

AUSTRALIA: TRADING HUMAN BEINGS ?

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Australia has signed and ratified all international agreements and conventions - and this is supposed to place Australia among the 'civilised' countries. Those treaties came into force upon ratification by a certain number of States. Art. 26 of the *Vienna Convention on the Law of Treaties* provides that: "Every treaty in force is binding upon the parties to it and must be performed by them in good faith."

In particular, Australia has adhered to the *Universal Declaration of Human Rights* (1948), the *International Covenant on Civil and Political Rights* (1966) - the I.C.C.P.R., the *International Covenant on Economic, Social and Cultural Rights* (1966), the *Optional Protocol to the International Covenant on Civil and Political Rights*, and the *Optional Protocol to the International Covenant on Economic, Social and Cultural Rights*. Read together, those treaties make up the so-called International Bill of Human Rights. Many countries, in addition, have domestic legislation providing for a *Bill of Rights* (United States, 1791, New Zealand 1990), or a *Charter of Rights and Freedoms* (Canada, 1982). The United Kingdom has a *Human Rights Act* (1998).

Even though Australia has signed all five international treaties which make up the International Bill of Rights, its Parliament did not see fit to enact similar legislation. Australia does not need one; on that there is agreement between the two major parties which translate to Australia the Westminster System of government. Naturally, there are some solitary dissenters on the point, but they are readily dismissed: 'the System' works well, there is law-and-order, there is the common law to guard an individual's rights, and there is an independent judicial system to administer that law. At the street level all that is expressed with popular and Solomonic wisdom: "If you have done nothing wrong, you have nothing to fear." And let us have another beer !

Australia is party to the 1951 *Convention Relating to the Status of Refugees* - the Refugee Convention, and has also signed the 1967 *Protocol Relating to the Status of Refugees*. The Convention makes the government 'responsible' for ensuring that Australia does not return people to

countries where their life or freedom would be threatened by their race, religion, nationality or membership of a social group, or political opinion. The Convention is designed not only to define who is a refugee, but also to explain what rights and obligations refugees should be entitled to in their country of asylum, and to set up a system which ensures that they have access to durable solutions - voluntary repatriation, resettlement or local integration.

The provisions of the Convention stipulate that no penalties can be imposed on refugees for their unauthorised - deliberately mis-named 'illegal' - entry or presence if they come directly from a territory where their life or freedom is under threat. This is so, provided that they present themselves without delay to the authorities and have a good reason for their 'illegal' entry. Moreover, the Convention states that refugees lawfully staying in Australia should be issued with travel documents for travel outside Australia, unless there are compelling reasons of national security or public order for not doing so.

In addition to the Refugee Convention, Australia has committed itself to a number of other international agreements which deal with situations of persecution. These include the *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* (1984) and the *Convention on the Rights of the Child* (1989).

Perhaps, at this point, a distinction should be drawn between the status of asylum seeker and that of refugee. An asylum seeker is a person who has fled her/his own country and applies to the government of another country for protection as a refugee. A refugee is a person who is outside her/his own country and is unable or unwilling to return due to a well-founded fear of being persecuted because of her/his race, religion, nationality, membership of a particular social group, or political opinion, and is unable to seek or is fearful of seeking protection in that country or is fearful of returning to her/his country. This basic definition of refugee has been augmented, refined or narrowed to varying degrees across jurisdictions. The term 'asylum seekers' refers to all people who apply for refugee protection, whether or not they are officially determined to be refugees.

Art. 14 (1) of the *Universal Declaration of Human Rights* states that: "Everyone has the right to seek and to enjoy in other countries asylum from persecution.", and Art. 3 (1) of the Convention against

Torture provides that “No State Party shall expel, return (Fr. *refouler* = to force back) or extradite a person to another State where there are substantial grounds for believing that[s/he] would be in danger of being subjected to torture.”

The I.C.C.P.R. is even more far-reaching, stressing that “Every human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of his life.” (Art. 6 (1)). In addition, “No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment. In particular, no one shall be subjected without his free consent to medical or scientific experimentation.” (Art.7 (1)), or held in slavery, or servitude or forced labour. (Art. 8).

Most significantly, in the context of asylum seeker claims, Art.9 provides that: “ 1. Everyone has the right to liberty and security of person. No one shall be subjected to arbitrary arrest or detention. No one shall be deprived of his liberty except on such grounds and in accordance with such procedure as are established by law.

2. Anyone who is arrested shall be informed, at the time of arrest, of the reasons for his arrest and shall be promptly informed of any charges against him.

3. Anyone arrested or detained on a criminal charge shall be brought promptly before a judge or other officer authorized by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release. It shall not be the general rule that persons awaiting trial shall be detained in custody, but release may be subject to guarantees to appear for trial, at any other stage of the judicial proceedings, and, should occasion arise, for execution of the judgement.

4. Anyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings before a court, in order that that court may decide without delay on the lawfulness of his detention and order his release if the detention is not lawful.

5. Anyone who has been the victim of unlawful arrest or detention shall have an enforceable right to compensation.”

Furthermore, under Article 10, “1. All persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person.

2. (a) Accused persons shall, save in exceptional circumstances, be segregated from convicted persons and shall be subject to separate treatment appropriate to their status as unconvicted persons;

(b) Accused juvenile persons shall be separated from adults and brought as speedily as possible for adjudication.

3. The penitentiary system shall comprise treatment of prisoners the essential aim of which shall be their reformation and social rehabilitation. Juvenile offenders shall be segregated from adults and be accorded treatment appropriate to their age and legal status.”

Many of Arts. 11 to 27 provide further guarantees of right and freedom from and against the State.

There is just a little problem: such comprehensive international legal framework for the protection of the human rights of refugees is not enforceable in Australian courts because it has not been ‘received’ into domestic law. In some countries, such as France, the Netherlands and Switzerland, ratification of international conventions results in their automatic incorporation into domestic law - not in Australia.

All that can be added to complete the picture is that, presently, the Refugee Convention is only referred to by definition of the term 'refugee' in the *Migration Act* 1958 and not by specifically implementing obligations of the Refugee Convention. Rather than legislating to protect the rights of asylum seekers and refugees, the Australian Government has provided the Minister for Immigration, along with his department, with extensive discretionary powers - for which there is limited accountability. And so much for ‘the rule of law’, as a fundamental pre-requisite for the protection of human rights for all. It begins with being undermined by lack of accountability on the part of government decision-makers in relation to refugees - surely, the most traumatised, needy and weak.

In this situation of international default, in a country which is still trying to extricate itself from of the century old experience of the ‘White’ Australia policy, and amidst an electorate which goes from indifference to flaunted and proud ignorance of civics, it is understandable that the two major parties

- by convenience referred to a 'Labor' and 'Liberal', the latter in perpetual anti-Labour Coalition with the 'agrarian socialists' of the Country Party - have developed, particularly in the last twenty years, a 'competition to stop the boats'. This is code for keeping out of Australia the victims of its complicity with the United States in the aggression on Afghanistan first, and then Iraq. To these war victims should be added the attempting-refugees from Sri Lanka civil war. These refugees have something in common: they are all non-white, they are mostly non-Christian, and they are too many to lend themselves to the kind of tokenism which was extended to the Sudanese refugees - most of whom anyway are Christians.

Several months before the Refugee Convention's passage the United Nations General Assembly established the United National High Commissioner for Refugees - U.N.H.C.R. The Commissioner's primary purpose is to safeguard the rights and well-being of refugees and ensure that everyone can exercise the right to seek asylum and find safe refuge in another State.

As a result of sloganeering, more than of a calm, objective and reasonable debate on the rights and duties of Australia and of those seeking asylum, several negative characterisations have been adopted, propagated and have entered into the everyday Australian language.

Appealing to selfishness and greed, many asylum seekers are frequently accused of being no more than 'economic migrants'.

There is no question that Australia is a wealthy country, but it is seriously doubtful that such wealth belongs to Australians. The last time a Prime Minister, Mr. Rudd, stood on that pedestal to impose a Resource Super Profits Tax on the mining companies - mainly the three behemoths: BHP Billiton, Rio Tinto Zinc and Xstrata, Mr. Rudd was forced by the Caucus of his own party - under pressure from C.I.A. 'protected sources' and other so-called unionists, some of them powerfully connected with the Crown - to resign his position. He was to make way to the present Prime Minister who promptly withdrew the tax proposal and would later on distinguish herself for fawning on the Joint Session of the U.S. Congress and for other acts more appropriate to the occupant of a vassal state's chieftaincy. Prime Minister Gillard was 'Labor' opposition immigration spokesperson from 2001 to 2003 - and more about that later on.

An honest and efficient administration would be able rapidly to ascertain whether a claimant is a genuine asylum seeker and not an 'economic migrant'. That administration would not indulge to and become complicit of the rednecks who care about no-one - Convention or no Convention. No such distinction is proffered by those who brand as 'illegal migrants' all asylum claimants who do not come by plane. The description of a person who arrives in Australia without a visa or travel documents and claims asylum as 'illegal' is incorrect, heartless and unworthy of civilised people. A person seeking asylum is not 'illegal' in Australia until the authorities decide that s/he does not have a right to stay in Australia.

In Australia there is a profound negative stigma attached to someone who jumps a queue. And what more conclusive way of damning an asylum seeker who arrives in Australia without a visa or travel documents - mostly by boat, but rarely by plane - as a 'queue jumper', by definition undesirable because contravening one of the few Australian 'values' ?! The apparent rationale of the 'queue' comes from the fact that the Government has said that for every person who arrives in Australia over the total number of people allowed through the onshore programme (The onshore component is made up of people who apply for refugee protection after they arrive in Australia.), one will be subtracted from the offshore programme (The offshore component is made up of people who have been given permission and assistance to come to Australia by the Australian Government, prior to their arrival.). Ignorant people do not go for such fine distinction: never doubt the evidence, look at the colour !

Calling people who apply for protection whilst in Australia 'queue jumpers' creates the impression that there are rules for seeking asylum that the people in U.N.H.C.R camps are following and those arriving onshore are not. There are no such rules and asylum seekers may not always come from countries where there are U.N.H.C.R. camps set up to process and find countries to resettle them.

Refugees are often forced to leave their countries in such a hurry that they do not have time to organise the appropriate travel documents. Often, refugees are too scared to ask for these documents because it is the government or its agents which are persecuting them - and they need to leave secretly. In other cases, where there has been a breakdown of the State, the relevant office or agency may have ceased to exist or be impossible to access. Indeed, the U.N.H.C.R. has stated that States should expect that refugees will not have valid travel documentation and must not punish them simply for that fact.

Conscious of such ‘public opinion’ - often manufactured by Murdochian press, porno-vision or radio shock-jocks - all governments of the past twenty or so years have adopted a ‘policy’ of mandatory detention. Under Australian law, all people who are not Australian citizens and who do not have a valid visa must be detained. The majority of people in detention centres in Australia are asylum seekers who have arrived by boat. This means that people may be detained even though they may be refugees under the Refugee Convention and refugees according to the Australian definition and fall within Australia’s yearly quota. The Convention and the U.N.H.C.R. say that asylum seekers should not be detained unless it is absolutely necessary. Even then, asylum seekers should only be detained for as long as is necessary to process their claims. Some people have been detained in Australia’s immigration detention centres for as long as five years.

Successive governments have also chiselled with the wording of the *Migration Act*. The new meaning of ‘persecution’, for instance, has been redefined in a way which would appeal to a Jesuit General. Since 2001 the re-definition gives the word a restrictive meaning, inconsistent with the intention of the drafters of the Refugee Convention. It greatly expands the risk of genuine refugees being returned to the country where they have a well founded fear of persecution.

Art. 31 of the Refugee Convention prohibits penalising asylum seekers based on the manner of their arrival into the country from which they are seeking protection. Yet on 20 October 1999 the new notion of ‘temporary protection’ was introduced - by regulation. Prior to that date all refugees in Australia had immediate access to a protection visa which provided permanent residence and immediate access to the comprehensive settlement support arrangements available to refugees resettled from overseas. Under the 1999 regulations, unauthorised arrivals found to be refugees only have access to a three year temporary visa, which prevents them from working, enjoying settlement services, pensions and allowances and other forms of assistance and medical care, from bringing their families to Australia, and from returning if they leave - with other discriminating restrictions.

Appeal to the judicial system against a decision of the Minister in charge, which remains theoretically possible, is costly, lengthy and debilitating for an already frail asylum seeker, and very often catastrophically unsuccessful.

One of the legal obligations under the Refugee Convention is the prohibition against discrimination against asylum seekers as a class of people, *and* between different categories of asylum seekers.

Australia's refugee programme is comprised of an offshore component and an onshore component. Until recently, there was no real distinction between classes of visas, and the conditions attached to visas, granted to a refugee under either component. Both entitled the visa holder to permanent residence in Australia and access to the same entitlements and services as other Australian permanent residents. It is still the case that refugees who enter Australia through the traditional offshore programme are entitled to a visa which gives them permanent residence. However, a number of recent legislative changes have radically altered the position for onshore asylum seekers and others who, but for recent legislative changes, would have been entitled to apply for a protection visa through the onshore programme.

The key changes include what has euphemistically been called the 'Pacific solution' - of which more later - and the setting up of a number of visa sub-classes which entitle particular 'classes' of refugee to temporary residence only and limited access to the entitlements and services available to permanent residents and citizens. These restrictions apply to these 'classes' of refugee even although the person: is a 'genuine refugees' under the Refugee Convention and fits the revised definition of refugee in the *Migration Act*; □has an identical claim to protection as other asylum seekers who arrive by other means; and □had little or no control over the circumstances of her/his arrival to Australia.

Another significant change introduced in September 2001 prevents individuals from applying for protection where they have previously been included in a family application. However, asylum seekers and refugees also have rights under other international agreements which are shared by the general population in countries party to these agreements. Simply complying with the rights outlined in the Refugee Convention does not satisfy a country's duty to protect the general rights of asylum seekers and refugees under these other agreements. These agreements, all of which Australia is a party to, include the I.C.C.P.R., the *Convention against Torture*, and the *Convention on the Rights of the Child* (1989).

