Indonesia and Malaysia Mission Report

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Table of Contents

I. Introduction

II. Sri Lanka

III. Countries of proximate refuge
- A. Instruments
- B. Detention
  - i) Indonesia
    - a) Adults
    - b) Children
  - ii) Malaysia
- C. Work
  - i) Indonesia
  - ii) Malaysia
- D. Education
- E. Health care
- F. Resettlement
  - i) Indonesia
  - ii) Malaysia

IV. Traditional resettlement countries
- A. A regional plan
- B. Australia
- C. Canada
  - i) Bill C-4
  - ii) Resettlement

V. Conclusions

VI. Recommendations

A. Sri Lanka

B. Indonesia

C. Malaysia

D. Countries of traditional resettlement

I. Introduction

I visited Indonesia and Malaysia in January 2012 to find out about the difficulties Sri Lankan Tamil refugees were encountering in the region and options for overcoming them. On January 10, I visited Sri Lankan Tamil refugees held at the Immigration Detention Centre, Tanjung Pinang, Indonesia. On January 11, I met in Jakarta, Indonesia with Masni Eriza, Deputy Director for Humanitarian Affairs, Directorate for Human Rights and Humanitarian Affairs of the Ministry of Foreign Affairs, Government of Indonesia and, in a separate meeting, with Steve Hamilton, Deputy Chief of Mission, Senior Programme Coordinator, International Organization for Migration. On January 12, also in Jakarta, I met with Francis Teoh, Senior Regional Protection Officer and Nathalie Springuel, Refugee Status Determination Officer, of the Office of the United Nations High Commissioner for Refugees.

In Kuala Lumpur, Malaysia on January 13, I met with Alan Vernon, Representative, Jose Alvin Gonzaga, Senior Protection Officer, and Brittocia Franklin, Assistant Community Service Officer of the Office of the United Nations High Commissioner for Refugees. In a separate meeting, I met with Sarah Devaraj, Project Coordinator and Nalini E., Program Manager, of Suaram, a Malaysian human rights NGO. On January 14, also in Kuala Lumpur, I spoke at a public forum organized by the NGO STROM, (Sri Lankan Tamils Refugee Organization of Malaysia) at a Hindu Temple, Kalamandam. Later I went to the STROM offices and met with a number of Sri Lankan Tamil refugees.

I first became involved in the plight of Sri Lankan Tamil refugees when I was asked to help a boatload of 87 Sri Lankan Tamil refugees aboard the ship MV (Merchant Vessel) Elysia stuck at Tanjung Pinang port Indonesia in July and August 2011. The refugees were destined for New Zealand, but were stopped July 10th 2011 en route by the Indonesian water police in Indonesian waters.

The refugees refused to disembark. New Zealand refused to take them. The Government of Indonesia stated that it would not use force to impose disembarkation on the passengers of the Elysia. The Government has also stated that it would give access to food supplies and medical care, but neither the Government nor the Office of the United Nations High Commissioner for Refugees (UNHCR) nor the International Organization for Migration (IOM) actually provided food supplies and medical care in a sustained manner to the passengers. After running out of food and water, the refugees on August 26th disembarked and were put into Indonesian detention. The asylum seekers I saw in Tanjung Pinang were all part of that group.

In August 2011, I went to Geneva to meet with Anja Klug, Senior Legal Officer, Head Asylum and Migration Unit, Division of International Protection Services and Pierfrancesco Maria Natta, Senior Legal Officer, Bureau for Asia and Pacific. The meeting took place on 1 September 2011. The particular focus of the September visit was the asylum seekers from the MV Elysia.

I nonetheless realized that the plight of the people on this ship could not be divorced from its geopolitical context. Helping this group meant addressing larger issues. So I tried to do that, in part through this mission to Indonesia and Malaysia.

Remedying the plight of refugees means addressing three different sets of problems. Difficulties posed in the country of flight, the countries of proximate refuge and the countries of resettlement all need consideration.

II. Sri Lanka

Sri Lanka ended in May 2009 a long brutal civil war between the Government of Sri Lanka and the minority Tamil forces who sought an independent country in the north. The war, which went on for twenty six years, resulted in 80,000 deaths. It culminated in a frenzy

of killing and mass detention of Tamil civilians.

Tamils in Sri Lanka continue to be victimized by the victors in the war. The systemic discrimination, harassment and persecution of minority Tamils by elements of the majority which sparked the civil war continues with a vengeance now that the Tamil side has lost that war.

The civil war in Sri Lanka was sparked by systematic discrimination and exclusion by elements of the majority against the Tamil minority. The violent Tamil Tiger response does not excuse the mistreatment which generated it. Now that the Government of Sri Lanka forces have won the civil war, the very mistreatment of the Tamil minority which engendered it has become more cruel. This is a victory without magnanimity.

It goes without saying that ending serious human rights violations in Sri Lanka would end refugee flight from Sri Lanka. If violations in Sri Lanka ceased, then refugees could return in safety and security. Refugee flight occurs because of serious human rights violations in the country of origin.

There is a tendency, when dealing with refugees, to take serious human rights violations in the country of origin as a given. In one sense they are, because refugees would not exist without human serious rights violations. Moreover, combatting serious human rights violations is a daunting, long term task which rarely succeeds in time to help individual refugees.

Nonetheless, in attempting to help refugees, we must not neglect the effort to end human rights violations in the country of origin. This effort, to end human rights violations in the country of flight, has both a long term and short term benefit. The long term benefit, hopefully, is the end of these violations, the cessation of refugee flight, and voluntary

repatriation of those who have left. The short term benefit is that the situation which caused the flight is highlighted; the need for refugee protection is underlined.

I know, in a general sort of way, what happened to Tamil refugees in Sri Lanka before they fled. The refugees who fled certainly know what happened to them. Yet, many people do not know.

Now that the civil war has ended, a blanket of silence covers the dead and muffles the living. The perpetrators make every effort to cover up the past to gain immunity and retain their positions of power. The perpetrators say everything is fine now and nothing much happened in the past. For governments of countries of destination and the public to want to provide a haven to refugees, they need to know what has happened, what is happening.

Protecting refugees is an international legal obligation which should be respected popular or not. Nonetheless, political will matters. When governments and the public want to protect refugees, that protection is a lot more likely to be forthcoming than when governments and the public are indifferent or hostile.

Widespread public awareness of the human rights violations which caused refugees to flee helps to create the political will necessary to generate effective protection. We need to lift the veil over the human rights violations past and present in Sri Lanka not just to end those violations in, one would hope, the not too distant future, but also to help to protect refugees now.

The Secretary General of the United Nations Ban Ki Moon appointed a panel of experts in June 2010 to advise him on a process of accountability for the violations of human rights and humanitarian law in the final stages of the Sri Lankan civil war. The Panel reported in

March 2011 found credible evidence of serious violations of international human rights and humanitarian law during the conflict and recommended a genuine investigation into the allegations of violations. The Government of Sri Lanka rejected this report, maintaining that its military inflicted no civilian casualties.

