmas Island pending transfer to Malaysia or another country. Whether transfer to Malaysia can take place is presently a matter of uncertainty because the domestic lawfulness of such action is being challenged in the High Court of Australia by 41 passengers (including a few unaccompanied minors) who arrived on the first boat. The hearing of the challenge commenced on 22 August. The purpose of this article, however, is not to consider the domestic lawfulness of transfer to Malaysia but rather the question of whether implementation of the Arrangement would be consistent with Australia's international obligations.

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Statement protecting Rwandan refugees: please sign on now!

On 31 December 2011, the UN High Commissioner for Refugees and several states hosting Rwandan refugees are considering invoking the 'Cessation Clause' of the 1951 Convention relating to the Status of Refugees. This is a very unusual and dangerous move that could cause revocation of the refugee status of tens of thousands of people who fled ethnic and political persecution in Rwanda, stripping them of basic rights and exposing them to forcible repatriation and possible persecution. Cessation is premature and should be stopped.

But you can do something about it! Send the Fahamu Refugee Programme an email indicating that you endorse the statement below. We will carry your views to the Executive Committee of UNHCR and representatives its Member States at their annual meeting in Geneva 3-5 October. Here's the text:

We, the undersigned, oppose invocation of the 'cessation clause' of the 1951 Convention relating to the Status of Refugees with respect to Rwanda. Thousands of persons fled Rwanda and are currently seeking protection abroad. These are not people escaping retribution from the 1994 genocide; they are those who have been fleeting Rwanda since that event because of the instability, ethnic strife, arbitrary judicial procedures, indiscriminate retaliation, political violence, intolerance of dissent, impunity, and lack of accountability that has followed.

Cessation is a drastic measure that would strip refugees of their legal rights and expose them to forcible repatriation and the risk of further persecution. The Cessation Clause should only be invoked with extreme caution when there has been, according to Guidelines of the UN High Commissioner for Refugees, 1) a fundamental and profound change in country conditions such that they no longer have a well-founded fear of persecution, 2) the change is demonstrably enduring and not merely transitory, and 3) the change enables refugees to enjoy the protection of the government.

Rwanda has made much progress since the genocide but it has not done so through reliable democratic and peaceful means. It remains a fragile, volatile, authoritarian regime with little tolerance for dissent, freedom of speech, or independent human rights reporting. Social and political fissures remain unresolved and the Rwandan government maintains an overtly hostile attitude toward its citizens who have fled. Positive changes need time to consolidate and genuine national reconciliation remains untested. Moreover, since 2009 more Rwandans have been fleeing, not just Hutu, but large numbers of genocide survivors who were never refugees before, as well as officials of the Rwandan government and officers from its army. Now is not the time to revoke protection from Rwandan refugees!

Endorse now! Send your name, title, and organizational affiliation as you wish it to appear, along with your country of residence to barbara@fahamu.org. If you can endorse on behalf of your organization, church, business, union, or other civic group, let us know—that will be even more powerful! (Otherwise we will just list your affiliation 'for identification only.')

Rwandan dissidents in the UK face danger from Rwanda's London embassy

The British police have warned two outspoken Rwandan dissidents living in London that their lives are in danger because the Rwandan government may be plotting to kill them, according to British officials and documents. In hand-delivered letters dated 12 May 2011, the Metropolitan Police Service warned the dissidents that the threat on their lives 'could come in any form' and that 'unconventional means' had been used before. 'Reliable intelligence states that the Rwandan government poses an imminent threat to your life,' the warning letters read. They added, 'Although the Metropolitan Police Service will take what steps it can to minimize the risk, the police cannot protect you from this threat on a day-by-day, hour-by-hour basis.' British officials confirmed the documents' authenticity on Thursday. For more on Rwanda, see these resources, via Refworld: Human Rights Watch, Rwanda: Stop Intimidating Regional Human Rights Group; International Criminal Tribunal for Rwanda (ICTR), *Prosecutor v. Jean Uwinkindi* (Decision on Prosecutor's Request for Referral to the Republic of Rwanda); Committee to Protect Journalists, Journalists Killed in 2010: Motive Confirmed; United States Department of State, Country Reports on Terrorism 2010 - Rwanda; UNHCR Global Report 2010, Rwanda.

Meeting report: Rwandans in Uganda express Cessation Clause concerns to UNHCR

Report of the proceedings of a 11 July 2011 meeting between UNHCR Staff Officers and Rwandan refugees and asylum seekers at Nsambya Sharing Youth Center, Kampala, Uganda, contributed by a Rwandan refugee, A.I. who was present.

The meeting was headed by UNHCR Senior Protection Officer John Kiliwoko. After a brief presentation of four other colleagues, Mr Kiliwoko enjoined me to stop filming the meeting and the UNHCR Security Officer confiscated the video camera. He gave me back the video camera at the end of the meeting after erasing the short recordings I had so far managed to make. Mr Kiliwoko told us that the meeting was to share information about the cessation clause, based especially on a report elaborated by UNHCR officials in Rwanda.

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LGBTI rights in Sudan: history and analysis

This article by Ghareeb, a member of Sudanese NGO Freedom Sudan, was originally published under a different name in LGBT Asylum News on 15 August 2011. It has been edited for publication in this issue.

In 2009, a Sudanese website called Rumat Alhadag posted an article about the establishment of the Sudanese LGBT Association Freedom Sudan and its goal to improve the rights of LGBT individuals in Sudan. A quick analysis of the replies to this article reveals the following: There were 39 replies (repetitions were not counted). While only four replies reflected positive attitude toward homosexuality and homosexuals, 33 replies displayed a negative — many times very aggressive — attitude toward the issue. However, one reply acknowledged its existence without showing a clear attitude and another one only displayed a surprised feeling. Words used to describe homosexuals included: 'dregs', 'decadents', 'immoral', 'animals alike' and 'salacious' with calls to for them to 'be expelled to an empty jungle', 'buried alive' and pursued 'by authorities'.

Before the establishment of Freedom Sudan in 2006, homosexuality was a taboo subject and not many people dared to talk about it publicly; if they did so they would then have to face fierce and sometimes personal attacks from society members. Even if they displayed a judgmental negative attitude toward the issue they would probably be labeled with descriptions like 'profligate' and 'excitement seekers' and accused with 'attempting to distort the image of Sudan'.

Sexual behavior in Sudanese culture is strongly linked to honour (the honour of the individual and the honour of the group are inseparable). The concept of 'honour' is a great and dangerous deal in Sudan, it pushes many people to lie even to themselves if necessary in order to protect it. That is why these attempts to talk freely about homosexuality were met by such enormous denial and aggressive attacks. Even until now after it has started to become less and less a forbidden subject, many people still think that this issue shouldn't be discussed openly and should be dealt with secretly by security measures only, since, according to these voices, these 'deviants' represent only a very small and closed group in Sudan and no one supports them.

Homophobia in Sudan

In the highly charged political climate of Sudan, many political and religious movements seized the opportunity of the already existent negative public attitude toward LGBT people and the shock caused by the formation of an association for LGBT individuals and also the appearance of LGBT groups on Facebook (i.e. 'Gay Story in Sudan', 'Sudan Next Top Gay', 'Sudanese Gays' and others) to use as an argument against other opponent groups.

Those who consider themselves to be moderate or even liberals or progressive thinkers blame the hypocrisy of the National Conference Party (NCP)* government and its supporters which, as they like to prescribe, while raising the logo of the 'civilised Islamic project' have created a proper atmosphere for 'extraneous and deviant phenomena' like the 'spreading' of homosexuality by forcing a puritanical form of Shari'a** (which was prominent during the '90s then started to weaken afterwards) that inhibit the mixing of males and females in public and academic life. This caused the elevation of sexual oppression among both sexes and pushed them to search for the 'alternative' (by which they mean homosexuality).

Many of them like to adopt the opinions of some journalists and social thinkers like Mariam Othman and Hanan Aljak who described homosexuality and bisexuality as psychological ailments and attributed them to different factors, such as sexual assaults during childhood; physical or emotional absence of the parent from the same gender; and other socio-economic factors like poverty, ignorance and the rising costs of traditional heterosexual marriage.

Ironically, extremists and fundamentalist Islamist groups like Ansar Alsunna (which has close ties with Saudi Arabia and the thinkers of the strict Hanbali School of Islam which prevails there) also blame the NCP government for its failure to sufficiently implement the Shari'a. They also don't forget to aim their arrows at their natural enemies (the liberals) for calling for more freedom in the society and separation of religion from politics.

Meanwhile, the NCP seems to be using the issue tactically against its opponents like in the famous case of the journalist Lubna Hussein who was arrested in August 2009 along with other women in a restaurant in Khartoum for wearing 'indecent dress' (in her case, trousers) in a public place — thus breaking the notorious article 152 in the Sudanese law 'Indecent Acts'.

By law, the other women were flogged with 40 lashes each, but Lubna was excluded from the sentence. Her immunity was due to her working for the United Nations Mission in Sudan, however she challenged the authorities by refusing to pay a fine and called for the abolition of article 152. Her case caused great embarrassment to the NCP government which was faced with not only international calls from human rights organisations to release Lubna and remove the above mentioned article but also with demonstrations inside Sudan which supported Lubna and her cause.