Some of the key rights contained in these instruments include the right to liberty and security of the person, freedom from arbitrary arrest or detention, freedom from torture, cruel, inhumane or degrading treatment, □the right to the equal protection of the law;□ the right not to be expelled, returned or extradited to a State where there are substantial grounds for believing that a person would be in danger of being subjected to torture, and most importantly the right of children to have their best

interests taken as a primary consideration in all actions concerning them, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies; the right of a child or her/his parents to have applications to enter or leave a country for the purpose of family reunification dealt with by the state in a positive, humane and expeditious manner; and □the right of a child to express her/his own views freely in all matters affecting her/himself, including the opportunity to be heard in any judicial and administrative proceedings affecting the child, either directly, or through a representative or an appropriate body, in a manner consistent with the procedural rules of national law.

The number of unaccompanied children granted protection visas in Australia has almost doubled in the past two years, from 101 in 2009 to 196 in 2010 - and already this year, a further 19 unaccompanied minors have won the right to remain in Australia. At last count, 1,051 children seeking asylum were in detention - higher than the peak figure reached under the Howard Government and the Rudd Government. Of them, 468 arrived alone. An Australian record of 1,065 children in detention was reached in mid January 2011.

Under the 1996-2007 Howard Government's 'Pacific solution', 1,637 people - including 452 children - were sent off to Nauru and Manus Island, where the average length of stay was 501 days or approximately one and a third years. The longest length of stay was 1,958 days - more than five years. Of the 1,637 people detained in the Nauru and Manus facilities, 1,153 or 70 per cent were ultimately resettled in Australia or other countries. Of those, 705 were resettled in Australia.

The 'Pacific solution' was really the crown jewel of the anti-refugee policy of the Howard Government.

To understand precisely what the 'Pacific solution' involved, it is important to understand the geographical meaning of 'Australia' and the terms 'territorial sea' and 'migration zone.' 'Australia' means the Commonwealth of Australia - which includes the states and internal territories and the external territories of Christmas Island, Cocos (Keeling) Islands, Ashmore and Coral Sea Islands. It also includes the territorial sea of Australia within 12 nautical miles of the coastline. The 'migration zone' is made up of the land area of all the states and territories of Australia and the waters of proclaimed ports within those states and territories. The land area starts at the mean low water mark. The 'migration zone' does not include the territorial sea which is off the coast of the Australian states

and territories. The purpose of the 'migration zone' is to define the area of Australia where a non-citizen must hold a visa in order legally to enter and remain in Australia. Anyone who enters the 'migration zone', including Australian citizens, must present her/himself for immigration clearance.

On 26 August 2001 the Norwegian container-ship *MV Tampa* was directed by the Australian coastguard to rescue 433 people from a sinking fishing boat in international waters off near Christmas Island. The rescuees were asylum seekers. The Australian authorities denied the *MV Tampa* authority to land the rescuees on Christmas Island, but its crew was concerned about the medical condition of some of the rescuees and, as a result, the vessel entered Australian territorial waters on 29 August 2001 and anchored 4 nautical miles from Christmas Island.

On 1 September 2001 the Australian Government announced the 'Pacific solution' in response to the *Tampa* incident. It was introduced in October 2001. The 'Pacific solution' involved a series of governmental agreements with Nauru and New Zealand for those countries to accept the asylum seekers and to determine whether any of them were entitled to protection under the Refugee Convention; the excision of certain territories from the 'migration zone' - meaning that, for the purposes of the *Migration Act*, excised territories are no longer deemed by law to be part of the 'migration zone' where one could seek asylum in Australia. These areas which are for the purpose no longer parts of Australia are: Christmas Island, Cocos (Keeling) Islands, Ashmore and Coral Sea Islands, Australian sea installations and Australian resources installations; □the detention and removal of unauthorised arrivals in the excision zone and powers to remove a person to another country where her/his claims, if any, for refugee status may be handled □a prohibition on people who arrive in an area excised from the 'migration zone' applying for any class of visa - unless the Minister exercises her/his discretionary power; and □where asylum seekers who arrive in the area are permitted to apply for a visa following the exercise of the Minister's discretionary powers, they will only ever qualify for a temporary protection visa (3 years). These people must reapply for a temporary visa every 3 years and may be deported on each occasion. If they leave Australia, they have no automatic right of return. It will be seen that these legislative amendments have the effect, among others, of differentiating between asylum seekers who 'arrive' by boat and land on one of the excised territories and those who arrive by plane.

The Howard Government's 'Pacific solution' was condemned internationally and did nothing to foster regional co-operation on people smuggling or promote international co-operation on providing protection to refugees. The U.N.H.C.R. expressed concerns that the 'Pacific solution' detracted from

Australia's international responsibilities. In sum, the Howard Government's was no 'solution' - let alone pacific. It was just: "Away from the eyes, away from the heart." 'Labor' was a rabid opponent of the 'Pacific Solution' from its inception in 2001. In May 2003, Ms. Julia Gillard, Shadow Minister for Immigration, said that it was "costly, unsustainable and wrong as a matter of principle." In 2007, weeks before the election of the Rudd Government, she said: "We have committed to ending the so-called Pacific Solution. We would not have off-shore processing in Manus Island and Nauru."

The Rudd Government pledged to dismantle the 'Pacific solution'. And so it did, and it seemed that there was no intention to return to that shameful period.

And when Mr. Kevin Rudd led federal Labor into office after its election victory of 2007, his Government was determined to set things right. On 29 July 2008 the then Minister for Immigration announced the Rudd Government's *New directions in detention*. He proclaimed a "more humane" policy which included the cancellation of 'temporary protection visas' and the abolition of the 'Pacific solution'.

The Opposition has been charging ever since that the Rudd Government 'softened' the Coalition's 'deterrent' policies against un-authorized immigration, and that, as a result, there was an immediate and sustained surge in the number of un-authorized refugees arriving by sea. This will never be proved. But some figures are said to speak for themselves. During 2007-08, the last year that the Howard Government's policies were in place, a total of 25 un-authorized immigrants arrived by sea in 3 boats. But during 2008-09, the number of un-authorized arrivals increased to 1,033 people in 23 boats, and during 2009-10 it went up to 5,614 people in 117 boats. Thus far, during the financial year 2010-11, 4,595 people arrived in 82 boats.

In this hostile debate, nobody talks about the possible consequences of Australia's complicity in the aggression on Afghanistan, and Iraq, the expansion of the 'war on terror' to Pakistan, and the situation of despair which followed the civil war in Sri Lanka.

So the Gillard Government has turned to Malaysia. Amnesty International has reported that up to 6,000 refugees each year in Malaysia are subjected to the brutal corporal punishment of [caning](#), and the United States *State Department Human Rights Report 2010* has noted that “refugees were particularly vulnerable to trafficking” in Malaysia. Corrupt local officials often forcibly confine victims within warehouses or brothels, coercing them into unpaid labour or prostitution. The Australian Government was not impressed.

A month before the federal election of 21 August 2010, and now as Prime Minister, Ms. Gillard told the Australian Broadcasting Corporation: “In recent days I have discussed with President Ramos Horta of East Timor the possibility of establishing a regional processing centre for the purpose of receiving and processing irregular entrants to the region.” Ms. Gillard seemed not to realise that contact should have been made with Prime Minister Xanana Gusmao, and not with the President. Ms. Gillard should have understood the difference between the head of state and the head of government, but approached the latter. Prime Minister Gusmao seemed to know nothing of such a proposal. Nevertheless Ms. Gillard continued to refer to ‘a plan’ to re-route asylum seekers to ‘East Timor’. Actually, the country is Timor-Leste - East Timor is the *colonial* name. So what was it: Lack of manners ? Imperial haughtiness ? Plain ignorance ?

To critics of the non-existent ‘plan’ she intimated that “Processing was then [with the Pacific solution] undertaken on Manus Island and Nauru. That's not my approach. That's not what I'm seeking to achieve.”

On 5 May 2011 the same A.B.C. announced that it had been “confirmed to [the programme] *Lateline* that Canberra is on the verge of reaching an agreement with Papua New Guinea to re-open the Manus Island detention centre. Australian and PNG government officials toured the island this afternoon and *Lateline* understands locals were told the centre will soon be reopened.”

Suddenly, on 6 May 2011, it appeared that the Gillard Government was poised to revive the ‘Pacific solution’, with the Papua New Guinea Government expected to agree to host a refugee processing centre. *The Australian* - one of Murdoch’s newspapers - had been told that the P.N.G. cabinet would meet that day to consider the formal Australian Government request, which had yet to go to

the Gillard Cabinet, to set up a centre, either by reopening the Lombrum naval base on Manus Island - which was used in that role from 2001 to 2004 - or by establishing a new centre. The decision to approach P.N.G. might have become a major about-face for 'Labor', which was scathing of the 'Pacific solution' when in opposition. On the other hand, it might have been another half-backed 'proposal', born out of an idea advanced by the Australian Foreign Minister at a meeting in Singapore with P.N.G.'s Prime Minister Michael Somare.

Prime Minister Gillard was tight-lipped about the matter while questioned in Adelaide, confining herself to saying "When I've got something to announce arising from [discussions in our region] then I'll announce it." On its part the U.N.H.C.R. confirmed that there had been discussion with Papua New Guinea. Was the Timor-Leste 'plan' dead ?

On 7 May 2011, her Minister for Immigration at the side, the Prime Minister announced that she had reached an agreement with the Malaysian Government to send the next 800 'un-authorized' asylum seekers to arrive by boat to Malaysia. They would not be sent to Christmas Island, or to any other processing centres. She said: "I want to be very clear about this: under the arrangement if someone seeks to come to Australia they are at risk of going to Malaysia and going to the back of the queue." In return Australia would accept up to 4,000 'genuine refugees' from Malaysia.

The Malaysian Prime Minister, Hon. Dato' Sri Najib Tun Razak and Prime Minister Gillard agreed to enter into a new bilateral arrangement as part of the Regional Cooperation Framework agreed to at the recent Bali Process Ministerial Conference in Bali. The asylum seekers sent to Malaysia would have their claims assessed by the United National High Commission for Refugees but would not be processed under Australian law. Meanwhile, Papua New Guinea had confirmed Australia had asked it to host a regional asylum seeker processing centre.

Only the Australian Greens maintained their opposition to the plan to send asylum seekers to a regional processing centre in Papua New Guinea on Manus Island. Greens Senator Sarah Hanson-Young said that the government's attempts to return to the 'Pacific solution' of the Howard Government was disappointing. "Julia Gillard said herself that [the Pacific solution] was a policy that was damaging, that it was costly to taxpayers and that it was unnecessary. I urge her to rethink and remember her own condemnation of this policy." she said.

The Asylum Seeker Resource Centre from Melbourne reacted immediately, pointing out myths and faults of Labor's plan to swap refugees with Malaysia.

Prime Minister Gillard's advice to future asylum seekers is, "Don't get on that boat... what it will mean is you have given your money to people smugglers, you have risked your life at sea and you will be at a real risk of ending up in Malaysia instead." Ms. Gillard failed to outline the consequences for asylum seekers who take her advice. This would be either to stay and face persecution, or to remain in a country of first asylum where two-thirds of the world's refugees remain in exile without basic rights for an average of 20 years - not quite a fair choice.

Secondly, the premises of the forthcoming agreement are wrong. Asylum seekers who enter Australia undocumented are not illegal under the Refugee Convention or Australian law. Those who are recognised to be refugees - and this includes the vast majority of boat arrivals - have an equal right to be protected as those waiting in overseas camps. No human being is more or less deserving of freedom from persecution. Furthermore, asylum seekers are not required to remain in countries such as Indonesia or Malaysia which are not signatories to the Refugee Convention and are either unable or unwilling to provide asylum seekers with the basic necessities of life.

Thirdly, the 'new policy' will only apply to un-authorized arrivals by sea and not to un-authorized arrivals by air. Should the Gillard Government be truly concerned about mythical 'queue jumpers', it would not choose to discriminate against only un-authorized boat arrivals. In fact, neither the 'Labor' Government nor the Opposition is interested in any misplaced notions of fairness - only the potential political gain from exploiting popular anxiety about being invaded by 'boat people'. Furthermore, there is no just and orderly 'queue' that boat arrivals have 'jumped'. Less than one per cent of all refugees in the world are able to access a queue for resettlement. Even if all refugees were placed in such a queue it would be a wholly unmanageable. There are 10 million refugees in the world. If every one of them joined a queue, it would take 135 years to clear it. The 'queue' is a fantasy of those who wish to shift Australia's responsibility to the world's most vulnerable people offshore.

Fourthly, the Minister for Immigration has announced that it would cost AU\$ 76 million to fly the 800 asylum seekers from Australia to Malaysia. The cost of processing asylum seekers while living in the community is roughly equivalent to the income rate paid through the Asylum Seeker Assistance Scheme. Over the entire 2009-10 financial year, the Government spent AU\$ 9 million on this scheme to provide services to 2,802 asylum seekers already living in the community. At that rate, AU\$ 76 million would provide for 23,661 asylum seekers living in the community for one year. While this does not include any additional health, counselling and case management costs, the total figure is undoubtedly significantly lower than flying asylum seekers to Malaysia. Of course, the human costs of deporting asylum seekers to inhumane conditions is incalculable.

Fifthly, the joint statement released by Prime Minister Gillard and the Prime Minister of Malaysia declares that “transferees will not receive any preferential treatment over asylum seekers already in Malaysia.” This is an alarming announcement given what is known about the current treatment of asylum seekers there. A recent investigation by Amnesty International reported that refugees and asylum seekers in Malaysia are abused, exploited, arrested and locked up - in effect, treated like criminals. Malaysia has not signed the Refugee Convention and so does not officially recognise refugee status. Asylum seekers face the daily prospect of being arrested, detained in squalid conditions, and tortured and otherwise ill-treated, including by caning. Almost 30,000 foreigners, including asylum seekers and refugees, have been caned in Malaysia in the last five years. Amnesty International concluded that the practice amounted to torture. This is what it involves: specially-trained caning officers tear into victims’ bodies with a metre-long cane swung with both hands at high speed. The cane rips into the victim’s naked skin, pulps the fatty tissue below, and leaves scars which extend to muscle fibre. The pain is so severe that victims often lose consciousness.