The Government of Canada in contrast backed an independent investigation into war crimes committed by the Sri Lankan army in the final phase of the civil war. Foreign Minister John Baird, according to a Globe and Mail report, told Sri Lanka's Foreign Affairs Minister, G.L. Peiris, at the UN in New York in September that Canada wants progress on human rights and post-civil war reconciliation, pushing back, according to a summary provided by sources, against Mr. Peiris's 'trust us' assurances[1].

One potential focus of attention is the Commonwealth heads of government meeting now scheduled for Colombo, Sri Lanka in 2013. The Government of Canada has already said that it would boycott that meeting unless the Government of Progress allowed an independent investigation into human rights violations during the civil war and made meaningful efforts at reconciliation with the Tamil community.

Canadian Prime Minister Stephen Harper said prior to the Commonwealth Heads of Government Meeting in Perth in October 2011:

> "I have expressed concerns about the holding of the next Commonwealth summit in Sri Lanka ... I intend to make clear to my fellow leaders of the Commonwealth that if we do not see progress in Sri Lanka in human rights I will not as Prime Minister be attending that Commonwealth summit. And I hope others will take a similar position."[2]

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[1] "In policy shift, Stephen Harper presses Sri Lanka on human rights", Campbell Clark Sep. 29, 2011

[2] "Canada seeks Sri Lanka boycott at Commonwealth meeting", Amanda Hodge, The

The Government of Sri Lanka appointed in May 2010 a Commission of Inquiry mandated to report on the events from the end of the cease fire in February 2002 to the end of the civil war in May 2009. The Commission reported in November 2011. The report was one-sided, setting out in great detail evidence and conclusions on the crimes of the opposition forces, the LTTE, but passing over the substantial evidence of war crimes and crimes against humanity of the government forces.

The Government of Canada maintained its position, after the release of this report, of intending to boycott the Commonwealth Heads of Government meeting in Sri Lanka for 2013, unless real change occurred in accountability for the crimes of the civil war and reconciliation between communities. The Prime Minister of Canada rejected the November 2011 report as failing to address the human rights concerns arising from the end of the civil war in 2009[3].

Perpetrators distort, pretend, deny. They seek impunity; having resorted to mass murder of innocents to maintain power, they do not hesitate to lie for the same purpose.

Justice requires truth. Even if Sri Lanka now were a rights respecting state, there would have to be accountability for the past. When the perpetrators remain in power and hide their abuses, disclosing them is more than just dealing with the past. It means confronting the reality of the present, part of which is the reality of the need today to protect refugees from Sri Lanka.

III. Countries of proximate refuge

Australian, September 14, 2011

[3] "Sri Lanka report not enough to change PM's mind on summit boycott" Postmedia News, January 12, 2012

When refugees flee, their ultimate destinations may be far distant countries of resettlement. Their immediate destinations though are countries of proximate refugees. Refugee protection does not just mean resettlement in the traditional resettlement countries. It should also mean, at least for some, local integration in the countries of proximate refuge.

Protecting refugees is a global responsibility. It is not just the responsibility of a few countries of traditional resettlement. Countries of proximate refuge must do their share. Doing their share should mean more than just being countries of transit, way stations for refugees all of whom ultimately arrive at countries of traditional resettlement. Doing their share should mean, at least for some refugees, the possibility of local integration.

As well, countries of proximate refuges, even for refugees in transit, must treat these refugees humanely. Inflicting misery to spur movement to the countries of traditional resettlement is cruel. It is also unrealistic because making refugees want to leave countries of proximate refuge does not make their acceptance in countries of traditional resettlement any more likely. It is as well a shirking of the duty to share the global responsibility for the refugee population.

For Sri Lankan Tamil refugees, Indonesia and Malaysia are countries of proximate refuge. These countries present a whole host of problems for refugees both in principle and in practice. The two are inter-related. The failure to embrace the principle of respect for rights of refugees makes violations of the rights of refugees all that much easier.

A. Instruments

Neither Indonesia nor Malaysia is a signatory to the Refugee Convention. Indonesia has included in its five year human rights action plan for 2010 to 2014 the signing of the Refugee Convention. That seems encouraging until one considers that this signing was

also part of the previous five year human rights action plan, from 2004 to 2009, but it did not happen. Despite the inclusion of the signing in the plan, indications are that yet again it will not happen.

Signature is different from ratification. After signature and before ratification a state party is bound not to act in such a way as to defeat the object and purpose of the treaty[4], but is not bound by all its terms. While some states enact all reforms necessary for ratification before signature of any treaty, other states take advantage of the gap between signature and ratification to change their systems to conform to the requirements of the treaty. Indonesia could sign now, ratify later and, during the interim, make the necessary changes. Signing now would be consistent with the current action plan. Indeed, it would set up a refugee specific action plan, actions necessary to allow for ratification.

Malaysia has not even gone that far. Malaysia has given no indication of an intent to sign the Refugee Convention. Malaysia does not even have a human rights action plan.

Nonetheless both states are parties to the Convention the Rights of the Child. Indonesia as well is a state party to the Convention against Torture. Both these Conventions have implications for refugees.

As well, the Universal Declaration of Human Rights binds both countries at customary international law. The Declaration asserts the right of every person to seek and enjoy asylum[5].

B. Detention

[4] Article 18 of the Vienna Convention on the Law of Treaties

[5] Article 14.

i) Indonesia

There are 361 known Sri Lankan Tamil refugees and asylum seekers in Indonesia as of the date of this report. 250 are released. The rest are detained.

a) Adults

In Indonesia, asylum seekers are detained as a matter of course as illegal migrants. The law mandates, but does not require universal detention. Detention is discretionary.

The Government of Indonesia has taken advantage of the discretionary space the law allows to adopt policy exceptions to the operation of the law - for women, children, family and the disabled. However, these exceptions do not prevent detention. Everyone is detained. The exceptions are eventually released. Also refugees, once recognized as such by Office of the United Nations High Commissioner for Refugees, are released.

Malaysia, as noted later, has a similar universal discretionary detention law, also with policy exceptions. In Malaysia, the discretion is exercised to allow asylum seekers to fall within the exception, not just refugees. Indonesia should adopt a similar exception.

Indonesia has not to date adopted such a policy in part because of a concern that released asylum seekers would flee by boat to Australia or New Zealand. These sea voyages put the asylum seekers at risk. They allow the flourishing of a smuggling industry. Australia and New Zealand have exerted diplomatic pressure on Indonesia to staunch this flow.

Australia itself has detained asylum seekers systematically who arrive by boat. The Government of Indonesia might wonder why Indonesia, a non-signatory the Refugee Convention should be expected to release asylum seekers, when Australia, a signatory to

the Refugee Convention does not do so, in violation of that Convention[6].

