POLITICAL ASYLUM IN AUSTRALIA

By A. C. Palfreeman*

The need to clarify Australia's position on asylum is becoming more urgent as events in South East Asia make it increasingly likely that claims for asylum in Australia will be made. Already Chinese have asked for asylum in Australia, West Irianese and Indonesians in New Guinea. It is clear that requests may come in the future from Vietnam, Thailand, Hong Kong and perhaps Malaysia.

Australia has of course admitted many thousands of refugees who might be described as "political" and has done so in one form or another for many years. But the determinants of policy are obscure. Are there for example any international treaties or conventions to which Australia is a party and which oblige us to accord asylum? Are there any statutory provisions in Australian legislation which govern the granting of asylum? Or is it simply based on Cabinet discretion and administrative regulation? What criteria are used to determine whether a refugee is "political" or "economic"? How can his claim be authenticated? Is a distinction made between Europeans and non-Europeans claiming asylum?

These and other questions require answers. This article may suggest what some of them may be. More definitive information must await formal declarations of policy by the Government.

The Background

Granting political asylum is now a recognized principle of international law. Its origins go back to the beginnings of recorded history and beyond. Primitive societies of all kinds have had particular huts, temples, tombs and trees designated as places of asylum and protection. It seems to have been a constant characteristic of Judeo-Christian civilization. In the view of one writer an asylum is—

> " . . . an inviolable place in which to take refuge . . . a domain of refuge and peace, inspired by the highest moral ideas of the Christian world . . .".[1]

The Christian Church, almost from its foundation, accepted the principle of the individual's right of asylum from persecution, made it an object of canon law, persuaded the secular authorities to respect churches, monasteries and shrines as places of asylum, under the direct authority of the Church,

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1 Le Bras, G., in the preface to Timbal's book, "Le Droit d'asile", Paris, 1939.

"The Australian Quarterly", Volume 42, No. 1, March, 1970, pp. 52-61.

even to the extent of meting out punishment to fugitives who deserved it, and of excommunicating those who violated the immunity of these places.

As the secular power of the Church waned, so did its ability to grant asylum, until by the end of the nineteenth century in Europe its practice was a memory. It has been resurrected more recently by draft dodgers in the United States.

But the principle remains and the principle is quite simply that the individual should, in case of necessity, and in the name of humanity, be able to flee injustice and persecution, find a neutral place, and have his fate decided with impartiality and after mature reflection.

This escape hatch to a neutral haven is perhaps more necessary today than ever before. We have only to remember the six million Jews who could not get out in time, and the many millions more in Europe, Asia and Africa who, over the last few decades, for political reasons, have been senselessly slaughtered. They may have lived if an escape hatch could have been held open.

Asylum in International Law

The founders of modern international law accepted and incorporated the principle of asylum into their doctrines. But there has been, and is, a good deal of disagreement about the real nature of the right of states to grant or withhold asylum, and of the individual to expect it.

The prevailing doctrine, upon which states today seem to base their practice, does not favour the individual. It maintains that international law and municipal law are separate and distinct legal orders, that states and not individuals are subjects of international law and that therefore the individual has no "right" of asylum in the real sense of the word.

The state has exclusive control over the individuals within its territory and from this principle two rules follow: one, that the state is totally competent to admit or not to admit aliens at will; and two, that the state has no competence over its own nationals within the territory of another state. The competence to grant asylum thus flows directly from the territorial sovereignty of states.

A study of the decisions of domestic courts seems to confirm this in practice. On the whole, they rule that the state has no legal duty to surrender fugitives in the absence of an extradition treaty. There is however a clear distinction between "common" criminal and political offenders. It has been a rule of international courtesy to send back criminals for trial in their own state, but for political refugees the custom is that the nation surrendering is to be the judge of what is, or what is not, a political offence. The custom has become law in some treaties.[2]

2 The Treaty of Political Asylum signed at Montevideo in August 1939 by six Latin American countries, limits claimants to asylum to those who have not already been before the courts, or who have not been found guilty of criminal offences. The treaty also distinguishes between territorial and extra-territorial asylum.
See "Actas de la Reunion de Jurisconsultas de Montevideo", 1940.