Sixthly, the exact size of Malaysia’s asylum seeker and refugee population is not known. However, estimates vary from 90,000 to over 170,000 asylum seekers and refugees. By the end of February 2010, U.N.H.C.R. said it had registered some 82,400 asylum-seekers and refugees, 18,500 of whom were children. But the organisation has acknowledged that a large number of people of concern to it remain unregistered. Limited funding and a difficult operating environment mean that the needs of the refugee population currently outweigh the capacity of U.N.H.C.R. to respond adequately. Asylum seekers must wait to undergo the refugee status determination process before being recognised as refugees. Given that there are only limited numbers of places, not all will be submitted by U.N.H.C.R. for resettlement. Only 5,865 refugees were resettled in 2008 and 7,509 in 2009. Clearly, the prospects of resettlement for up to 170,000 asylum seekers and refugees in Malaysia are dim.

Seventhly, while living in the community is preferable to detention, asylum-seekers and refugees in Malaysia are vulnerable to abuse and violence in their homes, in public and at their places of work. During immigration raids, police employ violent tactics to extort money from them, or to intimidate and harass them. Women refugees and asylum seekers are often the targets of violence, including sexual or gender-based violence. They have little protection against such violence, with minimal access to lawyers, medical treatment, safe houses and other necessary support.

Eighthly, the Malaysian High Commissioner in Canberra has said that the transferred asylum seekers would not be placed in detention, but instead would ‘mingle’ in the community while their claims were processed. Yet Amnesty International has reported that asylum seekers and refugees, *including those with U.N.H.C.R. documents*, are susceptible to detention in ‘filthy and overcrowded’ conditions. Many are held for months without access to lawyers and with no way of appealing against their detention. Some are detained indefinitely. Once in the centres, detainees lack proper health care, sufficient food and clean drinking water. Children under 18 are held with adults, and abuse by detention staff is rife. Poor detention conditions have led to serious illness and, in some instances, death. Neither the Malaysian nor the Australian Government is in any position to guarantee that asylum seekers will not be detained in these squalid conditions.

Ninthly, even if refugees are registered, their status is not respected by the authorities. Crackdowns by the government have seen refugees arrested and sent to detention, even those holding U.N.H.C.R. cards. Those who are arrested are subject to humiliation, physical abuse, theft and extortion. Refugees reported to Amnesty International that, when they showed state officials or police personnel their U.N.H.C.R. card, they were told it meant nothing. Some reported that the authorities threw away their U.N.H.C.R. documents before arresting them. Others who were still awaiting an actual card, showed their U.N.H.C.R. appointment letter instead, but were told it would not protect them from arrest or detention. Still others said that they could avoid arrest or detention by paying a bribe. Like asylum seekers, U.N.H.C.R. registered refugees have no right to work.

Finally, and most importantly, the legal grounds of the ‘Labor’ Government’s ‘new policy’ is questionable. Australia has strict obligations under the Refugee Convention and various other international human rights treaties. The Minister for Immigration is apparently aware of the heavy moral burden and the questionable legitimacy this ‘new policy’ carries: “I expect protests, I expect legal challenges, I expect resistance.” he declared shortly after the ‘policy’ was announced.

Australia's detention regime is at a breaking point. Overcrowding, riots and self-harm rates have skyrocketed. Instead of recognising the source of the problem - mandatory detention - the 'Labor' Government has chosen to punish the victims by 'getting tough on asylum seekers.'

It is worth noting that while the Minister for Immigration is an undergraduate in economics from the University of Sydney, the Prime Minister holds a bachelor of arts and a bachelor of laws from the University of Melbourne.

Realistically, the intended agreement could give the Gillard Government a political edge domestically as it directly addresses the Australian public's wariness of the boats and people smugglers. Legislation may be passed to curb people smuggling by imposing high fines and harsh punishments. Malaysia had done so in 2007 with its *Anti-Trafficking in Persons Act 2007*. But such laws do not work, or at least have not had the desired impact. In fact, more policing only makes life harsher for the thousands of asylum seekers in Indonesia and Malaysia.

The U.N.H.C.R. is faced with added difficulties which do not legally recognise refugees. Its efforts are curtailed by capacity issues and fewer than half of the asylum seekers in Malaysia are thought to have entered the processing system of the U.N.H.C.R.

In terms of the proposed agreement, Prime Minister Gillard and her Minister for Immigration were adamant that their scheme would make the 'product' sold by people-smugglers - 'freedom', a bad deal, as intercepted asylum seekers on boats would be flown right back to Malaysia and enter the 'end of the queue', quite an unenviable position for Malaysia.

In fact, many of those not processed are too poor to access the only U.N.H.C.R. office in Kuala Lumpur; others do not have the relevant information available to them. U.N.H.C.R. sometimes carries out field visits to process people in outlying areas, but again, many lack access. Access costs money and Australia may have to respond to this inequality when it seeks a fair treatment for its intercepted asylum seekers.

Already the rationale of swapping 800 unprocessed asylum seekers for 4,000 registered refugees has been criticised by many, and there is the risk that this new agreement - if it ever materialises - may join the growing list of failed regional solutions.

The conditions for asylum seekers in Malaysia have been a human rights concern for many years, and not much has happened to create positive change. The Minister for Immigration has given a firm commitment that the Australian Government will have oversight with the Malaysian Government, U.N.H.C.R. and the International Organisation for Migration, and the Prime Minister of Malaysia has given a firm commitment that asylum seekers sent by Australia will be treated with dignity and respect. But these commitments mean little without evidence in what is a very concerning protection environment for asylum seekers in Malaysia.

The Refugee Council of Australia expressed its concern with the Gillard Government's deal with Malaysia. The Council was also worried the Australian Government is failing to acknowledge Malaysia's historically poor treatment of asylum seekers. The Council strongly stated that no deals should be made with countries refusing to abide by the Refugee Convention. "Malaysia is not a signatory to the Refugee Convention - the Council remarked - but Australia is and it is shirking its own responsibilities in a deal like this."

As for Papua New Guinea the Council agreed that it is a signatory of the Convention, but some say a Papua New Guinea transfer deal is barely an alternative, and that, despite being a signatory of the Convention, the key question remains in fact in what conditions are refugees kept. It is known that Manus Island, when it was operating, was appalling from a human rights perspective.

But the paramount consideration was that, regardless of the nation, offshore processing is against United Nations policy and may gain criticism from the international community. The Refugee Council summed up its position: "Australia must process those people. [It] must do it quickly and humanely, and we must do it in our own country and not ship people off to another country to deal with it."

Respect for Australia's international obligations was paramount in the view of Amnesty International. The Australian director felt so strongly about it that it decided to send an open letter to Prime Minister Gillard.

In July 2009 and March 2010 Amnesty International had conducted two fact-finding missions to Malaysia to examine first-hand the detention conditions endured there by un-authorised migrants, including asylum seekers and refugees. The subsequent reports, [*A Blow to Humanity: Torture by Judicial Caning in Malaysia*](#) and [*Abused and Abandoned: Refugees denied rights in Malaysia*](#), highlighted serious human rights abuses against asylum seekers and refugees in Malaysia. Asylum seekers transferred to Malaysia would face lengthy status determination times, inhumane detention conditions and torture.

The U.N.H.C.R. estimates that there are approximately 90,000 refugees and asylum seekers in Malaysia. Malaysian law does not distinguish refugees and asylum seekers from undocumented migrants. It is unlikely the transferees will have access to adequate health care, schooling or employment opportunities. They may be forced to join the 1 million undocumented migrant workers working in dangerous and dirty jobs, subject to exploitation, and risking arrest by police and immigration officials or by state-sanctioned vigilante groups.

Persons who were found in breach of Malaysia's immigration laws may be detained in overcrowded centres in appalling conditions. Former detainees interviewed by Amnesty International reported malnutrition, disease, violence and suicide attempts inside the detention centres. Those who were unable to pay various fines were detained for months on end. Amnesty International was concerned that transferees to Malaysia could be subjected to inhumane conditions in detention.

The assurances by the Malaysian Government that asylum seekers are treated humanely and with dignity cannot be substantiated and contradict the dire circumstances in which asylum seekers and refugees are detained and treated in reality.

Asylum seekers transferred to Malaysia from Australia may also face torture, in the form of caning. In 2002, the Malaysian Parliament made immigration violations punishable by “whipping of not more than six strokes.” Under international human rights law, corporal punishment in all its forms constitutes torture or other cruel, inhuman or degrading punishment, which is prohibited in all circumstances.

The intended agreement puts Australia at serious risk of breaching the fundamental principle of *non-refoulement* which dictates that people cannot be sent to back to countries where they are at risk of persecution or torture. Malaysia is not a signatory to the Refugee Convention, nor has it ratified the *Convention against Torture* and the I.C.C.P.R.

Amnesty International was absolutely dismayed at the reference to sending people to “the back of the queue”. For 99 per cent of people who need protection, seeking asylum in another country is their only choice. Resettlement through the U.N.H.C.R. in no way resembles a queue and, in any case, is only available for a very small group. The resettlement programme exists to support the asylum system, not to replace or distort it. It is completely nonsensical to take asylum seekers who have entered Malaysia's territory to claim asylum, but not those who are trying to enter Australia's territory - when Australia is the country which has signed the Refugee Convention.

Amnesty International welcomed the move to resettle 4,000 extra refugees from Malaysia, but believes this should not come at the expense of the right to seek asylum in Australia.

Finally, the Australian Government was reminded that the number of refugees coming to Australia is low by international standards. The U.N.H.C.R.'s latest report, [*Asylum Levels and Trends in Industrialised Countries 2010*](#), indicates that Australia receives only 2 per cent of the industrialised world's asylum claims.

It is not known whether the Prime Minister ever replied. It seems it did not.

Aliran, which is a reform movement dedicated to justice, freedom and solidarity, and upholding human rights in Malaysia, vigorously protested against the proposed deal.

It said, quite explicitly: “ ... the Australian Government reveals its double standards in its selection of non-party states to the Refugee Convention, [and] appears to treat asylum seekers as commodities it can use to make trade-offs. It is seen to be out-sourcing the refugee assessment process to countries in the region willing to co-operate in this scheme - with no consideration for the protection of asylum seekers and their human rights.

In making such agreements, not only with small surrounding island states like Nauru and Papua New Guinea, ... the Australian Government appears to be seeking larger areas to establish ‘prison colonies’ for potential asylum seekers and undocumented immigrants entering Australian waters.

The AU\$ 300 million deal with Malaysia will not “put people smugglers out of business” or “prevent asylum seekers making the dangerous journey to Australia by boat” as the Australian Minister for Immigration anticipates. It will also not dissuade asylum seekers from getting “on that boat”.

Instead, it will increase over-crowding in Malaysian immigration detention centres, crackdowns by *Rela* immigration enforcers, and other security enforcers and intensify human rights violations by state actors and private citizens. [*Rela* Corps - or *Ikatan Relawan Rakyat Malaysia* - Volunteers of Malaysian People - is a paramilitary civil volunteer corps formed by the Malaysian Government. Its main duty is to check the travelling documents and immigration permits of foreigners in Malaysian cities, including tourists, visitors and migrants to reduce the increasing rate of illegal immigrants in Malaysia. *Rela* has the authority to deal with situations like policemen, such as raiding suspected streets or places such as factories, restaurants and even hotels.] The situation will be further aggravated by increasing incidences of corruption and extortion to which un-documented asylum seekers and even U.N.H.C.R.-confirmed refugees are vulnerable. The criminalisation of being an ‘irregular’ or ‘un-documented’ foreigner in Malaysia contributes to an environment of suspicion and prejudice towards foreigners in the country.”

Aliran was fully aware that the Australian Government was frequently complaining of its immigration detention centre riots. On the other hand, it appeared to be unaware that riots also occur in immigration detention centres in Malaysia very likely due to the inhuman conditions of these places and the rampant human rights abuse which goes on within their walls. Riots in such centres have erupted since 2008, notably in the Lenggeng centre in Negeri Sembilan.

Generously, *Aliran* noted that the Australian Prime Minister “appears to admit that she is aware of the terrible and squalid conditions of these centres in Malaysia as well as the difficult living conditions in which asylum seekers and refugees are forced to live like ‘fugitives’, simply because they are not legally recognised in this country.” And she had indeed referred to the possibility of being sent to Malaysia as a ‘risk’. “The Australian Government, however, is intent on pushing this hard-line scheme through without any qualms. The deplorable result of this is that neighbouring countries like Thailand and Indonesia faced with influxes of asylum seekers (particularly from Myanmar) also want to strike similar deals with Australia. These countries maintain similar human rights records to Malaysia in their treatment of asylum seekers and refugees.

Efforts by Malaysia, in cooperation with Australia, to combat human trafficking are commendable, but measures to stem the flow of asylum seekers appear to avoid the root of the human trafficking problem. The potential victims of this illicit trade are being punished by Australia as well as Malaysia, instead of the kingpins of the trafficking syndicates.

Finally, *Alitan* - pulling no punches - said: “It is appalling that Australia, a state-party to the 1951 Refugee Convention, which should better appreciate the complexities faced by asylum seekers and refugees, should decide to trade off its responsibilities to countries that have not ratified the Refugee Convention - countries whose human rights records are far from acceptable, let alone exemplary. Paradoxically, Australia’s move to ‘out-source’ its refugee assessment obligations comes at a time when asylum seeker arrivals seem to have dropped, *i.e.* from 2000 in 2010 to 940 in 2011. Yet, there is no guarantee that numbers will dwindle in future simply because boatloads of asylum seekers will be diverted to Malaysia and its Asean neighbours.”