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REQUESTS

Equal Rights Trust seeks feedback on new draft guidelines on detention of stateless persons

The Equal Rights Trust (ERT) seeks review and comment on its new draft guidelines on the detention of stateless persons. The draft guidelines, which can be found online in the Equal Rights Review, volume 7, will be the standard that ERT promotes in its advocacy on the detention of stateless persons both nationally and internationally. After all feedback has been received, ERT will revisit and amend the guidelines and consult with a few key experts. After finalisation, the guidelines will be published and proposed for adoption by key intergovernmental and governmental institutions, and by human rights and other civil society organisations and will be disseminated widely. The deadline for the provision of feedback and comments is **7 October 2011.**

Information on Christian Pentecostals in Eritrea

Information pertaining to the persecution suffered by Christian Pentecostals in Eritrea is required. Specifically, information about the persecution of Christian Pentecostals in Eritrea since the persecution of minority religious groups started in 2003, and up to date information about the possible risks that Christian Pentecostals might suffer if deported back to Eritrea, is required. Anyone with such information, please submit it by email to this address.

CASE NOTE: European Court of Human Rights finds conditions in Dadaab Camp violate Article 3, discusses probative value of 'anonymous' human rights reports

Martin Jones, a founding and active member of the Southern Refugee Legal Aid Network, provided the following commentary.

The European Court of Human Rights (ECHR) has recently handed down an interesting judgment in the matter of *Sufi and Elmi v. UK*. The case concerned the legality of attempts to return Somali failed asylum seekers to Mogadishu. In determining the case, the Court made interesting findings of fact about the situation in Somalia and Kenya (the latter, for Somali refugees). The judgment raises numerous interesting factual and legal issues.

In relation to Dadaab, the Court found that conditions in the camp violated the Article 3 requirement that '[n]o one shall be subjected to torture or to inhuman or degrading treatment or punishment.' Specifically, the Court found that the risk of violence from Kenyan police and criminal gangs within and outside the camps; overcrowding; lack of adequate water; and restrictions on freedom of movement cumulatively resulted in inhuman or degrading treatment. I have appended the operative paragraphs on this subject below. This finding may be useful in your advocacy attempts — particularly against 'warehousing' in such camps (as I think the same analysis would result in a similar finding in most refugee camps with which I am familiar).

The Court also made some observations about human rights reports relying upon quotations from anonymous individuals (in this case, commissioned by the UK government and reliant solely upon conversations with third parties within Somalia). The Court finds that such documents can be used to corroborate other evidence but that it is almost impossible for them to independently establish facts. The Court's analysis might be useful for those of you facing UNHCR's use of such 'internal' reports (or government reliance upon similar reports from itself or UNHCR).

For European (and other regional) lawyers, the judgment is also significant insofar as it discusses the interaction between EU (Qualification Directive) and Council of Europe law. It is already being much discussed in EU and migration law circles. The full judgment can be found here. •

HEADLINES

AFRICA

DRC, KENYA, UGANDA: Refugee Law Project helps spotlight male rape in DRC, Uganda (Guardian article, audio slideshow, Al Jazeera video), while struggles of LGBTI refugees in Kenya and Uganda gain attention

ETHIOPIA: Increasing numbers of Eritreans fleeing into Ethiopia

GABON: Refugee status ceases for Congolese

GHANA: Minister places LGBTI refugees at further risk, calling for Ghanaians to report homosexuals in effort to 'rid society of gay people'

KENYA: Somali refugees forced to abandon their children in desperation

NAMIBIA: Angolan refugees refuse to repatriate before impending cessation clause

SOUTH AFRICA: Ethiopian refugees sue Minister of Home Affairs for refusing access to asylum as goverment policy shifts to block asylum claims by Somalis and Ethiopians; meanwhile, South Africa plans mass deportation of over one million Zimbabweans

SUDAN: UNHCR expresses deep concern for deportation of Eritreans from Sudan

UGANDA: Member of the Refugee Law Project named 2011-12 Elizabeth Neuffer Fellow

Report assessing situation of asylum seekers in Poland: a legal aid centre response

Katarzyna Przybyslawska of the Halina Niec Legal Aid Center, answers criticisms to asylum procedures in Poland made by the Belgian Refugee Council (see its report here). Her candid responses shows once again the urgency of independent legal aid providers and their need for more capacity to carry out their work efficiently and effectively.

The Halina Niec Legal Aid Center (HNLAC) is a non-profit non-governmental organisation established in 2002 in Kraków. HNLAC's main objective is to protect human rights by providing free legal aid to persons at risk of social exclusion and discrimination, including the poor, victims of domestic violence, foreigners, asylum seekers and refugees. The HNLAC also monitors the adherence to standards of human rights, undertakes legal interventions and advocacy activities, and pursues research and educational projects. The centre also undertakes activities aimed at preventing and tackling human and child trafficking by organising social campaigns and offering legal aid to the victims. The HNLAC is UNHCR's implementing partner in Poland.

The Belgian Refugee Council (BRC) report provides an assessment of the situation of asylum seekers in Poland, in particular those who were sent back to Poland as a country responsible for examining asylum application on the grounds of the Dublin II regulation. The report recognised both positive and negative aspects of Polish asylum system.

The first technical comment in response to the report is the erroneous use of the phrase: 'closed reception centre/prison for asylum seekers'. There are no closed reception centres for asylum seekers in Poland and the establishment in Biala Podlaska is in fact a guarded center for foreigners for the purpose of expulsion.

The Belgian Refugee Council praised the existence of non-EU based national protection status (tolerated stay permit) in the Polish legal system. The HNLAC wishes to stress the importance of this status with regard to safeguarding foreigners' right to family life (art. 8 of the European Convention on Human Rights and Fundamental Freedoms). It should be noted however that given the ongoing preparation of a new act on aliens and act on granting protection to aliens, this protection instrument will soon undergo a change and foreigners seeking legalisation of stay in Poland solely due to their family ties will be eligible for a regular residence permit. The tolerated stay permit will be still applied in cases of risks to other basic human rights.

The BRC report indicates that the Belarusian Movement of Medical Workers provided information about returning … some asylum seekers of Chechen origin to Belarus. The HNLAC regularly monitors the border crossing with Belarus, where the majority of asylum applications are submitted as part of its Access Management and Support (AMAS) project and UNHCR implementing partner agreement. The monitoring includes examining individual complaints sent from the border crossing and regular missions to the border.

From the monitoring conducted, involving interviews with border guard officers, interviews with asylum seekers and participation in the preliminary interviews with foreigners trying to enter Poland via

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HEADLINES continued

AMERICAS

CANADA: Federal report suggests refugee determinations not always based in law

COLOMBIA: Refugee from Israeli-Colombian crime gang granted asylum in Israel

ECUADOR: Asylum Access Ecuador works to gain access to refugees detained in prison

USA: Iranian refugees fall victim to jurisdiction battle

ASIA-PACIFIC

AUSTRALIA: Lawyers take 11th-hour action, leading to victory in block of Australia's Malaysia asylum 'swap'

NEPAL: Nepal arrests six Tibetans fleeing Chinese administration while releasing 20 others

THAILAND: Thailand fails to screen for potential persecution, hands Uighur leader to China

EUROPE

AUSTRIA: New legislation permits detention of any asylum seeker

CYPRUS: Iranian asylum seekers beaten in detention subsequently lodge complaint with the EU

EU: EU calls for greater assistance to refugees fleeing Libya; NATO comes to aid of shipwrecked migrants, but EU refuses to accept them; FRONTEX to increase visibility and presence; European Asylum Support Office starts its activities

NORTHERN IRELAND opens its first immigration detention centre

POLAND: Drop in asylum applications by Russians

UK: Immigration tribunal releases new country guidance case for Eritreans fleeing Ethiopia; concerns raised over 'irrational decisions' made by UKBA to fill asylum targets; domestic violence claims to be brought under legal aid support

MIDDLE EAST

EGYPT: Egypt continues to kill migrants in the Sinai, shooting an Eritrean and two Sudanese; legal aid organisation AMERA outlines post-revolution challenges for refugees; Canadian embassy in Cairo to re-interview Eritreans rejected by untrained officer

JORDAN: Declaration of amnesty results in cancellation of overstay fines for refugees, asylum seekers

GLOBAL

UN human rights council passes historic LGBT resolution

Assistant High Commissioner states that detention is protection priority at May roundtable on alternatives to detention

Online refugee camp game relaunched

Ethiopian bishop raises Sinai killings at UN

UN urges more countries to sign conventions regarding stateless people, as number reaches 12 million

CASE NOTE: Court decision on Dublin II return from UK to Cyprus

MIGREUROP responds to a recent UK court decision which misuses NGO reports to justify its determination that returns to Cyprus are appropriate.

A decision by the Royal Court of Justice on 11 August 2011 rejected a claim for the suspension of a decision to send a Tamil asylum seeker to Cyprus, in application of the Dublin II regulation.