If we accept this view of the competence of the state, then the legal rights of the individual himself do not appear very great. What, for example, is his position vis-a-vis his state of origin after he has fled? The practice seems to be for local courts in that state not to recognize his right to asylum, except presumably when a treaty governing asylum exists and when municipal courts are expected to apply international law. But when there is no extradition treaty, and where a person for example is kidnapped in a foreign state and brought home for trial, the home courts would not recognize his right to asylum.[3]

What then are the individual's rights in the state in which he has sought refuge? Again there can be little doubt that he has no general "right" of asylum against that state. There is no general principle of international law which *obliges* a state to accord asylum. Oft quoted in this respect is the United Nations debate in the Third Committee of the General Assembly while it was preparing the draft of the Universal Declaration of Human Rights.

Article 14 of the Declaration now reads—

> "Everyone has the right to seek and enjoy in other countries asylum from persecution.
>
> This right may not be invoked in the case of prosecution genuinely arising from non-political crimes or from acts contrary to the purposes and principles of the United Nations."

But the original wording of the article reads—

> "Everyone has the right to seek and be granted, in other countries, asylum from persecution."[4]

This was opposed by a number of delegates, notably those from Britain, the Soviet Union, and Australia, on the grounds that no state should be under any obligation to grant asylum and that to give individuals the right to demand refuge would mean undermining the immigration policies of member states and would be an unwarranted interference in matters which should remain exclusively within the domestic jurisdiction of states.[5]

Article 14 may now be interpreted as simply reasserting the state's ability to grant asylum if it wishes, to resist attempts to retrieve the fugitive and in fact to confirm its complete control over all persons in its territory, nationals and aliens alike.

On the other hand, the state has sometimes limited its own power by providing for asylum in its constitution. For example, Article 129 of the Russian Constitution of 1936, the Preamble of the 1946 French Constitution and Article 10 of the 1947 Italian Constitution, all give aliens the right to claim asylum under certain conditions. In the Russian case you would have needed to be a person who was being persecuted "for defending the interests of the working people", or for "scientific activities", or by reason of your "struggle for national liberation".

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3 Garcia Mora, M.R., "International Responsibility for hostile acts of private persons against foreign states", 1962, pp. 136-138.
4 U.N. Document, A/c 3/285 Rev 1.
5 U.N. Document, A/c 3/SR, 121 p. 16.

It may of course be contended that constitutional and statutory self-limitations of this kind do not establish any international obligations on the state to grant asylum.

To summarize the prevailing view, so far discussed—it is that the right to asylum is indeed a principle of international law, but it does not refer to the right of the *individual* to receive asylum—it refers to the right of the *state* to grant it.

> "The so-called right of asylum is nothing but the competence of every state . . . inferred from its territorial supremacy, to allow a prosecuted alien to enter, and to remain on, its territory, under its protection . . ."[6]

However this view, which seems to relegate the individual to a simple object of international law, is meeting with growing opposition from lawyers, and even more from non-lawyers.

If, for example, one held that international law, like municipal law, is made by people to serve people, not to serve an amorphous collection of groups, interests, governments, corporations which make up the state—then one may also hold that fundamentally the individual is as much a subject of international law as he is of municipal law; and it follows from this that he enjoys rights and duties of his own in international law, irrespective of the "exclusive control over territory and people" by "sovereign" states.[7]

Many of these rights are listed in the Universal Declaration of Human Rights, which has been signed by all members of the United Nations. One of these, as we have seen, is the right to find refuge from persecution and death.

How many of us can accept that this is not really a right of the individual but simply an act of condescension by the state which may be extended to the individual or not, at will?

Australia's Formal Commitments

Australia has not entered into any formal commitments to permit the entry of people claiming political asylum as such. That is to say we are not party to bilateral or multilateral treaties which oblige us to admit people claiming asylum; nor do we limit our powers by way of constitutional provisions or statutes.

Certainly Australia is a signatory to the U.N. Declaration of Human Rights. We have already discussed the content and significance of Article 14 of the Declaration.