Aliran proffered some advice: “It would be wiser for the Australian Government and Asean to cooperate in efforts to solve the refugee and human trafficking problems at their roots rather than to seek to stem the tide of asylum seekers fleeing from internal conflict and repression in their countries. Moreover, Australian taxpayers will remain uncertain as to whether their money is being used for the right purposes in other countries where they have no access to such information.

Further, the Australian and the Malaysian governments must be transparent about this bilateral deal. ... Both governments should consult civil society refugee and migrant advocates and refugee communities in both countries before making arbitrary decisions that will overburden an already encumbered, slow-moving, under-funded and under-staffed U.N.H.C.R. system. Refugee and civil society stakeholders should also be allowed to participate in these negotiations as the repercussions of such decisions will directly impact them.”

Prime Minister Gillard could not avoid further questioning on 24 May while meeting the United Nations Human Rights Commissioner, Navi Pillay. Some information on her may help to describe the distinguished person behind much natural humility.

Navanethem "Navi" Pillay (1941) is a South African. She is of Indian Tamil descent, the daughter of a bus driver. Supported by her local Indian community with donations, she graduated from the University of Natal with a B.A. in 1963 and an LL.B. in 1965. In 1967, Pillay became the first non-white woman to open her own law practice in Natal Province. She says she had no alternative: “No law firm would employ me because they said they could not have white employees taking instructions from a coloured person.” As a non-white lawyer under the Apartheid regime, she was not allowed to enter a judge's chambers. She later attended Harvard Law School, obtaining an LL.M. in 1982 and a Doctor of Juridical Science degree in 1988. She was the first non-white woman on the High Court of South Africa, and she has also served as a judge of the International Criminal Court and President of the International Criminal Tribunal for Rwanda. Her four-year term as High Commissioner for Human Rights began on 1 September 2008.

Dr. Pillay, who was on an official visit to Australia, intended to raise a series of concerns about the Australia Government's treatment of asylum-seekers during official talks with the Prime Minister, the Minister for Immigration and the Attorney-General.

Dr. Pillay had already discussed Australia's treatment of asylum seekers and refugees with Amnesty International and other humanitarian agencies in Sydney on 23 May. They all expressed concerns with mandatory detention and offshore processing. On 20 May she had visited the northern detention centre in Darwin and the Airport Hotel, which are used to house asylum seekers.

Dr. Pillay said that she would ask questions about the deals the Government was contemplating with non-signatories of the Refugee Convention - Malaysia in particular.

In the evening of 23 May Dr. Pillay told a packed Sydney Town Hall that she found Australia's mandatory detention laws "extremely distressing". "I've come here with a clear message that these people have come here for a reason," she said. "They've run away from conflict and it is why they have taken such risks to get here." While the Commissioner conceded that Australian detention centres were of a First World standard, she criticised the Government for detaining people "who have not committed any crime". "You can have the physical conditions very good, but people who come here and expect to be treated as human beings are now held here under uncertainty for however long," she said.

Impassively, the Immigration Department chose 23 May to announce that force will be used if asylum seekers refuse to cooperate when being transferred to Malaysia. In late 2009 an Australian Customs ship carrying asylum seekers to Indonesia was involved in a stand-off because the passengers refused to get off. The Department Secretary said force will be used as a last resort if a similar thing happened. On the same day Dr. Pillay re-iterated that "Australia or all people that upholds these standards internationally should not collaborate with these kinds of scheme [such as the proposed deal]." "[Governments] should ensure that satisfactory measures [against torture and other cruel punishment] are in place."

The Department Secretary said that the Government had received extensive legal advice from the Solicitor-General on a number of occasions in putting together the deal. “I should say that the Australian Government is quite confident, very confident, of the lawfulness of this policy and this approach.” he said. The Secretary acknowledged that those transferred to Malaysia, mostly from the Middle East, would be subject to Malaysian law on their arrival, “just like an Australian tourist would”, and that the Malaysian Government would have a say in those arriving - just as the Australia Government would be able to veto some of those among the 4,000 mostly Myanmar refugees it had agreed to resettle.

Despite the Australian Government's reticence, sources familiar with the negotiations said that Malaysia was certain to insist on some degree of control over which asylum seekers are sent to Malaysia under the deal. The matter was raised as it was also revealed that the Immigration Department has spent more than AU\$ 13 million on litigation costs in the first nine months of the current financial year. From 1 July 2010 to 31 March a total of AU\$ 13.38 million was paid on litigation. The sum does not include costs already accrued from current cases but not yet paid. A total of AU\$ 26.1 million has also been set aside for internal and external expenses anticipated over the next two years in relation to judicial reviews of refugee status determinations following a landmark High Court decision in 2010. The Chief Immigration Department lawyer said that there were 60 cases on file in relation to irregular maritime arrival decisions, two of which had already proceeded to the Federal Magistrates Court.

The Minister for Immigration disagreed with his Department, saying on the subject that he was “not going to provide a running commentary on what are very detailed discussions.” He later told *Sky News* that “Australia makes the decision about refugees we take, obviously in consultation with referrals from the U.N.H.C.R.”

Meanwhile, the Immigration Department announced that the asylum seeker deal with Malaysia could be antedated to apply from when the plan was first announced, and could apply to the more than 100 asylum seekers who had arrived on 3 boats near Australia since the agreement was announced. They had been transferred to Christmas Island, where boat-people are usually detained, “pending removal to another country.” It was known that seventeen children were on those 3 boats. ‘Labor’ admitted that more children were likely to be sent to Malaysia under the deal.

The Minister for Immigration Minister has said that the agreement will cost around AU\$ 300 million over four years.

United Nations agencies were at odds over the deal. Early in May the U.N. High Commissioner for Refugees regional representative had praised the deal as a “significant practical contribution to what we are trying to achieve in the region.” He told *Radio Australia* that there are a lot of issues to iron out. “It is our hope and expectation that appropriate human rights and protection measures are built into those agreements so we are looking at a better and new path for dealing with people in the region, rather than looking backwards at some of the poor practices and difficulties of the past.”

But Dr. Pillay was determined to tell the Prime Minister that the transfer would “violate refugee law.” “They cannot send refugees to a country which has not ratified the Refugee Convention and the Convention against Torture. There are no protections for individuals in Malaysia.” she said. “The first option should not be how best to turn away people; the first option should be how to receive people.”

The Minister for Immigration had already been asked by Labor colleagues to clarify whether the Government's detention deal with Malaysia meets international human rights laws. A member of Labor Caucus reported that the Minister had told colleagues that he had met with Dr. Pillay on the morning of 24 May, that he had a “constructive and positive” discussion, during the course of which he had told Dr. Pillay that the U.N. High Commissioner for Refugees had had a “close engagement” with the process. Dr. Pillay - the Minister said - was “warmed” by the response.

Dr. Pillay continued to be critical of mandatory detention. She had appealed for Australians “to be more humane to asylum seekers whom - she pointed out - are still entitled to human rights.”

The sole consideration for the Gillard Government seemed to be that the proposed deal with Malaysia would help to solve a logistic and political problem.

Australian detention centres are struggling to cope with the number of asylum seekers arriving by boat and there has been violent unrest over the past couple of months at its two main facilities, in Sydney and on Christmas Island. The Immigration Department revealed on 24 May that the estimate damage bill for riots which rocked the Christmas Island and the Villawood detention centres earlier this year would be about AU\$ 9 million.

During 2010 there had been 'irregular maritime arrivals' on 134 boats carrying 6,535 people; in 2011, and up to 19 April, 16 boats arrived, carrying 921 people. The number of detainees as at 20 April was 4,552 on the mainland, and 1,748 on Christmas Island.

The executive director of the Human Rights Law Centre joined the other refugee-organisations in urging the Australia Government to abandon the deal. He told the Australian Broadcasting Corporation: "Australia's obligation is to provide protection to those people who lawfully seek asylum under the Refugees Convention. That is Australia's international obligation, it is our moral obligation, it is our human obligation."

Impervious to any criticism, the Australia Government maintained that it is on solid ground with its deal with Malaysia. The best it could do was to call on the Secretary of the Department of Immigration to say: "I understand she [meaning but that Dr. Pillay] had not been well-briefed in relation to Australia's plans." And to hell with diplomatic niceties !

Interviewed on the A.B.C. radio programme *PM* on 24 May, the Minister for Immigration said: "I had a constructive meeting with the High Commissioner this morning. I ran through the arrangements in terms of Malaysia and Australia, talked about the very close engagement with the United Nations High Commissioner for Refugees and indicated of course that Australia was very keen to increase our humanitarian intake, as we are doing as part of this agreement which the High Commissioner recognised."

Questioned on how he could guarantee that the transferees would not be exposed to cruel, inhuman or degrading treatment, the Minister said: “Well clearly we have an agreement from the Prime Minister of Malaysia that asylum-seekers sent to Malaysia will be treated with dignity and respect. Very clearly that covers those sorts of arrangements and of course, as I've said before, we would have an implementation taskforce consisting of representatives of both governments, the U.N.H.C.R., I.O.M. [International Organisation for Migration], potentially non-government organisations.”

Questioned on the recent arrivals, the Minister had this to say: “Well as you and I've talked about this before I've made the position very clear. People who arrive in Australia after the 7th of May are not being processed for their refugee claims; they're being processed for removal to a third country. I've indicated that not only is Australia been in discussion with Malaysia but with other countries and I'd have more to say at an appropriate time. It's very important we send that message that it's not appropriate to take that dangerous boat journey to Australia because the outcome that the people are seeking, of being processed and resettled in Australia, is not one that's open to boat arrivals in Australia.”

Asked “do you have a view about how long it is okay not to process people's refugee claims ? ” the Minister replied: “Well we're obviously pursuing international agreements and obviously we would do that as quickly as possible but it is also important to make that message very clear that people should not come to Australia by boat, not take that very dangerous journey because we are in international discussions and people will be processed to a third country.”

On being reminded that Australia is also a signatory to the U.N. *Convention on the Rights of the Child*, and that as the Minister for Immigration is also the guardian or custodian of unaccompanied children on Christmas Island, and that there are nine in that group of 107 awaiting deportation to some other country, and on being asked whether he believed it is in the best interests of those minors that they be sent to Malaysia rather than staying in Australia, the Minister responded: “What I say is it's in the best interests of people not to take a very dangerous boat journey. It's also in the best interests of the 18,000 children who are in Malaysia awaiting resettlement that some of those get a fair chance of resettlement in Australia under the 4,000 people that will be taken into Australia. Oh look, I understand these are very, very emotive issues but children taking the boat journey to Australia is a very dangerous thing. We lost a number of children in the boat crash on Christmas Island.”

But what do you say about your responsibility to those nine unaccompanied children or minors? the Minister was asked. To that he replied: "I say my responsibility as Immigration Minister is to ensure that we increase our humanitarian intake, take more children in as refugees and put disincentives in place so that people don't take the dangerous boat journey to Australia."

Australian media had already begun to compare the plan with the 'Pacific solution' which was branded "inhumane" by human rights groups before it was repealed by the Rudd/Gillard 'Labor' Government in 2007. Under that 'policy', asylum seekers were transferred to detention centres on the tiny state of Nauru and Manus Island in Papua New Guinea, but the Gillard Government was involved in talks to revive the Papua New Guinea plan.

Prime Minister Gillard told Parliament on 23 May that she was still thrashing out details of the transfer agreement with Malaysia. "Its aim is to break the people smuggler's business model and, as I've said to this house before, I'm not ruling in or ruling out arrangements." Gillard said.

In an interview with the A.B.C., Dr. Pillay said quite emphatically that "Australian law applies to processing even if it's done outside the Australian waters. ... I think [the deal] violates refugee law. They cannot send individuals to a country that has not ratified the torture convention, the convention on refugees. So there are no protections for individuals in Malaysia and Australia, of all people, that upholds the standards internationally, should not collaborate with these kinds of schemes."

Dr. Pillay had already met three Australian Cabinet ministers. She was still to meet the Prime Minister. Dr. Pillay said: "I've been given a lot of information. That's useful for me. Asked by the reporter "Are you still concerned that Australia is in breach of humanitarian law?" Dr. Pillay replied: "I'm looking into that after I've received assurances and so on."

The reporter: "In Senate estimates hearing, the immigration department chief was already hosing down the criticism of the plan."

The Immigration Secretary: "I'm not aware of the basis for the High Commissioner's comments. I understand that she had not been well briefed in relation to Australia's plans."

The reporter: "The Commissioner is due to meet and give a press conference tomorrow with the Prime Minister, but the Opposition has already seized on her statements and is telling the Government it has a duty to protect asylum seekers." The Opposition Immigration spokesman said: "At the moment there seems to be no formal guarantees, or no formal arrangements that would give a guarantee of that protection. So I think these are legitimate questions to be raised about this five-for-one people swap deal."

On 25 May Dr. Pillay discussed the proposed agreement with Prime Minister Gillard at the end of a six-day visit to Australia to examine major human rights issues.

Dr. Pillay criticised Australia's treatment of asylum seekers, including the policy of holding them in immigration detention centres for months while their applications for refugee visas are assessed. This arbitrary policy was partially explained by the backgrounds of asylum seekers who invariably are not white, western or European, said Dr. Pillay. The intended swap was racist. She called on Australian lawmakers "to break this ingrained political habit of demonizing asylum seekers. There is a racial discriminatory element here that I see as rather inhumane treatment of people judged by their differences in colour, religion and so on." Dr. Pillay told reporters in Canberra before leaving Australia.

Dr. Pillay said Australia should process refugee applications rather than transporting asylum seekers to Malaysia, which has not ratified the Refugee Convention and the *Convention Against Torture*. She was not satisfied by Prime Minister Gillard's assurances that Malaysia would provide written assurances that asylum seekers' right would be protected. "In my view and as international jurisprudence has shown, assurances are not sufficient protection." she said.

The Australian Government expected to finalise the deal with Malaysia in the “coming weeks”. But a similar deal with Indonesia is unlikely after it was ruled out by the Indonesian Government.