The request for judicial review was made on the basis of similarities between [the] unfair examinations of asylum claims in Cyprus and Greece. The European Court of Human Rights (ECHR) took a position in January 2010 in favour of the suspension of return procedures to Greece because of the lack of sufficient guarantees of a fair examination of asylum claims (Case *M.S.S. v Belgium and Greece*).

In the current case, the person escaped Sri Lanka and was delivered a document by the UNHCR in Malaysia stating that return to Sri Lanka would put the person at risk of persecution. The person then arrived in Cyprus via Syria, but did not lodge an asylum claim there. Instead, he reached the UK flying from Cyprus with a forged passport and asked for asylum at his arrival on UK soil.

The claimant then opposed his return to Cyprus for his asylum claim to be examined there, arguing that there was no effective protection of asylum seekers in Cyprus, although the country is part of the EU and party to the conventions which prohibit *refoulement*. According to the claimant, returning to Cyprus puts him at risk of being returned to Sri Lanka, being probably detained in Cyprus before, and, if not detained, of living in non-decent conditions.

The court decided that none of the arguments were founded: nothing proves that the Cypriot authorities are violating the rights of asylum seekers and that the latter are not properly informed about the asylum procedures and how to lodge a claim. Moreover, the court considers that, in case the claimant may be at risk of being returned, there would always be a possibility to oppose this violation of the *non-refoulement* principle through the ECHR interim procedure under Rule 39.

Reports brought before the court to highlight the weaknesses of the asylum system in Cyprus don't seem to justify for the court to suspend the return. In fact, it is considered that these reports emphasise failures in practice rather than systematic failures and legal loopholes in the asylum procedure itself.

Besides, contrary to what happened in *M.S.S v Belgium and Greece*, UNHCR did not express its disagreement with returns to Cyprus. Indeed, the court is basing its decision on a release from the UNHCR office in Cyprus in 2005 which says that, though low, the recognition rate of asylum applications in Cyprus is 'fair' since the vast majority of claims are unfounded (students, 'economic migrants').

Even more shocking is the fact that a report by KISA from 2008 on the procedures accessible to asylum seekers is used to show that the asylum procedure in Cyprus is improving. On the contrary, it is important to recall that KISA keeps opposing the detention of asylum seekers and underlines the systematic imperfections of the Cypriot asylum system. It seems that only part of Kisa's report was taken into account. Likewise, the court dismissed the argument made about living conditions, despite the KISA report on the reception conditions.

Similarly, about detention issues, the court based its decision on observations by the NGO Future Worlds Centre which led the court to the conclusion that detention conditions are not that bad after all. It is thus very clear here that the UK court does not oppose the very idea of detention of asylum seekers in Cyprus!

The claimant should therefore be sent back to Cyprus and cannot appeal against this decision on the basis that the principle of *non-refoulement* may be violated in Cyprus. Indeed, the decision of the court is bas[ed] on the belief that Cyprus is a safe country where such risk does not exist. ●

Cypriot legal aid organisation condemns police violence against immigration detainees

Submitted by the Steering Committee of KISA-Action for Equality Support and Antiracism in Cyprus (KISA).

After receiving a series of complaints, KISA has established that there has been an outbreak of police brutality against detainees in almost all towns in Cyprus. In particular, the complaints that have reached us refer to police violence against detainees occurring at the detention centers of Larnaca, Nicosia, and Paphos.

From contacts we have had with family members and detainees who had been victims of this brutal police violence, it seems that the incidents of attacks tended to be in retaliation to the detainees' protests against their living conditions while in detention and the state's attempts to deport them. KISA believes that none of the detainees' protests or actions were in any way aiming to harm other individuals, nor did they require such a disproportionate and violent punishment.

At this point we need to stress that the abuse against detainees was not confined to physical abuse. Members of the police had also verbally abused detainees through the use of insulting and degrading language aimed at particular individuals and their countries of origin, while at the same time humiliating their religious symbols and beliefs.

In addition, when the physical and verbal abuse ceased, the police took a number of restrictive and punitive measures that aimed to further demoralise the detainees. In particular, the police confiscated the detainees' personal phones thus preventing them to communicate with anyone outside detention, refused to allow their families to visit them, increased the daily hours of cell-confinement, and in some cases detainees were moved to other towns so as to make it even more difficult for them to have contact with their families and the outside world.

Finally, as we were informed, the detainees who could not be deported, such as people from Iran and Syria and stateless persons of Kurdish origin, encountered severe blackmail and psychological [pressure]... in order [force them] to agree to 'voluntary repatriation'. Especially in relation to Syrians, KISA considers particularly sad the fact that the Republic of Cyprus not only has not taken a firm and clear position in relation to the brutality of the Syrian regime against the mass rising of the Syrian people, but it continues even today to deport people back to Syria. KISA condemns all the incidents that have taken place in the detention centres around Cyprus, and urges the authorities to take all appropriate steps to ensure that the rights of all detainees are fully respected. •

OPPORTUNITIES

Legal advisor sought in Cyprus

A project that offers free legal advice and representation to asylum seekers and refugees, implemented by the Cyprus Neuroscience and Technology Institute and funded by UNHCR, is seeking legal advisor. The advisor will advise asylum seekers (including in detention centers) on the asylum procedure in Cyprus and provide representation during the administrative asylum determination process; prepare and submit administrative recourses against negative asylum decisions; and ounsel and provide representation to refugees and asylum seekers on access to their rights. The advisor should have a law degree (mandatory) and excellent command of both Greek and English languages. Prior experience or post graduate qualification in asylum issues and/or administrative law will be considered an advantage. Applications should be submitted by email by **14 September 2011**.

East Asia training on refugee mental heath, Hong Kong, 9-11 November 2011

Registration has opened for a training on refugee mental health. The training, which will include some lectures, discussions, small group sessions, role plays, and case presentations, will be useful for anyone who works directly with refugee clients, and cover topics such as: intervention models when working with refugee populations; traumatic experiences and normal reactions to them; consequences of violence; suicide assessment; mental health problem identification and treatment; the helping process; skills in interviewing; client assessment; interventions with vulnerable groups; and more. Registration is required to participate, and is limited to 60 seats. Please register online or, if necessary, by email, to be followed by a fee of HK$1,000. The deadline for registration is **15 September**.

East Asia Symposium: refugee policy in practice and how refugees experience it, Hong Kong, 12 November 2011

The Asia Pacific Refugee Rights Network (APRRN), together with key refugee advocates and practitioners, will hold a symposium to address a fundamental question: in practice how do you save lives, protect human rights, and provide for the diverse needs of vulnerable refugee populations with limited resources? The symposium will bring key actors from Hong Kong, Japan, Korea, Macau and Taiwan together to identify gaps and solutions, debate the key issues, and challenge misconceptions about the most vulnerable population in Asia: refugees. The symposium will be free and open to the public. Please RSVP to Flora Leung if you would like to attend.

Visiting fellowships, Refugee Law Initiative, University of London

Applications are invited for Visiting Fellowships at the new Refugee Law Initiative, hosted by the Human Rights Consortium at the School of Advanced Study, University of London. Fellows are usually junior or senior researchers, though applications from those with relevant experience in refugee law and protection will be considered; doctoral students are not normally eligible to apply. Visiting Fellowships are granted from one to three months. Fellows are expected to help develop the activities of the Refugee Law Initiative by pursuing their own research in one of the relevant research areas related to the Refugee Law Initiative or contributing to a publication. Office space, access to computing and printing facilities and a library card are provided. Further details are available online or by email: prospective applicants are encouraged to contact Dr Par Engstrom for all applications within wider human rights areas of interests, or Dr David Cantor for applications related to the work of the Refuge Law Initiative. Application deadlines are **30 September 2011** and **30 March 2012** for visits in the first and second halves of the academic year 2011-12.

Call for papers: conference on refugees, asylum law, and expert testimony

The conveners of the 2012 Conable Conference in International Studies (12–15 April 2012, Rochester Institute of Technology) seek papers on the use of expertise in asylum claims and refugee status determination in the Global South. Papers should have not been previously published or approved for publication. Prospective participants should indicate any and all sources of funding for travel and accommodation; limited financial assistance is available and will be prioritised for those from the Global South. One- to two-page proposal abstracts should be submitted with a CV by email by new deadline, **1 October**. For further details, please refer to the conference website.

Call for applications for the Human Rights Advocates Program (HRAP)

Applications are now open online for the 2012 session of the annual HRAP, which will take place at Columbia University from late August to mid December 2012. The HRAP is

designed for human rights activists from varied professions who are working with NGOs at the grassroots levels. Selection is based on previous work experience in human rights, a commitment to the human rights field, and the ability to pursue graduate-level studies. Full-time students or government officials will not be considered. Fluency in English is required and preference will be given to those who have not previously had opportunities to travel and study internationally. Completed applications are due by **18 November 2011**. For further information, please refer to the HRAP website.