One answer to that concern is that Australia has recently relaxed its universal detention regime for boat arrivals. Prime Minister Julia Gillard in October 2011 announced a policy of bridging visas for boat arrival asylum seekers while asylum claims were being assessed[7]. Australia has begun releasing detainees on these visas.

b) Children

The Convention on the Rights of the Child states that detention "shall be used only as a measure of last resort and for the shortest appropriate period of time"[8]. It also provides that children asylum seekers and refugees shall "receive appropriate protection and humanitarian assistance" and that States parties to the Convention shall cooperate with the efforts of the United Nations to provide that protection and assistance[9].

The Office of the United Nations High Commissioner for Refugees, in its 1994 publication "Refugee Children: Guidelines on Protection and Care" states:

> "It is UNHCR's policy that refugee children should not be detained. Unfortunately, refugee children are sometimes detained or threatened with detention because of their own, or their parents', illegal entry into a country of asylum. Because detention can be very harmful to refugee children, it must be "used only as a measure of last resort and for the shortest appropriate period of time" [CRC art. 37(b)].
>
> If refugee children are detained in airports, immigration holding centres or prisons,

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[6] Refugee Convention Article 31.

[7] Press conference October 13, 2011.

[8] Article 37(b).

[9] Article 22

> they must not be held under prison-like conditions. Special arrangements must be made for living quarters which are suitable for children and their families. Strong efforts must be made to have them released from detention and placed in other accommodation. Families must be kept together at all times, which includes their stay in detention as well as being released together.
>
> International standards Protection and assistance should make sure international standards are complied with whenever children are in detention.
>
> Detention must be in conformity with the State's law [CRC art. 37(b)]. A distinction must be made between refugees/asylum seekers and other aliens.
>
> Detention must only be used as a last resort and must always have a proper justification. For example, when identity documents have been destroyed or forged, a State might choose to detain an asylum seeker while identity is being established, but detention must be for the shortest period of time possible [CRC art. 37(b)]. Executive Committee Conclusion No. 44 (1986) discusses the limited circumstances when asylum seekers can be detained, and sets out basic standards for their treatment. Detention must never be used to punish asylum seekers or to deter or scare off other potential asylum seekers.
>
> The conditions must be humane, which means that the needs of refugee children must be met [CRC art. 37(c)]. These needs are defined throughout these Guidelines, and include protection from physical abuse, keeping the family together, access to education, and play."

Compliance with the Convention on the Rights of the Child, as well as humanitarian policy, should mean that children amongst the group of Sri Lankan Tamil refugees who arrived on the boat Elysia should have been free to leave the refugee camp where they were detained. Moreover, their parents should also have been free to leave with their children, on the principle that families should be kept together.

When I visited Tanjung Pinang, I saw detained children with my own eyes, seven in all, from the ship Elysia. They got off the ship, as I noted earlier, on August 26, 2011. I went to the detention centre on January 10th. So the children had been detained for over four months.

Why were these children being detained in spite of the Indonesian policy that children were not to be detained? I heard a wide variety of explanations and excuses.

One was that children could not be released unless they had housing. The International Organization for Migration had to organize housing and then get the approval of the local government to house the children (and their parents) in the arranged facilities. The local government had objected to some proposed arrangements and the central government did not have the power to override the local governments.

A second excuse I heard was that there was a fear that the children once released would put again on a ship by their parents. It was not in the best interests to have that happen. So the children were kept detained to prevent that from happening.

A third excuse was that the parents were not going to be released. To maintain family unity, the children would also be kept in detention so that they could be with their parents.

A fourth excuse was that the Sri Lankan embassy in Jakarta had maintained a close, persistent interest in the arrivals. The arrivals, including the children, were kept in detention while the Indonesian government determined the identity of the arrivals and their history.

A fifth excuse was that a decision to release was not the same as actual release. Aside

from the need for accommodation which had received the approval of the local authorities, there was also a need for an official escort from the place of detention to the place of accommodation, which could be a substantial distance. Arranging escorts took time.

A sixth excuse was that there were no Tamil language schools in the country. All the local schools gave instruction in the local language which the children did not know. So there was no point in releasing the children from detention to go to school.

What all these excuses had in common were that they were pretty lame. Children can pick up the local language at school if given a chance. Children should be under adult supervision at all times, and, as long as that supervision is responsible, they will not be placed on boats. Children should indeed not be separated from their parents; but that is an argument for releasing the parents, not keeping the children in detention. Obstruction from local authorities is never a justification for violating international standards. Interest of the Sri Lankan government in the detainees might be a reason for recognizing the asylum seekers as refugees *sur place*; it is not a reason for detention. Once a decision has been made to release, keeping people in detention while escorts are organized is inconsistent with the release decision. In sum, though there were many excuses, the detention of the MV Elysia children was inexcusable.

ii) Malaysia

There were 4,293 UNHCR registered refugees and asylum Sri Lankan seekers in Malaysia as of the end of October, according to the UNHCR[10]. There are 43 detention camps and detention centres across Malaysia each with an estimated 4 to 5 Sri Lankan Tamil refugees.

[10] UNHCR "Health and Displacement: Urban Refugees in Malaysia"

As one can see, the Sri Lankan Tamil refugee numbers in Malaysia are a totally different order of magnitude than the same numbers in Indonesia. The Sri Lankan Tamil refugee population in Malaysia is greater than the same population in Indonesia by a factor of ten. Despite the large overall difference, the number of Sri Lankan Tamil refugees in detention in Malaysia countries is roughly twice the number of those in detention in Indonesia, highlighting the draconian nature of Indonesian detention.

While Indonesia has, at least initially, universal detention, Malaysia has arbitrary detention. Malaysia law, not surprisingly, requires foreigners to have valid travel documents[11]. As well, Malaysia has a national identity card system. Malaysian law requires every person to have a Malaysian government issued identity card[12].

Asylum seekers are, eventually documented, through registration by the local Office of the United Nations High Commissioner for Refugees. However, during the many months while they are awaiting registration, they are vulnerable to detention as undocumented and many are detained. Many more escape detention by paying the arresting authorities bribes.

As well, UNHCR documentation is not the same as Government of Malaysia documentation. Under Malaysian law, even those with UNHCR documentation are considered undocumented. The UNHCR has informal understandings with the police to accept their documentation. However, like many such informal practices, sometimes they are observed; sometimes they are not.

The Government of Malaysia has committed not to prosecute in court those registered

[11] Immigration Act section 72.fx

[12] National Registration Act section 5, National Registration Regulations (Amendment 2001) regulation 3.

with the UNHCR for being in Malaysia illegally without documents[13]. The Attorney General in 2005 issued written directions stating that the Government would refrain from prosecuting holders of UNHCR documentation[14].

However, there is no similar direction from the police, nor from the Immigration authorities. The commitment of the Attorney General does not prevent refugees and UNHCR registered asylum seekers from being arrested for not having Malaysian issued identity documents and in fact they often are.

It would seem a matter of common sense that those who are not going to be prosecuted for an offence should not be arrested for the offence. Yet, that logic does not apply in Malaysia. Both the police and Immigration Department need to issue their own directions paralleling those of the Attorney General stating that they would not arrest, nor authorize the arrest of those registered with the UNHCR either as refugees as asylum seekers.