Australia is also a signatory to the 1951 "Convention relating to the Status of Refugees". Articles 31 to 33 oblige the signatories not to impose penalties on refugees who arrive illegally, not to expel refugees save on grounds of public order, and with due process of law, and not to expel a

6 Oppenheim, L., "International Law", Vol. 1., Longmans, 1948, p. 618.
7 cf. Drost, P. N., "Human Rights as Legal Rights", London, 1951.

refugee "to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion".[8]

However, the scope of the Convention is severely restricted since the definition of "refugee" is someone who has fled from events which occurred in Europe before January 1951.[9]

There is no reference in Australian legislation to political asylum. The Migration Act (1958) which delimits the statutory powers of the Commonwealth Government in deciding entry conditions makes no mention of it.

Australian Practice

A study of Australia's formal commitments therefore tells us little about actual policy. This requires a study in depth of ministerial statements and administrative practice which cannot be developed here at great length. But enough pointers are available to reach a tentative conclusion.

In the first place, the question of political asylum can only be considered in relation to Australian immigration policy generally. Hundreds of thousands of migrants to Australia since 1945 could, by one definition or another, be labelled as political refugees. But they did not claim political asylum and they were not officially admitted as anything but new settlers.

In the second place, Australia's policy on non-European immigration must be kept in mind. A non-European applying for entry on political or any other grounds is in a very different position to a European who does so. The White Australia policy applies to political refugees as much as it does to other categories.

As far as the entry of European settlers is concerned, no separate category of political refugee is admitted. Entrants must meet the formal requirements of the Migration Act and the administrative requirements of current policy. Some 20,000 Hungarians who fled their country after the 1956 uprising settled in Australia. Some hundreds of Czechs came here after the 1968 invasion, and there are many others from the Soviet Union, Eastern Europe and South Africa who may validly be called political refugees.

However, in announcing the policy on their admission to Australia, the Government has always been careful to point out that they came in as part of the immigration programme, and on the same basis as migrants generally—not as political refugees asking for asylum.[10] The same applies even to individuals already in Australia—for example diplomats—who make a request to stay here.

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8 Some Australian reservations about Article 32 of the Convention were withdrawn on 1 December, 1967.
9 For a detailed interpretation of the Convention, see Grahl-Madsen, A., "The Status of Refugees in International Law", Leyden, 1966, Part 1.
10 cf. Snedden, Minister for Immigration, in "Commonwealth Parliamentary Debates", H. of R. 60, August, 1968, pp. 646 and 808

Non-Europeans

Non-European applicants for political asylum are in a very different position. They are not admitted as part of the migration programme. Only a handful of non-Europeans are admitted each year as permanent settlers, on highly selective criteria; the great majority of foreign born non-Europeans now in Australia are temporary residents here for specific reasons for specific periods of time, after which they must return home.

It follows therefore that a non-European seeking refuge from political persecution, unlike his European counterpart, cannot come in under cover of the immigration programme. He may with luck fall into an existing entry category for non-Europeans for either permanent or temporary stay—i.e. a highly qualified person, a merchant, a student, etc.[11]

But if he does not—what then? If his only claim to entry is as a political refugee, would he be allowed into Australia? Perhaps the record would tell us something.

During the Second World War some thousands of non-European refugees from South East Asia were allowed into the country in spite of the established and highly restrictive entry policy. It was understood that they would return to their countries of origin after the war. Most of them did so, but some eight hundred of them, mostly Chinese, refused to go. Mr. Calwell's attempt to forcibly deport them, with his Wartime Refugees Removal Act in 1949, was the centre of acute controversy. The refugees claimed that returning to Communist China would be dangerous for them. In the end the incoming Liberal government in December 1949 fulfilled its election promise not to implement the Removal Act, and the eight hundred stayed.

Tacitly at least they became political refugees although officially the Department of Immigration's entry conditions for non-Europeans specifically excluded political refugees—"they are not admissable as such and may only be admitted if they genuinely comply with the conditions laid down under the general policy".

Until 1956 the Department, in administering its deportation policy, was not inclined to take over-seriously the claims of deportees that persecution awaited them in China. But enough evidence became available that it did, and this, together with public agitation, persuaded the government to change its policy. Thereafter Chinese who broke the conditions under which they had been granted temporary residence here, were not deported if they refused to go to China. However ships' deserters, stowaways and other illegal immigrants were still deported to their point of departure or anywhere else possible, irrespective of any plea for asylum.