Volunteer vacancies: Legal Fellowships, Helsinki Citizens' Assembly Refugee Advocacy and Support Program, Istanbul, Turkey
Helsinki Citizens' Assembly Refugee Advocacy and Support Program (hCa RASP), a Turkish NGO based in Istanbul, is seeking qualified applicants to serve as unpaid Legal Fellows to assist the organization in providing free legal assistance to asylum applicants vis-à-vis their RSD proceedings with UNHCR-Turkey. The ideal candidate will have knowledge and understanding of legal concepts used in refugee protection, familiarity with RSD procedures under UNHCR's mandate and applicable UNHCR standards, as well as experience in interviewing and working with vulnerable populations. Fluency in English is essential. Legal Fellows are expected to commit 4 or 5 days per week for a 6-month fellowship term, with possibility of extension. In exceptional cases, applicants may be accepted for a shorter term of commitment. Interested applicants are asked to send a CV and a letter of motivation in English by email with message subject 'Legal Fellowship Application.' More information on hCa RASP and the Legal Fellowship Program is available online here. hCa RASP does not have fixed fellowship terms; new fellows are selected and involved **on a rolling basis**.

Internships with the Organization for Refugee Asylum and Migration
The Organization for Refuge Asylum and Migration (ORAM)/ seeks committed, highly qualified interns for fall, spring and summer terms in their United States-based offices. Students from relevant disciplines are encouraged to apply. The current internship opportunities are legal internships (San Francisco or Washington, D.C.); LGBTI sensitization training internship (San Francisco); refugee resettlement internship (San Francisco); translation and research internship (San Francisco); and Mexico NGO outreach internship (Spanish-speaking). ORAM also has both San Francisco- and Washington, D.C.-based fellowship opportunities. Interested applicants should send a resume and cover letter to the ORAM Internship Coordinator with "ORAM Internship Application" in the subject line. Applications will be evaluated on an **ongoing basis** until the positions are For more information, see ORAM's Internship & Fellowship FAQ, or email them.

Syrian refugees in Turkey need international protection

An Euro-Mediterranean Human Rights Network (EMHRN) delegation conducted a mission 22-28 August to assess the situation of Syrian refugees in camps in southern Turkey, and met with refugees, Turkish NGOs and officials and other stake-holders. The mission concluded that while it is appreciative of Turkey's efforts to shelter the Syrians fleeing violence in their country, it urges the Turkish government to grant UNHCR full access to the camps and to allow the Syrians to apply for refugee status with full protection according to international conventions. A full report on the mission will be published by EMHRN; in the meanwhile, for more information please contact Rim Hajji, Deputy Coordinator, Migration and Asylum.

Thousands of Syrian men, women and children have crossed into Turkey after military and security attacks on their towns and villages following anti-government demonstrations taking place since March 2011. Most of the refugees are from the town of Jisr al-Shughour and surrounding villages, which were nearly emptied after the Syrian government publicly threatened to storm them. More have recently arrived from Latakia, and Hama. Today there are approximately 7,000 Syrian refugees housed in six camps spread across the Hatay border province. The EMHRN continues to strongly denounce the Syrian government's human rights violations against demonstrators, and urges it to stop its heavy crackdown.

Many refugees arrived with no passports or other form of identity, and those that EMHRN interviewed said they were well treated by the Turkish military at the informal border crossings, which registered their details and transferred them to special Turkish Red Crescent-run camps. Turkey has continued to allow its borders to remain open to the Syrians, who do not need visas, and has provided them to varying degrees with shelter, food, medical facilities and even children's playgrounds.

The Turkish government considers these refugees as "guests," a status that is open to interpretation and lacks the international protection that the UNHCR can provide. UNHCR has not been allowed regular access to the camps, and EMHRN learned that only those few Syrian refugees who managed with difficulty to reach the organization's Ankara office were registered as asylum seekers. As the Syrian conflict continues to intensify, refugees told EMHRN they did not feel safe enough to return home in the foreseeable future.

The EMHRN therefore strongly urges the Turkish government to grant the UNHCR unrestricted access to the camps, and to allow for refugee registration of those who wish to do so, in accordance with international conventions. Turkey has ratified the 1951 Geneva Convention but limits it to citizens of Council of Europe members.

Turkey has not allowed media visits to the camps, except for restricted access in June, nor visits by international and local human rights organizations, including the Coordination for Refugee Rights (CRR- a coalition of seven local and international human rights groups).

The EMHRN urges Turkey to reconsider its policies and, provided security safeguards are met, allow media access as well as oversight by international and local human rights organizations into how the camps are run. This would meet refugee demands, especially that some of them pointed to cramped conditions, water and sanitation problems, and sometimes inadequate medical attention.

Finally, the EMHRN would urge the Turkish government to introduce clear regulations allowing the refugees daily trips outside the camps, as these have so far been granted arbitrarily. Many told EMHRN that although their basic needs were being met, they felt they were being held in a prison, which is likely to exacerbate tension within the camps. ●

Australia's 'Malaysian solution' *continued from p. 1*

Australia is a party to the 1951 *Refugee Convention* and the 1967 *Refugee Protocol*. Under article 33(1) of the *Refugee Convention*, Australia has an obligation to ensure that a refugee is not sent directly or indirectly to *any* place of danger. Subject to an exception articulated in article 33(2), this *non-refoulement* obligation is engaged the moment a person who *in fact* falls within the definition of 'refugee' (whether or not formally recognised as such) comes within Australia's territorial or other jurisdiction. Australia is also a party to the *Convention Against Torture* (*CAT*) and the *International Covenant on Civil and Political Rights* (*ICCPR*). These treaties impose *non-refoulement* obligations which are not limited in application to 'refugees' and are not subject to exceptions. If Australia does end up transferring irregular maritime arrivals to Malaysia, it will be taking the risk of being placed in breach of its *non-refoulement* obligations by the future actions of others over whom it has no control.

It is also important to note that Australia is a party to the *Convention on the Rights of the Child (CRC)*. This treaty obliges states parties to 'respect and ensure' all the rights specified in it 'to each child within their jurisdiction without discrimination of any kind' [article 2(1)]. Moreover, article 22(1) specifically provides:

> States Parties shall take appropriate measures to ensure that a child who is seeking refugee status or who is considered a refugee in accordance with applicable international or domestic law and procedures shall, whether unaccompanied or accompanied by his or her parents or by any other person, receive appropriate protection and humanitarian assistance in the enjoyment of applicable rights set forth in the present Convention and in other international human rights or humanitarian instruments to which the said States are Parties.

Finally, states parties to the *CRC* are obliged to make 'the best interests of the child… a primary consideration' in all actions concerning children (article 3). Australia's obligations to children under the *CRC* are relevant, because, of the 206 passengers on the first three boats which arrived after the signing of the Arrangement, 62 were, or claimed to be, minors and 54 of those were unaccompanied.

Malaysia is a party to the *CRC* but is not a party to the other treaties mentioned above. While most international law scholars take the view that many fundamental human rights obligations, including *non-refoulement*, are part of customary international law and thus binding even on states which are not parties to those treaties, that is not a source of much comfort for Australia. At the end of the day, what really matters is not what international obligations Malaysia has in theory, but how it will conduct itself towards the transferees in practice. Malaysia's compliance with those human rights treaties to which it is a party is less than satisfactory. In light of this, the fact that Malaysia has chosen not to make even a formal legal commitment to comply with the other treaty regimes relevant in the present context must surely cast significant doubt on the strength of its political commitment to acting in practice in a manner consonant with those regimes.

If Malaysia sends transferees under the Arrangement to another country in which they are exposed to danger, Australia will be guilty of indirect *refoulement* to that country. How likely is this to happen? Malaysia's domestic legal system has no mechanism for determining asylum claims and no safeguards against *refoulement.* However, the Arrangement provides that transferees will be given the opportunity to have asylum claims considered by UNHCR in Malaysia [clause 10(2)(a)] and will have access to resettlement 'pursuant to UNHCR's normal processes' if found to be refugees (clause 6). The Arrangement also states that the Malaysian government 'will respect the principle of *non-refoulement*' in relation to transferees, unless they fall within the exception set out in article 33(2) of the *Refugee Convention* [clause 10(2)]. In relation to refugees who fall within the exception, the Malaysian government has indicated that it will 'discuss a suitable country of destination with UNHCR'. Asylum seekers, who are found not to be refugees by UNHCR, may be forcibly returned to their country of origin if they refuse to return voluntarily [clause 11(1)]. However, the Malaysian government has indicated that prior to any forced return it will provide the Australian government 'with the opportunity to consider the broader claims of any Transferee to protection under other relevant human rights conventions' on the understanding that the Australian government 'will make suitable alternative arrangements' for the removal from Malaysia of those found entitled to such protection [clause 11(2)]. It remains to be seen, whether this provision is a sufficient safeguard against Australia being placed in breach of its

non-refoulement obligations by Malaysian removal action. Much depends on whether the provision is implemented, and if so, how it is implemented.