The Immigration Act of Malaysia allows the Minister of Immigration to exempt any class of persons from any provisions of the Act[15]. This power could and should be used to exempt asylum seekers registered with the UNHCR from the requirement of having travel documents and visas[16].

The National Registration Act has a similar power, allowing exemption by regulation from

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[13] UN Human Rights Council, Eleventh session, Agenda item 6, Universal Periodic Review, Report of the Working Group on the Universal Periodic Review, Malaysia. UN Document A/HRC/11/30, 5 October 2009, Paragraph 12.

[14] FIDH and Suaram "Undocumented migrants and refugees in Malaysia: Raids, Detention and Discrimination" March 2008 page 9

[15] Section 55.

[16] Section 72.

the universal national registration requirement[17]. The Government of Malaysia should either exempt by regulation asylum seekers registered with the UNHCR from the requirement of the National Registration Act to be registered under that Act or allow asylum seekers registered with the UNHCR to be registered under that Act.

The legislation exemption powers given to the Government have not been used to exempt UNHCR registered asylum seekers from Malaysian documentary requirements. The result is that registered UNHCR asylum seekers are vulnerable to arbitrary arrest.

Registration in Malaysia with the UNHCR can take many months. In the interim, the UNHCR issues an appointment card. These appointment cards are insufficient to prevent arrest, even according to the informal understanding the UNHCR has with the police. If a person with an appointment card is arrested, the UNHCR will expedite his or her registration rather than seek his or her release without registration.

Delays at the UNHCR in registration then leave asylum seekers particularly vulnerable to arrest and detention. One option to resolve this problem would be to ask for the police and Immigration Department to refrain from arrest of those with appointments for registration. The trouble with that option is that it is open to abuse. Any migrant worker, even one without a colour of claim to refugee protection, could approach the UNHCR for an appointment.

The other option is to accelerate registration. The UNHCR operates under resource constraints, and the current delays in registration are a reflection of resource limitations. Nonetheless, the current delays indicate that what resources the UNHCR now has are being allocated unwisely amongst its various functions.

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[17] Section 5.

The UNHCR would be better off taking resources from determination to registration than to maintain the current balance. Shifting resources from determination to registration would mean that, though registration would take less time, determination would take more. Nonetheless, since Sri Lankans virtually never get resettled, a matter to which this report will return, determination matters a good deal less than registration. For populations which are resettled, particularly the Burmese, the current UNHCR allocation of resources between registration and determination may make sense. For Sri Lankans, it does not.

A particular problem is the auxiliary police, the People's Volunteer Corps, with the acronym RELA. This Corps has powers of arrest and was prior to 2008 paid, in addition to a base pay, 80 ringat per arrest. The Corps had a financial incentive to arrest, and undocumented asylum seekers are easy pickings. This form of payment also meant that the Volunteer Corps were easily bribed. As long as they got from asylum seekers, for not arresting, what they would have got from the government for arresting, they were inclined to leave the asylum seekers alone, at least till the next time.

RELA is involved in constant raids looking for undocumented foreigners. They do not recognize UNHCR registration cards as acceptable documentation. The UNHCR reported in 2009 that there were 3,500 arrests of refugees and registered asylum seekers. All refugees and asylum seekers live in fear of these raids.

UNHCR registration does not prevent arrest. It decreases the risk of arrest and increases the chance of release. Yet, registered asylum seekers still get arrested. If the UNHCR knows of their arrest, the Office will try to secure their release. However, simply informing the UNHCR of arrests can be difficult. Many Tamils do not speak English, the language of work of the UNHCR. As well getting access to the Office by phone when in detention can be difficult.

Refugees and asylum seekers also can be and are arrested for working illegally. Malaysia has begun a regularization of status program for illegal migrants discussed below.

Another common cause of arrest, odd though it may seem, is to forestall imminent departure. Malaysia puts refugees in a Catch 22. If they don't try to leave, they run the risk of arrest for not having proper documents or working illegally. If they do try to leave, they run the risk of arrest for the effort.

These arrests are attempts to stop smuggling and trafficking. While the goal is worthy, arresting victims is unworthy. Anti-smuggling efforts should target the smugglers, not the smuggled.

Refugees get arrested on arrival as well as to prevent departure, if the arrival takes an irregular form. Boat people are at risk both coming and going. Arresting people simply because they have come to seek asylum violates the Universal Declaration of Human Rights obligation to respect the right to seek asylum.

One consequence of the failure at law to have any refugee specific laws or regulations is that as a matter of policy refugees are treated as part of the migrant worker population. Migrant workers are quite different people from asylum seekers both conceptually and practically. Yet, in Malaysia they are blended. Moreover, since the migrant worker population is a far bigger group than the refugee population, migrant worker policy tends to drive refugee treatment.

C. Work

i) Indonesia

In Indonesia work is not available either legally or practically. Neither asylum seekers nor

recognised refugees are eligible for work permits. As well, the economy is so poor, unemployment is so high, that work is not available even underground, on the black market.

Asylum seekers, as noted, remain in detention pending recognition. Without outside support the situation of recognized refugees released from detention would be dire. The Government of Australia, Indonesia and the International Organization for Migration (IOM) signed a tripartite regional cooperation model (RCM) agreement in 2001 to address this problem. The IOM provides accommodation, medical care and a food allowance to recognized refugees. Australia supports these arrangements financially.

ii) Malaysia

In Malaysia, asylum seekers and recognized refugees cannot work legally, but can work illegally. The economy is robust enough to provide work to undocumented, underground workers.

This sort of work though presents a host of problems. It is subject to employer exploitation and low wages. As well, workers run the risk of arrest.

There is no tripartite agreement between the IOM, Malaysia and Australia comparable to the one for Indonesia and no program in Malaysia comparable to the Indonesian support for refugees provided by the IOM. Refugees in Malaysia need to work illegally to survive.

The absence of an IOM support program in Malaysia combined with the presence of such a program in Indonesia has created a perverse internal boat people movement from Malaysia to Indonesia. This movement is also spurred by the different UNHCR resettlement practices for Sri Lankan Tamil refugees in Indonesian and Malaysia discussed later in this report. Unless and until refugees and asylum seekers are allowed to work

legally in Malaysia, they should be provided accommodation, health care and food allowances similar to those provided to refugees in Indonesia.

Part of the swap agreement between Australia and Malaysia discussed later in this report was that the returned asylum seekers could work in Malaysia. It provides "Transferees will have ongoing access to self reliance opportunities particularly through employment."[18] If Malaysia was willing to agree to allow those returned from Australia to work, there is no reason why Malaysia could not also allow asylum seekers already in Malaysia to work. It would be odd that an asylum seeker would have to go from Malaysia to Australia and back to get the right to work in Malaysia.

Malaysia has begun a regularization of status program for illegal workers called the 6p's program. The 6p's refer to the six stages of the program which are registration, legalization, amnesty, supervision, enforcement and deportation[19]. Not every illegal worker who registers under the program would be legalized. Rather legalization depends on determinations whether there is a need for the work of the registered illegal worker and the suitability of the worker to do the work. Those not legalized would be deported.