The justification for this policy was, and is, that a reputation for leniency

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11 cf. Palfreeman, A. C., "The Administration of the White Australia Policy", M.U.P., 1967, Appendix II.

towards illegal entrants would magnify the problems of control to a quite unpredictable extent. A policy of judging "each case on its merit" is almost impossible to implement when there is practically no way of verifying claims.

New Guinea

Immigration from all sources into Papua and New Guinea during the Australian administration has always been strictly controlled. At the Versailles Conference in 1919, W. M. Hughes made it an issue when he insisted that the ex-German Territory be made a "C" class mandate, allowing the mandatory power to impose entry restrictions in the interests of the native people. Hughes' real concern of course was to prevent the penetration of Japanese and Chinese into the Territory, which the Germans to some extent had already permitted.

The restrictions have been severe and today the Asian population of the Trust Territory, largely Chinese, and concentrated in Rabaul and Kavieng, is much the same as it was when Australia took control in 1914. Only a handful live in Papua. Furthermore, since 1957, most Chinese in New Guinea have been eligible for Australian citizenship, which gives them unhindered entry to Australia; a policy which has been interpreted as a way of encouraging them to leave the Territory.

The entry of Europeans to Papua and New Guinea is also controlled. The Australian Government reserves the right to admit or exclude anyone including Australian citizens. But of course approved Europeans, Australians and others, may live and work there, acquire the use of land, develop enterprises of all kinds and for practical purposes become permanent settlers.

It is against this background that the question of political asylum must be considered. Claims have come, and could come, from three sources—from people of Dutch or part Dutch descent, from Indonesians, and from the native West Irianese.

The first category seems no longer of great importance, although at one time during the conflict between Indonesia and Holland over West Irian there was a serious suggestion that large numbers of Dutch citizens of mixed blood would seek asylum.[12]

A handful of Indonesians have crossed into Australian New Guinea and no doubt political upheavals in Indonesia will lead to more in the future.

But the most pressing question is what to do with the native West Irianese who cross the border and ask for help. This has now been a problem for five years.[13] How many are involved and what is the Government's policy?

Widely differing figures are given. In May 1967 Mr. Hasluck, then Minister for External Affairs, said that 1200 West Irianese had crossed since 1963 but, "a very small number had sought asylum".[14] In August

12 "Sydney Morning Herald", 8/12/57.
13 For the background to this cf. Van de Veur, P., "West Irian Refugees" in "New Guinea", Vol. 1, No. 4, 1966, pp. 13-19.
14 C.P.D., H. of R. 55, 1967, p. 1579.

1968 an administration official said that since 1963 "about 500 had sought to cross the border of which about 130 had been allowed entry".[15] In January 1970, an official said that of the 540 refugees scattered throughout Papua and New Guinea, 324 had been issued with temporary entry permits.[16]

Government policy since the first refugees came over has had somewhat of an *ad hoc* character. There are no statutory requirements on asylum so that entry policy is entirely within the discretion of the Federal Cabinet, although it is not always clear which of the three ministers, of External Territories, of Immigration or of External Affairs, is primarily concerned. The Migration Ordinance gives the Minister the power to grant permanent or temporary residence and to deport illegal immigrants. But what is the policy?

In 1962 Sir Garfield Barwick, then External Affairs Minister, said:

> "Whether any of these people will ask for asylum remains yet to be seen. If any do we will apply the traditional British principles of according political asylum, but I would point out . . . that very often to ask for political asylum is to ask for more, really, than the facts will warrant. So far as I am concerned, any questions which arise whether under the heading of political asylum or any other, will be entertained and decided from a very high humanitarian point of view."[17]

In 1965 Mr. C. E. Barnes, Minister for Territories, gave details of the procedure:

> "Every person crossing the border . . . (who) can give no reasonable grounds on which he could claim special consideration for the granting of permissive residence . . . is to be fed, well looked after, and returned across the border as expeditiously as practicable. Any with an apparent case for consideration as political refugees are to be closely questioned and reported on, and held for the time being at a nearby border station pending decision."[18]

In April 1967 the Administrator, Mr. D. O. Hay, said that—

> "they are to be succoured in the Territory while their case is being investigated. If on interview it is established that a case on humanitarian grounds exists, the Government will consider granting the persons concerned permission to reside in the Territory."[19]