If transferees are exposed to a real risk of serious human rights violations in Malaysia itself, Australia will be guilty of direct *refoulement*. Generally speaking, asylum seekers and refugees in Malaysia are subject to Malaysia's draconian laws relating to illegal immigrants and, for that reason, are at real risk of serious harm (Amnesty International 2010). However, the Arrangement states that transferees will be treated as being lawfully present in Malaysia while their asylum claims are being considered and, if recognised as refugees by UNHCR, pending resettlement [clause 10(3)(a)]. According to the Operational Guidelines, the mechanism which will be used to ensure lawful presence is the issuance of exemption orders under the Malaysian Immigration Act 1959/63 and the Passport Act 1966 [guideline 1.1.2(f)]. It appears that the transferees' special status will be evidenced by identity cards jointly issued by Australia and Malaysia. While all of this is welcome, it is not, even in theory, a complete safeguard against Australia being placed in breach of its *non-refoulement* obligations because Australia may well owe such obligations to transferees who are found not to be refugees by UNHCR and as a result cease to fall within the description of those whose presence in Malaysia will be treated as lawful.

The Arrangement does contain a further representation that transferees will be treated 'with dignity and respect and in accordance with human rights standards' (clause 8), but the mere existence of this representation is an insufficient safeguard against breach of Australia's *non-refoulement* obligations. One factor which must be taken into account is that undertakings given by the highest level of the Malaysian Government do not necessarily flow through to practice on the ground. In some cases this is due to ignorance. The occurrence of these cases may well be reduced by implementation of Operational Guideline 3 which states that '[d]etailed guidance concerning the operation of the Arrangement as it relates to Transferees' will be provided to 'relevant authorities' to ensure treatment in accordance with the Arrangement. The provision of such guidance will do nothing, however, to prevent mistreatment of transferees by, for example, corrupt officials seeking to extort bribes from asylum seekers and refugees (as has happened in the past). Even supposing, however, that the Malaysian government is *able* to ensure that its undertaking is honoured, Australia cannot simply assume without further inquiry that it *will* do so in every case. The only way in which Australia can ensure compliance with its own *non-refoulement* obligations is to make a good faith pre-transfer assessment of the risk of serious harm in Malaysia on the basis of all the available evidence in each individual case and to refrain from transferring any person assessed as being at real risk of such harm. It is also the case, of course, that Australia will not be in a position to make the best interests of the child a primary consideration in any proposed transfer of children, as required by the *CRC,* unless it makes a pre-transfer assessment of what those best interests are in each case.

More on Australia:

Government of Australia: Arrangement between the Government of Australia and the Government of Malaysia on transfer and resettlement

UNHCR: UNHCR Statement on the Australia-Malaysia Arrangement

IOM: IOM witnesses Australia-Malaysia asylum-seeker swap agreement

LGBT Asylum News: Is Australia planning to send LGBT refugees to Malaysia?

BBC: Australia and Malaysia 'to sign deal on asylum seekers'

BBC: Australia asylum: Christmas Island unrest continues

ABC News: More asylum seekers join rooftop protest

BBC: Australia to post YouTube film to curb people-smuggling

Government of Australia: Memorandum of understanding between the Government of the Independent State of Papua New Guinea and the Government of Australia, relating to the transfer to and assessment of persons in Papua New Guinea, and related issues

The Arrangement states that the Australian government 'will put in place an appropriate pre-screening assessment mechanism in accordance with international standards before a transfer is effected' [clause 9(3)]. However, both the Arrangement and the Operational Guidelines are silent on assessment purpose, criteria and procedures. When questioned, the Minister for Immigration has tacitly acknowledged that some exemptions from transfer may be made on a case-by-case basis through his careful insistence that there will be no *blanket* exemptions from transfer for unaccompanied minors or any other category of persons. The reason for this coyness is that the government fears undermining the deterrent purpose of Arrangement by giving those contemplating irregular travel to Australia guidance on what sort of characteristics might result in exemption from transfer. Both the Australian Human Rights Commission and UNICEF have expressed great disquiet at the prospect of unaccompanied minors being transferred to Malaysia. UNHCR has stated that its level of comfort with the Arrangement will depend, among other things, on 'the protection and vulnerability assessment procedures under which asylum-seekers will be assessed in Australia prior to any transfer taking place' (UNHCR 2011). UNHCR has not yet indicated that procedures which it considers satisfactory are in fact in place. Given that the aim is to transfer boat people to Malaysia 'within 72 hours of their arrival in Australia' (Operational Guidelines 1.3), it is to be doubted that any assessment procedures in place would be sufficiently thorough to ensure that Australia is safeguarded against breach of its international obligations.

As UNHCR pointed out in responding to the signing of the Australia-Malaysia Arrangement, it would be more consistent with general practice and preferable for all irregular maritime arrivals in Australia to be processed in Australia. However, UNHCR has not gone so far as to condemn the Arrangement

out of hand. This is unsurprising given that UNHCR has long conceded that an asylum seeker receiving state is able to transfer those asylum seekers to a third state as long as they will receive 'effective protection' there. The notion of 'effective protection' goes beyond mere safety from *refoulement* to encompass safety from risks to life, persecution, torture or other cruel and degrading treatment, arbitrary detention and arbitrary expulsion; respect for family unity; access to 'adequate and dignified means of subsistence'; accommodation of special needs; and 'a genuine prospect' of a durable solution 'within a reasonable timeframe' (UNHCR 2009: para. 153). The discussion above has already dealt with the availability in Malaysia of some of these elements of 'effective protection'. What remains to be discussed are the last four elements just listed.

According to UNHCR, the Arrangement and its implementing guidelines include acknowledgment of the principle of family unity and best interests of the child (UNHCR 2011). If this is so, the acknowledgment must be contained in some document related to the Arrangement which has been shown to UNHCR but has not been placed in the public domain. Turning to the standard of living which transferees will enjoy in Malaysia, this is likely to be adequate in the initial period of up to 45 days, in the usual case, during which most transferees will be accommodated in a low to medium security 'transit centre' while Malaysian authorities conduct police screening and the International Organization for Migration (IOM) and UNHCR commence their processing (Operational Guidelines 2.1). The standard of living which transferees will enjoy in the 30 days immediately following their release, or more likely enforced departure, from the transit centre is also likely to be adequate because they will receive 'a support payment to cover living costs' during this period from IOM (Operational Guidelines 3.2) and will also have access to IOM-provided accommodation if they are unable to move immediately into private accommodation (Operational Guidelines 3.1). The standard of living which transferees will enjoy thereafter is, however, highly uncertain because they will be expected to fend for themselves for the most part. To its credit, the Malaysian government has agreed that transferees who have asylum claims pending [Operational Guidelines 2.2.2(c)] or who have been found to be refugees [Operational Guidelines 2.3.1(b)] will have 'access to self reliance opportunities particularly through employment' [Operational Guidelines 3.2(a)]. The problem is that having the right to work doesn't automatically translate into actually getting work, let alone work which pays a living wage, especially in the case of persons like the transferees whose barriers to employment are likely to include lack of language and other relevant skills (Pamela Curr cited in Weiss 2011). In the case of those unable to support themselves, the Operational Guidelines hold out the possibility of 'financial assistance consistent with UNHCR's current practice' being provided on the basis of a case-by-case assessment by IOM or UNHCR [guideline 3.2(c)]. Whether this provision is adequate to ensure that all transferees have access to adequate and dignified means of subsistence is unknown to the author. The Operational Guidelines also state that transferees will have 'access to basic medical care under arrangements which UNHCR has for asylum seekers and refugees' and access to emergency medical services via IOM [guideline 3.4(c). This is better than nothing, but no Australian would consider it consistent with their human dignity to be limited to similar access. Similarly, the Operational Guidelines state that school age transferees 'will be permitted access to private education arrangements in the community' and, 'where such arrangements are not available or affordable', 'will have access to informal educational arrangements' organised by IOM (guideline 3.3). Again this is better than nothing, but it is a lot worse than the education to which transferee children would have had access if allowed to remain in Australia. The great disparity in access to health care and education which a child would enjoy in Australia and suffer in Malaysia suggests it could never be in the best interests of a child to be transferred from Australia to Malaysia. Unfortunately, the *CRC* only obliges states to make the best interests of the child *a* primary consideration, not *the* trumping consideration.

Even among asylum seekers and refugees, who must by reason of that status alone be regarded as vulnerable individuals, children are especially vulnerable cases and even more so if they are unaccompanied. The elderly too are more vulnerable than most, as are persons with mental or physical disabilities or health problems. Women are usually more vulnerable than men, particularly if they are single, pregnant or household heads. There may also be factors which cause certain religious, ethnic or sexual identities to be particular sources of vulnerability in some contexts and this is certainly true of the Malaysian context. The Arrangement states that '[s]pecial procedures will be developed and agreed to by the Participants to deal with the special needs of vulnerable cases including unaccompanied minors' [clause 8(2)]. The Operational Guidelines provide some further elaboration. They state that IOM will conduct health and vulnerability assessments of transferees while they are at the transit centre [guideline 2.1.2(a)]. They also state that '[t]ransferees will have access to the existing arrangements which UNHCR has in place for identifying and supporting vulnerable cases and a backup "safety net" will be provided by IOM' (guideline 3.5). The adequacy of these arrangements remains to be seen.