According to the answers given to the frequently asked questions put out to explain the program, UNHCR registered refugees are supposed to register under the program. Yet, deporting refugees on the basis that there is no demand for their work or that they are not suitable for the work offered flies in the face of the obligation to protect refugees.

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[18] Arrangement between the Government of Australia and the Government of Malaysia on Transfer and Resettlement, July 25, 2011 Annex A Operational Guidelines to Support transfers and Resettlement Situation of Transferees during Temporary Stay in Malaysia section 3.2 Self Reliance and Basic Support paragraph (a).

[19] See <www.angkapasti.com>

The Government of Malaysia has indicated that there would be some variation in the program which would be appropriate for refugees. In the meantime, the program has created confusion and uncertainty for refugees, as well as additional risk. Now, refugees and asylum seekers are damned if they do and damned if they don't. If they do not register under the program, they are violating its rules, which require registration. If they do register under the program, they have, at least *prima facie*, subjected themselves to the risk of deportation for reasons unrelated to the risk they face on return.

The program needs to be adapted to refugees and asylum seekers so that the last two stages, enforcement and deportation, do not apply to them. In meantime, they should not be required or even expected to register under the existing program.

D. Education

Malaysia has an indigenous Tamil speaking population of over one million and a network of over five hundred government funded primary schools where instruction is in Tamil. Yet, children of Tamil refugees, neither on arrival, nor after registration, nor after recognition, can go to these schools.

Instead, Tamil refugee children, insofar as they get any education at all, get education privately. Establishing and accessing private education is inevitably more expensive and administratively more difficult than enrolling in public education.

Tamil refugee children, including children of Tamil asylum seekers, even before UNHCR registration, should be able to access the Tamil public schools. The UN Convention on the Rights of the Child requires no less[20].

E. Health care

[20] Article 28.

In Malaysia, UNHCR registered asylum seekers have to pay the full cost of health care. Once they are recognized, they have to pay half the cost of health care. These health care costs are unduly onerous, not only in absolute terms, but also in comparison to the same refugee population in Indonesia, where health care costs are covered by the IOM. Here too there is a violation of the Convention on the Rights of the Child, since that Convention encompasses

> "the right of the child to the enjoyment of the highest attainable standard of health and to facilities for the treatment of illness and rehabilitation of health. States Parties shall strive to ensure that no child is deprived of his or her right of access to such health care services"[21].

UNHCR registered asylum seekers and recognized refugees should be able to access health care at the same cost as Malaysians.

F. Resettlement

i) Indonesia

Recognition rates for asylum seekers in Indonesia for Sri Lankans are high. Refugees in Indonesia, once recognized by the UNHCR, are almost entirely resettled. This resettlement program makes eminent sense in light of the minimal possibility of local integration. The economy is too poor and unemployment too high for it to be reasonable to expect recognized refugees to be able to integrate locally.

In spite of the high refugee recognition rate in Indonesia for Sri Lankan Tamil refugees and a high overall resettlement rate from Indonesia, there is also a high no show rate at refugee determination interviews for those asylum seekers released as exceptions to the universal detention policy, over fifty per cent. While no shows do not provide explanations why they are not there, there is a distinct possibility that they may have left Indonesia by boat on their own.

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[21] Article 24

This high no show rate speaks to a breakdown in communication. Asylum seekers likely to be recognized and resettled through legal channels are unwise to head off on boats on the high seas, where they risk misadventure at sea, and wherever they arrive, a hostile reception and likely detention. Asylum seekers and recognized refugees need more and better counselling, more and better information about processing times, and recognition and resettlement rates.

One simple way of doing that is simply posting this information on the UNHCR website for Indonesia ideally in the language of the refugees. The UNHCR Sri Lanka website has a number of linked documents in Tamil. There is no reason why the UNHCR Indonesia website could not do the same. While future processing times are always speculative, past processing times are always known and are a guide to future processing times.

ii) Malaysia

Malaysia rejects in principle the concept of local resettlement and integration. The Government of Malaysia continues to see the territory of Malaysia as a place of transit and not a country of resettlement and integration for refugees. At the United Nations Human Rights Council Universal Periodic Review in Geneva, Switzerland, February 2009, the Government of Malaysia said:

> "Malaysia is of the view that the onus and responsibility lie with the UNHCR to look into the welfare of refugees/asylum seekers particularly in finding suitable third countries to receive them since Malaysia is only a transit point."[22]

This would be all well and good if the UNHCR did indeed look into the welfare of

[22] United Nations A/HRC/11/30, 5 October 2009, General Assembly, Human Rights Council, Eleventh session, Agenda item 6, Universal Periodic Review, Report of the Working Group on the Universal Periodic Review, Malaysia, paragraph 12.

refugees/asylum seekers particularly in finding suitable third countries to receive them, but it does not, in general, for Sri Lankan Tamil refugees. The UNHCR makes a substantial effort to resettle Burmese refugees in Malaysia. The UNHCR, for Sri Lankan Tamil refugees, supports the local integration option even though Malaysia rejects it. The UNHCR in Malaysia makes no effort, other than in exceptional cases, to resettle Sri Lankan Tamil refugees abroad. That should change.

While, in general, UNHCR has difficulty meeting its overall refugee resettlement numbers, the situation of Tamils has its own features. There is a substantial Tamil diaspora in traditional resettlement countries willing and able to offer support to Tamil refugees. Often what blocks resettlement of Tamil refugees to these countries is nothing other than the failure of the UNHCR to refer Tamil refugees for resettlement. Whatever the general obstacles to refugee resettlement, these Tamil refugees would be resettled if only they were referred. In this context, refusal to refer serves no purpose.

IV. Traditional resettlement countries

A. A regional plan

The United Nations held an International Conference on Indochinese refugees in Geneva on June 13 and 14, 1989. Prior to the Geneva Conference, the U.N. held a preparatory meeting in Kuala Lumpur, Malaysia on 8 March 1989.

The Malaysian meeting proposed a draft declaration and comprehensive plan of action on Indochinese refugees. The Geneva meeting accepted the draft. According to the plan, resettlement of refugees from Indochina would cease, except for those who passed screening procedures.

The declaration that accompanied the plan stated that governments were preoccupied with the burden imposed on neighbouring territories by asylum seekers. The declaration

also stated that governments were alarmed current arrangements to deal with asylum seekers might no longer be responsive to the size of the problem.

The plan itself had three key components: the establishment of screening procedures, repatriation of those who failed screening, and resettlement of those who passed screening. Early establishment of consistent region-wide refugee status determination processes was required under the plan. According to the plan, the status of asylum seekers had to be determined by a qualified national authority, in accordance with established refugee criteria and procedures.

The criteria recognized were not restricted to the 1951 Convention. The Universal Declaration of Human Rights and other relevant international instruments had to be borne in mind and applied in a humanitarian spirit.