The Minister for Immigration said that he was “very satisfied” with the progress of negotiations between Australia and Malaysia over the deal. When pressed on what “coming weeks” meant, the Minister specified: “Weeks, not months.” He said that Australia was keen to pursue similar agreements with other nations in the region. But the Indonesian Foreign Minister had already dismissed the possibility of his country entering into a swap agreement with Australia. The statement, which came as Australia looked to finalise the deal with Malaysia, constituted a blow to the Australian Government which the previous week said it would also be interested in discussing a similar agreement with Indonesia. Instead Indonesia preferred to focus on expanding a regional framework. “What Indonesia has been doing with Australia is to develop the regional architecture ...so we have not been contemplating a bilateral approach.” he said as he emerged from talks as part of a meeting of foreign ministers held in Bali. The Foreign Minister did, however, describe the deal between Australia and Malaysia as having potential in terms of complementing wider regional efforts aimed at combating people smuggling and stopping the flow of asylum seeker boats. Indonesia is the main departure point for asylum-seeker boats heading to Australia.

The Minister for Immigration would not reveal specific details of his discussions with the U.N. Human Rights Commissioner on 24 May. Dr. Pillay has warned the swap deal may not be legal because of concerns about Malaysia's human rights record. “She did very much welcome the conversation that we had and told me that she was warmed by some of things that I explained to her.” the Minister said.

Dr. Pillay was scheduled to hold a press conference in Canberra at 12.30pm on 25 May. By now, news of the hardening of positions on the deal had been shared by overseas sources of information.

The British Broadcasting Corporation reported that the U.N. Human Rights Commissioner had “launched a scathing attack on Australia's policy towards ‘boat people’ and its indigenous population. Navi Pillay said Australia's policy of mandatory detention towards asylum seekers had cast a shadow

over its human rights record. She said that Aboriginal people suffered deep hurt and pain because of the Government's policies towards them.

So far the Australian Government has given no response.

This is the second time in as many days that Ms. Pillay has publicly attacked Australia's policy towards asylum seekers. And now she has widened her criticism to its treatment of Indigenous People - the first Australians.

She told Australian Prime Minister Gillard that its policy of mandatory detention towards all asylum seekers was in breach of its international obligations, and for many years had cast a shadow over Australia's human rights record. She said that men, women and, most disturbingly of all, children, had been held in detention, even though they had not committed a crime. She also slammed the nature of the asylum seeker debate, and what she called the constant political refrain that the country was being flooded by queue-jumpers.

On the question of Aboriginal rights she was just as scathing. She criticised what she called inappropriate and inflexible policies that had caused deep hurt and pain.

Speaking on 24 May, Ms. Pillay questioned the legality of Australia's latest plan to deal with the problem of boat people trying to reach its shore. She said that "[the] proposed deal with Malaysia ... potentially violates refugee law."

Details of Bowen's discussions with Dr. Pillay would not be revealed. Dr. Pillay was known for the view that the deal may be illegal because of the affairs on Malaysia's [human rights](#) record. Nevertheless, "She did very much welcome the conversation that we had and told me that she was warmed by some of things that I explained to her." the Minister said.

Australian Greens Senator Sarah Hanson-Young said that time is the greatest factor that can deter asylum seekers from making the boat journey to Australia. “We know from history that when people are in a very desperate situation, they take whatever means necessary.” she said. Since the deal was first flagged Christmas Island served as a legal limbo for at least 107 people - seventeen of them are children as young as young while nine are unaccompanied minors - floating in the waters of the Western Australian coast, added Hanson-Young. According to Senator Hanson-Young, “Immigration Minister Chris Bowen is undermining his role as guardian to protect these kids simply to uphold what is a poorly patched together agreement with a country which has not signed the refugee convention.”

No different was the reporting in the Canadian press. The intended deal was portrayed as jeopardising asylum seekers' rights and was part of a racist and inhumane Australian policy, a U.N. human rights official said on 25 May. U.N. High Commissioner for Human Rights Navi Pillay had discussed the agreement on that day with Prime Minister Gillard at the end of a six-day visit to Australia to examine major human rights issues.

In her final press conference before leaving Australia, Dr. Pillay said she was not convinced there were adequate safeguards in place for asylum-seekers who would be sent to Malaysia under the Government's refugee swap deal.

As the Minister for Immigration defended Labor's ‘Malaysian solution’, Dr. Pillay said she had told the Prime Minister that it was crucial that Australia comply with its treaty obligations. She said Australia had strong egalitarian foundations which made it “disappointing that the system is failing to protect certain groups. ... I urge the leaders of all Australia's political parties to take a principled and courageous stand to break this ingrained political habit of demonising asylum seekers.”

Dr. Pillay said that Australia's “arbitrary” mandatory detention policy had “for many years cast a shadow over Australia's human rights record.” And she said the practice had led to suicide. “Thousands of men, women and - most disturbingly of all - children have been held in Australian detention centres for prolonged periods, even though they have committed no crime.” Dr. Pillay told the press conference in Canberra. “When detention is mandatory and does not take into account individual circumstances, it can be considered arbitrary and therefore in breach of international law.”

Conceding that there had been “some improvements in recent years”, Dr. Pillay said she told the Prime Minister and the Minister for Immigration that asylum seekers were being detained for too long. [On 26 May the Australian Human Rights Commissioner released a report strongly criticising the length of time asylum seekers have been held in detention at the Villawood centre. The Commissioner said that 60 per cent of Villawood detainees had been detained for more than six months, and 45 per cent had been detained for more than a year.] “Mandatory detention is also a practice which can - and has - led to suicides, self-harming and deep trauma.” she said. Dr. Pillay spoke of the “grim despondency” of asylum seekers she met in Darwin's detention centres as they waited “for months, or in some cases well over a year, to be released. These people, who arrive with such relief and hope after experiencing trauma in their home countries, should not be treated in this way.” She said that she had told the Prime Minister and the Minister for Immigration that “Australia's mandatory immigration detention regime is in breach of Australia's international human rights obligations.”

Dr. Pillay slammed the “constant political refrain” that Australia was being “flooded” by “queue jumpers”. “It has resulted in a stigmatisation of an entire group of people, irrespective of where they have come from or what dangers they may have fled. I urge the leaders of all Australia's political parties to take a principled and courageous stand to break this ingrained political habit of demonising asylum seekers.”

Dr. Pillay was also critical of the pending asylum seeker deal with Malaysia, saying there must be adequate safeguards to guard against torture. “These include ensuring that there is no real risk of breach of the principles of the 1951 Refugee Convention and the Convention against Torture - which Australia has ratified but Malaysia has not.” she said. “In my experience, assurances of compliance with these standards are not sufficient and should be legally entrenched.”

Dr. Pillay said that the United Nations welcomed the apology to the Stolen Generations delivered by then-Prime Minister Rudd in 2008 and an investment in Aboriginal education. But she also criticised the ‘intervention’ policy introduced by the Howard Government and continued by the Gillard Government, which places controls on welfare spending for Aborigines to help fight alcohol and child

sex abuse in remote outback areas. “In my discussion with Aboriginal people, I could sense the deep hurt and pain that they have suffered because of Government policies which are imposed on them.” she said. Australia 460,000 Aborigines make up about 2 per cent of the population. They suffer higher rates of unemployment, substance abuse and domestic violence than other Australians, as well as having a 17-year gap in life expectancy.

But she said that, when she spoke to Aboriginal people in the Northern Territory, she could “sense the deep hurt and pain that they have suffered because of government policies that are imposed on them.”

Dr. Pillay said that she had met a number of indigenous communities during her time in Australia and they claimed government staff had an “imperialist attitude” and that the intervention was discriminatory. “I could sense the deep hurt and pain that they have suffered because of government policies that have been imposed on them.” she said. “I also saw Aboriginal people making great efforts to improve their communities, but noted their efforts are often stifled by inappropriate and inflexible policies.” She said that the Indigenous People she met had told her income management and housing programmes were not working well. “One person told me that he didn't have money left to buy ice-cream for his children.” she said. “The whole voluntariness of spending your own income has been removed from them. They feel they are being targeted.”

Dr. Pillay said that she urged the Government to do a “fundamental rethink” of the measures being taken under the Northern Territory emergency response. “There should be a major effort to ensure not just consultation with the communities concerned in any future measure, but also their consent and active participation.” she said. “Such a course of action would be in line with the UN Declaration of Human Rights.”

When asked what the Government should do to address the domestic violence and child abuse in Aboriginal communities, Dr. Pillay said it should be tackled in a broader context. “It has to be addressed in all its forms, right across the community.” she said. She also said that Aboriginal women had told her the best way to combat domestic violence was to empower and resource them to take the initiative in their own communities. “They need resources for their work and appropriate support from police.” she said. “But really, domestic violence occurs all over the world, in rich and

poor countries . . . and it would be wrong to stereotype the Aboriginal community as something occurring in just that community.” She said “inappropriate and inflexible” policies were stifling efforts by Indigenous People to improve their communities with effective local solutions and urged a rethink of the intervention. "I would urge a fundamental rethink of the measures being taken under the Northern Territory Emergency Response and there should be a major effort to ensure not just a consultation with the communities concerned in any future measures, but also their consent and active participation.” she said.

“The issues of indigenous disadvantage and the treatment of asylum-seekers need to be tackled through a human rights-based approach, not driven by short-term electoral advantage.” She had told the Prime Minister that Australia’s mandatory detention policy was in breach of international law and that Aborigines suffered “deep hurt and pain” because of policies imposed upon them.

Dr. Pillay said that her concerns about the Malaysian swap agreement centred on whether the bilateral agreement would provide adequate protection for refugees. Dr. Pillay warned that while there was a need to combat people-smugglers, such bilateral agreements needed to comply with international safeguards. “These include the ensuring that there is no real risk of breach of the principles of the 1951 Refugee Convention and the Convention against Torture, that Australia has ratified and Malaysia has not.” Dr. Pillay said that Australia's mandatory detention had “cast a shadow over Australia's human rights record”, while she remained “deeply concerned” about plans to repatriate dozens of Afghan asylum seekers. “These are people who have fled for their lives.” she said."These people have left Afghanistan because of huge risk to their life, and let's not forget they themselves did not cause the conflict in their own country." she said. “There's a great deal of outside forces involved in that conflict and civilians are caught in the crossfire.”

So far the Gillard Government has not responded to Dr. Pillay.

Immigration Department officials told a Senate hearing that 40 failed Afghan asylum seekers would be forcibly returned “in coming weeks to months”. Some Afghan politicians have questioned a deal struck between the Australian Government and the Afghan Government in 2010 allowing for the return of failed asylum seekers.

Earlier, the Minister for Immigration said that children would be “heavily represented” in the 4,000 refugees Australia will take from Malaysia. However he conceded that children who arrive in Australia by boat will be among the 800 asylum seekers to be sent to Malaysia as part of the swap deal.

As Indonesia dismissed the prospect of striking a similar arrangement with Australia, more details of the Malaysia deal have emerged, with the Minister for Immigration declaring a final agreement was “weeks, not months” away. When challenged on the plan to send children to the “back of the queue” in Malaysian refugee camps, the Minister for Immigration said on 25 May that the deal would reduce the overall number of children in refugee camps. “There are 18,000 children asylum-seekers in Malaysia and we are not going to add to that burden, we are going to reduce that burden.” he told A.B.C. Radio. “We are taking 4,000 extra people, we currently take a couple of hundred a year. We are going to take 1,000 extra a year and I envisage children will be very heavily represented in that intake.”

The Minister's comments came as Greens Senator Sarah Hanson-Young said that the Government's plan would put children at risk. “Malaysia is not a signatory to the Refugee Convention.” “Malaysia has not signed the Convention against Torture and for children that may be sent to Malaysia I'm very fearful of the protections of their human rights. [The Minister] is undermining his role as guardian to protect these kids simply to uphold what is a poorly patched together agreement with a country which has not signed the Refugee Convention.”

And how did the Gillard Government report the meeting with Dr. Pillay? It sent a spokeswoman for the Prime Minister to deliver a piece of mendacity. The spokeswoman said that “Ms. Pillay congratulated Australia on its strong record on human rights both domestically and internationally. ... The U.N.H.C.R. has made it clear ... that this arrangement [with Malaysia] is a real opportunity to enhance the protection for refugees, and has welcomed Australia's increased share of the humanitarian burden in the region.”

This clashes with the words of Dr. Pillay: “I come from South Africa and lived under this, and am every way attuned to seeing racial discrimination. ... There is a racial discriminatory element here which I see as rather inhumane treatment of people, judged by their differences, racial, colour or religions.”

More than 900 people, mostly from Afghanistan, Iraq, Iran and Sri Lanka, had arrived in Australia so far in 2011, while 134 boats carrying 6,535 people turned up in 2010, prompting the Government to harden immigration policy.

While Dr. Pillay's criticism may cause some discomfort internationally, it is unlikely to convince the Gillard Government or its conservative political opponents to change tack - given polls showing wide voter concern about ‘border security’.

The Australian Government has refused to guarantee that asylum seekers sent to Malaysia for processing will not be caned, while Amnesty International estimates that 6,000 would-be refugees detained in Malaysia were flogged in 2010. When asked if the 'Malaysia solution' would ban caning - the Minister for Immigration said that negotiations were continuing. He was also unable to say if the Australia Government could prevent pregnant women or children being kept in cages.

Independent Senator Nick Xenophon said that it did not make sense that Labor's would refuse to engage with Nauru because it has not signed the Refugees Convention, when Malaysia has not either.

The head of the Department of Immigration's detention health advisory group, Professor Louise Newman, said that the psychological trauma of locking asylum seekers up became apparent ten years ago, and ‘Labor’ was well aware of how toxic detention is to mental health. “Government are aware that this is a damaging and very toxic system.” she told A.B.C. Radio. “Yet the politics are such that it seems to be absolutely imperative.” Professor Newman agreed with the Australian Human Rights Commission's findings that there were high rates of self-harm and suicidal tendencies in detainees from Sydney's Villawood detention centre. “Villawood certainly is serious in terms of the cluster of

suicides (there).” she said. “Whenever we have in close proximity people killing themselves then that raises very serious issues about the function of the system.”