Turning now to the question of whether transferees will have a genuine prospect of a durable solution 'within a reasonable timeframe', much depends on the manner in which 'reasonable' is defined. At the end of May 2011, there were 94,400 refugees and asylum seekers registered with UNHCR in Malaysia. There was estimated to be a further 10,000 unregistered asylum seekers also in the country. The vast majority of all refugees and asylum seekers in Malaysia are Burmese and therefore unlikely to have the option of repatriating anytime in the foreseeable future. There is also little realistic prospect of repatriation for three of the four other sizable refugee groups in

Malaysia (Afghans, Iraqis and Somalis), though repatriation prospects seem better for the fourth group (Sri Lankans). The Malaysian government presently refuses to contemplate local integration as a durable solution for the refugees it hosts, which, as UNHCR points out, leaves resettlement as the only option for most. As previously mentioned, transferees who are found to be refugees will also have access to resettlement. However, in keeping with the 'stop the boats' rationale, the two governments have agreed to ensure that transferees will not receive any processing advantage over other asylum seekers and refugees in Malaysia [Arrangement clause 12(2))]. Therefore, even at a projected rate of 9,000 to 10,000 resettlement departures per year from Malaysia, it is clear that transferees will face an average wait of many years for resettlement. Can the waiting time be described as 'reasonable'? In terms of the human cost exacted by extended limbo the answer is undoubtedly 'no', but perhaps there are other measures of reasonableness that UNHCR and states would apply.

The final point worth making about the Arrangement follows from the fact that the resettlement wait for most transferees will in all probability extend beyond the four year duration of the Arrangement [clause 19(1)] The Australian government has indicated that it will continue to fund the support arrangements put in place for transferees beyond four years if necessary. The problem is that, while the terms of the Arrangement do contemplate its possible extension by mutual agreement [clause 19(2)], it can by no means be assumed that the Malaysian government will agree to an extension and still less that it will be prepared to treat transferees as if the Arrangement was on foot even after it has expired. In summary then, the Malaysian solution may well turn out to be an effective border protection solution for the Australian government, but, as a protection solution for the asylum seekers affected by it, it leaves much to be desired. ●

PUBLICATIONS & RESOURCES

Hong Kong court judgment considers UNHCR decision-making
Mark Daly, of Barnes & Daly in Hong Kong, calls our attention to the long-awaited judgment of the Hong Kong Court of Appeal in a case considering *refoulement* as international customary international law and UNHCR decision-making. The negative ruling can be read here. In his words, '. . . onward to the Court of Final Appeal'.

Are you defending a case on the grounds of membership of a particular social group?
This article, citing precedent cases, may be useful wherever you are working: Bresnahan, Kristin, 'The Board of Immigration Appeals's New 'Social Visibility' Test for Determining 'Membership of a Particular Social Group' in Asylum Claims and its Legal and Policy Implications', *Berkeley Journal of International Law*, vol. 29, no. 2 (2011), available online here.

New Zealand country information and evidence assessment
A paper by Rodger Haines QC, available online here, reviews how country information has been used and assessed in the New Zealand refugee status determination system. The hosting site of the paper, RefNZ Reference, contains many papers of interest to refugee law practitioners.

'Shadows of return' for Congolese refugees in Rwanda
Following the signing of a tripartite agreement between the UNHCR and the governments of Rwanda and the DRC in February 2010, the International Refugee Rights Initiative in Kampala has released a report that aims to bring credible and concrete information to speculation surrounding the return of Congolese refugees currently living in Rwanda. The report, 'Shadows of return: the dilemmas of Congolese refugees in Rwanda,' is based on interviews with 52 refugees; they report a strong desire to return home, but lack information about potential return process or structures. The report therefore makes recommendations on actions that may be taken to promote the likelihood of a positive outcome. This situation is important to monitor as it involves local authorities in vetting whether potential returnees are from the place they claim to be, a system that UNHCR has never tried before. A French-language version of the report is forthcoming; the English version is available online here.

Online videos of lectures on Palestinian refugees
Lectures on 'The Rights of Palestinian Refugees Under International Law: Durable Solutions and Future Prospect' and that on 'The Status of Palestinian Refugees in International Law and in Arab States', delivered by Professor Susan Akram from the Boston University School of Law, are now available online. These lectures were presented on 16 July 2011 at Amel Association's Amel House of Human Rights, as part of the two week Summer School on Law and Armed Conflict that was held in Beirut.

2011 Failed States Index
The Fund for Peace has released the 2011 Failed State Index report. This report is especially important for RSD Adjudicators because it would help in assessing the ability of the refugees' country of origin to provide national protection, influencing the decision with regards to which asylum claims require the protection of the international community.

Podcast of Elizabeth Colson Lecture
The annual Elizabeth Colson Lecture, titled 'The vanishing truth of refugees' was delivered by Professor Didier Fassin at the Oxford Refugee Studies Centre on 15 June 2011. The podcast of the lecture is now available online.

Rwandan refugees' UNHCR meeting *continued from p. 2*

The report is about the findings collected by UNHCR officials in Rwanda on the life of returnees. The information was collected from the interviews with returnees who are heads of households.

Among 13 interviewees who are house owners, 11 said that they saw their house naturally destroyed due to lack of care and two interviewees said that their houses are safe and strong. None met difficulties or persecution in retaking their houses. For another 20 interviewees speaking about the retaking of their lands and properties, ten said that it is somehow difficult to retake their lands only due to long administrative procedures, but the procedures lead to undoubted recovery of land; six retook their lands immediately without any problem and four have no lands because they had none even before their flight. Mr Kiliwoko added that there is a wide good road network, enough health centers and hospitals, good education system, and fast economic growth, improving landmarks which are all being enjoyed by the returnees.

The audience strongly condemned and criticised the report, asserting that it apparently aims to lure and persuade Rwandan refugees to return by peddling Rwandan Patriotic Front (RPF) propaganda, instead of exposing realities that are reigning in Rwanda, which are pushing Rwandans into exile and generating fears over return. On several occasions during the meeting, the audience angrily booed UNHCR staff members.

Rwandan refugees expressed their worry about how the interviews with the so-called returnees could have been conducted by and with people who are manipulated and controlled by the RPF. They mentioned that the assertions of interviewees should not be trusted because they are either disguised pro-RPF people or they could have been harassed and intimidated by RPF members beforehand. They found that UNHCR made unfounded observations instead of working as a protector of people victimised by RPF massacres, atrocities and persecutions in all possible forms. The audience also asked UNHCR to come out with a report about the (re-)cyclers (persons who have repatriated voluntarily and were forced to flee again) and new asylum seekers.

One refugee, J., told Mr Kiliwoko that we fled our country due to dictatorship, persecution, ethnic discrimination, tyrannical laws, political oppression, injustice of the judicial system, extra-judicial executions, genocidal massacres, abductions and forced disappearances, and limits on freedom of expression; all committed in the hands of RPF politico-military officers. So we are not economic immigrants who are fleeing the famine, the lack of education or roads for transportation. [UNHCR should come forward with reliable facts about what is happening in Gacaca Courts, in tribunals, in the political arena, [the] purposeful impoverishment [of] Hutus, [their] marginalisation and discrimination, who are reduced to second-hand citizens, on the use of [accusations of] 'genocidal ideology' as an oppressive tool against Hutus and dissident voices, in particular Hutus, who tried to call for remembrance of their relatives killed by the RPF as well as for the prosecution of RPF officers who slew their family members.

Mr S., who once worked as an officer of Rwanda's ministry in charge of repatriating refugees prior to fleeing to Uganda, testified how the RPF lures refugees to take them back to Rwanda in order to abduct and kill a big number among the returnees. He asked UNHCR to conduct an effective investigation into the abductions and killings perpetrated by RPF government against returnees and to ask for prosecution against perpetrators, before coming and sensitising Rwandans for repatriation.

One (re-)cycler, Mr R., spoke of how he was repatriated in 1997 from Gabon after being lured by UNHCR who said there were positive fundamental changes in Rwanda making it a safe country to return to. At his arrival, Mr R. was arbitrarily and unwarrantedly imprisoned for ten years before being acquitted by Gacaca Courts due to extreme pressure of Human Rights Groups. Mr R. continued by asserting that after the release, he was shot in his left leg by a RPF and IBUKA officers in an attempt to kill him. Mr. R. leg was thereafter amputated. When R. asked for police investigation into the attempted assassination, police colluded with the perpetrator to end his life and he was coerced to flee his homeland. The perpetrator even attempted to use Ugandan police to abduct him. Mr R. asked how he could trust UNHCR's pro-RPF reports and return to Rwanda; how could he return to a country ruled by a regime which is sending operatives to abduct him in his country of refuge?