The Office of the United Nations High Commissioner for Refugees Handbook on Procedures and Criteria for Determining Refugee Status was to serve as an authoritative and interpretative guide and there was to be a right of appeal, with the asylum seeker entitled to advice on appeal. The UNHCR was to ensure proper and consistent functioning of the procedures and application of the criteria.

Resettlement was divided into two categories - one for long stayers, and the other for newly determined refugees. Long stayers were all those who arrived before a cut-off date (the date screening was established). Long stayers were eligible for resettlement without going through screening.

For those who arrived after the cut off date, only those who passed screening were eligible for resettlement. The plan said a resettlement program would accommodate all those who arrived after the introduction of status determination procedures and were

determined to be refugees.

The plan went on to say that persons determined not to be refugees should return to their country of origin. The Chair of the Geneva Conference that adopted the plan in June 1989, Dato Haji Abu Hassan Bin Haji Omar of Malaysia, in his closing statement, indicated that the plan's purpose was to discourage Vietnamese from leaving Vietnam. He said "asylum seekers could no longer assume that they would be automatically regarded as refugees and therefore entitled to automatic resettlement."

An agreement akin to the Comprehensive Plan of Action between countries of proximate refuge and countries of resettlement for Sri Lankan and other refugees in the region is a plausible option. Countries of proximate refuge would screen. Resettlement countries would take the screened in. The screened out would be repatriated. The Office of the United Nations High Commissioner for Refugees would supervise the application of the plan.

That is an option I canvassed with the Office of the United Nations High Commissioner for Refugees in Geneva when I visited them in September 2011. The UNHCR, I was informed, is not encouraging a comprehensive plan of action patterned on the Vietnamese boat people model with resettlement states agreeing to resettle those asylum seekers screened in locally. Asia is considerably more developed now than it was twenty five years ago, at the time of the Comprehensive Plan of Action. Today the UNHCR is encouraging states in the region to resettle and integrate refugees.

While that option is all well and good if it were to happen, it is not happening. Neither Indonesia nor Malaysia is resettling and integrating refugees. As noted, neither state has signed the Refugee Convention. Practically, both countries behave as countries as transit. There is nothing in their regulatory environment with acknowledges their role as countries

of resettlement and integration.

Immigration Minister Jason Kenney said in Parliament in October 2010:

> "we have begun preliminary discussions with our international partners, including Australia, which obviously has a great stake in this issue, and with the United Nations High Commissioner for Refugees to pursue the possibility of some form of regional protection framework in the Southeast Asian region. In part that would entail encouraging the countries now being used as transit points for smuggling and trafficking to offer at least temporary protection to those deemed by the UN in need of protection and then for countries such as Canada to provide, to some extent, reasonable resettlement opportunities for those deemed to be *bona fide* refugees, which is something we are pursuing."

Again, that sounds fine. The notion of a regional protection framework in the Southeast Asian region with some reasonable resettlement opportunities for refugees makes eminent sense. Yet, fifteen months later there is no sign of it happening.

There has been established, since 2002, a regional effort to attempt to deal with refugee boat people in the region, under the name of the Bali process. However, this effort is dedicated to combating people smuggling, trafficking in persons and related transnational crime[23]. It does not deal with refugee integration and resettlement nor human rights violations in the countries fled.

A model for regional cooperation is the 2001 agreement between Indonesia and Australia aptly titled the Regional Cooperation Model. The financing that agreement provides for refugee food, shelter and health in Indonesia could aptly be spread to the region. Traditional resettlement countries generally, and not just Australia, could and should

[23] See <www.baliprocess.net>

finance allowances for basic needs for refugees throughout the region and not just for Indonesia.

B. Australia

Australia organized a swap with Malaysia, promising to take 4,000 refugees in exchange for 800 asylum seekers who arrived from Malaysia by boat. The High Court in Australia, understandably, struck down the swap as violating the Refugee Convention and consequently not authorized by Australian law[24]. Accepting the principle of refugee protection means asylum seekers can not be returned to a Refugee Convention non-signatory state where there is no legal commitment to protect refugees.

Nonetheless the swap agreement had a number of features which could be adopted by both Australia and Malaysia in other contexts. If Australia was willing to accept 4,000 refugees from Malaysia in return for removal of 800 asylum seekers already arrived, why would it not also accept 4,000 refugees in return for discouraging 800 asylum seekers yet to arrive?

An incentive is as likely to be as effective as a disincentive. If Australia committed to resettling refugees from Malaysia in significant numbers, it is likely that many UNHCR recognized refugees and UNHCR registered asylum seekers would take their chances through legal means to get to Australia rather than risk the high seas and detention in Australia on arrival.

C. Canada

i) Bill C-4

The Government of Canada introduced into Parliament a bill with the title "The Preventing

[24] *Plaintiff M70/2011 v Minister for Immigration and Citizenship; Plaintiff M106 of 2011 v Minister for Immigration and Citizenship* [2011] HCA 32 (31 August 2011)

Human Smugglers from Abusing Canada's Immigration System Act" on 15 October 2011. It is still at the first reading stage.

Although the legislation is not country specific, its predecessor, Bill C-49 was introduced in October 2010 into the minority Parliament in response to the arrival of Tamil boat people, 76 aboard the Merchant Vessel (MV) Ocean Lady in October 2009 and 492 aboard the MV Sun Sea in August 2010. The Minister of Citizenship and Immigration, the Honourable Jason Kenney, on second reading in the House of Commons, justified the proposed legislation by reference to these arrivals[25]. These arrivals were a tiny component of those from Sri Lanka fleeing persecution and seeking resettlement.

The legislation died in the last Parliament because in that Parliament the Conservative government was in the minority and none of the opposition parties would support it. The Conservative government in this Parliament has a majority and has reintroduced the legislation.

The Bill proposes punitive measures against Tamil and other refugees. The proposed legislation would discourage smuggling by punishing the smuggled.

The proposed law provides for mandatory twelve months detention for every member of a designated arriving group of persons unless the refugee protection claim is finally determined earlier or the cabinet Minister responsible decides that there are exceptional circumstances which warrant the person's release[26]. It further prohibits members of the designated groups from obtaining permanent residence until five years after a claim for

[25] Hansard, October 27, 2010.

[26] Section 12 adding to the Immigration and Refugee Protection Act section 57.1(1).

refugee protection[27]. The delay in obtaining permanent residence would lead to a delay in family reunification. The proposed legislation denies to the designated claimants the right to appeal negative decisions other claimants have[28].

Designation of a group may occur if the Minister has reasonable grounds to suspect that, in relation to the arrival in Canada of a group, there has been, or will be, smuggling for profit, or for the benefit of, at the direction of or in association with a criminal organization or terrorist group[29]. Smuggling is defined as organizing, inducing, aiding or abetting the coming into Canada of one or more persons knowing that, or being reckless as to whether, their coming into Canada is or would be in contravention of the Immigration and Refugee Protection Act[30].

Designation of an arriving group would be by the responsible Minister and not the cabinet. The legislation sets out designation criteria, but neither the human rights record of the country fled nor the prior position of the Government on that record is proposed as a criterion.