In August 1968 Mr. Hasluck said in Parliament:

> "Any claim for political refuge will be carefully considered on its merits. In granting permissive residence and in requiring conditions to be met by the refugee on the Australian side of the border we will full regard to the international conventions governing refugees."[20]

In May 1969 a press report stated that Mr. A. Try, assistant district officer at Wutung, had, until April 1969, "sent back everyone he considered did not have a reasonable case for permissive residence in Papua-New Guinea. Now all West Irianese who say they want to stay are automatically sent on to Yako."[21]

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15 "The Australian", 19/8/68.
16 "Sydney Morning Herald", 3/1/70.
17 C.P.D., H. of R. 36, 1962, p. 349.
18 C.P.D., Senate (28 Sep., 1965), p. 654.
19 "Sydney Morning Herald", 7/4/67.
20 C.P.D., H. of R. 60, 1968, p. 443.
21 "Sydney Morning Herald", 12/5/69.

Finally in January of this year, a press report that the 540 refugees, including the 324 who had temporary entry permits which expired on 31 December,1969, were liable to be deported to West Irian, brought a denial from the Department of Territories. The refugees would not be sent back against their will, and permissive residence would be granted on humanitarian grounds.[22]

Answering criticism that pressure had been put on refugees to return to West Irian, Mr. Barnes said that each individual case was examined when a refugee returned.

> "We grant permission for a native to return home only on economic grounds, definitely not on political grounds. Naturally, if there are any political implications involved for them in a particular case we do our utmost to prevent them from going back."[23]

Summary

Firstly it is clear that Australia is not bound by any legal obligation to accord asylum if she does not wish to do so; nor are there any constitutional or statutory provisions which limit the discretionary power of the Executive.

Secondly, it would seem that Europeans seeking refuge from political persecution are readily accepted for permanent settlement in Australia, not as refugees seeking asylum, but as migrants. They simply have to meet the normal requirements for all migrants as set down in the Migration Act and by administrative fiat.

Thirdly, for non-Europeans too there is no recognized entry category of "political refugee", and the Government does not admit to granting asylum as such to non-European applicants. They must satisfy the Minister that they fall into one of the entry categories laid down in 1966. If they cannot but are nevertheless able to convince him of the genuineness of their claim to refuge, they may be granted temporary residence on "humanitarian grounds". But it has been much more difficult for "illegal" entrants to have their claims accepted than for those who came in legally.

Fourthly, in the special case of New Guinea, West Irianese who cross the border and claim political asylum must first satisfy the Papua-New Guinea Administration that their claims are indeed "political" and not "economic". If they can do this successfully they are accorded "permissive residence", and taken to Manus Island, or somewhere away from the border where they live in comparative isolation.

Australia has a magnificent record as far as accepting European refugees is concerned. For twenty years probably no country has opened the doors wider, but our record in admitting non-Europeans is at best patchy and at worst incoherent.

This is not to say that lives have been lost as a result of our deportation policy, although there is evidence of hardship. The most serious criticism

22 "Sydney Morning Herald", 3/1/70.
23 "The Australian", 1/1/70.

that can be levelled at the policy on non-Europeans is that it is geared so closely to the traditional policy of restriction. Non-Europeans still find it almost impossible to settle in Australia and difficult enough to come in for temporary residence. Seeking asylum involves overcoming these hurdles as well.

But even with the weight of the White Australia policy around our necks, the Executive may be persuaded to consider two propositions before we are suddenly faced with substantial numbers of non-Europeans asking for asylum.

First, a nation which closes the door for reasons of economic cost, or of administrative difficulties in determining the bona fides of refugees, or because there is a diplomatic need not to antagonise other nations, or because a selective immigration policy must not be upset—this nation is surely guilty of fundamental inhumanity.

Second, whether or not the refugee can prove the validity of his claim, we have little reason other than prejudice not to give him the benefit of the doubt and let him in. Once here, the Migration Act, together with the equivalent statute in Papua-New Guinea, and the existing administrative procedures which regulate the conditions of temporary residence, are more than adequate to control his activities and if necessary his eventual departure.