The audience also asked questions about how we are mistreated and persecuted in Uganda both by UNHCR and the GoU. Topics related to these questions included:

- The 14 July 2010 forced deportation
- The killing of Rwandan refugees and asylum seekers either by Ugandan police or by Rwandan security agents during [the 14 July 2010] deportation
- The ban on cultivation by the GoU as a push factor for repatriation with the aim of impoverishing and starving Rwandan refugees. The audience likened this violation to acts committed by the RPF
- The refusal by UNHCR to grant assistance to children whose parents were either killed or forcefully deported to Rwanda on 14 July 2010
- The exclusion by InterAid, a UNHCR implementing partner, from being granted education financial aid
- The coercion needed to bribe Ugandan officers in charge of refugees in order to obtain asylum seeker certificates or to be granted refugee status
- The refusal of the GoU to grant us refugee status on the grounds of ethnic discrimination where as the majority fleeing Rwanda do so because of ethnic discrimination against Hutus
- The refusal of UNHCR to grant protection and resettlement to Rwandan refugees whose security is threatened by Rwandan agents and/or Ugandan authorities in conspiracy

with the Rwandan regime. Instead UNHCR's protection officers are telling us that the only solution for us is to return to Rwanda; a kind of push factor.

The audience also asked about the computer server which was stolen and went missing from the OPM Offices, Refugee Desk, July 2010. They expressed their worries that the Rwandan regime could be behind the ploy with the purpose of possessing the information and data of Rwandan refugees ahead of eventual repatriation.

Mr Kiliwoko avoided commenting on most of the very sensitive questions, observations and concerns listed above. [However] he asserted that he is going to share the information with every concerned person and institution. About the disappearance of the computer server and about the atrocities occurred during the 14 July 2010 forced deportation, he said that they are asking the GoU to conduct investigations and elaborate the report. He added that UNHCR was completely ignorant of the ploy of GoU and GoR to forcefully deport Rwandan refugees and asylum seekers. Mr Kiliwoko ascertained that UNHCR is continuing to push the GoU to lift the ban on cultivation as he promised to look into the case of bribes, discrimination, refusal to grant assistance to children, and refusal to grant protection and resettlement to Rwandan refugees.

Mr Kiliwoko said that the decision about the invocation of the cessation clause could be taken in three weeks as he promised that a two-year timeline will be accorded to Rwandan refugees with well-founded fears of return to Rwanda and justifiable reasons to retain their refugee status. He promised also to appoint a team which will be offering technical advice to Rwandan refugees during that two-year timeline.

However, the audience expressed their mistrust and lack of confidence towards UNHCR officials, moreover, about how those officials will handle the residual caseload. At the end of the meeting, Mr. John ensured to call for another meeting with us before any decision could be taken. ●

Ukranian asylum seekers

JRS Europe has published a new report titled 'No Other Option: Testimonies from Asylum Seekers in Ukraine.' It is based on interviews done with asylum seekers living in the JRS Ukraine refugee house in Lviv, Ukrainian border officials, UNHCR, Caritas, lawyers and doctors. The report reveals a nuanced picture of a country that simply cannot offer adequate protection to refugees, and even an adequate asylum procedure, due to deep gaps in capacity and good governance. This clearly highlights the importance of legal aid for asylum seeker in the Ukraine. A press release and a testimony from a refugee living in Ukraine are also available online. For more information, please contact Philip Amaral, JRS Europe.

Oblgations of EU member states towards asylum seekers

A new study titled 'Safe at Last? Law and Practice in Selected EU Member States with Respect to Asylum-Seekers Fleeing Indiscriminate Violence' has been published on UNHCR's Reworld website. The research focused on the practice of six EU Member States, Belgium, France, Germany, the Netherlands, Sweden and the UK, and examined the application, in particular, of Article 15(c) of the EU's Qualification Directive (QD).

Cultural expertise and litigation

A new book that examines the impact of the provision of expert evidence by social scientists in cases relating to minority groups and migration is now available. This book, *Cultural Expertise and Litigation: Patterns, Conflict, Narratives*, edited by Livia Holden of the Lahore University and published by Routledge, would be a useful resource for refugee legal aid practitioners.

Immigration detention in the United Kingdom

Using detention as a tool to deal with immigration in the UK has become increasingly common over the last decade; three recent publications highlight the serious problems with the practice. First, Global Detention Project's new report on the UK's detention profile examines key themes and issues that have arisen with regards to detention in the UK including the detention of children and asylum seekers. Second, a new post by Stephanie Silverman, 'Legal but unfair: the high stakes of the UK immigration detention system' outlines the current issues with the UK's detention of migrants and why it is problematic. Third, Detention Action has released a new report, 'Fast track to despair: the unnecessary detention of asylum seekers'. The report examines the detention conditions of male asylum seekers at Hamondsworth immigration removal centre and the lack of progress in immigration detention conditions in the UK since 2003.

UK legal aid cuts and provider closure imperil substantive justice for asylum seekers

On the heels of the closure of Refugee and Migrant Justice last year, the UK's next largest provider of asylum legal aid has been forced into administration after 35 years of operation, leaving asylum seekers extremely vulnerable. This news comes as the UKBA is being criticised for the use of bad country of origin information in asylum refusals — including *Glamour* magazine in one instance. Legal aid cuts severely affect access to justice for asylum seekers, and restrict the capacity of legal aid providers. *Womens Asylum News* has recently highlighted the effects of legal aid cuts on women and the *Guardian* newspaper reports that asylum claimants will lose access to their files and legal aid in a 'kafkaesque' UK asylum system and places blame on governmental cuts to legal aid. ●

LGBTI rights in Sudan *continued from p. 3*

When the preparations of these demonstrations were taking place, an article was published in Alwifaq newspaper (known to be pro-government) under the title 'And with the aid of western embassies, demonstration by prostitutes and homosexuals for the abolishing of the public order law' in which the writer mentioned that a demonstration was going to be organised by prostitutes and homosexuals benefiting from the case of the journalist Lubna with the aim to reach the UN headquarters in Khartoum and to hand in a petition requesting pressure on the government to remove the public order law.

The article was largely condemned and the government was accused of attempting to abort the demonstrations in support of Lubna and prevent supporters from gathering by sending a message via this article that whoever goes to this demonstration is either homosexual or a prostitute. In other words, using public homophobia as a weapon against opponents' demonstrations.

In the middle of all this political exchange, public opinion becomes more congested and homophobia exacerbates. So it wouldn't be a surprise to find a group on Facebook named (when translated into English) 'fighting homosexuals and those who call for sex in Sudan on Facebook' which incites the visitors to help in closing Sudanese homosexual groups by clicking 'report/block this person' on their page.

Even many individuals who are supposed to be objective considering their position display obvious prejudiced non-professional opinions which could be sometimes completely wrong. For example, in the forum of the Sudanese universities of public health graduates and public health officers (SUPHOF) some members put homosexuality side-by-side with increasing cases of AIDS in Sudan. Additional homophobic statements were made by some members of the National Program for the Prevention of AIDS, where some described homosexuality as a 'negative mutation' in sexual practices in Sudan, saying it also contributed to the high increase in AIDS in Khartoum state.

Although they mentioned concurrently that whereas the known HIV cases reached around 10,000 (the estimate is 88,000 cases), the number of homosexuals known to them was only 715 and the estimate prevalence of HIV virus among them was 7.8% — which means, according to their own figures, that there are only around 56 homosexuals infected with HIV. This contradicts their argument about homosexuality and AIDS spreading. The danger with these statements is that it came from a health program that is supposed to be objective and shouldn't discriminate against any group in order to promote early voluntary examination amongst the community.

Shadows from the Past

For me, fundamental Islamic teachings haven't been enough to explain all the hatred and discrimination practiced at both official and popular levels against homosexuals in Sudan, so I have searched for the missing part in the past and only then the picture started to become clearer to me.

Mr Shawgi Badri is a popular Sudanese writer and historian well known for his bold style in writing. Although he displays a frankly negative attitude toward homosexuality and considers it a problem, he still acknowledges both its presence and its historic existence in the Sudanese community — opposite to the public mainstream. This attitude has brought him many accusations of being 'non-loyal to the country' and 'a non-modest man who passed the seventh decade'. The reader can only imagine, if this is what a man who himself disapproves of homosexuality had to face, because he spoke freely about it, what do homosexuals have to face on a daily basis?

In a post on the website SudaneseOnline.com, Badri wrote a brief glance at the history of homosexuality since the Fonj Sultanate in Sinnar until the 80s passing through the era of 'Almahadia' in the late 18th century, the years of British colonisation and the period after independence. He referred to global historical figures who many people tend to believe were gay like Alexander the Great, Richard the Lionheart, the First Earl Kitchener and Leonardo da Vinci. He compared them to homosexuals in Sudan using the following statement which I think is the key statement in his article: 'For those people there were choices, however what is practiced in Sudan is a process of enforcement and humiliation'.

He gave the following examples:

- His schoolmaster used to force some of his classmates to have sex with him before he was caught.
- Many areas in the capital Khartoum were not safe for boys and young men to walk in after dark and even in the daytime some kids were harassed or even raped. Badri himself was subjected to harassment and many attempts but his strong physique and his aggressive behavior during adolescence protected him from these attempts.
- Some of this harassment took a 'class hatred' nature being carried out by some men of low socio-economic status against kids from families of high socio-economic status just to break their spirits and be 'well remembered by them when they grow up'.