One can see the problem this sort of legislation poses for human rights promotion. It violates the rights of refugees. The proposed legislation would mistreat people who have already suffered far too much, piling mistreatment in the country of asylum onto the mistreatment in the country of nationality and the country of proximate refuge.

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[27] Section 8 adding to the Immigration and Refugee Protection Act section 25(1.01).

[28] Section 17 creating in the Immigration and Refugee Protection Act a new section 110(2)(a).

[29] Section 5 adding to the Act section 20.1(1)(b).

[30] Section 18 replacing Act section 117(1).

The Refugee Convention prohibits detention of refugees on the sole basis that they arrived in the country illegally[31]. The proposed legislation does just that, holding out the threat of detention of refugees because of the manner in which they arrived.

The Canadian Charter of Rights and Freedoms prohibits arbitrary detention[32], cruel and unusual treatment[33] and deprivation of liberty in violation of the principles of fundamental justice[34]. Detaining the smuggled to stop the smugglers is all three - arbitrary, cruel and unusual, and a deprivation which is fundamentally unjust.

The criteria the courts have set out to prevent detention which is arbitrary, cruel and unusual and fundamentally unjust suggest that Bill C-4, once legislated, would be vulnerable to Charter challenge. In the case of *Sahin* in 1995 Mr. Justice Rothstein set out a number of factors to consider when determining whether detention violates the Charter as fundamentally unjust. One of these factors is the reason for the detention. Another factor is the length of time in detention. He wrote:

> "If an individual has been held in detention for some time as in the case at bar, and a further lengthy detention is anticipated, or if future detention time cannot be ascertained, I would think that these facts would tend to favour release."[35]

The Government of Canada justifies the legislation as removing the incentives of customers of smugglers. Calling prolonged detention, denial of family unity, unfair refugee determination procedures as disincentives to smugglers is a euphemism. One can

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[31] Article 31

[32] Article 9

[33] Article 12

[34] Article 7

[35] *Sahin v. M.C.I.* [1995] 1 F.C. 214

assume that if we treat Tamil refugees in Canada worse than they are being treated in Sri Lanka or the countries of proximate refuge, they will not want to come here. However, we should not be violating the human rights of refugees in order to deter smuggling.

Refugee determination systems use evasive techniques to prevent a commitment to refugee protection in principle from translating into the numbers the plight of refugees warrant. One of these techniques is a pretence that refugees are irregular economic migrants, queue jumpers, moving from poor countries to rich countries without going through immigration procedures of the country of destination. Some support for Bill C-4 comes from this quarter, a mistaken belief that the boat people are devious queue jumping economic migrants, rather than the desperate victims they are.

The Canadian legislation is bad in principle. But it is even worse in context. It says to the Government of Sri Lanka, go ahead, mistreat the Tamil minority. We don't care.

Because the legislation was introduced in response to the Tamil arrivals, the legislation sends a message to Sri Lanka that we are not concerned about the mistreatment of your Tamil population. We are more concerned about our own borders and entry policy than what happens to Tamils back home.

The current Government, as noted, has expressed concern about human rights violations inflicted on Tamils. Yet, when the victims of the failure to follow Canadian advice arrived on our shores, the response of the Government of Canada was to detain the arrivals *en masse* under the current legislation and propose legislation which would, in the future, impose a host of obstacles to the protection and settlement of such a group. While it is uncertain who in the future would be designated under the legislation, it is apparent that the government of the day, if the legislation had been in place at the time, would have designated the 76 Tamil arrivals aboard the MV Ocean Lady in October 2009 and the 492

aboard the MV Sun Sea in August 2010.

The proposed legislation is retroactive to March 2009. The Bill states that a designation of a group for the purpose of mass detention may be made in respect of an arrival in Canada after March 31, 2009[36]. Those in detention at the time the law enters into force may be kept in detention as the result of a retroactive designation[37]. The very choice of the date March 2009 suggests that the intent was to keep in detention those passengers of the MV Sun Sea and MV Ocean Lady still detained at the time of entry into force of the law.

One reason for the mistreatment of asylum seekers in Asia is the pressure put on those countries by resettlement countries. Another reason is the poor example resettlement countries give.

As the Comprehensive Plan of Action at the time of the Vietnamese boat people showed, part of the solution lies with the countries of proximate refuge. The solution now is not necessarily the same as the solution then. All the same, the contribution countries of proximate refuge have to make to the solution can not be ignored.

The logic behind C-4 is to discourage new arrivals like those aboard the MV Ocean Lady and the MV Sun Sea. Aside from the cruelty of the means, it is likely to have a perverse effect, leading countries of proximate refuge to mimic its cruelty and prompting asylum seekers in those countries to flee in much the same way the passengers of the Ocean Lady, Sun Sea and Elysia did.

The Minister justified the need for the proposed legislation on the basis that his proposed

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[36] Section 34(1).

[37] Section 34(3)

regional solution was mid to long term and something about smuggling had to be done now. Yet, making matters worse for the customers of smugglers in countries of destination is not a workable shortcut.

The mistreatment the refugees receive in their home countries and countries of proximate refugee is real, immediate, experienced. The threat of mistreatment Bill C-4 holds out, even if realized, will always be for the smuggled only a potential, and one, we can be sure, smugglers will disguise and misrepresent.

One form of abuse refugees in countries of proximate refuge suffer is exploitation by smugglers. That exploitation will not end because the smuggled are mistreated in countries of resettlement. On the contrary, that mistreatment will make the exploitation even more pernicious.

This response to the arrival of refugees is wildly inappropriate. Throwing asylum seekers in jail without review for long periods of time, preventing family reunification, and denying the possibility of error correction when asylum seekers are mistakenly refused are cruel responses. They do nothing to address the problem which caused the refugees to flee. They pile misery in the country of destination onto the risk of harm fled and the mistreatment in countries of intermediate refuge.

ii) Resettlement

The efforts of the Government of Canada to promote human rights in Sri Lanka are commendable and should be encouraged. The Bill C-4 initiative is deplorable and should be dropped. What should take its place is a Canadian initiative to organize a new comprehensive plan of action with countries of proximate refuge in Asia. This time the plan should provide for respect for refugee rights in countries of proximate refuge and a sharing of refugee resettlement amongst traditional resettlement countries and countries

in the region.

At the same time as Canada threatens to throw Sri Lankan Tamil refugees in detention who arrive in an irregular fashion, the Government is cutting off the option of arriving through legal channels. Refugees come to Canada through regular channels either as government assisted or privately sponsored. Visa offices will not consider applicants as government assisted unless referred by the UNHCR.

One noteworthy feature of the Australia Malaysia swap agreement is that refugees coming to Australia under the agreement do not have to have been recognized as refugees by the UNHCR. It is sufficient only that the UNHCR has registered them as asylum seekers[38]. Canadian regulations provide that government assisted refugees must, in the absence of any referral agreement or arrangement with a government or inter-governmental agency, be referred by the UNHCR[39]. As noted earlier, the UNHCR in all but exceptional cases will not refer Sri Lankan cases for resettlement. As well, simple UNHCR recognition through determination, which must precede referral, takes far too long.