Her comments came after news that asylum seekers shipped overseas under the proposed ‘Malaysian solution’ could be caned if they step out of line in detention. Living conditions at refugee camps in Malaysia have been condemned as crowded and unhygienic, with some inmates reported to have died from disease spread by rats. Malaysia flogs up to 6,000 detainees a year for immigration offences, using a rattan cane which causes visible injuries and scarring. The law allows guards to use the punishment on children.

The Minister for Immigration continues to deny that asylum seekers sent to Malaysia from Australia will be caned. He said he had received assurances that people sent there under the yet to be finalised deal will not be abused. “Malaysia has agreed to treat any asylum seekers transferred from Australia in line with their human rights.” he said on 26 May. He stressed that asylum seekers transferred to Malaysia would be processed by the U.N.'s refugee agency.

While the Minister insisted that the deal complies with the Refugee Convention, that document does not cover torture or cruel punishment. Asked whether international laws would be observed to prevent canings, the Minister's spokesman said negotiations were continuing. In 2010 Amnesty International's Dr. Graham Thom toured three Malaysian detention centres, hearing how some detainees had died of leptospirosis, contracted through rat urine. He photographed women and even a baby caged in squalid conditions at Lenggeng Immigration Depot, near Kuala Lumpur, and hundreds of men in one tennis court-sized enclosure. “We went to three different centres and each was equally appalling.” he said.

It was reported on 26 May that a group of Malaysian organisations had submitted a memorandum to the Australian High Commissioner in Malaysia asking for the asylum seeker deal between the two countries to be abandoned. The five organisations, made up of lawyers and refugee advocates, met with the Australian High Commissioner in Kuala Lumpur and expressed their concerns about the deal before handing over the memorandum. A spokesman said that they were allowed half hour with the High Commissioner to express their concerns about the in-principle plan of refugee swap. They called

on Australia to increase its resettlement programme without re-routing asylum seekers to other countries. The organisations claimed that Malaysia is not an appropriate place for Australia to send asylum seekers and invited the High Commissioner to pass the memorandum on to the Australian Government. Asylum seekers in Malaysia have no legal rights and the organisations want Australia to abandon the plan, or at least pressure Malaysia to sign the Refugee Convention. At a minimum - they said - Malaysia must introduce a domestic law to protect asylum seekers and refugees.

Earlier on 25 May the United Nations Human Rights Commissioner attacked the Australian Government's mandatory detention of asylum seekers, calling it a breach of international law. "Mandatory detention is also a practice that can - and has - led to suicides, self-harming and deep trauma." she said. She was also critical of the pending deal with Malaysia, saying there must be adequate safeguards to guard against torture. "These include ensuring that there is no real risk of breach of the principles of the Refugee Convention and the Convention against Torture - that Australia has ratified but Malaysia has not." she said. "In my experience, assurances of compliance with these standards are not sufficient and should be legally entrenched."

The Opposition continued to lament that the Australian Government has not addressed concerns about the human rights of asylum seekers to be sent to Malaysia under its proposed refugee deal. The Opposition Immigration spokesman said that the Government has no answer to the critics. "There is no guarantees in anything the Government's said so far, practically, about how people will be fed, clothed, sheltered, schooled, health care provided." he said. "[For] anyone who went under the 'Pacific solution', whether they went to Nauru or Manus Island, all these issues were addressed."

By the end of May 2011, during the Senate estimates hearings, officials from the Immigration Department have confirmed that 1,073 children remain in detention centres around Australia and on Christmas Island. The Minister for Immigration confirmed on 25 May that 600 children were yet to be assessed by immigration authorities. The situation was back to the same numbers in October 2010, when the Minister announced that the Government would release "significant numbers of children and vulnerable family groups" into community-based accommodation. He had been very clever in never specifying how many children and families would be released. During a *Radio National* interview, the Minister would only say that a "majority" of children would be released by 30 June

2011, but he still would not say what will happen to any children who arrive by boat after that deadline.

Officials from the Immigration Department made it known, during Senate estimates hearings, that they were continuing to work under the assumption that children would still be relocated into the community after 30 June. But the Department is still awaiting a decision from Cabinet. One would have thought that by now the Gillard Government would have its position clear on whether children and families should be behind barbed wire. It has been demonstrated that being outside in the Australian community, supported by various groups, would be most humane and cheapest way of helping refugees adapt to their new lives. There appeared to be some progress on that front, but there was still uncertainty for the more than 100 people who had arrived on Christmas Island since the Gillard Government's Malaysia announcement on 7 May. Some 17 children, 9 of whom are unaccompanied, were being detained at the Bravo detention centre on the island, pending 'their removal to another country'. The Minister has a clear conflict of interest in his position as Immigration Minister and also as the guardian of asylum seeker children, but he will not say what will happen to the 17. He has been asked repeatedly by journalists where they will go, but he prefer to respond by saying that it is his duty to deter people from taking the perilous boat journey ! Those 17 children are already here, though, and it is not known what will happen to them.

According to the organisation Human Rights Watch, what was known of the deal with Malaysia is that it appeared to lack necessary guarantees that asylum seekers transferred from Australia to Malaysia will be treated in accordance with Australia's international human rights obligations. It wrote that in a letter 26 May to Prime Minister Gillard.

Human Rights Watch was deeply concerned that Australia would be prepared forcibly to transfer asylum seekers to Malaysia. Forcibly transferring asylum seekers to a place, such as Malaysia, where they could be exposed to torture and other mistreatment, violates Australia's obligations under the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment and the International Covenant on Civil and Political Rights. Australia would offload asylum seekers to a country which has not acceded to the 1951 Refugee Convention, has no domestic refugee law, and no governmental refugee status determination procedure, relying instead on an under-resourced and backlogged determination conducted by the U.N.H.C.R., and has signed none of the abovementioned

treaties. Malaysia also has a poor track-record of refugee protection and virtually no record of refugee integration. So wrote H.R.W. to Prime Minister Gillard.

Human Right Watch was also concerned that the deal is premised on the dangerous notion that obligations of states party to the Refugee Convention can be transferred to states with no such convention obligations. Finally, it also feared that this deal would try to subvert the principles underlying refugee resettlement by transforming resettlement from a tool of international protection into a mechanism of migration-control.

Under international law, states have an obligation not to return - *'refouler'* - persons to a country where they are at risk of being subjected to torture or other cruel or inhuman treatment. Amnesty International - Human Rights Watch pointed out - has documented many first-hand accounts of whippings, assaults, and other ill-treatment faced by detained migrants in Malaysia. While whipping, as well as the common penalty of caning meted out by Malaysian courts for illegal entry, meets the definition of torture under the Convention against Torture, Australia has an obligation not to expel persons to a country where there are substantial grounds for believing that they would face torture, including because of a "consistent pattern of gross, flagrant or mass violations" of human rights in the country.

Under the I.C.C.P.R., to which Australia, though not Malaysia, is a party, "[a]ll persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person." The President of the Malaysian Bar has called conditions in immigration centres "degrading, demeaning and dehumanising, and wholly unacceptable to any civilised society." Conditions in the centres are overcrowded and unsanitary. Asylum seekers and refugees regularly fall prey to systematic police extortion, and often must make payments to stay out of detention centers to avoid being physically abused, denied medical services and treatment, and held without charge for months at a time. Art. 7 of the I.C.C.P.R. has been interpreted to prohibit deportation of persons to a country where they face a real risk of torture or "cruel, inhuman or degrading treatment or punishment."

Parties to the Refugee Convention, such as Australia, bind themselves to the principle of non-*refoulement* - a central tenet of the international refugee regime. The principle of non-*refoulement*

not only bars parties to the Convention from returning asylum seekers and refugees to countries where they may face a threat of persecution, but also from the return of asylum seekers and refugees to a country where there is a risk of 'chain deportation' to the country of feared persecution. Because Malaysia is not a party to the Refugee Convention and makes no distinction in law between refugees and other irregular migrants, it cannot predictably be regarded as providing refugees effective protection. In fact, Malaysia has deported large numbers of primarily Burmese migrants in the recent past, including asylum seekers - to Thailand. Thailand is also not a party to the Refugee Convention, has no refugee law, and regularly deports Burmese to Burma, a country which produces large numbers of refugees because of rampant human rights violations.

Question: has the Gillard Government approached Thailand in a possible 'regional solution' ?
"Human Rights Watch has also documented endemic corruption in the area of Malaysian immigration enforcement and collusion between Malaysian immigration officials and criminal elements. [The organisation has] interviewed Burmese nationals in Thailand and Malaysia who have described how Malaysian immigration officials handed them over to criminal gangs at the Thai border, who trafficked them into sex work, fishing or other industries in Thailand, or-for a price-smuggled them back into Malaysia. A U.S. Senate Foreign Relations Committee investigation, leading to a report issued April 3, 2009, also reached the conclusion that there was collusion between Malaysian immigration officials and human traffickers operating on the Malaysia-Thailand border."

While U.N.H.C.R.'s presence in Malaysia is positive and promotes refugee rights, its presence in and of itself does not guarantee that the government will respect refugees' rights. Supporters of the exchange agreement would cite U.N.H.C.R.'s assurances that the 800 asylum seekers sent to Malaysia will be treated in accordance with Refugee Convention standards. It was regarded as commendable that the Malaysian Government allows U.N.H.C.R. to conduct refugee status determinations and to protect refugees within its mandate. Limited resources have meant that U.N.H.C.R. faces a huge backlog of determination cases. Malaysia has also recently allowed U.N.H.C.R. to enter a number of immigration detention centres to assess refugee claims of detained asylum seekers. Here, too, U.N.H.C.R. is overstretched and has difficulty covering the 11 immigration detention centres in the country, so that asylum seeker detainees sometimes must wait months for case assessment and release.

“While Malaysia deserves credit for these positive developments - Human Rights Watch noted - we are concerned that U.N.H.C.R.'s access to detained asylum seekers remains wholly dependent on the Malaysian Government. These recent positive developments have followed years of government restrictions on U.N.H.C.R. access and could easily and unilaterally be reversed.”

Refugees in Malaysia are denied basic economic, social, and cultural rights. For example, U.N.H.C.R.-recognised refugee children are prevented from attending public schools and are denied elementary education, in violation of the *Convention on the Rights of the Child*. (Art.28)

Applicants for refugee status determination with the U.N.H.C.R. in Malaysia and U.N.H.C.R.-recognised refugees are not allowed to work legally and must provide for themselves through black-market labour.

No Convention state member should use resettlement to further migration control agenda. “Resettlement should not be part of a quid pro quo deal that reflects a migration-control agenda.” - wrote Human Right Watch to Prime Minister Gillard. “We urge Australia to maintain and to increase its generous refugee resettlement quotas, but to choose refugees in need of resettlement on transparent and objective grounds with the advice of U.N.H.C.R., and not based on a bilateral agreement that contravenes the Refugee Convention.”

Presently, there are more than 80,000 U.N.H.C.R.-recognised ‘people of concern’ in Malaysia and of the more than 12,600 refugees whom U.N.H.C.R. submitted for third-country resettlement from Malaysia in 2010, fewer than 8,000 were accepted and resettled during the year. Thus, the 800 asylum seekers to be transferred to Malaysia are likely to be placed at the end of a very long queue both for a determination of their refugee status and for the only available durable solution for most refugees in Malaysia-third country resettlement.

Human Rights Watch did not profess to have enough details about the intended agreement to know whether the 800 will be detained or if they may be processed in some expedited manner. However, since the intent of the agreement appears to be to frustrate the desire of asylum seekers arriving

irregularly by boat to establish themselves in Australia and to deter others from making the voyage, the organisation was concerned that the agreement will result in relegating them to lives of indefinite uncertainty and hardship in Malaysia.

Finally, the Prime Minister was reminded that she had said that the purpose of the Malaysia-Australia agreement is to end "the trade in human misery" by the smugglers who send boats of potential asylum seekers to Australia. H.R.W. found this phrasing unintentionally ironic because "The agreement with Malaysia does not appear to take a single step towards identifying and prosecuting smugglers for their crimes, but rather goes after the easy target-asylum seekers arriving on boats - by trading 800 of them for 4,000 refugees, and thus subjecting them, in all likelihood, to years of misery, given Malaysia's poor reception conditions for asylum seekers, lack of employment and educational opportunities for refugees, and unwillingness to consider integrating refugees into Malaysian society."

Concluding its letter, Human Rights Watch asked the Australia Prime Minister to reconsider the deal in light of Australia's international human rights obligations and in anticipation of the unnecessary human suffering it is likely to cause.

It may be too soon to know whether the Prime Minister ever replied.

In response to criticism of his country's record on human rights and the controversial asylum seeker swap deal, the Malaysian Foreign Minister questioned Australia's treatment of Aborigines. Speaking during a recess of a meeting of the Non-Aligned Movement in Bali, the Foreign Minister lashed out at suggestions the 800 asylum seekers covered by the deal could be caned, saying that Malaysia is a civilised nation. "Australians always have fears," he told A.A.P. on 27 May. When asked if he could guarantee that asylum seekers would not be caned, he said: "We won't treat them like you have treated Aborigines." The point is to be taken - but has nothing to do with mistreatment of asylum seekers.

By the end of May 2011 several Pacific nations were said to be keen to host refugee processing centres similar to those set up by the Howard Government in Nauru and Papua New Guinea. The Solomon Islands Government had approached the Prime Minister of Australia to host an asylum seeker centre. However the Australia Government had early indicated that the fragile political

situation in the Solomons remained a serious concern. A spokesman for the Minister for Immigration told the press that the Government was not currently talking to the Solomon Government about a refugee centre. The spokesman said the Government remains focussed on securing a deal with Malaysia and Papua New Guinea.

The Greens repeated their concern about the report. Greens Immigration spokeswoman Senator Sarah Hanson-Young said that the Government cannot be trusted on the issue, as it seems to keep changing its mind at the drop of a hat. "I don't think we can be taking anything the Government says seriously," she said. "They said no to Malaysia, now they say yes. They said no to Papua New Guinea, now they're saying yes. They're saying no to the Solomon Islands, are they going to say yes into the future?"