Another very alarming statement made by him which is relevant to the status quo:

> Sudanese youth in high schools and universities who were harassed or forced under fear, stimulation or threatening to have sex they found a shelter in the Islamic Brotherhood Organization which embraced them and offered them protection. Some of those were filled with hatred against the society and the others because they did not perform these acts by their own will and that might explain their dark behaviors when they reach power.

Badri once heard the mother of one of his classmates complaining to their neighborhood grocery man, 'what shall we do if the Minister of the Interior parks his car beside our house, climbs it and cries out for our kid from behind the wall?'. It is obvious from what is mentioned above that homosexual acts in the minds of many Sudanese are linked to sexual harassment,

child abuse, class hatred and marital infidelity as Badri summarised it at the beginning as a 'process of enforcement and humiliation'.

I failed to find one known example of a man to man or a woman to woman relationship described as being based on mutual love and respect between the two partners. If this is the case, no wonder where all this anger came from. Who knows, perhaps the men who are today eagerly chasing LGBT individuals are the children of yesterday whose innocence was brutally taken from them by past monsters. It made me ask myself the following question: to what extent is the reality today different from the past? Well, I am still in the process of finding out the answer. ●

Fahamu Refugee Legal Aid Newsletter is published by Fahamu Trust and Fahamu Ltd., 2nd floor, 51 Cornmarket Street, Oxford OX1 3HA, UK. Tel +44 (0)1865 727006, fax +44 (0)1865 727909, email info[at]fahamu.org. Fahamu Ltd was established in the UK in 1997. Fahamu Ltd was registered and incorporated as a not-for-profit company limited by guarantee in 2001 (no. 4241054). Fahamu has offices in Oxford, UK; Nairobi, Kenya; Dakar, Senegal; and Cape Town, South Africa. Fahamu Ltd is registered in Kenya as F15/2006. Board of directors: Belinda Allan, Paddy Coulter OBE, Shereen Karmali, Hakima Abbas. Fahamu Trust was registered as a charity in the UK (no. 1100304) in July 2003, with the following objectives: 'the advancement of education of the public world wide by the publication of electronic newsletters, courses and disseminating of information on human rights'. Fahamu SA is registered as a trust in South Africa IT 37201. Board of trustees: Belinda Allan, Paddy Coulter OBE, Patricia O. Daley, Maina Kiai, Onyekachi Wambu, Rob Wells. Executive director: Hakima Abbas. Fahamu's website is www.fahamu.org.

Asylum in Poland *continued from p. 5*

Terespol, it follows that many foreigners who were notified of a breach of the *non-refoulement* principle, resigned from submitting an application for asylum after being informed that given their status (former illegal stay in Poland, foreigner's data found in the list of persons whose stay in Poland is undesirable or Schengen Information System etc.), they would have to await a decision on the granting of international protection in a detention center.

During the monitoring the HNLAC also found that at the Terespol border crossing, all foreigners of Russian and Georgian origin were subjected to the so-called preliminary interview, during which foreigners were questioned about their reasons for coming to Poland and leaving their country of origin. If during the interview it is established that the foreigner wishes to apply for refugee status, the application is subsequently submitted officially. The mere use of the word 'asylum' is not considered by the Border Guards at Terespol as proof enough of expressing intention of seeking international protection. According to the results of the monitoring, the decisive element is stating the reasons for fleeing the country and whether they are consistent with the refugee definition; on the other hand if a foreigner declares a fear of persecution or threat to his safety in his country of origin without using the words 'asylum' or 'refugee' the application for asylum is considered to be submitted.

The HNLAC also monitored border crossing with Ukraine in Medyka, where there were no preliminary interviews and all persons expressing the will of seeking asylum (including those who merely used the world 'asylum' or 'refugee') were accepted. Subsequently after submitting the application for asylum Border Guards established on the grounds of the content of the application whether there was a threat of abusing asylum procedures. If so, Border Guards applied to the court to place the foreigner in a detention center. The HNLAC, in its monitoring report submitted to UNHCR, indicated that extending practice implemented in Medyka to other border crossings would contribute to limiting situations where foreigners feel they are being deprived of the right to seek asylum.

With regard to the situation of foreigners who were sent back to Poland on the grounds of the Dublin II regulation, the Belgian Refugee Council indicated that there were no clear regulations as to when Dublin II returnees can be detained. According to the Polish Act on granting protection to aliens within the territory of the Republic of Poland, Border Guards can apply to the court to detain a foreigner on a general basis. The act on granting protection to aliens within the territory of the Republic of Poland stipulates that asylum seekers can be detained if it is necessary to establish their identity, to prevent from abuse of asylum procedures or if they are a threat to other people's safety, health, life or property, to protect state's security or public security and order.

It is also possible to detain a foreigner if they crossed the border illegally. The last premise concerns the majority of Dublin II returnees who often left the country after submitting applications for asylum in Poland. Given the optional character of the last detention premise, the number of Dublin II returnees detained differed substantially among particular Border Guards divisions. For example, in 2010: Nadwislanski Border Guards Division (BGD) – 15.2 % of returnees were detained; Sudecki BGD – 26%; Slaski BGD – 31.79 %; Karpacki BGD – 33.2 %; Nadodrzanski BDG – 64%; Morski BGD – 77%. The HNLAC examined the implementation of the Dublin II regulation in Poland in 2008, 2009 and 2010.

The HNLAC report (accessible here on the HNLAC website), indicated major problems with Dublin transfers to and from Poland. Among them it is essential to mention the problems with providing adequate rooms for families with little children, lack of legal regulations allowing for providing returnees with meals during transfer procedure, the need to provide more interpreters in order to streamline the procedure, and foreigners providing inconsistent information on their state of health.

Another significant problem arising during the implementation of the Dublin II regulation is transferring foreigners to

Poland without documents confirming their identity, or documents that are not certified by a notary. The problem concerns mostly children who were born on the territory of the transferring state and entails difficulties in establishing their identity and issuing travel documents by their country of origin consulates. Another problem is the lack of applicable EU regulations concerning a situation where due to the neglect of the obligation of the accepting country, the foreigner cannot be transferred. Under such circumstances the Dublin II regulation stipulates that the foreigner should be returned to the transferring state. However there is a problem of purchasing him/her a return ticket since the carrier is not obliged to take such a foreigner on board.

Another difficulty is connected with late hours of transfers. If the transfer takes place after 2 p.m. (later than set), the whole procedure finishes late in the evening. If adults are accompanied by children they often get tired and hungry. If foreigners are referred to the reception center in Debak, they may use special rooms where they can be accommodated 24/7 and receive food (food packages), even late at night. In case the Border Guard files the court to detain the foreigner and the court sitting cannot take place on the day of arrival families are separated: parents are placed in detention facilities, whereas children are referred to an orphanage or police child chamber.

The Belgian Refugee Council expressed concern over strict interpretation of the constitutive elements of the refugee definition which leads to protection gaps. From the HNLAC's experience it follows that indeed possession of a passport by an asylum seeker is considered by asylum authority as a proof of the absence of a well-founded fear of persecution (page 18 of the report), internal flight alternative (page 21), and demand for requesting protection from the country of origin even if it is illusory and highly unlikely (page 29) are common arguments justifying issuing negative decisions in granting international protection.

The BRC report also indicates that the weight given to the subjective element sometimes leads to a refusal of protection even if the objective situation is as such that the person might actually be persecuted in case of return to their country of origin. The authors of the report state that a refugee status may be denied if the foreigner 'is not frightened enough', e.g. does not show enough fear during their interview. The HNLAC does not confirm such practice based on the decisions received. The assessment of the subjective element is used rather to verify the credibility of the asylum seeker and the negative decisions in Chechen cases are usually based on the finding that the fear of persecution is not well-founded and that there is not enough evidence to support the presumption of future persecution.

As far as difficulties with access to legal assistance are concerned (indicated on page 10 of the report), the HNLAC agrees that the burden of providing legal assistance in individual cases lies solely on NGOs, and the frequency of visits in refugee centers depends on funds available. The HNLAC currently implements the project that involves visits to refugee centres situated far from big cities enabling asylum seekers from such areas to be provided with legal assistance.

Given the fact that the majority of problems with the refugee status determination process indicated in the Belgian Refugee Council report arises from misinterpretation of substantive or procedural law by asylum authorities, the HNLAC believes that the key to improvement of the quality of asylum system in Poland lies in increasing the number of asylum decisions subjected to judicial control.

Every final decision in the subject of international protection can be challenged in administrative court within 30 days from receiving it. Polish law, however lacks clear regulations on the subject of the legal situation of foreigners awaiting courts' rulings in asylum cases. Thus the HNLAC intends to undertake actions aimed at drawing public authorities' and decision makers' attention to the problem of this group of foreigners since it would improve the quality of both refugee status determination and decisions issued in individual cases. ●

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