The Australia Malaysia swap agreement, at least insofar as it made refugees eligible for admission to Australia from Malaysia, provided only they had registered with the UNHCR, is exemplary. Canada should follow that example and enter into a referral arrangement or agreement with the Government of Malaysia which would allow Sri Lankan Tamil refugees in Malaysia to come to Canada as government assisted refugees without the need for a UNHCR referral.

It used to be that private sponsorship was enough at least to merit consideration of

[38] Clause 5(1)(a).

[39] Immigration and Refugee Protection Regulation 150(1)

refugee applications by Canadian visa offices. However, the Government of Canada has temporarily all but shut down new private sponsorship, capping the global total for 2012 for all Sponsorship Agreement Holders across Canada to 1,350 in order to reduce a backlog[40].

This cap should be lifted immediately. While private sponsorship processing delays are admittedly substantial, preventing new private sponsorships means preventing hope. If refugees see no light at the end of the tunnel, even after many years, they are far more likely to get on boats, to seek their own solutions.

In addition, the Government of Canada has proposed that private sponsorship would be possible only if the person sponsored is recognized as a refugee either by the state of temporary residence or the UNHCR[41]. In Malaysia, where the state does not engage in refugee determination and the UNHCR refugee determination for Sri Lankans is substantially delayed, this requirement would be a substantial obstacle to resettlement. This proposal should be rejected.

V. Conclusions

Much of the policy directed towards Sri Lankan boat refugees, in both countries of proximate refuge and countries of traditional resettlement is to create disincentives, discouraging asylum seekers from seeking asylum by boat. A far better approach is creating incentives, incentives to encourage individuals to stay in Sri Lanka by removing human rights violations which spur their flight, and incentives to encourage individuals to stay in countries of proximate refugees by creating more hospitable environments.

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[40] Kristen Shane "Feds cut privately-sponsored refugee claim intake to a trickle" Embassy Magazine, November 9, 2011

[41] Canada Gazette Vol. 145, No. 50 ù December 10, 2011

The creation of incentives is as likely to be effective in impacting behaviour as the creation of disincentives. The carrot is as effective as the stick.

Moreover, creating incentives removes the root causes of flight; it improves respect for international law and human rights. Creating disincentives exacerbates the root causes by showing indifference to them; it degrades respect for international law and human rights. The carrot is kind; the stick is cruel.

A far better way than disincentives of discouraging smuggling from countries of proximate refuge to countries of traditional resettlement is providing incentives so that people will want to stay. Making them so miserable that they are spurred to try to leave and then mistreating them for the effort which they have been prompted to make adds one cruelty to another.

The end of smuggling will come only from making matters better for refugees back home and in countries of proximate refuge. If Tamils are not being persecuted in Sri Lanka, if they are being treated humanely in countries of proximate refuge, the incentive for them to hire smugglers will evaporate.

Particularly galling is the embrace of disincentives and the neglect of incentives. When governments embrace disincentives but do little or nothing to promote incentives, then one can question the sincerity of their commitment to address squarely the problem of the arrivals governmental initiatives propose to discourage. To pile up disincentives and ignore incentives is an exercise in hypocrisy, a wanton form of cruelty. To use the only the stick and to ignore the carrot is a form of sadism.

VI. Recommendations

A. Sri Lanka

1. The Government of Sri Lanka should combat systemically discrimination, harassment and persecution inflicted on the Tamil minority.

2. The Government of Sri Lanka should cooperate in the establishment and functioning of an international independent investigation into war crimes and crimes against humanity committed during the armed conflict.

3. The Government of Sri Lanka should accept that reconciliation can be achieved only through accountability.

4. All Commonwealth governments should join the Government of Canada in boycotting the heads of government meeting scheduled for Sri Lanka in 2013 unless and until a functioning process of accountability for the crimes of the armed conflict and reconciliation between the communities caught up in that conflict is established.

B. Indonesia

5. The Government of Indonesia should act on its action plan and sign the Refugee Convention.

6. The Government of Indonesia should adopt a policy exception to its universal detention law for illegal migrants to encompass asylum seekers.

7. The Government of Indonesia should apply in practice its policy of not detaining children and their parents.

8. Registered asylum seekers and recognized refugees should be allowed to work.

9. The UNHCR should post on its website for Indonesia in the Tamil language information

about processing times, procedures and acceptance rates for registration, recognition and resettlement.

C. Malaysia

10. Malaysia should commit to signing the Refugee Convention.

11. For refugee populations which are not being resettled, the UNHCR should shift resources from determination to registration to ensure that registration is completed as quickly as possible.

12. The police and the Immigration Department should issue directions paralleling those of the Attorney General of 2005 stating that these authorities would refrain from arresting holders of UNHCR registration cards.

13. The Minister of Immigration should exempt, under section 55 of the Immigration Act, asylum seekers registered with the UNHCR from the requirement under section 72 of the Act to have valid travel documents and visas.

14. The Government of Malaysia should either exempt, by regulation, asylum seekers registered with the UNHCR from the requirement of section 5 of the National Registration Act to be registered under that Act or allow asylum seekers registered with the UNHCR to be registered under the National Registration Act.

15. Recognized refugees and UNHCR registered asylum seekers should be allowed to work.

16. The 6p's program needs to be adapted to refugees and UNHCR registered asylum seekers so that the last two stages, enforcement and deportation, do not apply to them.

In meantime, they should not be required or even expected to register under the existing program.

17. Unless and until refugees and registered asylum seekers are allowed to work, they should be provided accommodation, health care and food allowances similar to those provided to refugees in Indonesia.

18. UNHCR registered asylum seekers and recognized refugees should be able to access health care at the same cost as Malaysians.

19. Tamil speaking refugee and registered asylum seeker children should be allowed access to Tamil language public schools.

20. The UNHCR in Malaysia should refer for resettlement Sri Lankan Tamil refugees in Malaysia.

21. The UNHCR should post on its website for Malaysia in the Tamil language information about processing times, procedures and acceptance rates for registration, recognition and resettlement.

D. Traditional resettlement countries

22. The traditional resettlement countries and countries in the Southeast Asian region should agree to a regional protection framework with some reasonable resettlement opportunities for refugees.

23.Traditional resettlement countries should finance allowances for basic needs for refugees throughout the region.

24. The Government of Australia should commit to resettling the 4,000 refugees from Malaysia to which it had committed resettling under the swap agreement with Malaysia.

25. The Government of Canada should withdraw Bill C-4 from Parliament.

26. The Government of Canada should enter into a referral arrangement or agreement with the Government of Malaysia which would allow Sri Lankan Tamil refugees in Malaysia to come to Canada as government assisted refugees without the need for a UNHCR referral.

27. The Government of Canada should lift the cap for 2012 for private sponsorship of refugees.

28. The Government of Canada should reject the proposal that privately sponsored refugees must be recognized as refugees either by a state or the UNHCR.

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