The Malaysia deal has attracted interest from other nations in the region, with Thailand saying it would be interested in striking a similar deal with Australia.

The Australia Government confirmed that the deal with Malaysia - and possibly one with Papua New Guinea - would remain at the centre of its immigration policy. This is despite reports that South Pacific nations, including the Solomon Islands, have asked Australia if they can be part of a new Pacific solution for processing asylum seekers.

However, a spokeswoman for the Minister for Immigration downplayed any talks with the Solomons. "Our focus is on arrangements with Malaysia and P.N.G." she said in a statement on 28 May. "Australia engages with countries across the region as part of the cooperation framework endorsed by more than 40 nations at the Bali Process meeting."

'Labor' was said to be in talks with Papua New Guinea and Thailand about similar deals. Australian Greens Senator Sarah Hanson-Young said that was a terrible policy approach. "How much time, energy, public resources are wasted on these proposed solutions that do nothing but try and push Australia's obligations offshore, out of sight and out of mind." Senator Hanson-Young told reporters after meeting with detainees and staff at Sydney's Villawood detention centre. "An Australian detention centre in the Solomon Islands is a terrible, terrible idea. A detention centre in Nauru is a

terrible idea. Sending people to Malaysia is a terrible idea. And a new 'Pacific solution' would be a waste of time and money.”

The Minister for Immigration was hoping to be able to announce by the end of June that the promise to move most of the children who have been in detention centres into community arrangements has been kept. 'Most' might only equate to 50 per cent plus one, but it will represent a big achievement. Already the Minister had approved the transfer of 467 adults and 475 children from facilities where mental health problems are endemic to place where they may lead a normal life. By 30 June, the target set by the Minister when he announced in October 2010 that couples with children and unaccompanied minors would be moved progressively into the community, it will also be clear whether his other big initiative - the deal with Malaysia - had real potential to stop the boats and improve the lot of asylum seekers in the region.

While many questions remain unanswered on the Malaysian deal, especially concerning the fate of those who are dispatched to “the back of the queue” in a country without a queue and with a poor human rights record, the verdict on shifting families and children into community detention in Australia could hardly be more positive.

“This is one of the most successful programs in managing boat arrivals that I've experienced.” said Paris Aristotle, who chairs the advisory body which developed the community detention model and is director of the Victorian Foundation for Survivors of Trauma and Torture. “It's bang on target. It's been a massive effort and it's working extremely well.” commented the director of services and international operations for the Red Cross, the body given the task of co-ordinating the effort with a host of non-government organisations.

An asylum seeker who had spent months in a hopelessly overcrowded Christmas Island facility, and slightly longer in the Melbourne detention centre for unaccompanied boys, before being approved for community detention, said that he had no hesitation in declaring that the centre known as the Melbourne Immigration Transit Accommodation is worse than Christmas Island - not least because, on the island, there was contact with families with small children, and reminders of life in a broader sense. At the M.I.T.A. there are more than 100 teenage boys whose common emotional denominator tends to be depression and despair - a mental state which asserts itself in acts of, or

attempts at, self-harm, and is reflected in their blank expressions and scarred arms. Their sense of self-worth is diminished each time they are permitted to leave, whether on an excursion or a trip to the doctor, by the presence of security guards. It makes them feel like criminals, they say.

The contrast with community detention could not be more stark. "You're allowed to go anywhere. You can go to school without any officer." said the mentioned asylum seeker, who describes the house's two Afghan carers as "like a big brother and a father" and intends to complete his Victoria Certificate of Education and proceed to university. The director of Christmas Island Asylum Seekers, who taught the mentioned asylum seeker on the island, is also qualified to comment on the benefits of community detention, having witnessed seemingly carefree boys become "broken young men" in detention. "The difference it makes to people's livelihoods and mental health is remarkable." she said. "There are still too many children in detention facing great difficulty - boys who have become severely depressed, boys who have developed anxiety disorders, boys not sleeping or eating"

To realise the Minister's pledge, the Red Cross put its community detention operation onto 'emergency' footing two months ago. Its representative said: "We did that because the numbers the Minister was signing off on were starting to rise and we wanted to make sure we could get the properties, get the staff, have the case management working, get the kids into houses and get volunteers organised." ... "For four weeks we treated it as an emergency. We seconded staff from all over the country, we signed up more partners and we got those hundreds of people out so fast."

The success of the programme and the co-operation between the Government and non-government sector raises two questions. First, will the programme be afforded the same level of urgency after 30 June, when almost half the children will still be in detention centres ? And second, will its success prompt the extension of the approach to other vulnerable groups, including the males who make up the bulk of Australia's immigration detention population ? Many are husbands and fathers.

The clear evidence is that community detention is not only cheaper and better for the mental health of the detainees, it is also more conducive to those whose claims are rejected accepting this verdict and voluntarily returning home. As Aristotle put it: "The outcomes for people who are supported in this way are better at every level, including when people are unsuccessful and have to return home. People are able to make much more rational decisions when their mental health is intact." And there is

another advantage, too. Because the asylum seekers are out in the community, they are countering the negative perceptions which were fuelled from some of the reactions to the string of riots and disturbances in detention centres. Indeed, the success of the programme begs a further question: if this approach had been adopted earlier on, could the riots have been averted? Certainly services would not have been stretched to breaking point and detainees would have been less likely to crack. Arguably, the hardening of attitudes against those who come by boat might have been averted - and the opportunity for the Opposition shamelessly to politicise the issue would have been reduced.

Of course, that opportunity will remain for as long as the boats keep coming. The last week of May 2011 saw Opposition figures cast themselves as protectors of human rights as they claimed that Malaysia represented a bigger threat to human rights than their proposed reopening of the Nauru detention centre. While this position might be challenged by those Nauru detainees who were banished to the local gaol for frivolous offences, the point will remain valid so long as the details of the deal remain unclear.

The clear difference between what is proposed and what the Howard Government imposed is the potential for a regional agreement. Or so it seems, and it is said. As Aristotle sees it: "If the agreement were able to create circumstances where the protection space for people in Malaysia could be improved over time, then that's a positive step towards a regional framework. The reality is that the treatment of asylum seekers in the region from a human rights perspective ... is something no one is managing extremely well. If they can get the detail right, and the safeguards right and the oversight mechanisms right, then just maybe this could be the start of something that could help."

The events which occurred during the week of Dr. Pillay's visit have left the clear impression that the 'Labor' Government cannot claim a shred of principle on asylum policy any more. It has shamed itself repeatedly and in a most hypocritical way. The very same persons who condemned the 'Pacific solution' have embraced a 'Malaysian solution'. The people who said that Nauru was unacceptable for offshore processing in part because it was not party to the Refugee Convention are not worried that Malaysia is also outside it.

If the Gillard Government was not desperate, it would be embarrassed. If its Caucus members were not frightened of the electoral backlash over boat arrivals, it would be up in arms. During that week

Dr. Pillay lashed out at the deal and Malaysian human rights activists attacked it. Before departing Dr. Pillay re-iterated that the bilateral agreement would need to be scrutinised carefully for its human rights guarantees.

Meanwhile, Malaysian activist Eric Paulsen, a founder member of Malaysian *Lawyers for Liberty*, wondered how Australia could achieve what others could not. “All of a sudden, without any changes to Malaysian immigration laws and policies, will asylum seekers suddenly become immune to their day-to-day reality of arbitrary arrest, detention, harassment, extortion, jailing and whipping ? We doubt that very much.”

Most unfortunately for the Gillard Government, on 26 May a former Australian Human Rights Commissioner between 2000 and 2005 reinforced a point on which the Opposition has insisted relentlessly when he said that the Howard Government’s ‘Pacific solution’ was *- tant pis tant mieux* - preferable to the Gillard Government’s deal with Malaysia. He had been responsible for conducting the landmark investigation which forced the Howard Government to abolish mandatory detention for children, and he was now calling the present situation “extremely disappointing; it’s however a pragmatic response in the current circumstances. ... At least when we had our detention centre in Nauru we were able to control the conditions in the detention centre. If we send them to Malaysia I think it will be a much worse solution.... [Now] Government is panicking and trying to do something about it.” “It’s in a way an enormous disappointment to me that after initial changes, which aimed at improving the deal for children in immigration detention, we return back to the same which we saw seven years ago.” he said. “It relates to the number of people who are coming to Australia now. At the moment we’ve got almost 7,000 people in immigration detention. During the peak of Howard Government we had 3,500 - so we’ve double the number of people.”

The former Human Rights Commissioner also described the effects of detention on children as ‘tragic’. “I saw children self-harming, I saw children going into razor wires, I read reports of attempted suicide.” he said. “Basically what’s happening is children are detained for very long periods of time. The longest a child [spent] in Australian immigration detention was five years, five months and 20 days - I remember that case. ...They are missing enormous opportunities because access to schooling is inadequate. Then quite often the families are breaking down because there not traditional roles for man and for woman any more. ... Quite a significant number of children acquired mental illnesses under the trauma of immigration detention. ... What it really means is that it will take

a long time before they recover and in some cases they be whole life dependent on our welfare system.”

On 30 May 2011 the Gillard Government was facing embarrassing parliamentary defeats over key elements of its asylum seeker policy.

The Australian Greens Adam Bandt and the Independent Andrew Wilkie - two crossbenchers who usually support Labor - were spearheading a motion, supported by the Opposition, condemning the deal with Malaysia. They also supported an Opposition motion for a parliamentary inquiry into Christmas Island and Villawood detention centre riots. Debate on the motions was adjourned on 30 May but the combination made it highly likely they would have passed. The Senate already has passed the Greens motion condemning the Malaysia deal, which was then put to the House of Representatives by Mr. Bandt.

Moving the motion, Mr. Bandt acknowledged that his decision was not taken “lightly”. The motion was to condemn the Gillard Government's deal with Malaysia which would see 800 asylum seekers intercepted in Australian waters and sent to Malaysia; and to call on the Government immediately to abandon the proposal.

Mr. Bandt said: “The Government's deal to expel asylum seekers from Australia to Malaysia is wrong and should be condemned by this parliament. The deal, like the now-defunct [Timor- Leste] plan, is a rushed political fix designed to paper over the failure of the Government and the Opposition's mandatory detention policy. The deal will mean asylum seekers are expelled to Malaysia. The deal violates Australia's international obligations and is an abuse of human rights.

If passed, this motion will mean that for the first time in the life of this Parliament both houses of parliament will have condemned a government policy. ... The Government will need to take this matter very seriously because it will have received a very clear message from Parliament rejecting the Malaysia deal and a very strong request that the deal be abandoned.

We all know why we are at this low point in this country's treatment of asylum seekers and refugees. For more than a decade we have had a political race to the bottom between the old parties, as they have chased votes that they think exist in certain marginal seats around the country. On the one side you have the Coalition, the party of razor wire and children overboard, peddling fear and stoking resentment in the community; and on the other you have Labor, the party of mandatory detention, promising a new direction at the election but then again giving into fear and refusing to lead public opinion on this issue. It is almost like the old parties are locked in an arms race on refugees, competing to be tough and lacking in compassion. So now, instead of winding back mandatory detention, we have a government expanding offshore detention and now adopting the Howard Government policy, so roundly condemned, of expelling asylum seekers to another country - a country that has not signed the Convention on refugees, a country that has a history of caning asylum seekers and engaging in other abuses of human rights and a country that has not yet guaranteed any protections of the people [whom] our Government intends to expel there.

Mr. Bandt asked: "Why do we sign up to international conventions if we are not going to abide by them? Why do we seek to contract out our obligations? We cannot send fairness offshore. It is for this reason that this deal has been widely condemned, including by the United Nations High Commissioner on Human Rights when she visited Australia last week.

The Government will say that this deal is good because, in return for accepting those expelled, Malaysia will send others to Australia. Let me be clear that the Greens' position is that our humanitarian refugee intake should be significantly expanded. But an expansion of our refugee intake should not be bought at the violation of the rights of others or by swapping one person for another. Refugees and asylum seekers are human beings, not a card in a political game. It is a reflection of how low the political debate in this country has sunk that there is willingness in some quarters to accept this as a legitimate approach to immigration policy.

I was elected by the people of Melbourne in part to bring a value of compassion and represent it in this parliament. My electorate of Melbourne thrives in part because of the decades of migrants and refugees who have chosen to settle there. The people of Melbourne do not give in to the fear and hysteria promoted by the old parties. They value diversity and the multicultural community in which they live. They know that there is an alternative. We can do what happens in most parts of the world - that is, allowing people, regardless of how they come to this country, to seek asylum. Detention is a last resort, and even then should only be for the minimum possible period - a period of days, for health and security checks. The people of Melbourne also know that at a time when the country is facing a skills shortage and a mandatory detention bill of over \$1 billion there are good economic reasons for a policy of fairness.

I say to the members in this place that I know moving a motion condemning the Malaysian deal is very confronting for the Government and the passage of this motion will be a significant event in the life of this Parliament. But there are times when, regardless of the implications, enough is enough. The Malaysia deal is wrong. It violates human rights and Australia's international obligations. It should be scrapped and I urge all members to add their voice to this call.”

The Speaker asked whether the motion would be seconded.

The Independent Andrew Wilkie rose to second the motion. And went on: “If someone comes to Australia seeking asylum we have a responsibility enshrined in the Refugee Convention, to which we are a signatory, to give them protection, quickly to assess their claim and to provide refuge if that claim is upheld. This legal responsibility applies regardless of how asylum seekers reach our shores and should be applied equally to those who arrive by boat as to those who come here by aeroplane.

Our real responsibility goes much deeper than our legal obligation as a signatory to the Refugee Convention, because we also have a pressing moral obligation to render all possible assistance to asylum seekers in a genuine spirit of goodwill. It is regarding this moral obligation that the Government is doing the wrong thing by planning on trading asylum seekers with Malaysia, so much so in fact that the Labor Party has now lost the moral superiority it once had regarding Australia's response to irregular immigration. This troubles me because the Labor Party's approach to asylum seekers was a not insignificant consideration some nine months ago when I was struggling with the decision of who to give limited support to in this place.

Frankly, to establish a trade in people fleeing violence and persecution is an abomination. Yes, it may well help to deter asylum seekers from attempting the risky voyage to Australia, but it is wrong, so wrong in fact that I detest it even more than the so-called Pacific solution engineered by the Howard Government and still favoured by the Opposition. At least on Nauru and Manus Island there were Australian officials to ensure that some safeguards were maintained.

Mr. Wilkie proceeded to ask: “How on earth can conditions in Malaysia be tough enough to deter asylum seekers to Australia but safe enough for the Australian government to claim that refugees' human rights will be protected ? They cannot. For a start Malaysia has not signed the Refugee Convention and nor has it ratified the *Convention Against Torture and Other Cruel, Inhuman or*

Degrading Treatment or Punishment. It has not even signed the *International Covenant on Civil and Political Rights*. As the United Nations Human Rights Commissioner has pointed out, any deal with Malaysia simply offers no protection if the refugee and torture conventions have not been ratified by that country.

The Government has a political problem, not an immigration problem. Rather than joining the Opposition in singling out asylum seekers who arrive by boat for special punishment, the Government should have the courage to inform the community about the facts. Asylum seekers are not breaking any rules. The majority are genuine refugees. And far from being swamped, the number of people arriving by boat in Australia is small compared with the much more worrying number of these overstayers arriving daily by air.

So I call again on the Government and the Opposition to stop, take a deep breath and focus instead on developing sophisticated responses to irregular immigration into Australia that much more effectively address the conditions in source, first asylum and transit countries. Remember, this is first and foremost a humanitarian crisis and not a border protection problem.

Australia receives just two per cent of the industrialised world's asylum claims. These are some of the most disadvantaged and vulnerable human beings on the face of the planet. Let us not sacrifice the modest advances made in our treatment of asylum seekers in the last few years in the pursuit of political self interest. In particular, let us not start trading asylum seekers with a country that often treats such people as criminals, forcibly returns them to danger, routinely relies on the lash of the cane and even resorts to the barbaric death penalty.

The bottom line is that this deal with Malaysia is a shameful public policy that is inconsistent with our international obligations. It must be abandoned. That is why I have seconded the motion condemning the deal put forward by the member for Melbourne and that is why I will vote in support of it.”

Two Labor MPs spoke in support of the Government, saying that Australia was taking more refugees and taking a tough approach to people smuggling. Speaking against the motion, Labor backbencher Ms. Julie Owen conceded: “Whatever we do, it does leave some people in real harm.” But she said there will be more tragedies like that in December 2010 with deadly boat sinking off Christmas Island, where up to 50 people drowned, if the trade in people is not stopped.” Ms. Owen said most asylum seekers fly to Malaysia before starting a boat journey to Indonesia, then to Australia, at a cost of about AU\$15,000. “The logic of the Malaysian arrangement is actually very simple. Why would you pay a substantial amount of money and risk your life on a boat only to be returned to where you

had begun your boat journey ?” she asked. She said she is very pleased to see Australia is increasing refugee intake by 4,000 under the deal.

The Opposition Immigration spokesman Mr. Morrison said the Malaysia deal is “conceived in denial and negotiated in desperation. Confusion still reigns over when it (the swap of asylum seekers with Malaysia) starts and who goes there and who does not. It is quite clear the Malaysian Government will have a right of veto over who goes to their country.” He also said asylum seekers will be held on Christmas Island indefinitely because the deal has not been finalised.

“There are laws in Malaysia permitting fines, imprisonment and whipping of people who illegally reside in Malaysia. That is the law in Malaysia. ... Unless this Government has an absolutely rock-solid guarantee that these laws will not apply to people sent to Malaysia then clearly they can give no guarantee about the human rights and welfare of those sent.” Mr. Morrison said.

Meanwhile, on 30 May the Opposition moved a motion for a select committee to investigate Australia's immigration detention network, including the recent riots in Christmas Island and Sydney's Villawood detention centre.

Mr. Wilkie said that he will support the Opposition's motion, and the Greens were still in talks over the details of the inquiry. Messrs. Bandt and Wilkie had indicated that they would also have supported the Opposition's motion to scrutinise the “chaos and misery” of Australia's immigration detention network. In return for his support, Mr Bandt has secured Coalition support for his own motion condemning the Government's Malaysian deal. “Anything we can do to shed a light on the (policy) is something that I welcome.” he said. Mr. Bandt welcomed the broadening of the proposed terms of the inquiry and is negotiating on the membership of the committee.

The Opposition Immigration spokesman, who moved the motion, agreed to crossbench calls for the inquiry's terms of reference to be broadened. That included consideration of “any reforms needed to the current immigration detention network in Australia.”

Another boat carrying 52 asylum-seekers was intercepted off Ashmore Reef on 30 May.

The Opposition Immigration spokesman said that he had amended his original motion to include issues raised by the Greens and that the inquiry would now examine the funding available to government agencies and the health and well-being of asylum seekers in detention. “The Coalition remains open to further amendments to enable a joint inquiry, as suggested by the Greens, and will hold further discussions this week.” Mr. Morrison will still need to secure two votes from among crossbenchers Bob Katter, Tony Crook, Rob Oakeshott and Tony Windsor and when the motion is presented in the next parliamentary sitting. Mr. Katter and Mr. Crook are expected to support the inquiry.

Liberal backbencher Ms. Judi Moylan, who has previously crossed the floor against the policy of mandatory detention, again slammed the practice. “I support this motion (for inquiry) in the hope that it will publicly air and stop the cruel and odious practice of indefinite arbitrary detention of asylum seekers.”

Defiantly, Prime Minister Gillard said that the Australian Government will proceed with plans to set up a regional processing centre in Malaysia for asylum seekers despite the Greens condemning the proposal. Ms. Gillard was standing firm on the issue. “Now, I understand people in the Parliament have different views but I am determined as Prime Minister to strike this arrangement with Malaysia.” ... “It's an innovative approach and part of a regional solution.”

The Minister for Immigration, of course, expressed disappointment with the Greens' course of action.

A successful motion in the House would also have a chance of passing in the Senate where the Greens, who will hold the balance of power in the upper house from July, could vote with the Opposition and Independent MPs.

If the Greens' motion went through, it will mean both houses of Parliament have taken the unusual path of condemning a government policy.

The motion was likely to be voted on in June but the Government will almost certainly lose.

On the Greens motion, Mr. Morrison said that the Coalition would offer support because the Malaysian solution did not address Australia's international obligations.

As June arrived, events began moving faster. It was said that deportation of boat people could begin as early as 8 June, subject to approval of the deal by the Malaysian Government and the signing of a memorandum of understanding.

This would take place despite the pleas to the Minister for Immigration by a group of asylum seekers, who claimed that they had been tortured in Malaysia, not to send Australia's boat arrivals to that country. They said that their only crime was 'not being a Malaysian citizen'.

On 2 June the Australian Parliament agreed to set up the broadest inquiry ever into immigration; the Government was now supporting the Opposition motion. The Coalition had originally proposed a limited inquiry into the network of immigration detention centres but it broadened the scope of the inquiry to win the support of the Greens. After two weeks of negotiations with the Independents and the Greens the Coalition's spokesman won support for a joint select inquiry into Australia's immigration detention network.

At first the Prime Minister had derided the move as a stunt. The Prime Minister said: "We all know of course that they're not interested in the policy because if they were interested in the policy then presumably they would be supporting an inquiry that looked at detention not just now but also

detention under the Howard Government.”

Now the Minister for Immigration was joining in the stunt by saying that “This is a Government which is more than happy to have transparency when it comes to our immigration policy.” The Government's decision probably had something to do with the fact Mr. Morrison had mustered the numbers to push through the inquiry without the Government's help. The motion went through.

It might have been an embarrassing moment for the Gillard Government.

The terms of reference cover everything from the riots and disturbances at the Christmas Island and Villawood detention centres to the circumstances surrounding the interception of asylum seeker boats. Finally, for the moment at least, on the evening of 2 June the A.B.C. *Lateline* programme disclosed that it had obtained the draft agreement. Throughout the document there is no use of the words asylum seekers - the 800 asylum seekers to be sent to Malaysia are called “illegal immigrants.” It includes amendments made by the Malaysian Government as recently as 30 May, to the effect that Malaysia wants to decide which asylum seekers it would accept. It provides that Australia will cover nearly all costs of the refugee swap, including transport, education, health, housing, resettling costs as well as the relocation of asylum seekers to third countries. It calls for Australia “to be fully responsible to

accept and ensure voluntarily forced returns [of asylum seekers] to their country of origin.” It removed all reference to human rights in the revised document and does not want the Refugee Convention to cover its side of the deal. Specifically, “The treatment of the [800 asylum seekers to be transferred] while in Malaysia will be in accordance with the Malaysian laws, rules, regulations and national policies.”

Lateline is said to have obtained a series of internal emails from the U.N.H.C.R. which shed light on the negotiations. From these emails, it is revealed why there is no reference to human rights in the draft of the agreement - Malaysia removed it. The emails make it clear that the U.N.H.C.R. has serious concerns that the deal may breach Australia's obligations under the Refugee Convention and it may breach the U.N.H.C.R.'s requirement to operate according to international law.

Amnesty International refugee coordinator is worried about the deal: “The principle of non-discrimination is captured in the Universal Declaration of Human Rights and is very explicitly captured in article three of the Refugee Convention.” he said. “This agreement undermines non-discrimination principles in a number of ways - both in treatment of people arriving here but also how they might be treated in Malaysia. And there are very real concerns about both.”

The U.N.H.C.R. has expressed concerns about what might happen to children under the plan. “Exceptions from transfer to Malaysia will need to be made in the case of separated or unaccompanied children where return to Malaysia is determined to be not in their best interest.” the document said.

Prime Minister Gillard has repeatedly refused to answer questions about what this deal means to children arriving here by boat. On 9 May Ms. Gillard was asked if there would be “any exclusions for people who are sick, infirm, young, close to birth.” The Prime Minister replied: “We are not at this stage dealing with those kinds of details.”

But an internal U.N.H.C.R. document written a day later suggests that Australia already had a position on sending children to Malaysia. “AUL (Australia) doesn't want to provide exceptions for UAMS (unaccompanied minors) and vulnerable individuals for fear if (sic) this being a pull factor exploited by smugglers.” the document said. The draft agreement does say: “Special procedures will be developed and agreed to by the participants to deal with the special needs of vulnerable cases including unaccompanied minors.”

On 3 June the Minister for Immigration confirmed that children will be among the asylum seekers to be sent by Australia to Malaysia as part of the deal. He added that the deal should only be judged when it is finalised, but he said he will not put in a clause to exempt unaccompanied children. The Minister insisted that “You need to send a strong message.” ... and on the question of the children he said: “I don't want unaccompanied minors, I don't want children getting on boats to come to Australia, thinking or knowing that there is some sort of exemption in place. I never want to go through, and I don't want our nation to go through, what we went through in December and the months following, burying children as a result of a boat accident. And it is inevitable that that will occur again unless we break the people smugglers' business model.”

The Minister was eager to point out that the *Lateline* documents are a draft and the final deal has not been reached. “The Malaysian government has been very clear [in its] commitment to deal with those people in a way which respects their dignity, which respects human rights standards, and that is why organisations like the UNHCR have been involved in these discussions.” he said.

In what may appear as a clumsy *demarche*, the U.N.H.C.R. Regional Representative - previously so enthusiastic - said that the deal is still under discussion. “We hope that the agreement will be judged on its final terms, not according to one piece of a part of a negotiation that has been going on for some months.” ... “It's no secret we have had some difficulties with part of the process. That is why we have come back and said in our view we want to see some good clear protection standards for the people returned.”

The Minister for Immigration announced on 3 June that unaccompanied children will be among the asylum seekers sent from Australia to Malaysia as part of a refugee swap, despite the fact - as

Greens Senator Sarah Hanson-Young repeated - that the Minister has a special responsibility for unaccompanied asylum-seeker children. “The Minister forgets that he is legally the guardian of unaccompanied minors.” she said. “The Minister, for the sake of a political quick-fix, is prepared to expend the rights and obligations he should be offering to these very, very vulnerable children.”

* * * * *

The ‘Malaysia deal’ is turning into a *fiasco*.

The Minister for Immigration is likely to be blamed for it by the Prime Minister. The Minister is, of course, politically responsible but personally excusable: an undergraduate in Economics who went straight into ‘politics’; he is not likely to have been exposed to concepts of international law - which is essentially customary and more than other laws depends on the good faith of the parties. He could have been badly advised by a *Service* which is no longer *Public*, but has remained arrogant and racially prejudiced. “Who are these Malaysians, anyway ? - former ‘hewers of wood and drawers of water’, performers of menial tasks.”

The Prime Minister is an Arts/Law Graduate with some ten years of practice in industrial law. Maybe she read international law. If this is the case, she does not understand anything about it. More likely, she is good at factional ‘dealings’, particularly now from the position of dominatrix of a Cabinet she alone chose - maybe in her image, more likely in the ‘understanding’ that its members are to prostrate themselves before a new goddess - or else.

She may think of herself as a transplanted Margaret Thatcher, whom she strongly imitates during Question time in the House. It stands to reason: Ms. Gillard is provincial in the sense of limited, unsophisticated, narrow-minded, unpolished and, when the chips are down, *One* who does not care for anyone else’s opinion. It stands to reason: Ms. Gillard is insular by origin and up-bringing. She may even be xenophobic. “Why aren’t these asylum seekers good Christian, preferably of the Anglican brand, which is said to make room even for atheists ?” - that sort of thing, and if the word is not mis-placed that sort of *milieu*.

She is a *Thacherite*: no record exists that she ever admitted making a mistake, and above all she seems to have “No beliefs, no ideas, only attitudes” - as it was said of Margaret Thatcher. One of such attitudes could very well define Ms. Gillard:” I am Julia, and I am not turning.”

She appears to be comfortable with Hawke, she would never be with Keating. In comparison with Whitlam she stands as *New Labor*’s Tammy Faye.

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